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# Assignments and Subleases: An Archaic Distinction

Jerome J. Curtis, Jr.\*

Property teachers are fond of telling their students that the law of landlord and tenant, once merely a subpart of the law of conveyancing, is today the product of the confluence of property and contract law. This assertion is certainly true and is probably best illustrated by judicial pronouncements and legislative enactments that have placed into residential leases implied contractual undertakings that obligate landlords to guarantee the habitability of the premises.<sup>1</sup> The habitability doctrine is predicated on the notion that most residential tenants do not view themselves as entitled only to a nonfreehold estate in land with no claim to anything from their landlords beyond legal title and, in some states, actual possession.<sup>2</sup> In addition, the tenants have bargained for premises suitable for their purposes in the justifiable expectation that their landlords will maintain the property in tenantable condition.<sup>3</sup> In imposing obligations on

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1. See, e.g., *Green v. Superior Court*, 10 Cal. 3d 616, 111 Cal.Rptr. 704, 517 P.2d 1168 (1974); *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Pines v. Persson*, 111 N.W.2d 409 (Wis. 1961). See also RESTATEMENT (SECOND) OF PROPERTY (1976) "Statutory Note to Chapter Five," (a listing of the various statutes); *id.* at § 35.1, Reporter's Note (a detailed listing of cases).

2. At common law the only obligation impliedly undertaken by the landlord was to guarantee the quiet enjoyment of the premises. R. POWELL, POWELL ON REAL PROPERTY, ¶ 225(1). In many states this means only that the landlord warrants that he has the legal right to let the premises for the term described in the lease. In other states, however, the landlord is also obliged to put the tenant in actual possession. *Id.* The Restatement adopts the more onerous view. RESTATEMENT, *supra* note 1 at § 6.2.

3. See *supra* note 1 and accompanying text.

residential landlords, courts and legislatures have also surrounded the obligations with traditional contract remedies, thus, for example, freeing the tenant from the medieval idea that covenants of the tenant and the landlord are independent.<sup>4</sup> Nearly all the commentators view this inculcation of contract into leases as salutary. A few, however, feel the development may in some instances have proceeded too far.<sup>5</sup> Regrettably, the receptivity of the law of leaseholds to contract principles has not been as generous as contemporary ideas warrant. This article examines one area in which encrustments of ancient property law continue to hamper an appreciation of the inherently contractual nature of the lease—whether residential, commercial, industrial, or agricultural.

The law governing the effects of a transfer of a leasehold interest is still deeply steeped in feudal concepts of property and personal rights and obligations. This body of law displays remarkable vitality in the face of the notion so pervasive in other fields of the law that the legal system ought to uphold the legitimate expectations of the participants in a transaction. This notion led to the general acceptance of imposing contractual duties relating to the condition of the premises upon residential landlords.<sup>6</sup> Unfortunately, the law concerning the alienation of leaseholds places more importance upon privity of estate than upon the intentions of the parties to the lease or to the transfer. The result of this devotion to ancient learning is that many transferees of leaseholds can enjoy the benefits of the lease without any responsibility to perform the obligations of the original tenant under the lease and without the benefit of the landlord's covenants under the lease.<sup>7</sup> This is due to the division of leasehold transfers into two categories: assignments and subleases. The common law provided the lessor with a claim against the transferee or the transferee a claim against the landlord upon the covenants in the head lease only if the transfer were deemed an assignment.<sup>8</sup>

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4. At common law, even though a lease agreement might contain express covenants by both landlord and tenant, neither might excuse performance on the grounds that the other was in breach of his obligations with the exception that the tenant was excused if the landlord violated the implied covenant of quiet enjoyment. 1 AMERICAN LAW OF PROPERTY §3.11 (1952). In contrast, modern contract law recognizes that the promises of the parties to a bilateral contract are dependent so that one of them may be excused upon a substantial breach by the other. RESTATEMENT (SECOND) OF CONTRACTS §245 (1979). A. CORBIN, CORBIN ON CONTRACTS §§629-32 (1951).

5. In praise of the development, see, e.g., Kratovil, *The Restatement (Second) of Contracts and the UCC: A Real Property Law Perspective*, 16 J. MAR. L. REV. 287 (1983). Cf. Meyers, *Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879 (1975).

6. See, *supra* note 1 and accompanying text.

7. See *infra* text accompanying notes 21-26.

8. *Id.*

The perpetuation of the distinction between assignments and subleases bears little relation to contemporary ideas or needs. Although modern principles of contract law more clearly reflect the expectations of those dealing in leaseholds, American courts continue to force twentieth century lease problems into medieval molds that only distort the intentions and expectations of tenants and landlords. The purpose of this article is to examine the role currently played by the assignment-sublease distinction and to suggest that the distinction be jettisoned in favor of current contract principles.

#### DEFINING ASSIGNMENTS AND SUBLEASES

In simple terms, an assignment is a transfer of every property interest a tenant has under a lease. The effect of an assignment is to destroy the landlord-tenant relation formerly existing between the transferor and the landlord and to substitute the transferee as tenant to hold directly of the landlord.<sup>9</sup> The historical analog of the assignment is the transfer of freeholds by substitution. A sublease is a transfer of some, but not all, of the transferring tenant's interests. The sublease resembles a transfer of a freehold by subinfeudation, a type of conveyance that was abolished as a lawful method of transferring a fee simple by the statute *Quia Emptores* in 1290.<sup>10</sup> A sublease does not destroy the tenurial relation between the sublessor and the landlord. A new tenurial relation is created by a sublease between the transferor and the transferee. The sublessee holds the estate "of" the sublessor who holds "of" the landlord. Jurisdictions are not in agreement as to what rights can be retained by a transferor without producing a sublease. Most jurisdictions seem to begin with an assumption that the interest retained must be a reversion before the transfer will be viewed as a sublease. Under this apparent majority rule, the retention of some lesser interest will not produce a sublease.<sup>11</sup> The issue is perhaps most commonly illustrated by leases containing provisions for re-entry by the landlord.

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9. *Hailey v. Cunningham*, 654 S.W.2d 392, 396-97 (Tenn. 1983). Blackstone defined an assignment as:

An assignment properly is a transfer, or making over to another, of the right one has in any estate; but it is usually applied to an estate for life or years. And it differs from a lease [sublease] only in this: that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor.

2 W. BLACKSTONE, COMMENTARIES \*326-27.

10. 18 Ed. 1, cc. 1-3.

11. Wallace, *Assignment and Sublease*, 8 IND. L.J. 359, 366 (1933).

A transferring tenant may be willing to convey all of his interests under the lease but only if some means of retaking the leasehold in the event that the transferee defaults in any of his obligations under either the original lease or any agreement made at the time of the transfer between the tenant and the transferee can be retained.<sup>12</sup> In such a case, the transferor will purport to convey all his rights, titles, and interests under the lease but simultaneously reserve the right to re-enter and terminate the transferee's interest in the event the transferee defaults. Of course, the language providing for re-entry upon default can be viewed as creating in the transferor a property interest, that is, a right of re-entry or a power of termination. The transfer, therefore, becomes a sublease because the entirety of the transferor's interests has not been conveyed. This is the result in many states.<sup>13</sup> In other states, however, the right of re-entry or power of termination is considered to be a mere chose in action, not a retained property right, so that the transfer can properly be deemed an assignment.<sup>14</sup> These jurisdictions emphasize that a right of re-entry is not a reversion. Still other states refuse to abide by any legal standard in determining the characterization of a transfer and instead give the transaction the characterization intended by the parties.<sup>15</sup>

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12. Despite an assignment the tenant remains liable on his covenants in the lease. This is because the assignment does not destroy the tenant's contractual relationship with the landlord. See *Samuels v. Ottinger*, 169 Cal. 209, 146 P. 638 (1915); see also RESTATEMENT, *supra* note 1, at §16.1, Reporter's Note 5. Thus, the tenant will want some means of indemnity if he is called upon to perform such a covenant or is held liable for breach thereof. *Id.*

13. *Kendis v. Kahn*, 90 Cal. App. 41, 265 P. 844 (1928); *Dunlap v. Bullard*, 131 Mass. 161 (1881); *Fratcher v. Smith*, 104 Mich. 537, 62 N.W. 832 (1895); *Saling v. Flesch*, 277 P. 612 (Mont. 1929); *Hobbs v. Cawley*, 35 N.M. 413, 299 P. 1073 (1931); *Spears v. Canon de Carnue Land Grant*, 461 P.2d 415 (N.M. 1969); *Davis v. Vidal*, 105 Tex. 444, 151 S.W. 290 (1912). RESTATEMENT, *supra* note 1 at §15.1, comment i. "The tenant has made a sublease, even though the transfer is initially for the balance of the term, if the right to possession of the leased property may return to him upon the occurrence of some event." *Id.*

14. *Johnson v. Moxley*, 216 Ala. 466, 113 So. 656 (1927); *C.N.H.F. v. Eagle Crest Dev. Co.*, 99 Fla. 1238, 128 So. 844 (1930); *Davidson v. Minnesota Loan and Trust Co.*, 158 Minn. 411, 197 N.W. 833 (1923); *Stewart v. Long Island R.R. Co.*, 102 N.Y. 601, 8 N.E. 200 (1886); *Ottman v. Albert Co.*, 192 A. 897 (Pa. 1937); *Jensen v. O. K. Inv. Corp.*, 29 Utah 2d 231, 507 P.2d 713 (1973); *State v. Meador*, 60 Wash. 2d 543, 374 P.2d 546 (1962). The English authorities hold that a transfer of the balance of the term with a reserved right of entry is an assignment. See *Palmer v. Edwards*, 1 Doug. 187, 99 Eng. Rep. 122 (1783); *Doe J. Freeman v. Bateman*, 2 B. & Ald. 168, 106 Eng. Rep. 328 (1818); *Webb v. Russell*, 3 T.R. 393, 100 Eng. Rep. 639 (1789).

15. *Jaber v. Miller*, 239 S.W.2d 760 (Ark. 1951); *Gagne v. Hartmeier*, 611 S.W.2d 194 (Ark. 1981); *Bowlby-Harman Lbr. Co. v. Commodore Services, Inc.*, 107 S.E.2d 602 (W.Va. 1959). Often, however, courts restrict the application of this principle to characterizing the relation between the transferring tenant and the assignee of the tenant while they adhere to common law notions to fix the obligations between the landlord and the assignee. See *Ernst v. Conditt*, 390 S.W.2d 703 (Tenn. App. 1965); *Ferguson v. Gulf Oil Corp.*, 382 S.W.2d 34 (Mo. App. 1964); *Davis v. First Nat'l Bank*, 258 S.W. 241 (Tex. 1924); *Frith v. Wright*, 173

A substantial minority of states presently holds that the retention by a transferring tenant of certain interests or rights that do not amount to reversions may constitute the transfer of a sublease. Thus, the reservation by the transferor of a rent different than that specified in the head lease has been held to render the transfer a sublease.<sup>16</sup> Similarly, the retention of a right to remove fixtures at the end of the lease has been regarded as giving rise to a sublease.<sup>17</sup> Some courts have reached similar conclusions where the transferor conveyed all his rights in a physical part of the leased premises,<sup>18</sup> or where the transferee covenanted to return the premises to the transferor on the last day of the term,<sup>19</sup> or where the transferor extracted from the transferee any covenant advantageous to the transferor.<sup>20</sup>

### CONSEQUENCES OF THE DISTINCTION

Little harm would result in recognizing a distinction between assignments and subleases if taxonomy was the only concern. Regrettably, more than pedantry is involved, for the mutual rights and liabilities of landlords and tenants frequently turn on the label placed on the transfer to a successor of an original tenant.<sup>21</sup> If deemed an assignee, the successor can hold the landlord directly responsible for damages flowing from breaches of the landlord's covenants in the main lease.<sup>22</sup> In addition, the landlord can hold an assignee to

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S.W. 453 (Tex. 1915); *see also*, Ferrier, *Can There Be a Sublease for the Entire Unexpired Portion of a Term?*, 18 CALIF. L. REV. 1 (1929).

16. D.A.C. Uranium Co. v. Benton, 149 F. Supp. 667 (D. Colo. 1956); Fratcher v. Smith, 62 N.W. 832 (Mich. 1895); Phelan v. Kennedy, 185 App. Div. 749, 173 N.Y.S. 687 (1919); Roberson v. Pioneer Gas Co., 173 La. 313, 137 So. 46 (1931).

17. Brummitt Tire Co. v. Sinclair Ref. Co., 75 S.W.2d 1022, 1029 (Tenn. 1934).

18. Fratcher v. Smith, 104 Mich. 537, 62 N.W. 832 (1895); Fulton & Kirker v. Stuart, 2 Ohio 216 (1825); Chapman v. Knickerbocker Amusement Co., 85 Ohio App. 215, 84 N.E.2d 283 (1949). *Cf.* Sheridan v. O. E. Doherty, Inc., 106 Wash. 561, 181 P. 16 (1919).

19. Ganson v. Tiff, 71 N.Y. 48 (1877); Collins v. Hasbrouck, 56 N.Y. 157 (1874); Post v. Kearney, 2 N.Y. 394, 51 Am. Rep. 303 (1849).

20. Piggott v. Mason, 1 N.Y. 412 (1829); McLaren v. Citizen's Oil & Gas Co., 14 Pa. Super. 167 (1900). *Cf.* Steward v. Long Island R.R. Co., 101 N.Y. 601, 8 N.E. 200 (1886); Gillette Bros. v. The Aristocratic Restaurant, 239 N.Y. 87, 145 N.E. 748 (1924).

21. For centuries the majority view was that the transferee of a leasehold interest could not be held to any of the obligations of the tenant under the lease unless the transfer were by assignment. Holford v. Hatch, 1 Doug. 183, 185, 99 Eng. Rep. 119, 121 (1779). "Only assignees of the whole term, whether by actual assignment, or by devise, sale under execution, &c. are liable to the covenants for rent, &c. for, if there is a reversion of a day reserved by the immediate lessor, there is no privity between the undertenant and the first lessor." *Id.*

22. This flows from the fact that the assignee, unlike the sublessee, is in privity of estate with the landlord and that the requirements regarding privity are identical whether the question is the devolution of the burden or of the benefit of a covenant. RESTATEMENT, *supra* note 1, at §16.2(3)(d). *See also id.* comment e to §16.2. "The privity of estate requirement with respect to the benefit of a promissory obligation is the same as this requirement with respect to the burden of an obligation. . . ." *Id.*

the covenants of the original lessee in the head lease.<sup>23</sup> In contrast, if the successor is a sublessee, he has no claim at law against the landlord under the head lease, and the landlord has no direct claims against the successor.<sup>24</sup> Absent a contractual relation between the lessor and the tenant's transferee, the law courts require privity of estate before they will impose or find obligations. Due to historical influences<sup>25</sup> the lessor is in privity of estate with an assignee but not with a subtenant.<sup>26</sup> This is not to say that no mutuality of duties can exist between landlord and subtenant, but only that law as contrasted with equity will not enforce the landlord's covenants at the behest of the subtenant. In addition, the law courts will not permit the sublessee to collect damages for breaches of the landlord's covenants. Equity, since the case of *Tulk v. Moxhay*,<sup>27</sup> has not been concerned with privity and will enforce covenants against subtenants who acquired their interest with knowledge of the covenant.<sup>28</sup> Furthermore, nothing in the character of a sublease precludes the landlord from retaking possession or otherwise terminating the head lease and all rights derived thereunder by reason of the occurrence of a condition authorizing the termination.<sup>29</sup> Finally, the possibility that privity of contract might in a given case exist between the landlord and the sublessee should not be overlooked. The respective obligations would therefore stem from the norms of contract law.<sup>30</sup> Consider the following illustration of several of the principles just described:

Landlord and Tenant make a lease of Blackacre for a one-year term, Tenant agreeing to pay rent in equal monthly installments and to refrain from using the premises for any use other than as a single-family dwelling. Two months later Tenant sublets to Subtenant, who has used the premises for the last six months as a convalescent hospital but has paid no rent. Subtenant has not expressly assumed any of Tenant's obligations under the lease.

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23. *Id.* at §16.1(2)(d).

24. See *supra* notes 22-23 and accompanying text. See also *Haynes v. Eagle-Picher Co.*, 295 F.2d 761 (10th Cir. 1961), *cert. den.* 369 U.S. 828 (1962).

25. See *infra* notes 36-78 and accompanying text.

26. *Rittenberg v. Donohoe Const. Co.*, 426 A.2d 338 (D.C. App. 1981) (subtenant not in privity of estate); *Stoddard v. Illinois Improvement and Ballast Co.*, 113 N.E. 913 (Ill. 1916) (assignee in privity of estate).

27. 2 Phil. 774, 41 Eng. Rep. 1143 (1848).

28. *Hall v. Ewin*, 37 Ch. D. 74 (1887). See also *infra* note 31 and accompanying text.

29. 1 AMERICAN LAW OF PROPERTY §3.62 n.8.

30. Unfortunately, until the comparatively recent development of the theory of third party beneficiary contracts, even an express assumption of the tenant's covenants by the sublessee would not place the sublessee and landlord in privity of contract. See *infra* notes 79-114 and accompanying text.

Under traditional rules, Landlord is entitled to an injunction restricting use of the premises to use as a single-family dwelling if Subtenant took with notice of the restrictive covenant since equity, being unconcerned with privity of estate, ignores the distinction between assignments and subleases.<sup>31</sup> Also, if the main lease conferred upon Landlord the right to re-enter upon a breach of the restrictive covenant, Landlord could exercise that right and determine the interests of Tenant and Subtenant, for Tenant cannot confer on Subtenant a greater interest than Tenant had—in this case, a term subject to a condition subsequent.<sup>32</sup> Subtenant, who has enjoyed the actual use of the premises for six months, has no duty to pay rent to Landlord because no privity of estate exists between them. The landlord's sole recourse for the arrearage in rents is against Tenant.<sup>33</sup> If Subtenant had assumed the covenant to pay rent, Landlord would have been entitled to proceed against either Tenant or Subtenant for rents in many jurisdictions today.<sup>34</sup>

In contexts not involving land, most courts find implicit in any acceptance of the benefit of a contract an undertaking by the transferee to perform the transferor's burdens under the contract.<sup>35</sup> This article suggests that no reason exists to exclude the transfer of leaseholds from the reach of what today is a generally acknowledged principle of contract law.

## HISTORICAL RATIONALES

### A. *Tenure*

The distinction between assignments and subleases originated from the rules governing the transfer of freeholds in a feudal society. In feudal times, no valid reasons existed to distinguish a substitution and a subinfeudation in order to identify persons owing and entitled

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31. *Dunn v. Barton Hazelton*, 16 Fla. 765 (1878). Thus, equity may enjoin actions of a subtenant that violate or threaten to violate covenants in the head lease and may grant specific performance covenants against the subtenant, but equity will unlikely award a landlord money damages for a breach of covenant against a subtenant who has assumed the obligation. 1 AMERICAN LAW OF PROPERTY §3.62 (1952). Cf. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, LAW OF PROPERTY §6.68 (1984).

32. *Brock v. Desmond*, 45 So. 665 (Ala. 1908); *Georgeous v. Lewis*, 128 P. 768 (Cal. App. 1912); *Blackford v. Frenzer*, 62 N.W. 1101 (Neb. 1895); *Wehrle v. Landsman*, 92 A.2d 525 (N.J. 1952); *McDuffie v. Noonan*, 29 P.2d 684 (Wash. 1934).

33. RESTATEMENT, *supra* note 1, at §16.1, comments e and f.

34. Under contemporary contract principles, the lessor might qualify as a third party beneficiary of the assumption promise, but this was not a possibility at common law. See *infra* notes 83-97 and accompanying text.

35. See *infra* notes 99-101 and accompanying text.



to fealty. Even tenants for years, who were nonfreehold tenants, owned fealty.<sup>36</sup> No medieval precedents relating to periodic tenancies exist because periodic tenancies were unknown until the sixteenth century.<sup>37</sup> The remaining nonfreehold, tenancy at will, did not carry with it fealty.<sup>38</sup>

From the beginning, the common law clearly recognized a basic difference between the freehold and nonfreehold estates. This is evidenced, in part, by a refusal to classify leaseholds as realty. The common law viewed the rights of lessees "as almost entirely contractual,"<sup>39</sup> and did not allow tenants to recover possession wrongfully taken from them through ejectment proceedings until 1499.<sup>40</sup> Although land could not be devised until the Statute of Wills in 1540, leaseholds could be transmitted by testament long before that time.<sup>41</sup> Until the Statute of Frauds, leaseholds could be created by parol without the solemnity surrounding the creation of freeholds.<sup>42</sup> In addition, leaseholds could be created to commence in futuro.<sup>43</sup> Even after the Statute of Frauds was enacted, leaseholds for a period of one year or less remained capable of being created without a writing.<sup>44</sup>

Before current notions of contract were developed, a grantor of lands who bargained for some continuing consideration could retain a claim that was viewed as emanating from the land. Thus, a rent

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36. "For these be rent services, because fealty is incident to these rents; for (as it hath been said before) a lessee for life or years shall do fealty. And if a man make a lease at will reserving a rent, the lessee shall not do fealty, and yet the lessor shall distreine for the rent of common right." E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* \*142b. T. LITTLETON, *LITTLETON'S TENURES IN ENGLISH* §132 (Wambaugh ed. 1903). Fealty is the obligation of the tenant to perform the service reserved by his lord under penalty of forfeiture of his estate and to attend his lord in battle. 2 W. BLACKSTONE, *COMMENTARIES* \*45. Unlike a tenant holding a fee, the tenant for years did not render homage to the lord, that is, the tenant for years did not humbly kneel before his lord and swear that "he did become his man from that day forward, of life and limb, and earthly honor." LITTLETON at §85.

37. Littleton makes no mention of periodic tenancies. This tenancy evolved from the tenancy at will. 7 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 243-44 (2nd ed. 1937).

38. Nowhere does Littleton or Coke include the tenant at will among those owing fealty. See COKE, *supra* note 36, at \*67b, \*93b.

39. Even Blackstone refers to terms of years as "contracts." 2 W. BLACKSTONE, *COMMENTARIES* \*140. See also 1 *AMERICAN LAW OF PROPERTY* §3.12.

40. 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 213-17 (5th ed. 1942).

41. 2 W. BLACKSTONE, *COMMENTARIES* \*386-87, \*430, \*489-94; 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 115 (2d ed. 1968).

42. T. LITTLETON, *supra* note 36, at §59: "And it is to be understood, that in a lease for yeares, by deed or without deed, there needs no livery of seisin to the lessee." *Id.* Coke noted that, while "to many purposes" one is not a tenant until he enters the land, he does have an *interesse termini* from the making of his lease, this interest is alienable, and that entry can be made though the lessor die in the interim. E. COKE, *supra* note 36, at \*46b.

43. *Barwick's Case*, 5 Co. Rep. 93b, 77 Eng. Rep. 199 (1597).

44. 29 Car. II, c. 3.

service was thought of as something reserved out of the land.<sup>45</sup> The medieval overlord could only look to his own vassal, i.e. the person who held the land directly of the lord, if the overlord desired to collect the rent.<sup>46</sup> If the immediate grantee from the lord had transferred all rights to a successor, the grantee would have effected a substitution, the analog of an assignment. The result of this transaction was that the transferor would then have no personal liability to the lord since the transferor would hold nothing of the lord. Similarly, if the transfer had been by subinfeudation, the analog of the sublease, the transferor would still hold an interest in the land of his lord who then could continue to hold the transferor responsible for the rent.<sup>47</sup> This all made some sort of sense, when dealing only with the feudal services that were thought of as emanating from the land. However, even in feudal times, scarce reason existed to apply the analogies of substitutions and subinfeudation to transfers of leaseholds. During this period of time no incidents flowed to the land-freehold tenants. The nonfreehold tenants "were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price, than as having any property in them."<sup>48</sup> Indeed, medieval lawyers probably did not appreciate the analogy of transfers of leaseholds to substitutions and subinfeudations.<sup>49</sup>

The history of feudalism in England establishes that the feudal services quickly lost their significance in anything but a symbolic sense. The real value to an overlord at that time lay in the feudal incidents.<sup>50</sup> The incidents, however, were annexed only to the freehold estates.<sup>51</sup> Yet, the law continued to insist that a tenurial relation existed between the lessor and lessee of a term of years and thus to require a substitution, i.e. an assignment, to establish a relation between the landlord and a transferee of a tenant.<sup>52</sup> Besides the duty to avoid

45. E. COKE, *supra* note 36, at \*141a-42b.

46. Today, contractual privity might exist between the lessor and the assignor, *see infra* notes 79-114 and accompanying text, but at early common law liability depended upon privity of estate, which was destroyed vis a vis the assignor by the assignment. 7 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 262-72 (discussion of medieval concepts of rent).

47. Although the analogy of substitutions and subinfeudations to assignments and sublettings seems self-evident, one scholar could find little evidence that the medieval lawyer appreciated the analogy. Ferrier, *supra* note 15, at 5. Perhaps, the similarity was so obvious that the profession never bothered to preserve the perception in writing.

48. 2 W. BLACKSTONE, COMMENTARIES \*142-43.

49. Ferrier, *supra* note 15, at 5-6.

50. Services, having been reserved out of the land, became obsolete or fell prey to inflation. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 531-45 (5th ed. 1956). Incidents, many of which entitled the lord to the income from the land, offered benefits of real worth. *Id.*

51. *See, e.g.*, 7 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 8 (2d ed. 1937).

52. *See infra* notes 36-67 and accompanying text.

committing waste, a tenant has two basic obligations: to pay rent and honor the tenant's covenants that run with the land. Through an examination of the evolution of the law surrounding these obligations, an understanding of why the law continues to be preoccupied with privity of estate when determining the duties and rights of successors to the original tenant should be possible.

### B. Rents

Except where a reversion was retained, *Quia Emptores* made the creation of a rent service impossible for fees simple because thereafter a fee simple could be transferred only by substitution.<sup>53</sup> This meant that the rent service was now regarded as something reserved out of the land but incident to a reversion. *Quia Emptores* allowed, however, the rent to be severed from the reversion. This occurred, for example, when the lord transferred the rent to another but retained the reversion.<sup>54</sup> Not all rents were rent services, for the common law also recognized rent charges and rent secks. These other rents were created by an indenture that, in the case of the rent charge, conferred a right to distrain upon the lord and, in the case of the rent seck, did not confer such right.<sup>55</sup> The feudal relationships varied greatly depending upon the nature of the rent. As discussed above, where the rent was a service, only those in privity of estate were bound to each other.<sup>56</sup> Privity of estate does not appear to have been as important in determining the rights and obligations in connection with rent charges or rent secks as under rent services. Coke observed "a diversitie between a rent service and a rent charge, or a rent seck" by noting that in the case of a rent charge or a rent seck a tenant in possession

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53. Arguably, the owner of a lesser estate than a fee simple could transfer the interest of the owner to another by substitution and reserve a rent service without retaining a reversion, for the terms of the statute covered only fees simple. Indeed, there was language in some English authorities in support of the idea. Ferrier, *supra* note 15, at 5-9. The English courts, however, finally put the matter to rest by concluding that a reversion must be retained. See *Langford v. Selmes*, 3 K. & J. 200, 69 Eng. Rep. 1089 (1857). "[I]t never before was suggested that there could be any tenure between a lessee for years and a person to whom he granted the whole of his term." *Id.* at 1092.

54. E. COKE, *supra* note 36, at \*150a-52a. "[B]ecause rent is incident to the reversion, as hath beene said, and (as Littleton saith here) passeth away by the grant of the reversion . . . But by the grant of the rent the reversion doth not passe." *Id.* at \*151b. Upon the transfer of the rent, the reversion being retained, the rent was no longer a rent service but became a rent seck. See LITTLETON *supra* note 36, at §228. See also *infra* notes 55-57 and accompanying text (for a discussion of the types of common law rents).

55. A rent charge exists "because such lands or tenements are charged with such distress by force of the writing only, and not of common right . . . without any such clause put in the deed, that he may distreine, then such rent is rent secke." LITTLETON, *supra* note 36, at §217. See also *infra* note 70 and accompanying text.

56. See *supra* notes 45-47 and accompanying text.

attorns "without respect of any privitie."<sup>57</sup> Coke's point apparently was that the benefit of a rent charge or rent seck could be transferred without transferring the entirety of the lessor's interest in contrast with the case of the rent service.

The modern covenant to pay rent shares a great deal in common with the rent service after *Quia Emptores*. For example both involve the retention by the landlord of a reversion. In instances where the lease is written, the modern lease is likely to contain an express undertaking by the tenant to pay rent and even an express provision setting forth the landlord's remedies in the event of a breach by the tenant. In these respects, the modern lease frequently resembles the rent charge. The fundamental distinction between a rent service and the other kinds of rents at common law lay in the fact one was the result of a reservation by the landlord and the other of the granting of a charge upon the land by the tenant. With this distinction in mind and in view of the modern perception of a covenant to pay rent as the giving of a promise, the modern rent smacks more of rent charge or rent seck than a service. The difficulty with this reasoning lies in the generally held view that landlords obtain a rent service.<sup>58</sup>

The rent charge and the rent seck were essentially contractual in nature. In contrast, the rent service was "fundamentally different," being an incident of tenure.<sup>59</sup> Despite the greater similarity between the rent charge and the modern rent, than that between the rent service and the modern rent, the law has relied on the analogy to rent services in determining the attributes of the modern lease. A landlord at common law might own both a rent service and a rent charge or seck, the former a feudal incident and the latter a personal claim against the tenant. Thus, landlord could lease to tenant for one year, "reserving" a certain rent, but tenant could also give his express

57. "Here is to be observed a diversitie between a rent service and a rent charge, or a rent secks; for as to the rent service, no man (as hath beene said) can attorne, but he that is privie; so in the case of a rent charge, it behooveth that the tenant of the freehold doth attorne to the grantee /of the lord /without respect of any privitie." E. COKE, *supra* note 36, at \*311b. Coke gives the following example:

And therefore if the tenant of the land charged with rent charge or rent secke make a lease for life, and he that hath the rent charge or rent secke granteth it over, the tenant for life shall attorne, for the tenant of the freehold, according to the expresse saying of our author, and (as hath been said) there needeth be no privitie.

*Id.*

58. "Thus today rent reserved the creation of a leasehold or life estate is a rent service with the common law right of distress, but rent reserved in a conveyance in fee simple absolute or created by grant is either a rent seck or a rent charge, depending upon whether there is an express provision giving the right of distress." 2 AMERICAN LAW OF PROPERTY at §9.41.

59. 32 HALSBURY'S LAWS OF ENGLAND §892 (3d ed. 1960).

promise to pay this sum. The language reserving the rent to the landlord would give rise to a rent service while the express promise would grant the landlord a rent charge or seck, depending upon whether there was provision for distraint.<sup>60</sup>

In order to appreciate the apparent error of modern landlord-tenant law, a review of the common law procedures for enforcing rent services and rent charges or secks is necessary. Where the lord had a rent service, the remedies of the lord were to distraint or sue in debt.<sup>61</sup> On a rent charge, however, the remedies were to distraint or bring an action of annuity.<sup>62</sup> A lord having a rent seck could seek redress for arrearages under the writ of novel disseisin.<sup>63</sup> Later, due to the contractual nature of rent charges and rent secks, covenant would lie against the tenant.<sup>64</sup> Furthermore, if a tenant assigned the leasehold and if the landlord accepted the assignee, the tenant could no longer be sued in debt though he might be answerable in covenant on the tenant's express undertakings.<sup>65</sup> The reason debt would not lie after the landlord accepted an assignment was that privity of estate no longer existed between the landlord and the assignor. Privity had passed to the assignee,<sup>66</sup> hence the present rule that the assignee is liable on

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60. See, e.g., *Thursby v. Plant*, 1 Saund. 237, 85 Eng. Rep. 268 (1669) (where the lease was made upon a "yielding" of a certain rent and where the tenant also made an express covenant).

61. "Tenant for terme of yeares is where a man letteth (lou home lessa) lands or tenements to another for terme of certaine yeares, after the number of yeares that is accorded between the lessor and the lessee. And when; the lessee entreth by force of the lease, then is he a tenant for terme of yeares; and if the lessor in such case reserve to him a yearely rent upon such lease, he may chuse for to distraine for the rent in the tenements letten, or else he may have an action of debt for the arrearages against the lessee." T. LITTLETON, *supra* note 36, at §58.

62. "Also, if a man grant by his deed a rent charge to another, and the rent is behind, the grantee may chuse, whether he will sue a writ of annuity for this against the grantor, or distreine for the rent behind, and the distresse detain until he be paid." *Id.* at §219. The right to distraint here is by virtue of the express provision to that effect which is given under a rent charge and not by virtue of any tenurial service as in the case of a rent service. *Id.* at §217-18.

63. "Also, if a man which hath a rent secks, be once seised of any parcell of the rent, and after the tenant will not pay the the rent behind, this is his remedie. He ought to go by himselfe or by others to the lands or tenements out of which the rent is issuing, and there demand the arrearages of rent. Also, if the tenant denie to pay it, this deniall is a disseisin of the rent... and of such disseisins he may have an assise of novel disseisin against the tenant, and shall recover the seisin of the rent, and his arrearages and his damages, and the costs of his writ and of his plea." *Id.* at §233.

64. *Brett v. Cumberland*, Cro. Jac. 521, 523, 79 Eng. Rep. 446, 447 (1619); *Barnard v. Goodscall*, Cro. Jac. 309, 79 Eng. Rep. 264 (1624).

65. *Walker's Case*, 3 Co. Rep. 22a, 76 Eng. Rep. 676 (1587); *Bachelour and Gage's Case*, Cro. Car. 188, 79 Eng. Rep. 765 (1630); *Thursby v. Plant*, 1 Saund. 237, 240, 85 Eng. Rep. 268 (1669).

66. *Thursby v. Plant*, 1 Saund. 237, 240, 85 Eng. Rep. 268, 270 (1669). "[B]ut the common law annexes the action of debt for rent to the reversion, and the assignee shall maintain it only upon the privity of estate, and not upon the privity of contract." *Id.* See also *Orgill*

covenants running with the land. Privity of estate was essential for the enforcement of a rent service, but only contractual privity was needed to proceed in covenant. Thus, the assignor remained responsible on his express undertakings, incurred in granting the rent charge or rent seek.

In sum, one leasehold may give rise to both a rent service and a rent charge or rent seek, and it is necessary to analyze the modern lease to see to which of these antecedents it is most closely related. The courts, however, have ignored much of the contractual nature of a rent covenant by insisting upon privity of estate before allowing the covenant "to run with the land" and by refusing to subject the rent covenant to contemporary notions of contractual privity.<sup>67</sup>

### C. *Covenants Running With The Land*

Although rent is perhaps the most obvious example of an obligation that may bind a successor of a tenant, rent is clearly not the only one. As discussed above, a service can be retained out of the land by a transferor, as was true of the rent service, and in that case the service can be enforced against those who are in privity of estate with the obligor. Furthermore, the common law permitted the burden of a promise to pay rent to be enforced in much the same way the common law enforced rent services. The law did this by concluding that certain obligations ran with the estate granted at the time the promises were made and were somehow annexed to the estate so as to obligate those who succeeded to the entire estate.<sup>68</sup> Recognizing that some promises were personal and not expected by either promisor or promisee to bind or benefit third parties, the law erected several standards for determining which of these promises could "run with the land." The whole subject of covenants running with the land and servitudes, their counterpart in equity, has been called "an unspeakable quagmire."<sup>69</sup> A review of this body of law is, therefore, clearly beyond the scope of this article. For present purposes, it suffices to observe that neither law nor equity has permitted the burden of any covenant to bind a tenant-covenantor's successor unless the covenant was the type that is reasonable for the covenanting parties to have intended

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v. Kemshead, 4 Taunt. 643, 128 Eng. Rep. 483 (1812) (where Mansfield observes that in accepting an assignment, a lessor forfeits a claim in debt).

67. See *infra* notes 74-76 and accompanying text.

68. "[B]ecause the deed comprehending the warrantie, doth extend to the assignees of the land.." E. COKE, *supra* note 36, at \*385b.

69. E. RABIN, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* 480 (2d ed. 1982).

to bind the successors of the covenantor. If covenants met this standard, they were said to "touch and concern the land." In addition, the law courts required that the parties had the intent that the burden run and that privity of estate exist between the party claiming the benefit and the party who is to be charged. Although tomes have been devoted to determining how the intent of the parties is ascertained and how to decide whether the burden touches and concerns the land, the present concern is with the requirement for privity of estate.

The early common law, in one respect did treat rents differently than other covenants. Before the Statute 32 Henry 8, ch. 34, a rent service could run with a reversion and could even be severed from the reversion and alienated; however, the benefit of a covenant given by a tenant did not run with the reversion.<sup>70</sup> In the words of this statute, enacted in 1540, the reason the benefit of a tenant's covenants did not pass with the reversion was that "by the Common Law, no Stranger to any Condition or Covenant could take Advantage thereof. . . ." <sup>71</sup> Apparently, "stranger" was any successor other than the lessor's heir.<sup>72</sup> Even so, before 1540, the burden and benefits of covenants in a lease did devolve upon the tenant's assignee.<sup>73</sup> In addition, the common law was not merely interested in determining whether the parties were "strangers." If that had been the case, landlord-tenant law would have been no different than the prevailing contract law, and privity of estate would not have been a concern. Privity of estate, however, was of profound importance, as seen by holdings that an assignee of a tenant could be held to covenants running with the land only as long as the assignee has not assigned

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70. See E. COKE, *supra* note 36, at \*215a and b (for a description of the effects of this statute). If the lord granted the rent to another, the rent became a rent seck "because the tenements are not holden of the grantee of the rent, but are holden of the lord who reserved to him the fealty." T. LITTLETON, *supra* note 36, at §225. "But otherwise it is of a rent, which was once rent service; because when it is severed by the grant of the lord from the other services, it cannot be said rent service, for that it hath not fealty unto it, which is incident to every manner of rent service; and therefore it is called rent seck." *Id.*

71. See BACON, LAWS 537-38 (1793) (where the statute is given verbatim).

72. "Covenants Real, or such as are annexed to Estates, shall descend to the Heirs of the Covenantee, and he alone shall take Advantage of them." *Id.* at 533. The Statute 32 Hen. 8, c. 34, in the preamble, speaks only of "Grantees of Reversions, and all Grantees and Patentees of the King, of Abbey Lands." *Id.* The reference to abbey land is to the fact that when, during the Reformation the crown acquired church land, the lands had already been leased to others, and that grantees from the crown thus succeeded only to the reversion of the crown in these lands and therefore were themselves only "grantees of reversions." Bacon was apparently writing without reference to the Statute, which he takes up later in his treatment. All this leads to the inference that the obligations and entitlements of the lessor ran to the heir of the lessor but not to the transferee.

73. "As an Assignee shall be bound by a Covenant Real annexed to the Estate and which runs along with it, so shall he take Advantage of such . . ." *Id.* at 536.

the assignee's interest.<sup>74</sup> Once an assignee assigns to another assignee, the assigning assignee is neither in contractual privity with the covenantee (i.e. a stranger) nor does the assignee hold any interest in the land (i.e. no privity of estate exists between the assigning assignee and the lessor). In fact, even before the assignee assigned the estate to another transferee, the assigning assignee was a stranger, and the assignee incurred responsibility on the covenants solely because of the assignee's privity of estate. Thus, before 1540, an assignee of a leasehold was not deemed a "stranger" to a covenant that touched and concerned the land although the assignee of the reversion was so regarded. No satisfactory explanation has been located as to why the early common law found privity of estate between a lessor and the assign of tenant but not between the tenant and the assignee of the reversion. Professor Reno has opined that, "there was no corporeal ownership in the case of the reversion that could act as the vehicle of transmission as in the case of the leasehold."<sup>75</sup> This would indicate that prior to 1540 privity of estate was simply a fiction whereby the benefit or burden of a covenant touching and concerning the land would run to the assignee of a corporeal, i.e. possessory, interest in land. By the statute of 1540, the concept was expanded to include assigns of noncorporeal, i.e. nonpossessory, realty interests.

One additional observation must be made before leaving the subject of the medieval understanding of privity of estate. Many commentators, and certainly many courts, are convinced that the common law always required that those found to be in such privity simultaneously claim some interest in the same land.<sup>76</sup> This requirement was always satisfied between lessor and lessee, or between one of them and the assign of the other, or between the assigns of both of them, for one of them would have a possessory estate, i.e. the leasehold, and the other a nonpossessory interest in the land, i.e. the reversion. If the early common law did indeed insist on this requirement, apparently the medieval lawyer, at least after 1540, thought of privity of estate as the result not only of a succession to the interest of one of the original parties to a covenant but also of the tenurial relationship between the original parties at the time of the making of the covenant. The present author is inclined toward the view of Judge Clark that only

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74. "Also an Assignee, who assigns over, is liable, and shall pay the Rent which incurred due before, and during his Enjoyment . . . But in Covenant against A. as Assignee for Non-payment of Rent, he may plead, That before any Rent was due and payable, viz. on such a day, he granted and assigned all his Term and Estate to J.S. who by Virtue thereof entered, and was possessed for the Residue of the Term; and this shall be a good Discharge." *Id.* at 536.

75. 2 AMERICAN LAW OF PROPERTY at §9.1.

76. CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND 116-37 (2d ed. 1947).



succession to the interest of one of the covenanting parties was required.<sup>77</sup> Nevertheless, although the requirement is always present in landlord-tenant cases, any effort to discover the reasons for the early common law approaches to covenants running with the land may be inconclusive due to the inability to resolve this question. Interestingly, Coke drew a distinction between privity of estate and privity of tenure, the former existing between lessor and lessee and the latter between lord and tenant.<sup>78</sup> Whatever this distinction may prove about the debate described in the preceding paragraph, the distinction does suggest that Coke at least recognized that privity of estate could exist between landlord and tenant without tenure although perhaps all he was trying to say was that privity of estate could exist in connection with freeholds and nonfreeholds.

What is the relevance of the foregoing discussion of the common law development to the question of whether today assignments and subleases should be distinguished? One could summarize the common law principle as requiring a succession of all of a covenantor's or a covenantee's interest in a corporeal or incorporeal interest in land before the successor could claim the benefit or be subjected to the burden of a covenant that touched and concerned the land. This development must be viewed in proper context, by recalling that the principle evolved at a time when the law of contracts as we know it today was far in the future. As observed above, even medieval courts recognized the contractual nature of the covenants of landlord and tenant, for they gave relief for breaches through action in covenant. Apparently modern courts, however, overlook the contractual nature of lease covenants and persist in requiring privity of estate before they will hold a successor of a tenant responsible for the tenant's covenants.

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77. Clark, *The Doctrine of Privity of Estate in Connection with Real Covenants*, 32 YALE L.J. 123 (1922). Judge Clark also suggested that subtenants might be entitled to the benefits and be subjected to the burden of the tenant's covenants although he did not cite any authority for his view nor engage in any deep consideration of his suggestion. *Id.* at 145. He simply concluded that "the requirement should not be applied technically so as to require succession to the identical estate of the assignor but merely to his general legal position." *Id.*

78. Privity is a word common as well to the English as to the French, and in the understanding of the common law is fourfold.

1. As privies in estate, whereof Littleton here speaketh; as betweene the donor and donee, lessor and lessee, which privitie is immediate . . . And fourthly, privities in tenure, as to the lord and tenant, &c. which may be reduced to two generall heads, privies in deed, and privies in law.

E. COKE, *supra* note 36, at \*271a.

## CONTRACTUAL CONSIDERATIONS

At the time the common law was developing rules for determining the devolution of the benefits and burdens of real covenants, the law of contracts was in its infancy. For example, *Spencer's Case*,<sup>79</sup> perhaps the most significant of the cases permitting burdens to run with the land, was decided long before choses in action were assignable or the rights of third party beneficiaries were recognized.<sup>80</sup> Seizing upon the notions of tenure, which were readily at hand, the early common law employed the concept of privity of estate to identify the persons bound or benefitted by a covenant. In the intervening centuries, an impressive body of contract law has evolved. Landlord-tenant law, however, has been slow to incorporate these contract principles. True, some recent receptivity to contract ideas in the law of residential leases<sup>81</sup> and in such other areas as allocation of risk of loss has occurred.<sup>82</sup> Still, the century-old idea of privity of estate continues to haunt the law with an insistence that the rights and liabilities of tenants' successors depend on whether the successors are in privity of estate with the landlord. This article suggests that two contemporary contract principles should be incorporated into the body of landlord-tenant law in order to bring that law into harmony with modern expectations without regard to privity of estate. The first of these is that third parties may enforce promises, and the second that an acceptance of the benefits of a contract should be presumed to constitute an assumption of the burdens of the contract.

### A. *Third Party Beneficiary Contracts—Express Assumptions*

English courts refused to recognize that enforceable rights could exist in favor of a creditor against one who assumes another's debt. The reasons usually given for this refusal are that: (1) mere strangers cannot enforce bargains;<sup>83</sup> (2) no consideration flows from the

79. 5 Co. Rep. 16A, 77 Eng. Rep. 72 (1583).

80. See W. HOLDSWORTH, *The History of the Treatment of Choses in Action by the Common Law*, 33 HARV. L. REV. 997 (1920) (on assignability). "It is true also that it was recognized that certain covenants might be so annexed to a particular estate in the land that successive holders of that estate could enforce them. But to the end the common law never in theory departed from its rule that rights of a contractual kind could not be assigned by an act of the parties to the contract." *Id.* at 1018-19.

81. See, e.g., *supra* notes 1-5 and accompanying text.

82. In former times, the tenant would bear the risk of the destruction of the premises; modernly, however, the risk of destruction is generally borne by the landlord. See RESTATEMENT (SECOND) OF PROPERTY §5.4, Reporter's Notes 5 and 6 (1976).

83. *Crow v. Rogers*, 1 Str. 592, 93 Eng. Rep. 719 (1726).

creditor;<sup>84</sup> and (3) no privity exists between the creditor and the assuming promisor.<sup>85</sup> The first and last reasons given are not reasons at all, for they merely state the conclusion. In view of this refusal to enforce an express assumption, understanding the English refusal to find any contractual relationship between a landlord and a successor of a tenant becomes easy. This is true whether or not the successor expressly assumed the tenant's obligations under the head lease. If the landlord could not enforce an express promise to assume, there was no need to consider whether any implied promise to do so should be enforced.<sup>86</sup> To this day the English persist in refusing third parties to claim the benefit of another's promise.<sup>87</sup>

American decisions, although containing many references to privity of contract, employ the term merely as a short-hand way of stating a conclusion that mutual rights and obligations exist between persons. Thus, privity of contract is not seen as a positive requirement to contract formation, but as the product of the formation.<sup>88</sup> Nearly all American states now concede that persons other than the immediate parties to a bargain can claim the benefit of a promise made by one of the immediate parties.<sup>89</sup> The case most often cited as giving birth to this idea is *Lawrence v. Fox* decided in New York in 1850.<sup>90</sup> There can be no doubt that the doctrine of *Lawrence v. Fox*, has swept the country so that the only real problem that arises in such cases is whether on the facts the third party should be afforded the benefit of a promise, not whether third parties ever can be given the benefit. In the context of the transfers of leaseholds, the issue will usually arise when the instrument of assignment or sublease contains a promise by the transferee to perform some or all the covenants under the head lease. Courts frequently have upheld the rights of landlords against both assignees and subtenants on the basis that the assumptions placed the original obligee and the assuming party in contractual privity.<sup>91</sup>

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84. *Price v. Easton*, 4 B. & Ad. 433, 110 Eng. Rep. 518 (1833).

85. *Id.*

86. *Stevenson v. Lambard*, 2 East. 575, 580, 102 Eng. Rep. 490, 492 (1802) (assignee liable in covenant on rent covenant only upon the privity of estate).

87. F. CALAMARI & F. PERILLO, *CONTRACTS* §17-1 (2d ed. 1977); *RESTATEMENT (SECOND) OF CONTRACTS* §§302-315 (1979) (introductory note to chapter 14).

88. See A. CORBIN, *CORBIN ON CONTRACTS* §778 (1952). "The mystery of 'privity' remains; but it is no longer of much interest because court action is not much influenced by it." *Id.* See also *LaMourea v. Rhude*, 295 N.W. 304 (1940).

89. F. Calamari & F. Perillo, *supra* note 87 at §17-1.

90. 20 N.Y. 268 (1850). Some commentators believe that a few American courts had recognized third party rights before *Lawrence v. Fox*. See F. CALAMARI & F. PERILLO, *supra*, note 87 at §17-1.

91. *Fanta v. Maddex*, 80 Cal. App. 513 (1926) (acceptance of assignee by landlord "as tenant under the terms of said lease subject to all the terms of said lease" placed assignee

Thus, the task is not to determine whether landlords generally can enforce assumptions of tenants' obligations, but rather to ascertain what courts require before they will recognize landlords as beneficiaries.

Generally, a showing that one or more of the parties to a bargain intended to confer enforcement rights on another suffices to enable the third party to enforce a promise emanating from the bargain. Occasionally, a court will state that both parties to the bargain must have intended to confer rights upon the third party if the latter is to acquire the benefit of the promise. Most courts today, however, would emphasize the intention of the one who bargained for the promise, the promisee.<sup>92</sup> In leasehold cases, the promisee would be the transferring tenant, and the focus should be on his intent. Ideally, the careful draftsman of an instrument transferring a leasehold would include explicit provisions addressing the responsibility of the transferee on covenants in the head lease and indicating whether the landlord is to have the benefit of any assumptions. Difficulties arise when the instrument is totally silent about the matter. In addition, difficulties also exist when the instrument provides that the transferee assumes the covenants under the head lease without disclosing whether the landlord was intended to have the benefit of the assumption. Whether there can be any assumption apart from an express undertaking to perform the covenants under the main lease is a subject that will be addressed later in this article. At this juncture, the focus is on determining whether a landlord is meant to have the benefit of an express assumption.

Ascertaining the intention of the promisee is an issue of fact. Evidence relevant to determining the intention of the parties, admissible under the rules of evidence, can be considered. Frequently, concrete evidence of the parties' intent is unavailable or totally inconclusive. In such cases, most courts rely on what are basically presumptions. If certain facts are present, the courts will presume that the promisee intended to confer a right on a third party, and on other facts they will not. A review of the cases, however, discloses a tendency to

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in privity of contract and privity of estate with landlord); *Goldberg v. L. H. Realty Corp.*, 86 So. 2d 326 (Miss. 1956) (landlord may enforce the assumption of duty to pay rent of the sublessee); *Bank of New York v. Hirschfeld*, 336 N.E.2d 710 (N.Y. 1975) (assignee of landlord bound contractually by the covenant of the lessor where assignee took "subject to existing lease."). In many cases, the court speaks in terms of suretyship, and occasionally the court will employ the jargon of subrogator. See RESTATEMENT, *supra* note 1, at §16.1, Reporter's Note 5. See also *infra* notes 95-96 and accompanying text.

92. F. CALAMARI & F. PERILLO, *supra* note 87, at §17- 2; A. CORBIN, *supra* note 88, at §776. See also Summers, *Third Party Beneficiaries and the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 880 (1982).

presume that the third party was intended to have rights under a promise in either of two cases: (1) the promisor agrees to tender performance to the third party; or (2) performance of the promise will discharge a debt owed the third party by the promisee.<sup>93</sup>

Of course, whenever an obligor extracts from a third party a promise to perform an existing obligation, determining whether the obligor meant to bargain for the benefit of the obligee or whether the obligor merely bargained for a promise of indemnity is not always easy. In the latter case, the obligee would not qualify as a third party beneficiary because the obligor would have bargained exclusively for the obligor's own benefit.<sup>94</sup> The clear drift of the cases, however, is to emphasize that the promisee seeks a discharge of obligation and gives no thought to whether the rights of the promisee or the promisee's creditors against the promisor should be paramount.<sup>95</sup> To establish that a landlord is an intended beneficiary of an assignee's or a sublessee's promise to assume covenants in the head lease is, therefore, rather easy. Due to privity of contract between the landlord and the transferring tenant, the landlord is a creditor of the tenant, whose contractual obligations survive the transfer. Unless evidence to the contrary is established a court should assume that the landlord was meant to have the benefit of the assumption.<sup>96</sup>

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93. F. CALAMARI & F. PERILLO, *supra* note 87, at §§17-2, 17.6. Cf. A. CORBIN *supra* note 88, at §788. Corbin argues that, though the issue is usually articulated as being whether there was an intention to benefit a third-party creditor, that should not be the predicate because: It is clearly evident that when a debtor buys the defendant's promise to pay his creditor, he is not doing this with a donative intention or motivated by a desire to confer a benefit upon his creditor. His mind is intent upon his own interests; and his purpose is to secure relief from his own onerous burden.

*Id.* Corbin does identify other reasons for enforcing the promise at the behest of the third-party creditor beneficiary. *Id.* at 757.

94. Although *Lawrence v. Fox* permitted a creditor third party to sue on the promise, a few courts have refused to allow creditor third parties to do so either because they felt (1) that the promisee would not intend to benefit a creditor but only to acquire a right of indemnity or (2) that allowing suit would impose too great a hardship on the promisor to subject the promisor to claims by both promisee and creditor. *Second Nat'l Bank v. Grand Lodge F. & A. M.*, 98 U.S. 123 (1878); *In Re Gubelman*, 13 F.2d 730 (2d Cir. 1926). Courts continue to distinguish creditor and donee beneficiaries but only for purposes of ascertaining the probable intention of the promisees or, in some states, of both promisor and promisee. See F. CALAMARI & F. PERILLO, *supra* note 87, at §17-2.

95. *Prudential Fed. Sav. & Loan Ass'n. v. King*, 453 P.2d 697 (Utah 1969); *Lonas v. Metropolitan Mortgage and Sec. Co.*, 432 P.2d 603 (Alaska 1967); A. CORBIN *supra* note, 88 at §776; S. WILLISTON, *WILLISTON ON CONTRACTS* 356A (1936). Cf. *J. E. Martin, Inc. v. Interstate 8th Street*, 585 P.2d 299, 301 (Colo. 1978) ("For the assumption of liability under a lease to be enforceable by the original lessor it must be expressed to him, not to the lessee.").

96. *Spears v. Canon de Carnue Land Grant*, 461 P.2d 415 (N.M. 1969); *Cooper v. Astin*, 343 S.W.2d 713 (Tex. 1961); *Shearer v. United Carbon Co.*, 103 S.E.2d 883 (W.Va. 1958) (landlord is creditor beneficiary of sublessee's assumption); *Goldberg v. L. H. Realty Corp.*, 86 So. 2d 326 (Miss. 1956); *Hartman Ranch Co. v. Associated Oil Co.*, 10 Cal. 2d 232, 249,

To the extent that American courts recognize that the landlord can be the beneficiary of an assumption promise made by a transferee of a tenant, the courts acknowledge privity of estate is not a material consideration and permit assignees and sublessees to be treated alike. However, the courts are merely enforcing the transferee's express promise to assume. Where no express undertaking to assume exists, the ancient distinctions between assignments and subleases and the obsession with privity of estate continue to deter a wholesome receptivity to contemporary contract principles. In contract matters generally, courts have come to the realization that one who takes the benefits of a contract should be presumed to have assumed the contract obligations. Feudal mindsets, however, still dominate the approach to the transfer of leaseholds.<sup>97</sup> Likewise, under contemporary contract principles, the presumption should arise in cases of complete and of partial transfers, for contract law does not recognize the arcane distinction between assignments and subleases and treats partial as well as total transfers of contract rights as "assignments." The result is that the term "assignment" has different meaning in contract law than under traditional landlord-tenant law.

#### *B. Third Party Beneficiary Contracts—Implied Assumptions*

Although nearly all courts agree that the obligee of an assumed obligation can be a third party beneficiary of an express assumption, a trend to imply such an assumption whenever the benefits of a contract are assigned has emerged. Although some commentators believe that an assignee is not bound to the assignor's obligations unless the assignee expressly assumes the obligation,<sup>98</sup> the decided drift of the cases favors a presumption that an acceptance of the benefits of a contract constitutes an assumption of the obligations.<sup>99</sup> Both the

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73 P.2d 1163, 1171 (1937) ("plaintiff was entitled to judgment by reason of the express promise of assumption made by defendant.").

97. *Kelly v. Tri-Cities Broadcasting, Inc.*, 147 Cal. App. 3d 674 195 Cal. Rptr. 303 (1983) (nonassuming assignee not in privity of contract with landlord); *J. E. Martin, Inc. v. Interstate 8th Street*, 585 P.2d 299 (Colo. 1978) (nonassuming subtenant not in privity of contract with landlord); *Leitch v. New York Cent. R. Co.*, 58 N.E.2d 16 (Ill. 1944) (nonassuming assignee not in privity of contract with landlord); *Goldberg v. L. H. Realty Corp.*, 86 So. 2d 326 (Miss. 1956) (sublessee has no obligation to landlord absent assumption); *Mann v. Ferdinand Munch Brewery*, 121 N.E. 746 (N.Y. 1919) (nonassuming assignee not in privity of contract with landlord); *First Am. Nat. Bank of Nashville v. Chicken Soup of America, Inc.*, 616 S.W.2d 156 (Tenn. 1980) (without assumption no privity between landlord and assignee after landlord relets following abandonment by assignee).

98. L. SIMPSON, *HANDBOOK OF THE LAW OF CONTRACTS* §132 (2d ed. 1965); Note, *Contracts Assignments Which Purport to Assign an Entire Executory Bilateral Contract*, 10 WAKE FOREST L. REV. 179, 180-82 (1974).

99. See *RESTATEMENT (SECOND) OF CONTRACTS* §328 (1979) (for the cases cited in the Reporter's note).

first and second Restatements of Contracts endorse this principle of implied assumption,<sup>100</sup> and most courts appear committed to the proposition.<sup>101</sup> Thus, a consensus has developed that parties to an assignment of a contract normally regard the transaction as effecting both an assignment and a delegation. If, indeed, this is the probable intention of the parties to an assignment, seemingly the principle would be applicable to transfers of leaseholds. A lessor and any successor of the tenant, whether assignee or subtenant, should be regarded as standing in privity of contract unless the law of contracts would refuse to recognize a subtenant as a contract assignee on the grounds that an assignee is one who acquires all benefits of the contract.

The presumption of implied assumption should possibly only arise where there has been a total transfer of the rights under a contract. Therefore, since a subletting falls short of a complete transfer, no presumption of assumption by the sublessee should arise. Some support for this contention can be found in the Restatement, which indicates that the presumption arises upon assignments of the contract or of all rights under the contract or where there is "an assignment in similar general terms."<sup>102</sup> The analogy between a transfer by sublease and a partial assignment of contract rights is obvious. The authors of the Restatement, however, probably did not intend to restrict implied assumptions to total transfers of contract rights, for they defined an assignment as the transfer of a benefit in whole or in part.<sup>103</sup> Case authority on the point is difficult to find, but Professor Corbin could see no reason to exclude partial assignments of contract rights from the presumption.<sup>104</sup> The concern of the law of contracts is not with technical distinctions based on the classification of assignments, but rather with protecting the expectations of the parties. This solicitude

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100. *Id.* at §§163(2), 328(2). The first Restatement spoke only to assignments of the "whole contract" while the second speaks of an assignment of the contract or all rights under the contract and of transfers "in similar general terms." See A. CORBIN, 4 CORBIN ON CONTRACTS 906; Comment, *Obligations of the Assignee of a Bilateral Contract*, 42 HARV. L. REV. 941 (1929).

101. See *supra* note 99 and accompanying text.

102. RESTATEMENT (SECOND) OF CONTRACTS §328(1) (1979).

103. *Id.* at §317(1).

104. "Sometimes a contractor attempts to assign his 'contract,' meaning thereby to assign his rights and also to delegate performance to his duties. This is the case, also, with some partial assignments, the assignor meaning thereby to assign a part of his rights and to delegate a corresponding part of the performance to be rendered in exchange... a partial delegation will usually be permissible whenever a total delegation would be. There may be rare cases in which splitting the performance promised by the assignor would be materially injurious to the obligor (third party), so that a tender of performance by two persons would be insufficient." A. CORBIN *supra* note 88, at §889. Williston also thinks partial assignments and delegations should be governed by the principles controlling total transfers. See 3 S. WILLISTON, WILLISTON ON CONTRACTS §418A (1960). See also *Ross v. Morrigan Veneer Co.*, 92 So. 823 (Miss. 1922); *J. F. Auderer Laboratories v. Deas*, 67 So. 2d 179 (La. 1953).

for the expectations of the parties contributed to the refusal of the law courts to permit a partial assignee to proceed against an obligor. The law courts reasoned that permitting such a suit would subject the promisor to multiple claims, one by the assignor and one by the assignee, contrary to the legitimate expectations of the promisor.<sup>105</sup> Equity, on the other hand, has for a long time enforced partial assignments. In addition, since the merger of law and equity the majority of courts has countenanced claims by partial assignees.<sup>106</sup> In the context of landlord-tenant relations, it may be assumed that a transferring tenant and the tenant's transferee, whether the latter be assignee or subtenant, contemplate that the party actually enjoying the use of the premises should perform the tenant's obligations under the head lease. This is not a question of subjecting the landlord to multiple claims, but of permitting the landlord to look to the party in possession for performance. In addition, the above assumption does not involve subjecting the transferor to separate claims by the landlord and the transferee. Accordingly, where the claim in question is that of the landlord, no practical reason exists to distinguish assignments and subleases, as these have been understood under the law of real property. Occasionally the landlord may be the obligor and be concerned with defending separate claims by the tenant and the tenant's transferee. Obviously, this concern would exist only where the transfer is by sublease, for otherwise the transferor would have no claim. In disputes not involving realty, most courts today, appreciate the difficulty facing the obligor in such a situation and have fashioned flexible rules for accommodating the situation. Thus, modern courts have avoided the rigidity of the older rule barring enforcement of partial contract assignments in legal actions.<sup>107</sup> Nothing in the nature of landlord-tenant relations exists that renders this approach inappropriate for resolving multiple claims against landlords.

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105. Perhaps the primary explanation for the position of the law courts was the rule against splitting causes of action, but the courts were also concerned with the unfairness of subjecting the obligor to multiple claims. 4 A. CORBIN, CORBIN ON CONTRACTS §889; F. CALAMARI & F. PERILLO, *supra* note 87, at §18-22 (1977).

106. Both the first and second Restatements of Contracts recognized the validity of partial assignments with the proviso that, when the obligor has not agreed to perform separately the assigned part of a right, an action cannot be maintained against the obligor over an objection by the obligor unless all potential obligees are joined or unless joinder is infeasible and it is equitable to proceed without all the potential obligees. See RESTATEMENT OF CONTRACTS §156; RESTATEMENT (SECOND) OF CONTRACTS §326 (1979). *Accord* Taylor v. Sanford, 203 Cal. App. 2d 330, 21 Cal. Rptr. 697 (1962); Finance Corp. v. Modern Materials Co., 312 P.2d 455 (Okla. 1957); Prudential Fed. Sav. & Loan Ass'n. v. Hartford Accident & Indemnity Co., 325 P.2d 899 (Utah 1958).

107. *Id.*



In spite of the prevalence of the notion that an assignee impliedly assumes the burdens of a contract, real property transactions are generally regarded as *sui generis* and not within the rule.<sup>108</sup> This reservation is reflected by the caveat to Section 328 of the Restatement of Contracts (Second):

The Institute expresses no opinion as to whether the rule stated in Subsection (2) applies to an assignment by a purchaser of his rights under a contract for the sale of land.

Just why real sales, which presumably include transfers of leaseholds, should be exempt from the normal rules is something of a mystery.<sup>109</sup> When this caveat was before the American Law Institute in 1967, Professor Braucher noted that the drafters were not satisfied with the justification for excepting land transactions.<sup>110</sup> Courts continue, without any articulation of their reasons, to refuse to find implied assumption in the assignment of land contracts.<sup>111</sup>

The author suspects that the distinction between land contracts and other contracts is without foundation and results from the habit of common law lawyers to rely upon precedent.<sup>112</sup> The law of landlord and tenant evolved before most of the current principles of contracts were known, and the profession continued to resort to the ancient precedents even after the development of modern contract law. A good illustration of this tendency is *Lisenby v. Newton*,<sup>113</sup> where in 1898, the California Supreme Court refused to hold the assignee to the vendee under a land contract liable to the vendor by relying upon the 400 year old *Spencer's Case*.<sup>114</sup>

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108. *Cedar Point Apartments, Ltd. v. Cedar Point Inv. Corp.*, 693 F.2d 748, 753n (8th Cir. 1982); *Haarman v. Davis*, 651 S.W.2d 134 (Mo. 1983); *Bank of New York v. Hirschfeld*, 336 N.E.2d 710 (N.Y. 1975); *Langel v. Betz*, 164 N.E. 890 (N.Y. 1928); *Champion v. Brown*, 6 Johns. Ch. 398, 10 Am. Dec. 343 (N.Y. 1922).

109. Note, *supra* note 100 at 943-44 (where the commentator states he perceives no significant distinction between land contracts and other types of agreements).

110. The draftsmen were compelled by the cases to insert the caveat and thought the distinction had something to do with the analogy of land contracts with mortgages. However, they felt that the distinction between land contracts and other contracts did not make any sense. See 44th Annual Meeting, A.L.I. Proc. 380-87 (1967).

111. *Cedar Point Apartments, Ltd. v. Cedar Point Inv. Corp.*, 693 F.2d 748 (8th Cir. 1982), *cert. den.* 461 U.S. 914 (1983); *Harmann v. Davis*, 651 S.W.2d 134 (Mo. 1983); *Hahn v. Earth City Corporation*, 625 S.W.2d 640 (Mo. App. 1981); *Norton v. First Fed. Sav.*, 624 P.2d 854 (Ariz. 1981); *Lanos v. Metropolitan Mortgage and Securities*, 432 P.2d 603 (Alaska 1967). *Cf. Radley v. Smith*, 313 P.2d 465 (Utah 1957) (holding that the assignee of the vendor under an installment land sales contracts impliedly assumed the duty of the vendor to pay property taxes).

112. See Grismore, *Is the Assignee of a Contract Liable for the Non-Performance of Delegated Duties?*, 18 MICH. L. REV. 284, 293-4 (1920).

113. 120 Cal. 571 (1898).

114. The *Newton* court found no significance in the vendor covenanting on behalf of himself and his assigns, for Lord Coke had opined that covenants which were personal could not be

## CONCLUSION

The law of contracts does not recognize the arcane notion of privity of estate and permits the promisee under a bilateral contract to enforce the contract against the obligor and those who assume the obligation. Where someone not a party to the bargain was intended by those who struck the bargain to have the right to enforce the promise, the intended beneficiary and the promisor may be said to stand in privity of contract<sup>115</sup> with each other. In the jargon of contract the former would be labeled a third party beneficiary. Thus, under contract principles an undertaking by a transferee of a leasehold to perform any of the covenants made by the transferor under the lease agreement that created the interest being either wholly or partially transferred could constitute an assumption of that obligation of which the landlord was a third party beneficiary.

Current contract doctrine also holds that, as a general proposition, the transferee of the benefits of a contract by the mere acceptance of the benefits impliedly consents to perform the obligations of the contract. Neither the authors of the Restatement, nor the courts, nor the commentators, nor the author have been able to identify an acceptable basis for excluding contracts involving land from the reach of this principle. Occasionally, the circumstances of a particular case may overcome the presumption. For example, a subtenant who receives only the right to possession for a period less than the remaining terms should not be deemed to have assumed the obligation to pay rents accruing after the possession reverts to the sublettor. Yet, the usual cases involve claims by landlords against assignees or subtenants on obligations arising while the latter were entitled to the use of the premises. In this situation, to assume the sublessor and sublessee contemplated that the sublessee would be responsible for these obligations seems reasonable. The general contract rule of implied assumption allows an examination of the circumstances to determine whether the implication is appropriate so that no fear of any inflexibility resulting from the reception of the doctrine into the corpus juris of landlord and tenant exists. The careful drafter of an instrument transferring a leasehold will include express provisions dealing with the transferee's responsibilities for the covenants of the tenant under

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made to run with the land. *Id.* at 573. Just why the court was concerned with whether the assignee under a contract binding assignees should not be deemed to have assumed the burdens of the contract is difficult to say.

115. This assertion may be little more than a truism. *See supra* note 88 and accompanying text.

the lease agreement. Additionally, the drafter should make clear whether the landlord is an intended beneficiary of any promises made by the transferee to perform a covenant in that lease. Difficulties arise when the instrument is totally silent about this matter. Difficulties also arise when the instrument provides that the transferee will perform one or more of the tenant's covenants under the lease but fails to disclose whether the transferor or the landlord, or perhaps both, was intended to be the beneficiary of the promise. In these instances of equivocal manifestations of the intention of the transferor and transferee, courts should—as indeed they do in cases outside the real property context—rely upon a presumption that anyone accepting a transfer of the benefits of a contract shall be presumed to have undertaken the responsibility for performing all unperformed promises of the transferor under the contract.<sup>116</sup> This presumption would, of course, be rebuttable in accord with a justifiable concern with the intentions of the parties to the transfer rather than with a sterile inquiry into whether the transfer constituted an assignment or sublease.

The principles of neither property law nor contract law justify refusal to find reciprocal rights and obligations between landlords and subtenants who did not expressly assume the obligations owing to the landlord. The common law recognized that certain obligations attached to land and could benefit and bind only those in privity of estate. Other obligations, even though concerning land, might constitute personal obligations enforceable where privity of estate was lacking. This has been illustrated by cases in covenant involving tenants who had assigned their leaseholds.<sup>117</sup> In essence, the common law concluded that express undertakings by tenants, as contrasted with services reserved by landlords, constituted contractual obligations. Still, because for centuries the law of contracts did not recognize the alienability of choses in action or the rights of third party beneficiaries, successors of a party to a contract were neither benefitted nor burdened by the contract unless they stood in privity of estate. To this day in England, third party beneficiaries are not protected. In the United States, however, such beneficiaries are protected, and choses in action are transferable. In this country, therefore, there should seemingly be no barrier to extending to the covenants of landlords and tenants these incidents. This extension is supported by the historically sound view that the same obligation might be both a rent service enforceable only where privity of estate existed and a covenant enforceable in

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116. *See supra* notes 99-101 and accompanying text.

117. *See supra* note 65 and accompanying text.

contract.<sup>118</sup> Our courts, regrettably, have perceived tenants' obligations under leases as services. By overlooking the distinction between services, on the one hand, and rents seck, rent charges, and covenants running with the land, on the other hand, modern courts have aborted the evolution of the law of contracts so as to deny leases the benefits of developing notions of contract. American contract law has permitted third party beneficiaries to enforce agreements made by others for the benefit of third parties and has embraced assumptions by subtenants as within this rubric. Contemporary contract law presumes an assumption by any transferee of the benefits of a contract, and nothing in the nature of subleases exists to warrant stifling the growth of the law of contract because of a moribund adherence to perceptions of feudal legalisms. This is particularly true where these perceptions fail to reflect the reasonable expectations of landlords, tenants, and their transferees.

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118. *See supra* notes 60-70 and accompanying text.

