8/6/70

Memorandum 70-96

Subject: New topic

Attached are two letters from Professor Blawie of Santa Clara Law School and a letter from James G. Ford, City Attorney of Red Bluff.

Professor Blawie originally wrote to suggest that the Commission recommend the repeal of Civil Code Section 715.8. I was delighted to be able to respond to him by pointing out that this section has been repealed by the 1970 Legislature upon Commission recommendation.

Professor Blawie further suggests a study of the extent to which frivolous, and the like, conditions contained in instruments of conveyance should be enforceable. He notes statutes in other states that provide some means of avoiding such conditions. He also suggests a study of the related problem of the distinction made between real covenants and equitable servitudes when there has been a change of condition, noncompliance, and the like. Professor Blawie notes that New York has enacted a statute dealing with the second matter and that a study of the whole area was made by the New York Law Revision Commission. He suggests that there should be a maximum duration on such covenants and servitudes as well as on powers of termination and possibilities of reverter. This area would appear to be one suitable for study by the Commission.

The City Attorney of Red Bluff notes a somewhat related problem. See Exhibit II. A tract of land was donated to the city for a park about 50 years ago. The area is no longer suitable for a park and the city wants to sell the tract and use the money for a park in a more suitable location. The grant to the city contains a reversionary clause, however, and one of the

reversioners seeks a substantial payment as a condition for agreeing to the new scheme. This problem could be considered in the study suggested above if the Commission decides to undertake that study.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 70-36

EXHIBIT I

THE UNIVERSITY OF SANTA CLARA · CALIFORNIA · 95053

June 1, 1970

John DeMoully, Esquire
Secretary, California Law Revision Commission
Stanford University
Palo Alto, California

Dear John--

Pursuant to your invitation to me to send along a comment as to parts of the statutes which need attention from time to time, I am taking the liberty to make certain suggestions.

With the new power of appointment statute on the books, and CC 1468 etc. having ironed out the covenant/servitude area, I find only one area in California law for which I still have to make apologies in the property area.

CC 715.8, as you know, was adopted without any need for it, and it serves no valid purpose in our law. The California Rule Against Perpetuities is a model set of statutes, except for this provision. It is now long enough in the past that the statute was adopted, that repealing it should cause no one any embarrassment. The Rule has a valid place and is truly a valuable piece of social legislation, though a century old. CC 715.8 in a foolish and indirect fashion allows titles to be encumbered in California to no good end, and allows property to be tied up in one family line for generation upon generation. It is time we got rid of it. I am enclosing a handout which I pass out in my Trusts and Estates course. The text illustrates the problem.

We could also stand a statute like Minnesota's making unenforceable remote, trivial, precatory, or irrelevant conditions contained in instruments of conveyance. This would conduce to giving the judges more elbow room as to undesirable conditions.

Best wishes,

James L. Blawie

Professor of Law

THE UNIVERSITY OF SANTA CLARA • CALIFORNIA • 95053

June 5, 1970

John H. DeMoully, Esquire
Executive Secretary
California Law Revision Commission
Stanford University School of Law
Stanford, California 94305

Dear John--

Thank you for your kind reply, and the enclosures.

Since you express interest in the 'Minnesota type statute' which declares unenforceable frivolous, etc. conditions contained in instruments of conveyance, I will presume upon your good nature further. These statutes have not been a smashing success by any means, but they do allow the trial court judge some considerable freedom in keeping titles unclouded. The original statute seems to have been Michigan's, Mich. Comp. Laws 1948 s. 554.46, followed very early (1840?) by Minnesota, Minn. Stat. Ann. s.500.20 (1), and later by Wis. Stat. Ann. s. 230.46 and Ariz. Rev. Stat. Ann. s. 33-436. Such a provision could easily be added to Cal. C.C. 1441 or 1442, or contained in a new section 1443.

Another problem which comes up, now that we have twentieth century law as to real covenants and equitable servitudes (C.C. 1457-1470) is as to extinction of either when it has served its purpose. You will recall that American law rather irrationally distinguishes between them by and large, allowing the equitable defenses of change of condition, laches, widespread noncompliance, etc., to be pleaded in the equitable servitude instance, but not in the real covenant instance. Hence, upon a mere accident as to whether a certain covenant is interpreted as servitude or real covenant depends the outcome of a case for enforcement.

New York state and other jurisdictions have solved the problem by allowing all defenses available in defense of a suit on an equitable servitude to be used as well in a real covenant case. Also, incidentally, such statues normally do away with any distinction as to remedy, so that injunction and damages are available in either instance. These statutes are eminently desirable, if for no other reason, because they help the hapless practitioner who never really learned the difference to plead easily and properly

in the trial of land use restrictions without fear of embarrassment or implication of malpractice. The New York Law Revision Commission did quite a study of this whole area twelve years ago (N.Y. Law Rev. Comn. Recs., Rpt. 65B, 1958) which you might find handy. The resulting legislation, based upon similar earlier undertakings elsewhere, is Real Prop. Actions and Proceedings Code s. 1951-1953 (McKinney Cons. Laws N.Y. Ann., Bk. 49½)

It is high time we followed the lead of other states, most notably the New England states, in putting a maximum duration on such covents and servitudes, as well as on powers of termination and possibilities of reverter. Thirty or forty years seems the current fashion. We do lack most of the fine, careful reanalysis of the future interests area which most prosperous, sophisticated states have long since undertaken. But enough for now. At the rate you fellows have been proceeding lately, it won't be too long, I suspect. The major problems have been dealt with pretty well. It is quite a tribute to you and to the commission.

Cordially yours,

James L. Blawie

Memorandum 70-96

EXHIBIT II

CITY OF RED BLUFF

RED BLUFF, CALIFORNIA

May 28, 1970

JAMES G. FORD
CITY ATTORNEY
208 HICKORY STREET
PHONE 527-8137
(AREA CODE 916)

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

I have been plagued with a very perplexing problem for the past several years since I became city attorney. I am enclosing a copy of a letter I wrote to Carlyn Reid some time ago together with a copy of the conveyance to which it refers.

I don't know whether this responsibility extends to new legislation. If it does, it would seem that it would be a fertile field for checking into the possibility of some statutory enactment which would void these restrictions, say, after fifty years. This seems to me comparable to that which the law against perpetuities deals with.

Any comments you might have along these lines would be greatly appreciated. If you thought it worthwhile to have some law professor who specializes in real property problems retained as a consultant, I think that through the League of Cities and the Supervisors Association we might be able to arrange for financial support.

Very truly yours,

James G. Ford

JAMES G. FORD
City Attorney

JGF/mla

October 24, 1968

Mrs. Carlyn F. Reid
Staff Attorney
League of California Cities
Hotel Claremont
Berkeley, California 94705

Re: Kraft Playground

Dear Carlyn:

For the past several years I have been wrestling with a complex problem concerning a playground which was given to the City of Red Bluff in 1919 and which contains a reversionary chuse. I am enclosing a copy of the conveyance.

The character of the community has changed and in recent years this playground has received very little use. It is a valuable commercial location a block from downtown Red Bluff on the banks of the Sacramento River. Adjoining it is a fine modern motel right at the Sacramento River Bridge. The City would like to sell the property and use the proceeds for playground facilities in a more suitable location.

Edward Kraft, the donor of the playground, also provided by will a $10,000 maintenance trust. It was the City's idea to arrange to have this trust paid over to the reversioners in return for their conveyance of their reversionary interest to the City.

After considerable effort over a period of years, we located three persons whom we believe to be the only reversioners. Our initial contacts with them were very encouraging and they each indicated that they would be willing to go along with our proposal to convey their reversionary rights in return for a one-third interest in the maintenance trust fund, which is administered by the Wells Fargo Bank.

However, recently one of the reversioners has had a change of mind and now refuses to go along unless he is paid $10,000. Obviously, to be fair to the others, the City would have to inform them of this and presumably pay them $10,000 each. It is doubtful if the property is worth much more

than $30,000 and acquisition at that price would obviously be of no benefit to the City.

I just don't know how to proceed. The complete reversionary interest has been appraised at approximately $8,500 and we could hardly embark on condemnation proceedings where our purpose in acquiring the property is to sell it.

Could you refer me to any city that has faced a similar situation? It would be great if there were some way to wipe out these reversionary interests after a lapse of time.

Another thought was that I might confer with one of the law school real property professors. Do you happen to know any professor who handles this type of consulting service?

Any assistance or suggestions you can come up with would be greatly appreciated.

Very truly yours,

JAMES G. FORD,
City Attorney

JGF/mla