

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Repeal of Civil Code Section 1464:
The First Rule in Spencer's Case

November 1995

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

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STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION

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November 2, 1995

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

This recommendation of the California Law Revision Commission proposes the repeal of Civil Code Section 1464, a relic of the 1872 Field Code. Section 1464 codifies the First Rule in Spencer's Case (1583) — that a covenant affecting something not in being does not run with the land unless the word “assigns” is mentioned. The section is inconsistent with modern concepts of construction of instruments and conflicts with more recently enacted statutes.

This recommendation is submitted pursuant to Resolution Chapter 87 of the Statutes of 1995.

Respectfully submitted,

Colin W. Wied
Chairperson

REPEAL OF CIVIL CODE SECTION 1464: THE FIRST RULE IN SPENCER'S CASE

Civil Code Section 1464 provides:

1464. 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 code¹ 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.³)

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,⁴ as well as in England⁵ where the concept originated.

1. Section 695.

2. 5 Co. Rep. 16a, 77 Eng. Rep. 72, 74 (K.B. 1583).

3. *Spencer's Case*, 77 Eng. Rep. at 74.

4. 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

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.⁶

The requirement of Section 1464 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 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.”⁷ The later enacted statutes are also broader in their application than the codification in Section 1464 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

Tex. L. Rev. 428-29 (1949); C. Berger, *Land Ownership and Use* § 10.5 (3d ed. 1983); 5 R. Powell & P. Rohan, *Powell on Real Property* ¶ 673[2] [b] (1994).

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

6. See, e.g., French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 *S. Cal. L. Rev.* 1261, 1285 (1982); Coskran, *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers*, 22 *Loy. L.A. L. Rev.* 405, 557 (1989).

7. 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).

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.

PROPOSED LEGISLATION

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

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

~~1464. 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 inconsistent with modern principles of construction of instruments and is eclipsed by the broader provisions of more recently enacted statutes. See Sections 1468, 1469, and 1470, which do not require use of the word “assigns” in order that a covenant run with the land, but only that successive owners are “expressed to be bound” in the instrument. See also 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). Section 1464 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 & P. Rohan, *Powell on Property* ¶ 673[2] (1994).
