Study H-600 April 10, 1995

Memorandum 95-25

Covenants That Run With The Land: Civil Code § 1464

One of the topics authorized for Commission study is whether the law relating to real property, including Civil Code Section 1464, should be revised. Section 1464 relates to covenants that run with the land.

Real Covenants

A real covenant is a promise respecting the use of land, e.g., a promise to build a brick wall or an access road on land. The covenant is enforceable between the covenantor and covenantee because the parties are in privity of contract with each other.

If either or both parties have transferred their interests in the land, may the covenant be enforced between their successors? If it is a personal covenant, i.e. intended as a promise only between the original parties, it may not be enforced by or against successors. But if the covenant runs with the land it binds and is enforceable between successors.

Covenants that Run with the Land

"Certain covenants, contained in grants of estates in real property, are appurtenant to such estates, and pass with them, so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee, in the same manner as if they had personally entered into them. Such covenants are said to run with the land." Civil Code Section 1460.

Several conditions must be satisfied in order for a covenant to run with the land, including that the covenantor and covenantee intend the covenant to run, that the covenant touches and concerns the land, and that the parties involved are successors in privity of estate. Civil Code Section 1464, which the Legislature has authorized the Commission to study, deals with the issue of intent that a covenant run with the land.

Intent that a Covenant Run

The instrument creating a covenant that runs with the land must disclose the intention of the parties that the covenant run. The usual method of expressing this intention is a statement that the covenant binds the successors and assigns of the covenantor, and is enforceable by the successors and assigns of the covenantee. However, this is only one of the methods of expressing the required intent. The failure to mention "assigns" is not ordinarily fatal, and in fact the requisite intention may also arise by inference under the circumstances. See 7 H. Miller & M. Starr, Current Law of California Real Estate § 22:2 (2d ed. 1990); 4 B. Witkin, Summary of California Law, *Real Property*, § 487 (9th ed. 1987).

There are a few circumstances under California law where the instrument must include an express statement that it binds "assigns" in order for the covenant to run:

(1) A covenant created during the period from 1905 to 1968, between independent fee owners. See Civil Code § 1468, before its 1968 amendment.

(2) A covenant concerning something not in existence at the time of the covenant's creation. See Civil Code § 1464.

The Rule in *Spencer's Case*

The requirement of Civil Code Section 1464 that a covenant concerning something not in existence must expressly mention "assigns" in order to run with the land is a codification of the first Rule in *Spencer's Case*. (The second, and more important, Rule is the requirement that the covenant "touch and concern" the land).

In *Spencer's Case*, *5* Co. Rep. 16a, 77 Eng. Rep. 72 (K.B. 1583), Spencer (the landlord) had leased property to a tenant for a term of 21 years, the tenant covenanting "for him, his executors, and administrators" to build a brick wall on the premises. The tenant did not build the wall, and assigned the lease. Spencer brought an action of covenant against the assignee. The court held that "the covenant concerns a thing which was not in esse at the time of the demise made, but to be newly built after and therefore shall bind the covenantor, his executors, or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being." The court went on to note that "if the lessee had covenanted for him *and his assigns*, that they would make a new wall upon some part of the thing demised, that for as much as it is to be done upon the land demised, that it should bind the assignee; for although the covenant doth extend

to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee *by express words*." (Emphasis added.)

Unfortunately, the report of *Spencer's Case* does not elaborate the reasons for this rule, although the report does note that "after many arguments at the Bar, the case was excellently argued and debated by the Justices at the Bench: and in this case these points were unanimously resolved by Sir Christopher Wray, Chief Justice, Sir Thomas Gawdy, and the whole Court. And many differences taken and agreed concerning express covenants and covenants in law, and which of them run with the land, and which of them are collateral, and do not go with the land, and where the assignee shall be bound without naming him, and where not: and where he shall not be bound although he be expressly named, and where not."

Civil Code Section 1464

The first Rule in *Spencer's Case* — that the assigns must be expressly bound where the promise is to do acts concerning something not *in esse* — had an early following in case law in the United States. It also made its way into David Dudley Field's draft code (§ 695) and, during the 19th Century, into the state codes that Field influenced, such as California Civil Code Section 1464, where it remains in effect today. With this exception, the rule has been generally discarded in the United States.

Section 1464 was enacted in 1872 and not amended since. It extends the first Rule in *Spencer's Case* to all covenants, not limiting it to covenants affecting leasehold interests:

> 1464. WHAT COVENANTS RUN WITH LAND WHEN ASSIGNS ARE NAMED. A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with land so far only as the assigns thus mentioned are concerned.

Although this provision has not been a significant factor in the development of the California law of real property covenants, it has been relied upon in one or two appellate cases, most recently Marin County Hospital Dist. v. Cicurel, 154 Cal. App. 2d 294, 316 P. 2d 32 (1957). In that case the owner of a tract conveyed a

parcel from the tract, together with an easement along a strip of the tract. The grantor agreed in the deed also "to extend one of the roads of the tract to connect with said strip as to give ingress and egress thereto to vehicles, if so requested by" the grantee. After a series of transfers of both the grantor's interest and the grantee's interest, the successors of the grantee sued the successors of the grantor for the promised road. The trial court found that the provision for extension of a roadway was a mere personal covenant and therefore not enforceable as between the successors. The Court of Appeal affirmed, stating:

> In the present case the governing section is 1464 which refers to "the addition of some new thing to real property" and requires that, before such a covenant will run it must be made expressly binding on assigns. That is this case. The road to be built upon request was not in existence at the time of the [original] deed. Thus the covenant, necessarily, was a covenant "for the addition of some new thing to real property." Such a covenant was binding on the assignees of the covenantor only so far as they are mentioned in the deed. (*Bailey v. Richardson*, 66 Cal. 416 [5 P. 910].) In the instant case assigns are not mentioned in the [original] deed, nor in any subsequent deed. Thus the covenant must be held to be a personal covenant on the part of [covenantor], and not binding on his assigns.
> 154 Cal. App. 2d at 301.

Criticism of Civil Code Section 1464

Three different Law Revision Commission consultants and a former Commission member have criticized Civil Code Section 1464 in real property studies.

Professor Jim Blawie in his 1979 study prepared for the Commission — *A Study of the Present Law of Property and Conveyancing with Critical Analysis and Suggestions for Change* — states that the common law first Rule in *Spencer's Case* has been rejected in almost every other American jurisdiction and that Section 1464 might as well be eliminated:

> The leading American case is probably Purvis v. Shuman, 273 Ill. 286, 112 N.E. 679 (1916) [additional citations]. It sets out that the use of the word assigns is irrelevant, and the intention of the parties as to whether a covenant is meant to run with the title is to be gathered from an inspection of the entire instrument.
> Blawie, at 96.

The rule is also criticized by Professor Bill Coskran in his study for the Commission published in 1989 — *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers*, 22 Loyola L.A. L. Rev. 405 (1989). The question addressed by Professor Coskran is whether a tenant's promise not to assign the tenancy without the landlord's consent also binds the parties' successors. He notes that both Civil Code Sections 1464 and 1468 (which is discussed below) require an express statement of intent to bind successors in certain situations, but argues that there is no intrinsic reason why intent cannot be implied with regard to a leasehold transfer restriction. "If the intent is not expressed, the most likely intent should govern. This is just a way of looking at, and following, the reasonable expectations of the parties." He gives the following example:

> Suppose that the clause states that "the tenant shall not assign or sublet with the lessor's prior written consent, which consent shall not be unreasonably withheld." There is no express language binding assignees. The clause restricts transfer without the lessor's consent. Is it likely that the parties intended and reasonably expect that it only bind the original tenant, and that subsequent parties are free to transfer without any limitation? Or, is it likely that the parties intend and reasonably expect that any and all transfers be subject to review and consent by the lessor? It is asking much of a credulous person to expect that a one-shot restriction is intended.
> 22 Loyola L.A. L. Rev. at 557.

Professor Susan French, a Commission consultant on real property and probate, also has criticized the rule in a 1982 study not prepared for the Commission. She refers to the requirement that the word "assigns" must be used in an instrument where performance of the promise relates to something not yet *in esse*, but notes that, "In all other situations, the parties are free to select their own words to manifest their intent that the burdens and benefits should run. This is comparable to the easement doctrine that no particular formula is necessary to make either burden or benefit run." French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 So. Cal. L. Rev. 1261, 1271 (1982). Professor French concludes that general doctrines governing the interpretation and construction of bilateral documents can be used to determine whether a particular agreement is intended to run with the land. "There is no need to require expression of that intent by use of 'assigns' or any other particular formula." Id. at 1306.

Professor Howard Williams, before he became a member of the Law Revision Commission, stated that "since we are less concerned today than at common law with the use of technical words of art in instruments creating interests in land there is little justification of the continued requirement of such language in order that a covenant run with the land in the cases where it concerns something not *in esse*."

> It is difficult to justify differing treatment of identical covenants relating to something not in esse based on the purely fortuitous circumstances of use or non-use of the mystic word "assigns", which in turn depends on the similarly fortuitous section of a competent or incompetent draftsman by the parties to the covenant; this is certainly "an irresponsible way of eliminating running covenants quite by chance." [citation]
> Williams, *Restrictions on the Use of Land: Covenants Running with the Land at Law*, 27 Texas L. Rev. 428-29 (1949)

The literature is replete with such criticisms of the first Rule in *Spencer's Case.* Professor Bordwell, for example, states that "It is probable that no one would deny that the distinction is the scholastic product of a by-gone age." Bordwell, *English Property Reform and its American Aspects*, 37 Yale L.J. 1, 27 (1927).

Professor Berger argues that the principle "should have been stillborn, for it serves no rational basis, and traps only the unwary or slovenly draftsman. Most courts have either repudiated the doctrine of have ignored it." C. Berger, Land Use and Ownership § 10.5 (3d ed. 1983). Professor Berger notes that, except for remnants of the "not *in esse*" distinction such as that preserved in Civil Code Section 1464, the general rule is that no special words are used to establish intent. "With respect to some of the more usual covenants (e.g., covenant to pay rent), intention usually is presumed. Otherwise, the courts may infer intent from the nature of the covenant, the relation of the parties, the other aspects of the original transaction." Ibid.

Powell notes that the Restatement of Property has rejected this common law rule and adopted "the more sensible proposition" that the presence or absence of the term "assigns" in an instrument that contains a covenant relating to something not *in esse* is only evidence of the intent of the parties. "The general trend away from formalism in the field of covenants supports the *Restatement's* position. Courts of equity, in contrast to the law courts, have never followed this resolution of *Spenser's Case* [sic] and have regularly held that the word 'assigns' is

not essential even when the covenant relates to something not *in esse*." 5 R. Powell and P. Rohan, Powell on Property ¶ 673[2] (1994).

Rationale for Civil Code Section 1464

Does the law make any sense when it provides that a covenant to build a brick wall or connect an access road does not run with the land unless "assigns" are expressly mentioned, whereas a covenant to repair or maintain a wall or road may run with the land even though assigns are not expressly mentioned?

The staff has seen only a few efforts in the literature to justify or rationalize the first Rule in *Spencer's Case*. Professor Burby states that "The burden incident to a covenant of this type is particularly heavy so the intention to bind remote parties should be clearly expressed. W. Burby, Handbook of the Law of Real Property § 59 (3d ed. 1965).

Professor French also suggests that the formality of requiring use of the word "assigns" to bind successors to perform a covenant that relates to a thing not in being may have been imposed because:

> Where the object of the covenant was to build something or to make repairs to a structure to be built, the potential liability for breach of the promise is arguably more difficult to predict than that on a promise related to a thing already in existence. Since such a covenant has greater potential for depressing the value of the leasehold interest, requiring a clear showing of intent to bind successors made sense.
> 55 So. Cal. L. Rev. at 1285.

Professor French goes on to point out, however, that if this was its function, the requirement lost its value as soon as "assigns" became part of the boilerplate. "It serves no useful purpose today." Ibid.

A more likely explanation for the rule, in the staff's opinion, is that if a thing is in existence and affects use of the property, such as a wall or road, an assignee may be led to suspect the existence of a covenant requiring maintenance and repair associated with the thing, and will be circumspect about possible burdens. But if the thing does not exist, there is nothing to put the assignee on notice or give the assignee reason to investigate the possibility of a covenant requiring new construction, and therefore the intent to impose the burden on assignees should be express. A reasonable person would not ordinarily expect, when buying a piece of property, that a promise of a former owner made generations ago to build something on the property would continue to have any relevance for

the new purchaser, absent express binding language. Whereas a reasonable person buying a piece of property that is subject to a covenant to repair or maintain an existing structure might well expect to be subject to a continuing obligation despite the absence of express language binding assignees.

Interrelation of Civil Code Sections 1464 and 1468

Civil Code Section 1468, during the period between its enactment in 1905 and its amendment in 1968, extended the "assigns" requirement to covenants between owners of two parcels of land:

> 1468. A covenant made by the owner of land with the owner of other land to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, and which is made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with both of such parcels of land.

There was no overlap between this provision and Section 1464, since Section 1464 is limited to a covenant contained in a grant of an estate whereas Section 1468 at that time was construed to apply to the situation of a covenant not contained in a grant.

The 1968 amendment of Section 1468 greatly expanded its application and now the provision does in fact overlap Section 1464 in some circumstances. Section 1468 now provides, among other things, that a covenant for use, repair, maintenance, or improvement of land made between a grantor and grantee of the land, runs with the land if a number of conditions are satisfied, including that "successive owners of the land are in such instrument expressed to be bound thereby for the benefit of the land owned by, granted by, or granted to the covenantee". Civil Code § 1468(b).

Section 1468 thus no longer requires the word "assigns" to be used, but in its place requires an express statement of intent to bind successors for a vastly expanded range of covenants. This provision apparently abrogates the general common law rule that intent to run and bind successors may be inferred from the purposes of the covenant in those circumstances covered by the section.

Whether Section 1468 as amended also impliedly repeals the narrower Section 1464 is not clear. If a covenant is made in a grant and is for improvement of the land (e.g., a wall or road), does the "assigns" language of Section 1464 or the somewhat more liberal expression of intent allowed by Section 1468 prevail?

There is no reported case addressing the issue. The staff guesses that the more recent, but broader, enactment would prevail over the more narrow provision were the issue to arise.

Also noteworthy for comparison are Civil Code Sections 1469 and 1470, enacted in 1953. These sections deal with affirmative and negative covenants made by a landlord, including covenants relating to use, repair, maintenance, and improvement of property owned by the landlord contiguous to the leased premises. They provide that such a covenant does not run with the land unless successive owners "are in the lease expressed to be bound thereby for the benefit of the demised real property." Civil Code §§ 1469, 1470. Again, these provisions overlap Section 1464 in the case of a lease covenant requiring improvement of property. If the issue were to arise whether the "assigns" language of Section 1464 prevails over the more general expression of intent language of Sections 1469 and 1470, the staff again would guess that the more recent and broader provisions would be held to prevail.

Where does this leave us on the interrelation of Section 1464 with the other more recently enacted statutes governing the language necessary to create a covenant that runs with the land? The staff has seen no analysis of the matter, but our reading of the law is that Section 1464 has to a large extent been superseded by the more recent enactments. The more recent enactments are consistent with Section 1464 in that they require an express statement of intent that the covenant run, but they are somewhat more liberal than Section 1464 in that they do not require the word "assigns" to be used.

Staff Recommendation

Despite the academic blistering of the requirement that the word "assigns" must be used in order for a covenant affecting a thing not in being to run with the land, the staff questions whether Civil Code Section 1464 is really that procrustean. We suspect that any general expression in the instrument that the covenant is intended to run with the land or bind successors would be held to satisfy the statute.

Although Section 1464 is narrow in its application to covenants affecting things not in being, it is consistent with later and broader enactments that uniformly require an expression of intent to bind successors in order for a covenant to run. Civil Code §§ 1468, 1469, 1470. The real questions, in the staff's opinion, are not whether the Section 1464 approach of requiring an express

statement of intent is proper, but (1) whether it makes any sense to single out, as Section 1464 does, covenants relating to things not in being, and (2) the related question whether Section 1464 still has any significant application, being largely eclipsed by later enactments.

The staff believes that the basic approach of Section 1464 to require an express statement of intention in order for a covenant to run with the land, is consistent with general California statutory law on the matter. The arguments of the academics — that intention should be derived from the purposes of the covenant and the circumstances under which it is made — do not appear to be consistent with California's statutory approach. The staff can visualize circumstances under which we might want to depart from the basic statutory approach and provide that the intention of the parties need not be derived from express words in the instrument. But we would do this only in the context of a comprehensive study of covenants that run with the land. We would not want to do this for an isolated provision such as Section 1464.

A problem with Section 1464, in the staff's opinion, is that it requires an expression of intent in different words than the requirements of Sections 1468-1470. Section 1464 in fact uses the word "assigns", whereas the other provisions refer generally to "successive owners" expressed to be bound by the covenant. This discrepancy could give rise to arguments over whether technical language is required, even though the staff believes the ultimate ruling would be that the covenant need not mention the word "assigns".

The language of Section 1464 could be revised to harmonize with the other provisions, or the section could be repealed in reliance on the other provisions. The staff believes that Section 1464 is largely superseded by the other provisions. It relates to only a narrow segment of real covenants. The staff doesn't believe there's much sense in trying to rehabilitate the section for the remote circumstances that might not be covered by the later enactments. We would therefore repeal the provision. A staff draft of a tentative recommendation to do this is attached.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

TENTATIVE RECOMMENDATION

relating to

REPEAL OF CIVIL CODE SECTION 1464

Civil Code Section 1464 provides:

> 1464. WHAT COVENANTS RUN WITH LAND WHEN ASSIGNS ARE NAMED. A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with land so far only as the assigns thus mentioned are concerned.

This provision was enacted as part of the 1872 Civil Code and has not been amended since. It is drawn from David Dudley Field's draft code[1] and codifies the common law First Rule in *Spencer's Case*.[2] That case deals with the question whether a covenant by a tenant "for him, his executors, and administrators" to build a brick wall on leased premises binds the tenant's assignee. The First Rule in *Spencer's Case* states that a covenant concerning something not in existence must expressly mention "assigns" in order to run with the land. (The Second, and more important Rule in *Spencer's Case*, is that a covenant must "touch and concern" the land in order to run.)

Section 1464 addresses the issue of the requisite expression of intent for a covenant to run with the land. The ancient concept that a specific word such as "assigns" must be mentioned has generally been discarded throughout the United States,[3] as well as in England[4] where the concept originated. The modern concept is that whether a covenant is intended to run with the land is determined from the entire instrument and that use of the word "assigns" is not necessary.[5]

Section 1464's requirement that assigns must be mentioned has been largely eclipsed by later enacted provisions of the Civil Code that provide a more liberal standard for determining intent. Sections 1469 and 1470, enacted in 1953, include a provision that a covenant by an owner of property to improve contiguous leased

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1. Section 695.

2. 5 Co. Rep. 16a, 77 Eng. Rep. 72 (K.B. 1583).

3. See, e.g., Purvis v. Shuman, 273 Ill. 286, 112 N.E. 679 (1916); Williams, *Restrictions on the Use of Land: Covenants Running with the Land at Law*, 27 Texas L. Rev. 428-29 (1949); C. Berger, Land Use and Ownership § 10.5 (3d ed. 1983); 5 R. Powell and P. Rohan, Powell on Property ¶ 673[2] (1994).

4. Bordwell, *English Property Reform and its American Aspects*, 37 Yale L.J. 1, 27 (1927).

5. See, e.g., French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 So. Cal. L. Rev. 1261, 1271 (1982); Coskran, *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers*, 22 Loyola L.A. L. Rev. 405, 557 (1989).

premises does not run with the land unless successive owners "are in the lease expressed to be bound thereby for the benefit of the demised real property." Likewise, Section 1468(b), as revised in 1968 and thereafter, includes a provision that a covenant for improvement of land made between a grantor and grantee of the land runs with the land if "successive owners of the land are in such instrument expressed to be bound thereby for the benefit of the land owned by, granted by, or granted to the covenantee."

The later enacted statutes codify the modern trend of the law concerning formalities such as use of the word "assigns". The later enacted statutes are also broader in their application than Section 1464's codification of the particular circumstances of *Spencer's Case*. If a case were to arise in which either Section 1464 or one of the later enacted statutes could be applied, it is not clear which would be held to prevail.

The Law Revision Commission recommends that Section 1464 be repealed. It is an unnecessarily formalistic relic of a bygone era and is inconsistent with modern concepts of construction of instruments. It conflicts with more recently enacted statutes, and its existence creates the potential for litigation over which statute should be applied. Repeal of the provision would supplant a codification of 1583 English law with modern legislation and contemporary common law.

The Commission's recommendation would be effectuated by enactment of the following measure.

PROPOSED LEGISLATION

An act to repeal Section 1464 of the Civil Code, relating to covenants that run with the land.

The people of the State of California do enact as follows:

Civil Code § 1464 (repealed). First Rule in *Spencer's Case*

SECTION 1. Section 1464 of the Civil Code is repealed.

~~1464. WHAT COVENANTS RUN WITH LAND WHEN ASSIGNS ARE NAMED. A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with land so far only as the assigns thus mentioned are concerned.~~

Comment. Section 1464 is repealed because it is eclipsed by the broader provisions of Section 1468 and other statutes. It codified the First Rule in *Spencer's Case*, a common law principle that is now discredited in both the United States and Great Britain. See, e.g., Bordwell, *English Property Reform and its American Aspects*, 37 Yale L.J. 1, 27 (1927); C. Berger, Land Use and Ownership § 10.5 (3d ed. 1983); 5 R. Powell and P. Rohan, Powell on Property ¶ 673[2] (1994).