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COVENANTS IN LEASES IN WEST VIRGINIA*

LONDO H. BROWN

Benefits and Burdens of Covenants

Having seen that there are certain requirements necessary to make covenants run with the land, it should be pointed out that even though those elements are present other things may be held to prevent the running of covenants. As above pointed out, there was nothing in the statute of Hen. VIII which indicated that anything but the benefits of covenants were to run with the land in so far as the assigns of the lessor were concerned since the statute only purported to give the assigns of the lessor the benefit of any covenant or condition which the lessor himself might have had. Therefore, in cases where the lessor could not have enforced covenants in the lease against assigns of the lessee, assigns of the lessor could not do so under the statute. Since statutes in derogation of the common law are strictly construed,¹³⁰ the statute would probably be construed not to make the burdens run as against the assigns of the lessee.

While it appears that none of the courts have considered covenants to have run with the reversion at common law, most appear to consider that they ran with the leasehold estate. Assuming this to be true, and in the light of the cases on the subject,¹³¹ this seems not to be too broad an assumption, then probably the burdens as well as the benefits ran with the leasehold interest. This would explain the court's assumption in *Spencer's Case* that the burden of the covenant in question would have run so as to bind the assignee of the lessee if it had been a covenant in regard to a thing in esse.

It is true that the statute did not in so many words make the burdens of covenants run as against the assigns of the lessee, but when one goes behind the words to the purpose of the statute, it seems that the mischief to be remedied was the fact that the assigns of the lessor, particularly the grantees of the king, did not get the benefit of the covenants in leases to which their newly acquired lands were subject. It would also be a reasonable as-

* The first installment of this article appeared at 57 W. VA. L. REV. 1 (1955).
¹³⁰ *Robinson's Case*, 131 Mass. 376, 41 Am. Rep. 239 (1881); *Perry v. Strawbridge*, 209 Mo. 621, 108 S.W. 641 (1908); *State v. Beale*, 104 W. Va. 617, 141 S.E. 7 (1927).

¹³¹ See note 66 *supra*.

sumption that Parliament also intended by the statute to give the grantees of the king, and the assigns of lessors, the benefit of such covenants to the extent that they could be enforced against the assigns of the lessees since many of the lessees of the lands granted must have assigned their interests, but this would follow at common law if both the benefits and burdens ran with the leasehold interests. It is reasonable to assume that Parliament had this in mind.

After the statute it could well be said that both the benefits and the burdens ran with the leasehold interest because they did at common law, and because the second part of the statute made the benefits run with the leasehold interest, and both the benefits and burdens ran with the reversion because the first part of the statute made the benefits run and the second part made the burdens run when it gave the lessees and their assigns the same benefit of the covenants in leases as against the assigns of the lessor as the lessee had against the lessor.

The view that after the statute both the benefits and the burdens of covenants ran with the land is generally accepted by the authorities in this field,¹³² although some of these writers make only broad statements that the statute of Hen. VIII made covenants run to and against the assigns of the lessor,¹³³ or that the statute made both the benefits and burdens of any covenants pass to the assigns of either the lessor or lessee.¹³⁴

In any event, there is considerable confusion in regard to the running of benefits and burdens of covenants in leases. This confusion might well be due in part to the fact that many courts fail or refuse to recognize that a covenant has such a dual aspect.

In the case of *Hebert v. Dupaty*,¹³⁵ there was a covenant by the lessor that he would not carry on in the vicinity a business which would compete with that of the lessee. The lessor sold adjacent premises, and the grantee started a business in competition with the lessee. The court held that the covenant was a personal obligation on the part of the lessor and did not run with the land as a burden on the land.

On the contrary, in the case of *Norman v. Wells*,¹³⁶ where the lessor continued as owner of the adjacent land and the lessee had assigned the leasehold estate, after which the lessor started a com-

¹³² 1 TIFFANY, REAL PROPERTY § 125 (3d ed. 1939); Bordwell, *English Property Reform and Its American Aspects*, 37 YALE L.J. 1, 20 (1927).

¹³³ *Id.* at 20.

¹³⁴ 1 TIFFANY, REAL PROPERTY § 125 (3d ed. 1939).

¹³⁵ 42 LA. ANN. 343, 7 SO. 580 (1890).

¹³⁶ 17 WEND. 136 (N.Y. 1837).

peting business, the court held that the covenant ran with the land and the lessee's assignee was entitled to its benefit.

So, in the case of the same covenant, the benefit has been held to run and the burden not to run. But the result reached in both cases is supported by reason and authority. In the *Hebert* case the burden of the covenant did not touch or concern the reversion, the land subject to the lease, but concerned other land of the lessor, and so was a personal covenant so far as the burden was concerned. However, in the *Norman* case the benefit of the covenant did touch or concern the leasehold estate and so should run with that estate.

Likewise, where the covenant is by the lessee not to do something on the demised premises which would compete or otherwise interfere with the lessor's business, the burden of the covenant is held to run with the leasehold estate since it touches or concerns that estate, and the benefit of the covenant is held not to run with the reversion since it does not touch or concern that estate.¹³⁷

The West Virginia court would probably reach the same result as that reached in the *Hebert* case since it has held that except as between landlord and tenant no burden can be imposed on land by a grantor's covenant so as to bind a subsequent grantee of the covenantor.¹³⁸

In the fairly early history of the West Virginia court it was faced with the running of the benefits and burdens of covenants, and it arrived at seemingly contrary results. Two cases concerning rights-of-way confronted the court. In the first case, that of *Lydick v. Baltimore & Ohio R.R. Co.*,¹³⁹ decided in 1881, the court held that a covenant made by the grantee of the right-of-way for a railroad to build a switch from the right-of-way to a mill on the grantor's property ran with the land and the assignee of the covenant, owner of the land, was entitled to the benefit of the covenant. Since the original covenantor had not assigned his interest, there was no necessity to determine whether the burden of the covenant ran. The court found privity of estate in the relation between the dominant estate and the servient estate, the right-of-way interest granted out of the estate, and correctly so it seems

¹³⁷ In *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. 619 (5th Cir. 1897) the court held that the burden of such a covenant ran with the leasehold estate; and in *Thurston v. Minke*, 32 Md. 487 (1870) the burden was held not to run with the reversion. But see *Clegg v. Hands*, 44 Ch. D. 503 (1890), a case criticized in Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. 639 (1914), for a contrary holding.

¹³⁸ *McIntosh v. Vail*, 126 W. Va. 395, 28 S.E.2d 603 (1943). The court in this case says that this is the English rule and the minority rule in this country.

¹³⁹ 17 W. Va. 427 (1881).

since upon the termination of the servient estate it would merge into the dominant estate and the two interests would again become one estate, the fee. It will be noted, however, that the thing to be done was not to be done on the estate granted, the right-of-way, but on the estate reserved, but the court seemed to have no difficulty in finding that the benefit of the covenant ran with, in effect, the reversion.

In the second case, *West Virginia Transportation Co. v. Ohio River Pipeline Co.*,¹⁴⁰ decided two years later, the grantor of a right-of-way for a pipeline covenanted that he would not lay, or give anyone else the right to lay, another pipeline across the property out of which the right-of-way was granted, the property reserved. The grantor conveyed the property and the court held that the burden of the grantor's covenant did not run with the property reserved and was only a personal covenant; thus holding, in effect, that the burden of a covenant in such a conveyance does not run with the reversion. In that case, however, the court distinguished such conveyances from leases and stated that "except as between landlord and tenant no burdens can be imposed upon lands by any covenant of the owner, which will run with the land and bind the grantee of the land".¹⁴¹

While the fact was not mentioned by the court, it was faced with the problem in the two cases of whether the burdens and the benefits of covenants could run separately. In the *Lydick* case the burden of the covenant was on the estate conveyed in the original conveyance, the right-of-way, and that estate had not been assigned, but it seems that the court would have held that the burden of the covenant would have run with the land in view of the reasoning which supported its holding since it held that the covenant ran because it concerned the land and there was privity of estate between the covenantor and covenantee. In a later case of the same type,¹⁴² this issue was presented to the court. There the grantee of the right-of-way covenanted to build a depot on the land of the grantor out of which the interest was granted and the grantee had assigned his interest. The court held that the burden of the covenant ran with the land and the assignee of the grantee was bound. The result of these two cases apparently is that both the benefit and the burden of the covenant run when the covenant is made by the grantee of the estate conveyed, and the covenant benefits the estate reserved.

¹⁴⁰ 22 W. Va. 600 (1883).

¹⁴¹ *Id.* at syl. 6.

¹⁴² *Harper v. Virginian Ry.*, 76 W. Va. 788, 86 S.E. 919 (1915).

In the *West Virginia Transportation* case, although it could not be denied that the covenant benefited the estate conveyed in the original conveyance, the right-of-way, and nothing in the court's opinion would bar an assignee of the right-of-way from suing the original covenantor on the covenant, not even the original covenantee could sue an assignee of the covenantor, since the burden could not run with the land. So, in that case even though the benefit of the covenant was capable of running with the land, relief was denied because the burden could not run. Whether the benefit of such a covenant would run with the land in such a case was decided a few years later in a case where the issue was whether the devisee of the grantor was entitled to the benefit of a covenant made by the grantee of a right-of-way for a turnpike that the grantor was to have toll-free use of the turnpike.¹⁴³ The court held that the grantor's transferee was entitled to the benefit of this covenant since it was a covenant which ran with the land. The result of these two cases apparently is that when the covenant is made by or to the grantor of the estate conveyed, other than a leasehold estate, the covenant runs with the land if it benefits the estate reserved but not if it burdens the reserved estate. In other words, the benefit runs in one case but the burden does not in the other.

But neither of the above cases is authority for the proposition that the benefits of a particular covenant will run even though the burdens of the same covenant do not, for in the *West Virginia Transportation Company* case it was merely held that the burden did not run and the question of whether the benefit of that covenant would run, that is, whether an assignee of the right-of-way would have the benefit of the covenant against the original grantor, was not before the court. And presumably the court in the *Lucas* case¹⁴⁴ would have held as it did later in the *Harper* case¹⁴⁵ that the burden ran had that question been before it.

But in another case,¹⁴⁶ one dealing with neither leases nor rights-of-way but with a covenant between adjoining owners, the court dealt with both the benefits and burdens of the same covenant. The court there stated that the covenant could not run with the land because of the lack of privity of estate even though the parties intended that it should. However, the court held that

¹⁴³ *Lucas v. Smithfield, C. H. & F. Turnpike Co.*, 36 W. Va. 427, 15 S.E. 182 (1892).

¹⁴⁴ *Ibid.*

¹⁴⁵ *Harper v. Virginian Ry.*, 76 W. Va. 788, 86 S.E. 919 (1915).

¹⁴⁶ *Hurxthal v. Boom Co.*, 53 W. Va. 87, 44 S.E. 520 (1903).

the intent of the parties that the covenantee's assigns should have the benefit of the covenant was sufficient to allow such an assign to bring action on the covenant against the covenantor, but admitted that intent to place a burden on the estate of the covenantor in the hands of a subsequent owner would be ineffective. The court in this case could be said to have recognized that the benefits and burdens of covenants were capable of running separately when it quoted the familiar rule that a covenant is said to run with the land when either the liability to perform it or the right to enforce it passes to the assignee of the land.¹⁴⁷

But since none of these cases dealt with leases, any differentiation between the running of benefits and burdens in them may be explained by the aforementioned rule, well established in West Virginia, that except as between landlord and tenant no burden can be imposed upon land by a grantor's covenant so as to bind a subsequent grantee of the covenantor.¹⁴⁸ It is not easy, however, to see a good reason for making a distinction between a lease case and a right-of-way case in such a situation since the same type of privity of estate exists in both relationships.

Our court has not differentiated between the running of benefits and burdens in leases and in the case of *United Woolen Mills Co. v. Honaker*¹⁴⁹ seemed to take for granted that our statute,¹⁵⁰ a modern version of the statute of Hen. VIII, makes burdens as well as benefits run with the land. In that case, where the issue was whether a covenant by the lessor to renew the lease ran with the land so as to be binding upon the assigns of the lessor, the court stated, "If there were otherwise any doubt about a covenant of renewal in a lease running with the land, the above statute settles the question, and the court clearly erred in holding otherwise in its decree".¹⁵¹ The court was referring to the statute mentioned next above and cited no other authority for its holding. That statute provides, in part, as follows:

"A lessee, his personal representatives, devisees or assigns, may have against an heir, devisee, grantee or alienee of the reversion, or any part thereof, or of any estate therein, his heirs, devisees or assigns, the like benefit of any condition, covenant, or promise in the lease, as he could have had against the lessors themselves."¹⁵²

¹⁴⁷ *Id.* at 92, 44 S.E. at 522.

¹⁴⁸ See note 138 *supra*.

¹⁴⁹ 96 W. Va. 166, 122 S.E. 440 (1924).

¹⁵⁰ W. VA. CODE c. 37, art. 6, § 2 (Michie, 1949).

¹⁵¹ *United Woolen Mills Co. v. Honaker*, 96 W. Va. 166, 169, 122 S.E. 440, 441 (1924).

¹⁵² W. VA. CODE c. 37, art. 6, § 2 (Michie, 1949).

Apparently the court in the *United Woolen Mills Co.* case took the view that this statute made all covenants in a lease run with the land. Would it take the same view as to all conditions and promises in a lease, personal as well as real? In fact, the statute, like the statute preceding it,¹⁵³ which gives assigns of the lessor the same advantages against the lessee and his assigns upon conditions, covenants and promises in a lease which the lessor might have enjoyed, is quite often effective only if a covenant runs with the land, and does not make all conditions, covenants and promises in a lease run.

In a situation where it is an assignee of the lessee attempting to enforce a covenant of renewal in a lease against the lessor or one of his assigns instead of, as in the *United Woolen Mills Co.* case, the lessee himself trying to enforce the covenant against an assignee of the lessor, the statute would not make the covenant run. The statute would only give an assignee of the lessee the like benefit of the covenant as he could have had against the lessor himself. In such case the lessee's assigns would have no rights against the lessor unless the benefit of the covenant ran with the land. In this respect our statute is different from the second part of the statute of Hen. VIII which might be interpreted as giving the assigns of the lessee the same rights under covenants in the lease against the lessor and his assigns as the lessee himself would have had.¹⁵⁴

However, since a chose in action is assignable in West Virginia,¹⁵⁵ and the assignee can sue in his own name,¹⁵⁶ the lessee's rights under the covenant may be assigned along with the lease and the assignee would have a right against the lessor in case of a breach of the covenant, but that would be by virtue of the assignment and not because the statute made the benefit of the covenant run. Possibly in such case the West Virginia statute may give the assignee of the

¹⁵³ W. VA. CODE c. 37, art. 6, § 1 (Michie, 1949): "An heir, devisee, grantee or assignee of any land let to lease, or of the reversion thereof, and his heirs, personal representative or assigns, shall enjoy against the lessee, his personal representative, devisees or assigns, the like advantage by action or entry upon any condition or forfeiture, or by action upon any covenant or promise in the lease, which the grantor, assignor, or lessor might have enjoyed."

¹⁵⁴ See note 68 *supra*.

¹⁵⁵ *Hartman v. Corpening*, 116 W. Va. 31, 178 S.E. 430 (1935); *Wilt. v. Huffman*, 46 W. Va. 473, 33 S.E. 279 (1899). But see *Rawlings v. Fisher*, 101 W. Va. 253, 132 S.E. 489 (1926), where the covenantee specifically assigned his rights under a covenant and the court held that the assignee could not maintain an action on the covenant because it was not a covenant which ran with the land. For some reason the court did not consider the assignee's rights under the assignment of the covenantee's rights under the covenant. This case was very ably criticized in *DONLEY, LAW OF COAL, OIL AND GAS IN VIRGINIA AND WEST VIRGINIA* 180 (1951).

¹⁵⁶ W. VA. CODE c. 55, art. 8, § 9 (Michie, 1949).

lessee the benefit of the covenant as against the assigns of the lessor. Without such a statute, however, the burden of the covenant would not devolve upon the assigns of the lessor unless it was of the type which would run with the land.¹⁵⁷ And it is believed that the West Virginia statute, in itself, does not make either the benefits or burdens of covenants run. In spite of the statute, covenants, in order to run with the land, must meet the aforementioned requirements for the running of covenants. This statute, and its companion which deals with the rights of lessors and their assigns against lessees and their assigns, being nothing more than a reenactment of the statute of Hen. VIII, a part of the common law, should be interpreted in the light of the common law.

The statute of Hen. VIII and *Spencer's Case*, being a part of the common law,¹⁵⁸ were made a part of the law of West Virginia by the constitution of this state¹⁵⁹ unless altered or repealed by the legislature.¹⁶⁰ It can hardly be argued that the legislature by virtually copying the statute of Hen. VIII altered or repealed that part of the common law. So it seems that the law of West Virginia includes the statute of Hen. VIII, and the interpretation of that statute in *Spencer's Case* limiting its effect to covenants running with the land, those which directly pertain to the land rather than those merely collateral, or personal to the lessor.

If this argument for carrying the law of *Spencer's Case* into the law of West Virginia is not convincing, there is an even more effective approach. In the case of a borrowed statute, that is, one copied from another jurisdiction,¹⁶¹ the law is well established that

¹⁵⁷ *Masury v. Southworth*, 9 Ohio St. 340 (1869).

¹⁵⁸ The statute of Hen. VIII has been held to be a part of the common law in many jurisdictions. See *Sheets v. Sheldon*, 2 Wall. 177 (U.S. 1864); *Scott v. Lunt*, 7 Pet. 596 (U.S. 1833); *Patten v. Dshen*, 1 Gray 325 (Mass. 1854); *Carlton v. Bird*, 94 Me. 182, 47 Atl. 154 (1900); SIMS, REAL COVENANTS RUNNING WITH THE LAND 73, 74 (1901); *Bordwell, English Property Reform and Its American Aspects*, 37 YALE L.J. 1, 22 (1927).

¹⁵⁹ W. VA. CONST. ART. VIII, § 21, provides that such parts of the common law as were in force when the constitution went into effect, and which were not repugnant thereto, should be the law of the state until altered or repealed by the legislature.

¹⁶⁰ In *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 302, 112 S.E. 512, 517 (1922) the court stated, in regard to another English rule of law, "However much there might be an inclination to dissent from it, as an original proposition, if any at all, it is so well fortified in precedents and judicial opinion that its genuineness cannot be judicially denied nor its consequences avoided. Being a part of the common law it is made effective here by the constitution, and there being no repugnancy between it and the constitutional provision, it must 'Continue the law of the State until altered or repealed by the Legislature'."

¹⁶¹ Authority for the proposition that the statute of Hen. VIII was enacted in West Virginia is found in 1 TIFFANY, LANDLORD & TENANT § 149 (b)1 nn. 83, 84 (1912), and SIMS, COVENANTS WHICH RUN WITH THE LAND 74-77 (1901).

the borrowing jurisdiction adopts any construction of the statute made by the courts of the other jurisdiction prior to the time the statute was borrowed. So the construction in England of a statute enacted there and copied by West Virginia may be considered as accompanying the statute and forming an integral part of it.¹⁰²

Therefore, it appears that since *Spencer's Case* is generally considered as being a construction or interpretation of the statute of Hen. VIII,¹⁰³ and since the West Virginia statutes were copied from that statute, our statutes apply only in cases where the covenant runs with the land and do not make the covenants run with the land except in so far as the statute of Hen. VIII was effective to make covenants run which had not theretofore run with the land. The statement in the *United Woolen Mills Co.* case should be considered with this limitation. This does not mean that the holding of the court in that case was erroneous as the covenant there considered was of the type which should run with the land and is generally held to run, but the statement given in the case as the reason for its running may be too broad.

It therefore appears that West Virginia is in virtually the same position in regard to the running of covenants in leases, including the running of benefits and burdens, as it would be had the above mentioned statutes not been enacted in this jurisdiction. This view is further strengthened by the statement in *Miami Cooperative Mining Co. v. Cherokee Coal Co.*, a case decided a month before the *United Woolen Mills Co.* case, that "The decided weight of authority is that a covenant on the part of a lessor that at the end of a term he will pay the lessee for improvements placed thereon by the latter is not a covenant that runs with the land and is not enforceable against a grantee of the lessor".¹⁰⁴

Even if the statutes were interpreted literally, the first West Virginia statute only gives the assigns of the lessor the same rights in regard to covenants in the lease against the lessee and his assigns as the lessor might have enjoyed. This would have the effect of making the benefits under the covenants which the lessor had run to his assigns, but unless the lessor had rights against the assigns of the lessee then the assigns of the lessor would acquire no rights against them by virtue of the statute. In other words, the statute does not in plain words purport to make the burdens of the covenants

¹⁰² *Cathcart v. Robinson*, 5 Pet. 264 (U.S. 1831); *Harris v. Diamond Construction Co.*, 184 Va. 711, 36 S.E.2d 573 (1946).

¹⁰³ *Massachusetts Mutual Life Ins. Co. v. Jeckell*, 124 F.2d 339 (6th Cir. 1941); *Purvis v. Shuman*, 273 Ill. 286, 112 N.E. 679 (1916).

¹⁰⁴ 96 W. Va. 11, 15, 122 S.E. 286, 287 (1924).

in a lease run so that the assigns of the lessee shall be bound to perform them, and such burdens will not fall upon those assigns unless the covenant runs with the land at common law.

In like manner, as stated before, the second statute, which gives the assigns of the lessee the like benefit of covenants in the lease against the lessor and his assigns as they could have had against the lessor, has the effect of making the burdens of the lessor's covenants run to his assigns. But the statute does not make the benefit of those covenants run to the assigns of the lessee since they must already have had rights under the covenant against the lessor before they would have any rights against him or his assigns by virtue of the statute. So, for the benefits of a covenant in a lease to run to the assigns of the lessee, they must run with the land at common law.

Thus it appears that, if the statutes were construed literally, the situation undoubtedly would exist in West Virginia which was envisaged by Judge Clark when he stated that the benefits and burdens of covenants are capable of running separately; that the covenantee's assignee may sue the covenantor when the benefit runs, and the covenantee may sue the covenantor's assignee when the burden runs, but the covenantee's assignee may sue the covenantor's assignee only when the benefit and burden both run.¹⁶⁵

However, the statutes copied from Hen. VIII are generally not to be interpreted literally, as shown by the previous discussion. In the states which have not copied the statute of Hen. VIII, but have adopted it as a part of the common law, it is the spirit of the statute and not its letter which is binding.¹⁶⁶ It would seem that the same rule should, and apparently does, apply where states, like West Virginia, have gone one step further and copied, or virtually copied, that statute. But, even so, there is nothing in that statute, properly construed, that compels the conclusion that if one end of a covenant, such as its benefit, runs, the other end must necessarily run.¹⁶⁷ And so there is nothing in the West Virginia statute to prevent one end of a covenant running even

¹⁶⁵ CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND 102 (2d ed. 1947).

¹⁶⁶ "This would seem true of all the old statutes that have been adopted as a part of the common law of the United States. As integral parts of our common law, they have not the exceptional imperative character of our own statutes. They have been adopted in principle and not in letter. They partake of the vitality and progressive adaptability of judge-made law rather than the sterility and rigidity of legislative enactments." Bordwell, *English Property Reform and Its American Aspects*, 37 YALE L.J. 1, 23 n.186 (1927).

¹⁶⁷ Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639, 654 (1914).

though the other end does not run, and the West Virginia court has not raised the question in any of the cases it has decided. This is not surprising since the great majority of covenants in leases touch or concern both the leasehold estate and the reversion if they touch or concern either, and so both ends run or neither does. And, in most cases, the litigation is between an original party and an assignee of the other original party and so the court is only concerned with the running of one end of the covenant. The court is only faced with the problem of the running of both ends of a covenant when the covenantee's assignee is suing the covenantor's assignee.¹⁶⁸

But the West Virginia court has, in effect, held that the burden of a covenant to pay rent runs with the land by holding that an assignee of the lessee is bound by a covenant in the lease to pay rent since such a covenant runs with the land.¹⁶⁹ No one is likely to doubt that the benefit of this covenant would be held by the court to run to the benefit of an assignee of the lessor. It has also held that the burden of a lessee's covenant to pay taxes runs and binds an assignee of the lessee.¹⁷⁰ There is no occasion for the court to mention the running of the benefit of the covenant, but presumably the court would hold that it too would run.

In *Harbert v. Hope Natural Gas Co.*,¹⁷¹ where a covenant was made by the lessee in an oil and gas lease to furnish the lessor with free gas if gas in paying quantities was found on the demised premises, both the lessee and the lessor had assigned their interests. The lessor's (covenantee's) assignee attempted to enforce the covenant against the lessee's (covenantor's) assignee, and the court held that the covenant ran with the land, and the lessor's assignee could enforce it against the assignee of the lessee. The effect of this holding was that both the benefit and the burden of the covenant ran with the land as the case fit into Judge Clark's statement that the covenantee's assignee can only sue the assignee of the covenantor on a covenant if both the benefit and burden run.

But in *Miami Cooperative Coal Co. v. Cherokee Coal Co.*,¹⁷² where the covenant in controversy was the lessor's covenant to pay for any improvements put on the demised premises by the lessee,

¹⁶⁸ See Judge Clark's statement that the covenantee's assignee may sue the covenantor's assignee only when the benefit and burden both run. CLARK, COVENANTS AND OTHER INTERESTS RUNNING WITH THE LAND 102 (2d ed. 1947).

¹⁶⁹ *Kanawha Valley C. & C. Co. v. Sharp*, 73 W. Va. 427, 80 S.E. 781 (1914).

¹⁷⁰ *West Virginia Cent. & P.R.R. v. McIntyre*, 44 W. Va. 210, 28 S.E. 696 (1897).

¹⁷¹ 76 W. Va. 207, 84 S.E. 770 (1915).

¹⁷² 96 W. Va. 11, 122 S.E. 286 (1924).

both parties had assigned their interests, the court stated that this covenant did not run with the land and was not enforceable against an assignee of the lessor. The court was talking in terms of the burden running, although not in so many words; it did not state whether the benefit of the covenant would run, but it seemed to assume that it would.

So, in West Virginia, as in most jurisdictions, the question of whether the benefits and burdens of covenants in leases are capable of running separately has not been answered except by implication and the implications are not enlightening. Even when the text writers and other authorities are looked to, the answer is not clear, but the general view is that they can run separately.¹⁷³ The most that can be said is that the courts will have to recognize that covenants have a dual aspect and decide cases in the light of that recognition before the question is finally settled.

Covenants Held to Run in West Virginia

Since the West Virginia statutes do not *ipso facto* make covenants in leases run with the land, we must look to other authorities to ascertain if a particular covenant does run. Therefore, it may be worthwhile to find what covenants are generally held to run.

The most common covenants in leases which are generally held to run are the covenants to pay rent, to pay taxes, to repair, not to carry on a particular trade or business on the demised premises; to carry on only a particular trade or business on the premises; to relinquish possession of the premises at the end of the term peaceably and in good repair; to vacate on sale and notice; to reside on the premises; to insure where the proceeds of the insurance, by statute or agreement, must be laid out on the premises; not to assign without the consent of the lessor, assigns being named in the covenant; to renew the lease; option to purchase the premises given in the lease; and quiet enjoyment.¹⁷⁴ Many other covenants are often held to run.¹⁷⁵

The question of particular covenants running in leases has not been at issue in many West Virginia cases; therefore, many of the above named covenants have not been considered by our court. It has been held or stated, in effect, by our court, however, that

¹⁷³ "The answer to the question is not clear on the authorities, since it has rarely been carefully considered. On such authority as exists and also logically it would seem that benefit and burden should be capable of running separately." CLARK, COVENANTS AND OTHER INTERESTS RUNNING WITH THE LAND 102 (2d ed. 1947); Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639, 654 (1914).

¹⁷⁴ 1 TIFFANY, REAL PROPERTY § 126 (3d ed. 1939).

¹⁷⁵ 1 TIFFANY, LANDLORD & TENANT §149(2) (1912) lists many other covenants generally held to run.

all of the following run with the land: the burden of a covenant by the lessee to pay taxes,¹⁷⁶ the burden of a covenant by the lessor to renew,¹⁷⁷ the burden of a covenant by the lessee to pay rent,¹⁷⁸ the benefit and burden of a covenant by the lessee in an oil and gas lease to furnish the lessor with free gas if gas is found in paying quantities,¹⁷⁹ the burden of a covenant by the lessee not to assign without the lessor's consent if the covenant is made for the lessee and his assigns,¹⁸⁰ the benefit of a covenant by the lessee to protect boundary lines and develop the premises.¹⁸¹ In one case it is stated as obiter dictum that the burden of a covenant by the lessor to purchase improvements put on the premises by the lessee does not run and bind the assignee of the lessor.¹⁸²

While it is helpful to know what covenants the court considers as running or not running with the land for use as precedents in appropriate cases, it would perhaps be better to know why they are held to run or not to run, that is, to find the applicable rule of law. But, in searching for such a rule in the West Virginia cases, one finds more confusion than enlightenment.

In the *Harbert* case¹⁸³ there was a bare holding that a covenant by the lessee in an oil and gas lease to furnish the lessor with free gas ran with the land. The only reason given for the holding was that the covenant was a benefit to the land. The court cited *Minor's Institutes* as authority for its holding, and at the place cited the following statement is found: "Covenants which *run with the land*, are such as pass with the land, and with the reversion respectively, into whose hands soever either may come. They are such covenants as concern the land demised, and concern the owner of the reversion, in respect of such ownership".¹⁸⁴ The statement in the *Harbert* case that a covenant will run because it is a benefit to the land must be taken with some reservations. In an earlier case¹⁸⁵ (not a lease case), the court held that it was not sufficient that the covenant benefit the land; it must also be contained in a

¹⁷⁶ *West Virginia Cent. & P.R.R. v. McIntyre*, 44 W. Va. 210, 28 S.E. 696 (1897).

¹⁷⁷ *United Woolen Mills Co. v. Honaker*, 96 W. Va. 166, 122 S.E. 440 (1924); *Thaw v. Gaffney*, 75 W. Va. 229, 83 S.E. 983 (1914).

¹⁷⁸ *Kanawha-Gauley C. & C. Co. v. Sharp*, 73 W. Va. 427, 80 S.E. 781 (1914).

¹⁷⁹ *Kimble v. Wetzel Natural Gas Co.*, 134 W. Va. 761, 61 S.E. 728 (1950); *Harbert v. Hope Natural Gas Co.*, 76 W. Va. 207, 84 S.E. 770 (1915).

¹⁸⁰ *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 112 S.E. 512 (1922).

¹⁸¹ *Cummings v. United Fuel Gas Co.*, 116 W. Va. 599, 182 S.E. 789 (1935).

¹⁸² *Miami Cooperative Mining Co. v. Cherokee Coal Co.*, 96 W. Va. 11, 122 S.E. 286 (1924).

¹⁸³ *Harbert v. Hope Natural Gas Co.*, 76 W. Va. 207, 84 S.E. 770 (1915).

¹⁸⁴ 2 *MIN. INSR.* 699 (2d ed. 1877).

¹⁸⁵ *Hurxthal v. St. Lawrence Boom Co.*, 53 W. Va. 87, 44 S.E. 520 (1902).

grant of the land, or some estate therein, so that there be privity of estate.

In the *Cummings* case¹⁸⁶ the court gave about the same reason for the running of the covenant as that given in the *Harbert* case, although the language used was that the covenant was for the benefit of the owners of the land. The court in this case cited the *Harbert* case as authority for its holding and added, "Consult: *Hurxthal v. Boom Co.*" The latter case was the one holding that there must be privity of estate as well as the fact that the covenant is a benefit to the land.¹⁸⁷

In the *McIntyre* case¹⁸⁸ the reason given for the running of a covenant to pay taxes so as to bind an assignee of the lessee was that the assignment by the lessee and the acceptance by the assignee created a privity of estate between the assignee and the lessor; that the assignee of a lease is fixed with notice of its covenants and takes the estate of his assignor *cum onere*; and that each successive assignee of a lease, because of privity of estate, is liable upon covenants maturing and broken while title is held by him. This reasoning is very broad and would seemingly include all covenants, personal as well as real.

In *Kanawha-Gauley C. & C. Co. v. Sharp*,¹⁸⁹ it was said that the covenant to pay rent inheres in the estate as a covenant real and binds the assignee of the term by reason of his privity of estate to pay the rent accruing during his ownership and possession of the estate.

In the *United Woolen Mills Co.* case¹⁹⁰ the only reason assigned in the opinion for the running of the lessor's covenant to renew the lease was our statute which was copied from the statute of Hen. VIII which, as heretofore pointed out, should not in itself be held to make covenants in leases run.

In the case of *Thaw v. Gaffney*,¹⁹¹ there was just a statement that a covenant to renew perpetually passed with the land and was binding upon the assigns.

In *Easley Coal Co. v. Brush Creek Coal Co.*,¹⁹² the court stated that a covenant by the lessee, for himself and his assigns, not to assign without the consent of the lessor runs with the land. No

¹⁸⁶ *Cummings v. United Fuel Gas. Co.*, 116 W. Va. 599, 182 S.E. 789 (1935).

¹⁸⁷ *Hurxthal v. St. Lawrence Boom Co.*, 53 W. Va. 87, 44 S.E. 520 (1902).

¹⁸⁸ *West Virginia Cent. & P.R.R. v. McIntyre*, 44 W. Va. 210, 28 S.E. 696 (1897).

¹⁸⁹ 73 W. Va. 427, 80 S.E. 781 (1914).

¹⁹⁰ 96 W. Va. 166, 122 S.E. 440 (1924).

¹⁹¹ 75 W. Va. 229, 83 S.E. 983 (1914).

¹⁹² 91 W. Va. 291, 11 S.E.2d 512 (1922).

reason was given other than that by taking the lease, the assigns take upon themselves the covenant. The statement was obiter dictum, however, as the real holding as to such covenants was that they did not run if assigns were not named. The reason for this holding will be discussed later in detail.

Thus, it is seen that in most of the cases holding that certain covenants in leases run or do not run with the land in West Virginia, there is very little to aid the attorney in determining whether other covenants run, and there is not much more help in the authorities cited in those cases. As an example, in *Miami Cooperative Mining Co. v. Cherokee Coal Co.*,¹⁹³ no reason was assigned for the statement that the lessor's covenant to pay for improvements which the lessee placed upon the demised premises did not run with the land, other than that such was the weight of authority. In examining the cases cited as authority for the statement, the reason found is that this covenant relates to a thing not in esse and all are traceable to *Spencer's Case*. It is not likely that our court would today give that as an outright reason for a covenant's not running. In a very early right-of-way case the court held that a covenant by the grantee to build a spur track on the reserved land of the grantor ran with the land and did not mention the fact that the covenant concerned something not in esse.¹⁹⁴

However, in the *Easley Coal Co.* case the court did give a reason for its holding that the covenant under consideration did not run with the land and discussed the reason at some length. In order to understand properly that holding and estimate its effect, it is necessary to analyze at some length the rule laid down in the case and the reasons for its adoption by the court.

The Rule in Dumpor's Case

The reason given in the *Easley Coal Co.* case for its holding that the covenant not to assign without the consent of the lessor did not run with the land was that there had been one consent to an assignment given by the lessor and that where there has been a consent to an assignment by the lessor in such case the covenant was discharged at common law; that this part of the common law, not having been changed by statute in West Virginia, was the law in this jurisdiction and this covenant could run only if permitted to do so by legislative enactment. The court cited *Dumpor's Case*¹⁹⁵

¹⁹³ 96 W. Va. 11, 122 S.E. 286 (1924).

¹⁹⁴ Lydick v. Baltimore & Ohio R.R., 17 W. Va. 427 (1881).

¹⁹⁵ Dumpor v. Symns, 4 Co. Rep. 119b, 76 Eng. Rep. 1110 (1603).

for the origin of this common law rule, which is commonly known as "the rule in *Dumpor's Case*." This much discussed, often criticized,¹⁹⁶ and sometimes repudiated¹⁹⁷ rule, is that, where there is a condition against assignment without license and a license is once given to assign, the condition is wholly destroyed and determined. The reasons given for the rule are not very satisfactory or conclusive. The court in *Dumpor's Case* gave as a reason the fact that a condition could not be apportioned, that is, as some courts say, it is an entire condition and therefore not capable of being released in part.¹⁹⁸ It has been said that the license gives to the lessee the power to convey an absolute interest, free of the restraint of the condition, and the assignee, taking this interest, holds it absolute and discharged of the restraint.¹⁹⁹

In *Dumpor's Case* the owners demised premises for a term of years to a lessee with a provision in which the lessee, for himself and his assigns, agreed not to assign without special license of the lessors. Three years later the lessors by their deed licensed the lessee to assign to any person. The lessee then assigned the premises to one Tubbe who devised the premises to his son who retained possession until he died. The administrator of the latter assigned the premises to the defendant, and the lessors claimed a forfeiture for breach of the condition. The court, purporting to follow cases which held that a condition could not be apportioned, held that a license to assign to any person destroyed the condition against assignment so that the assignee could assign without a license. As far as England is concerned, the doctrine was never overruled, but was abrogated by statute in 1859.²⁰⁰

Dumpor's Case was followed in England by *Brummell v. Macpherson*,²⁰¹ and in that case, like *Dumpor's Case*, the covenant not to assign without consent in terms expressly bound the lessee's

¹⁹⁶ The rule in *Dumpor's Case* has often been criticized. See Dakin & Bacon v. Williams & Seward, 17 Wend. 447 (N.Y. 1837); Easley Coal Co. v. Brush Creek Coal Co., 91 W. Va. 291, 112 S.E. 512 (1922); *Brummell v. Macpherson*, 14 Ves. 173, 33 Eng. Rep. 487 (1807); 1 TIFFANY, REAL PROPERTY § 205 (3d ed. 1939).

¹⁹⁷ See excellent discussion of the rule in *Investor's Guaranty Corp. v. Thomson*, 31 Wyo. 264, 225 Pac. 590 (1924), wherein the court refused to follow the rule, calling it a "venerable error", although Wyoming had adopted the common law of England by statute.

¹⁹⁸ *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N.W. 47 (1890); Dakin & Bacon v. Williams & Seward, 17 Wend. 447 (N.Y. 1837); *Childs v. Southern Theatres, Inc.*, 200 N.C. 333, 156 S.E. 923 (1931).

¹⁹⁹ Dakin & Bacon v. Williams & Seward, 17 Wend. 447 (N.Y. 1837). See also *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 304, 112 S.E. 512, 517 (1922), where the court said that the legal effect of the assignment by the lessee with consent was an assignment to the assignee and his assigns.

²⁰⁰ Law of Property Amendment Act, 1859, 22 & 23 Vict., c. 35.

²⁰¹ 14 Ves. 173, 33 Eng. Rep. 487 (1807).

assigns. The *Brummell* case extended the rule by holding that the condition was discharged even though the consent to assign was to a specified person rather than to any person as in *Dumpor's Case*, and that is the way the rule was adopted in the United States.²⁰²

Generally the courts, when speaking of the rule in *Dumpor's Case*, speak in terms of a condition rather than a covenant, but occasionally a court speaks of a covenant.²⁰³ However, there is a great difference in the two terms. A covenant is a promise or agreement to do or not to do a certain thing, and the legal result of the nonfulfillment of a covenant is that the party violating it must respond in damages.²⁰⁴ A covenant is in the words of, and is binding on, the covenantor only, while a condition is in the words of, and may be binding on, both parties.²⁰⁵ And covenants in leases are generally held to be mutually independent unless in terms expressly conditional,²⁰⁶ and such covenants are to be treated as independent rather than conditions precedent.²⁰⁷

For these reasons, in the absence of a statutory provision to the contrary, the lessor has only an action for damages in case of a breach of a covenant in a lease, unless the lessor expressly reserves the additional right to reenter and terminate the lease in case of such breach.²⁰⁸ A condition is a qualification annexed to an estate by the grantor whereby it may be enlarged, defeated or created upon an uncertain event;²⁰⁹ and as a consequence of the nonfulfillment of a condition, there may be a forfeiture of the estate at the grantor's option since he may reenter and possess himself of his former estate.²¹⁰

There are different types of conditions. Two of the most common are conditional limitations (more properly called a special limitation since the term conditional limitations is also used to designate executory interests) and conditions subsequent. In the case of a special limitation the estate ends when the event upon which the limitation is based occurs, without any further act on

²⁰² *Aste v. Putnam's Hotel Co.*, 247 Mass. 147, 141 N.E. 666 (1923); *Pennock v. Lyons*, 118 Mass. 92 (1875).

²⁰³ See *Aste v. Putnam's Hotel Co.*, 247 Mass. 147, 141 N.E. 666 (1923).

²⁰⁴ *Woodruff v. Woodruff*, 17 Stew. (44 N.J. Eq.) 349, 16 Atl. 4 (1888).

²⁰⁵ *Langley v. Ross*, 55 Mich. 163, 20 N.W. 886 (1884).

²⁰⁶ *Palmer v. Meriden Britannia Co.*, 188 Ill. 508, 59 N.E. 247 (1900); *Arbenz v. Exley, Watkins & Co.*, 52 W. Va. 427, 44 S.E. 149 (1903); *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S.E. 662 (1901); 3 WILLISTON, CONTRACTS § 890 (Rev. ed. 1936).

²⁰⁷ *Newsome v. Smithies*, 3 H. & N. 840 (1858).

²⁰⁸ 2 TIFFANY, LANDLORD & TENANT § 194b (1912).

²⁰⁹ *Langley v. Ross*, 55 Mich. 163, 20 N.W. 886 (1884).

²¹⁰ *Woodruff v. Woodruff*, 17 Stew. (44 N.J. Eq.) 349, 16 Atl. 4 (1888).

the part of either party to the transaction; but in case of a condition subsequent it is generally considered necessary that there be some act on the part of the lessor to terminate the estate granted.²¹¹ There is confusion in the cases as to the distinctions between covenants, limitations, and conditions subsequent, but for the purposes of this paper it is sufficient to show the difference between a covenant and a condition, as shown above, and then show that there may be two types of conditions subsequent. One type of condition subsequent is a provision in a lease, as in *Dumpor's Case*, that upon the happening of an event the lessor shall have the option to reenter and terminate the lease, and a breach of a covenant by the lessee is not necessary. The other type is where there is a covenant or covenants in the lease and they are followed by a provision for a right of reentry by the lessor in case of a breach of covenant or covenants. In the case of the latter the covenant, being coupled with a condition, has a dual aspect, and the lessor has the right to damages and, or, the right to reenter and terminate the lease in case of a breach of covenant by the lessee.²¹² This is the type of condition subsequent in which the rule of *Dumpor's Case* is applied in most cases today and was the type concerned in the *Easley Coal Co.* case.

There is some question as to whether the rule in *Dumpor's Case* is applicable to covenants as well as conditions. There is nothing in the facts as reported in *Dumpor's Case* to indicate that there was a covenant involved in the case. The court talked of a condition, never mentioned a covenant, and seemed to assume that the lessor would have had the right to reenter had the condition against assignment not been discharged. So that case probably concerned a pure condition subsequent rather than a covenant coupled with a condition subsequent. In all the cases involving the rule in *Dumpor's Case* that the writer has examined, with one exception, there has been one or the other of these types of conditions subsequent.²¹³

Some questions raised by the rule in *Dumpor's case* have not been well answered by the cases. Does the coupling of a condition with the covenant against assignment without consent make the

²¹¹ *Burnee Corporation v. Uneeda Pure Orange Drink Co.*, 132 Misc. 435, 230 N.Y. Supp. 239 (1928); 2 *TIFFANY, LANDLORD & TENANT* § 194c (1912).

²¹² "We must construe the covenant without regard to the proviso for re-entry, for its construction must be the same in an action for damages for breach of the covenant as in an action for the recovery of land on the ground that the proviso for re-entry has come into operation by reason of such breach." *Bristol v. Westcott*, 12 Ch. D. 461 (1889).

²¹³ The exception is *Reid v. Weissner Brewing Co.*, 88 Md. 234, 40 Atl. 877 (1898).

covenant a condition, so that when the court says that the condition is discharged by a consent it means the covenant as well as the condition? When there are other covenants in the lease along with this covenant followed by a condition subsequent, such as the one under discussion, and there is a consent by the lessor to an assignment is the whole condition discharged?

Both questions would seem to have logical answers. In the case of the first question some of the cases say that the covenant is discharged or that it will not run with the land after the assent is once given.²¹⁴ That seems to be the effect of most of the decisions where there is a covenant coupled with a condition. So both the covenant and the condition would seem to be determined. As to the second question certainly the consent to an assignment would not discharge the whole condition, but only that part of it giving a right of reentry to the lessor for the breach of the covenant not to assign without consent.

But since there is a well recognized distinction between a covenant not to assign without consent and such a covenant coupled with a condition for reentry for breach of the covenant,²¹⁵ the really difficult question is whether the rule applies where there is a pure covenant against assignment without consent without any condition attached to it. In such case, since the covenants in a lease are generally considered to be independent of each other and the lessor's only remedy in case of a breach of covenant is an action for damages, he having no right to forfeit the lease, there is no condition to be discharged; and unless the consent of the lessor to an assignment destroys the covenant, under the rule there is no reason that the covenant cannot run with the land.

There is authority for the view that the rule does not operate in the case of a pure covenant.²¹⁶ However, there is one case to the contrary. In *Reid v. Weissner & Sons Brewing Co.*,²¹⁷ there was only a mere covenant not to assign without consent. The court held that the first consent destroyed the covenant and it was gone forever. But this holding was not necessary to the decision,

²¹⁴ *Aste v. Putnam's Hotel Co.*, 247 Mass. 147, 141 N.E. 666 (1923); *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 112 S.E. 512 (1922).

²¹⁵ In *Kew v. Trainor*, 150 Ill. 150, 155, 37 N.E. 223, 224 (1894) the court stated, "This is not a mere covenant not to assign, but a power of re-entry for breach of a covenant and this is declared by Taylor, Landlord and Tenant, § 278 to have the force of a condition". In *Investor's Guaranty Corp. v. Thomson*, 31 Wyo. 264, 281, 225 Pac. 590, 595 (1925) the court said, "The effect of a mere covenant, agreement not to assign, without the right of reentry, so as to make it a condition, is of course different from a condition".

²¹⁶ 2 *TIFFANY, LANDLORD & TENANT*, § 152(1) (1912).

²¹⁷ 88 Md. 234, 40 Atl. 877 (1898).

since the issue was whether an assignment by an assignee was sufficient to relieve him from further liability on the covenants in the lease. Further, the holding might have resulted from the court's failure to distinguish between covenants and conditions, for apparently without recognizing that there might be any distinction, the court held the covenant discharged and cited *Dumpor's Case* and the *Brummell* case as authority, speaking in terms of conditions as it did so. In the syllabus of the case the court used the following language:

"When there is a condition in a lease against the assignment of the term without the consent of the lessor, and such consent is given to one assignment without any restriction as to future assignments, the condition is waived altogether and the assignee may assign the term without the consent of the lessor."

In passing it is pointed out that this case was cited as authority by the West Virginia court in the *Easley Coal Co.* case and the above syllabus was quoted.²¹⁸

Reason, as well as authority, supports the view that the rule in *Dumpor's Case* applies only to conditions and does not extend to mere covenants. One of the reasons given for the rule is that a condition is not capable of apportionment,²¹⁹ and a covenant not coupled with a condition is frequently made divisible and capable of apportionment.²²⁰ A very probable reason behind the rule is the courts' antipathy toward forfeitures of estates and their reluctance in aiding in their enforcement,²²¹ and this reason is also missing where there is a mere covenant without a provision for terminating the lease in case of a breach of the covenant. It has been stated that the rule should not be extended.²²²

If, as seems to be the case, the rule in *Dumpor's Case* does not operate to discharge a covenant as well as a condition, then the West Virginia court would probably hold that a bare covenant not to assign without the consent of the lessor would run with the land

²¹⁸ *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 301, 302, 112 S.E. 512, 516 (1922).

²¹⁹ See note 198 *supra*.

²²⁰ *Dakin & Bacon v. Williams & Seward*, 17 Wend. 447 (N.Y. 1837).

²²¹ See *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 296, 112 S.E. 512, 514 (1922), where, although the fact that forfeitures of estates are not favored in law is not given as a reason for the rule in *Dumpor's Case*, the West Virginia court discussed this proposition with approval at great length. See also *Lynde v. Hough*, 27 Barb. 415, 422 (N.Y. 1857); *Goldman v. Feder & Co.* 84 W. Va. 600, 100 S.E. 400 (1919); *Kilgore v. County Court*, 80 W. Va. 283, 92 S.E. 562 (1917).

²²² *Paul v. Nurse*, 8 B. & C. 486, 108 Eng. Rep. 1123 (1828); 12 HARV. L. REV. 272 (1898).

without the aid of legislative enactment since the reason it gave for the covenant's not running in the *Easley Coal Co.* case was that the rule in *Dumpor's Case* discharged the covenant. In so holding the court displayed an antipathy toward the rule. In that case, the court stated that the covenant would run if the lessee covenanted for himself and his assigns, apparently because the rule would not then operate to exhaust the lessor's rights under the condition.²²³ So the court, by failing to distinguish between a covenant and a condition, may have made too broad a statement when it stated in its holding that a covenant not to assign without consent which does not in its terms extend to the assigns of the lessee does not run with the land.²²⁴ But the court is not to be criticized for this as it is a very common oversight, and, since there was a provision for reentry in that case, the court was applying the rule to a condition, or at least to a covenant coupled with a condition, and not to a bare covenant.

Another reason for saying that the burden of the covenant in question can run with the land without the aid of legislative enactment, even where the rule in *Dumpor's Case* is followed, is that by the great weight of authority an implied consent to an assignment by the lessor, as by the lessor's acceptance of rent from the assignee with knowledge of the breach of the covenant not to assign without consent amounting to a waiver of the breach, does not have the effect of destroying the condition,²²⁵ so it would remain in existence and run with the land in such case. The reason given for this result is that the rule does not apply when the assent is not given as contemplated in the lease. Thus, it has been said that the rule does not discharge the covenant where an oral assent was given and the lease required a written assent.²²⁶ It might be said that, although the law implies a consent to future assignments where one consent is actually given by the lessor, it will not imply such a full consent where the law itself implies the first consent. However, it should be noted that there are some cases holding that the condition will be discharged by a waiver as well as by express consent.²²⁷

Another reason that the burden of the covenant not to assign

²²³ *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 302, 112 S.E. 512, 517 (1922).

²²⁴ *Id.* at 303, 112 S.E. at 517.

²²⁵ *Plummer v. Worthington*, 321 Ill. 450, 152 N.E. 133 (1926); *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N.W. 47 (1890); *Doe v. Bliss*, 4 Taunt. 735 (1813); 1 TIFFANY, REAL PROPERTY § 205 (3d ed. 1939); 23 HARV. L. REV. 630 (1910).

²²⁶ *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N.W. 47 (1890).

²²⁷ *German American Savings Bank v. Gollmer*, 155 Calif. 883, 102 Pac. 932 (1909); *Heeter v. Eckstein*, 50 How. Pr. 445 (N.Y. 1874).

without consent may run at common law is that it is generally recognized that the destructive effect that a consent to assign has upon a condition against assignment without consent is nullified by the insertion in the consent a provision that no further assignment shall be made without the lessor's consent.²²⁸ Since the condition is not then destroyed, its burden presumably runs with the land and is binding upon the assigns. This exception to the rule that one consent discharges the condition is apparently recognized in West Virginia in view of the following statement of the court in the *Easley Coal Co.* case:

"Under the authorities and rules of interpretation, we are of the opinion that, even though the assignee expressly assumes, in general words, the terms and conditions of the lease, in an assignment assented to by the lessor, there is no restraint on his right further to assign, unless it is specifically forbidden or covenanted against in some way, in the assent or the assignment."²²⁹

If such a saving clause in the instrument granting the assent has the effect of making the covenant binding upon the assignee where such assignee has not expressly assumed the burden of the covenants in the lease, then it can only be binding upon him because of his being in privity of estate with the lessor and an assignee is only bound on covenants which run with the land by virtue of being in privity of estate with the lessor.²³⁰ Therefore, it appears that this is a covenant which runs with the land unless it is discharged by the rule in *Dumpor's Case*.

A further reason that the covenant must be said to be one which will run with the land unless discharged by the rule in *Dumpor's Case* is the fact that it has been held that it will run, and is binding upon the assigns of the lessee, if assigns be named in the covenant.²³¹ Again the only reason it would be binding upon the assigns in such case is because it is a covenant which runs with the land and there is privity of estate between the assigns of the lessee and the lessor since there would be no privity of contract between them.

²²⁸ *Springer v. Chicago Real Estate Loan & Trust Co.*, 202 Ill. 17, 66 N.E. 850 (1903); *Kew v. Trainer*, 150 Ill. 150, 37 N.E. 223 (1894); *Reid v. Weissner Brewing Co.*, 88 Md. 234, 40 Atl. 877 (1898); *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 112 S.E. 512 (1922); 1 *TIFFANY, REAL PROPERTY* § 205 (3d ed. 1939).

²²⁹ *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 307, 112 S.E. 512, 518 (1922).

²³⁰ *Atwood v. Chicago, Milwaukee & St. Paul Ry.*, 313 Ill. 59, 144 N.E. 351 (1924); *Congleton v. Pattison*, 10 East 130, 103 Eng. Rep. 725 (1808).

²³¹ 1 *TIFFANY, REAL PROPERTY* § 126 (3d ed. 1939); See *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 112 S.E. 512 (1922).

However, it is difficult to see why the naming of the assigns in the covenant should make any difference in West Virginia and other jurisdictions which follow the rule in *Dumpor's Case*. Some of the courts take the position that if the covenant or condition is single, that is, the covenant against assignment without consent does not extend to assigns, then the rule applies; and if the covenant or condition is multiple, that is, it does extend to assigns, the rule does not apply.²³² That is apparently the view taken by the West Virginia court in the *Easley Coal Co.* case when it stated that the covenant would run with the land if assigns were named.²³³

This is a strange position to take since it is accepting the rule in *Dumpor's Case* in one breath and repudiating it in the next, since the rule was laid down in a case where the assigns were named.²³⁴ Thus, it was originally applied under circumstances where it is now said to be inapplicable. In *Investor's Guaranty Corp. v. Thompson*, the Wyoming court, in speaking of the *Easley Coal Co.* case, stated that the court in the West Virginia case clearly appears to have repudiated the gist of *Dumpor's Case* when it said that a covenant by a lessee for himself and his assigns runs with the land and is binding upon the successive assignees.²³⁵ But it is submitted that that statement in the West Virginia case is pure dictum and will not be followed in view of the holding in the case that the rule in *Dumpor's Case* is, and must be, the law in West Virginia by virtue of the constitutional provision adopting the common law as the law of the state.²³⁶

In defense of the West Virginia court, it reached the correct result in the case in spite of the above mentioned dictum, since assigns were not mentioned and the holding was that the condition was discharged. The rule of *Dumpor's Case* was the common law rule at the time our constitution went into effect, and this part of the common law had not been modified by the statute which may have had the effect of making the benefit of the condition run with

²³² See *Childs v. Warner Bros. Southern Theatres*, 200 N.C. 333, 156 S.E. 923 (1931); *Investor's Guaranty Corp. v. Thomson*, 31 Wyo. 264, 225 Pac. 590 (1924).

²³³ 91 W. Va. 291, 302, 112 S.E. 512, 517 (1922).

²³⁴ *Dumpor v. Symms*, 4 Co. Rep. 119b, 76 Eng. Rep. 1110 (1603); *Brummell v. Macpherson*, 14 Ves. 173, 33 Eng. Rep. 487 (1807); *Aste v. Putnam Hotel Co.*, 247 Mass. 147, 141 N.E. 666 (1923); *Investor's Guaranty Corp. v. Thomson*, 31 Wyo. 264, 225 Pac. 590 (1924).

²³⁵ 31 Wyo. 264, 279, 225 Pac. 590, 294 (1924).

²³⁶ "Such parts of the common law, and of the laws of this State as are in force when this article goes into operation and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the Legislature. . . ." W. VA. CONST. Art. VIII, § 21 (1872).

the reversion,²³⁷ which, as will be pointed out later, was in existence at that time.

Running of Covenants in Nonlease Cases in West Virginia

When one turns to West Virginia cases other than lease cases, one finds rules of law similar to those laid down in other jurisdictions in regard to the running of covenants.

In *Lydick v. Baltimore & Ohio R.R. Co.*,²³⁸ where there was a conveyance of a right-of-way with a covenant by the grantee to build a spur track to a mill on the land out of which the right-of-way was granted, the court held this to be a covenant running with the land and point five of the syllabus reads:

"If some interest in land or a right-of-way or incorporeal hereditament issuing out of the land is granted, and in the deed the grantee covenants with the grantor and his assigns that he will do something which concerns the land and becomes united to it, so that it affects the value of the land, in whosoever hands it may come, such covenant runs with the land, and there is privity of estate between such covenantor and such covenantee."

In *McIntosh v. Vail*,²³⁹ another case outside the lease field, the court went into the question of the running of covenants considerably more in detail than it has done in any lease case. In that case the court stated,

"It is contended by counsel for appellees that the covenant as to gas royalties is analogous to the free gas covenant, which was held an appurtenance in *Harbert v. Natural Gas Co.*, 76 W. Va. 207, 84 S.E. 770. Examination for the reason which prompted the Court's conclusion that the covenant for free gas was a covenant real does not appear from the opinion other than it is as much a covenant real as one to pay money rentals on gas wells and a benefit to the land. The first cases which developed the doctrine of real covenants were those in which covenants between landlords and tenants, relating to the use and enjoyment of leased premises, were involved. In such cases the estate of the tenant was, of course, a possessory one, while that of the landlord was a reversionary one. Existence of privity of estate was clear under such relationship. Covenants on the part of the tenant to repair or to pay rent unquestionably respected and concerned the subject matter of the estate of each of the contracting parties, and such covenants enhanced the value of the reversionary estate of the landlord. Both privity of estate and the factor of touching and concerning the land in a

²³⁷ W. VA. CODE c. 72, § 21 (Barnes, 1918).

²³⁸ 17 W. Va. 427 (1881).

²³⁹ 126 W. Va. 395, 28 S.E.2d 607 (1943).

beneficial way existed in the case of landlord and tenant. See *W. Va. C. & P. R. Co. v. McIntire*, 44 W. Va. 210, 28 S.E. 696, which holds that a lessee's covenant to pay taxes is a covenant real. Thus it is understandable that courts, when considering covenants in mineral leases to pay royalty, to furnish free gas, to test and develop the land, and to protect it from drainage uniformly applied the rule of covenants running with the land in ordinary leasehold estates."²⁴⁰

It seems clear that in West Virginia there must be privity of estate in order that a covenant may run with the land.²⁴¹ This particular problem was brought out in several nonlease cases where the problem is more likely to arise. The court has not seen fit to mention this required element for the running of covenants in lease cases often, since privity of estate is present where the relationship of landlord and tenant exists, although there was a problem at one time as to privity of estate where their assigns were concerned. But our court apparently takes for granted that this element is present in lease cases, and of course it is right in so doing.

Likewise, it is well settled in West Virginia that the covenant must touch and concern the land in order that it run with the land.²⁴²

So when one considers the nonlease cases and ascertains from them the reasons why covenants have been held to run or not to run, along with the lease cases holding covenants to run or not to run, it appears that West Virginia generally follows the common law in regard to the running of covenants in leases in spite of broad statements in the cases that our statutes make all covenants in leases run, or that an assignee of the lessee takes the lease with its burdens.

Other Statutes in Regard to the Running of Covenants in West Virginia

An even greater question as to changes in the common law in regard to the running of covenants in leases in West Virginia by legislative enactments than the one presented by our statutes copied from that of Hen. VIII is presented by article 4, chapter 36 of the Code of West Virginia.

²⁴⁰ *Id.* at 404, 28 S.E.2d at 612.

²⁴¹ *McIntosh v. Vail*, 126 W. Va. 395, 28 S.E.2d 607 (1943); *Rawling v. Fisher*, 101 W. Va. 253, 132 S.E. 489 (1926); *Tennant v. Tennant*, 69 W. Va. 28, 70 S.E. 851 (1911); *Hurxthall v. St. Lawrence Boom Co.*, 53 W. Va. 87, 44 S.E. 520 (1903).

²⁴² *McIntosh v. Vail*, 126 W. Va. 395, 28 S.E.2d 607 (1943); *Harbert v. Hope Natural Gas Co.*, 76 W. Va. 207, 84 S.E. 770 (1915); *Hurxthall v. St. Lawrence Boom Co.*, 53 W. Va. 87, 44 S.E. 520 (1903).

It is obvious from an examination of that article that it deals with warranties in conveyances in fee as well as covenants in leases. That sections two through eight of the article concern covenants of warranty in fee conveyances is a fair inference since they concern covenants of general warranty, special warranty, right to convey, quiet possession, freedom from encumbrances, special covenant against encumbrances, and further assurances in deeds.

There is no doubt that sections nine through fifteen concern covenants in leases since all of them specifically mention leases, or lessee and lessor, or more than one of those terms. They concern covenants to pay rent, cancellation of oil and gas leases for non-payment of delay rental, covenants to pay taxes, covenants not to assign or sublet without the consent of the lessor, covenants to leave premises in good repair, effect of destruction of leased buildings without fault on the part of the lessee, covenants of quiet enjoyment, and covenants for reentry for breach of covenants.

While these things are fairly obvious from an examination of the article, the meaning and intent of sections sixteen and seventeen of the article are far from obvious. After mentioning these various covenants and describing what language shall constitute such covenants, and providing for the effect of such covenants, in the first fifteen sections, the legislature enacted section sixteen which provides:

"Each of the covenants hereinbefore mentioned in this article, as well as the covenant of seisin, when used in a conveyance of land, delivered after the date when this Code shall take effect, shall be considered as a covenant running with the land, whether such covenants have heretofore been so considered or not, unless a contrary intent shall be apparent from the conveyance."

Is the effect of this section to make all covenants in leases named in the foregoing sections run with the land, whether such covenants ran at common law or not?

In regard to the covenants to pay rent and to pay taxes, there is not too much question inasmuch as they have been held to run by the West Virginia court without the benefit of this article. Nor is there much question in the case of the covenant of quiet enjoyment as it is generally held to run with the land,²⁴³ and the West Virginia court has intimated it considers that this covenant runs in *Headley v. Hoopengartner*,²⁴⁴ where the court, after holding that there were implied covenants of warranty of title and quiet

²⁴³ 1 TIFFANY, REAL PROPERTY § 126 (3d ed. 1939).

²⁴⁴ 60 W. Va. 626, 636, 55 S.E. 744, 748 (1906).

enjoyment in a lease, stated, ". . . Mansfield Headley having leased to Hoopengartner, Wharton, Karnes and Co., the remote assignors of defendants, his interest in the seven-eighths of the oil and gas underlying the seven acres, reserving one-fifth of the one-eighth royalty, would be liable on his warranty to Hoopengartner, Wharton, Karnes & Co., or those claiming under them. . . ."

An added reason for thinking that the court would hold that the covenant of quiet enjoyment runs is that the section of the article which deals with this covenant,²⁴⁵ seems itself to make the benefit of this covenant, and probably its burden, run, since it provides that a covenant of this import "shall have the same effect as a covenant that the lessee, his personal representatives and lawful assigns, paying the rent reserved, and performing his or their covenants, shall peacefully possess and enjoy the demised premises for the term granted, without any interruption from any person whatever".

The section in regard to the covenant to pay taxes²⁴⁶ could be construed as making the burden of this covenant run with the land and binding upon the assigns of the lessee, since it provides that a covenant of this nature shall have the effect of a covenant that all taxes, levies and assessments on the demised premises, or upon the lessor on account thereof, shall be paid by the lessee or those claiming under him. (The section exempts, however, assessments for permanent improvements and income taxes on the rent.)

The section in the article concerning covenants to leave the demised premises in good repair seems, in itself, to make the benefit of the covenant run to the assigns of the lessor when it provides that a covenant of this import shall have the same effect as a covenant that the demised premises will, at the expiration, or other sooner determination, of the term, be peaceably surrendered and yielded up to the lessor, his representatives or assigns, in good and substantial repair and condition, reasonable wear and tear excepted.²⁴⁷

The benefit of a provision in a lease that the lessor shall have a right of reentry for default on the part of the lessee, in reality a condition or a power rather than a covenant, is generally held to run and pass to a transferee of the reversion,²⁴⁸ and would probably be held to run in West Virginia. The section in article four in regard to the effect of such a provision might possibly be

²⁴⁵ W. VA. CODE c. 36, art. 4, § 14 (Michie, 1949).

²⁴⁶ *Id.* § 10.

²⁴⁷ *Id.* § 12.

²⁴⁸ 1 TIFFANY, REAL PROPERTY § 210 (3d ed. 1939).

construed to have the effect of making both the benefit and the burden of such a provision run with the land.²⁴⁹

There is no uniformity in the language used in the various sections of this article. In fact, of all the sections in the article which deal with covenants in leases, only the section which concerns the covenant to pay rent²⁵⁰ is devoid of language which might possibly be interpreted as making either the benefit or burden, or both, run with the land without the aid of section sixteen, quoted above.

The section in regard to the lessee's covenant not to assign or sublet without the consent of the lessor²⁵¹ employs language which would indicate a legislative intent to make the benefit of this covenant run when it provides that such a covenant shall have the effect of a covenant that the lessee will not assign or sublet the premises without the consent of the lessor, his representatives or assigns.

However, to suggest that these sections, in themselves, may be construed by the court as making the covenants therein mentioned run with the land may be giving too much effect to the use of the word "assigns", and further any effect of the above-mentioned language which seems to indicate a legislative intent to make the benefits or burdens of covenants run is apparently negated in the last section of the article and the revisers' note following it. Since that section was enacted without change by the legislature as a result of the suggestion of the revisers of the Code, their intent as to its meaning is entitled to great weight in case of ambiguity.²⁵² That section and the revisers' note thereto are as follows:

"The legal scope and effect of the covenants mentioned
in this article, and the person or persons by and against whom

²⁴⁹ W. VA. CODE c. 36, art. 4, § 15 (Michie, 1949). This section provides that words in a lease giving the lessor the right to reenter for breach of covenant on the part of the lessee "shall have the effect of an agreement that if the rent reserved, or any part thereof, be unpaid on or after the day specified in the deed for the payment thereof, or if any of the other covenants on the part of the lessee, his personal representatives or assigns, be broken, then, in either of such cases, the lessor, or those entitled in his place, at any time afterwards, into and upon the demised premises, or any part thereof, in the name of the whole, may re-enter and the same again have, repossess and enjoy, as of his or their former estate".

²⁵⁰ *Id.* § 9.

²⁵¹ *Id.* § 11.

²⁵² In *In re Tarlo's Estate*, 315 Pa. 321, 325, 172 Atl. 139, 140 (1934), the court stated that where the meaning of a statute is obscure the reports of committees appointed to codify the law is entitled to even greater weight than that given a committee report, especially if the legislature enacts the exact language of the committee's draft. See also *State ex rel. Globe Steel Tubes Co. v. Lyons*, 183 Wis. 107, 197 N.W. 578 (1924).

such covenants may be enforced, shall be determined according to the rules of law applicable to such cases, and the plain intent and meaning of the parties.²⁵³

"REVISERS' NOTE. This section is new. Under the language of the first section of this article, rights and liabilities might be claimed to be created in and against persons, not parties to the covenant, and not brought within its scope by any legal principle. The legislature probably had no such intent, and no decision of our court finds any such intent, but it seems advisable to clarify the matter by an express provision in the statute, hence this section is added. This provision is also made applicable to the other sections of this article in which language similar to that of the first section is used."²⁵⁴

In order to clarify the above revisers' note, it is necessary that the first section of the article be quoted. It provides as follows:

"When the words the said . . . covenants, are used in a deed, such covenant shall have the same effect as if it were expressed to be by the covenantor, for himself, his heirs, personal representatives and assigns, and shall be deemed to be with the covenantee, his heirs, personal representatives and assigns."²⁵⁵

In view of the above section and revisers' note it is doubtful if any of the sections in the article would, in themselves, have the effect of making covenants run, either as to benefits or burdens, without the aid of section sixteen.

Even if section sixteen should be construed as making all the covenants mentioned in the article run with the land, it is believed that the covenant not to assign or sublet without consent, or at least the part of this covenant in regard to not assigning without consent, is the only one upon which such a construction would have much effect. For if that section were so construed, though the effect of that construction would be to make both the benefits and burdens of the other covenants mentioned in the article run with the land, this would not be in conflict with any West Virginia holding and would be in line with some, it would be consistent with the general tenor of the various sections themselves for the most part, and, as noted before, it would be in line with the weight of authority generally. In the case of a covenant not to sublet without consent, such a construction would be consistent with the weight of authority,²⁵⁶ and would be in line with

²⁵³ W. VA. CODE c. 36, art. 4, § 17 (Michie, 1949).

²⁵⁴ *Id.* Revisers' Note.

²⁵⁵ *Id.* § 1.

²⁵⁶ The foregoing discussion has shown that the reason the covenant not to assign without the consent of the lessor is held not to run in West Virginia

the statement of the Virginia court in *McKildroe v. Darracott*,²⁵⁷ decided while West Virginia was still a part of Virginia, that the rule of *Dumpor's Case* in regard to assignments has not been extended to subleases.

But, in the case of the covenant not to assign without the consent of the lessor, it was held in the *Easley Coal Co.* case that this covenant not only did not run in West Virginia, but that it was beyond the power of the court to hold that it did run, and that the covenant could only run if permitted to do so by legislative enactment.

The *Easley Coal Co.* case was decided in 1922 and section sixteen was enacted in 1931. Therefore, that section could have changed the law in regard to the covenant not to assign without consent as laid down in the *Easley Coal Co.* case.

While the language of the court in that case was the broad statement that the covenant did not, and could not, run with the land, the effect of the holding was that the burden of the covenant did not run to the assigns of the lessee, since it was the original covenantor, or lessor, who was attempting to enforce the covenant against an assignee of the lessee after having given its assent to an assignment by the lessee. There was no occasion to decide whether the benefit of the covenant did or could run. As a matter of fact, the reason assigned for the covenant's not running was applicable only to the running of the burden; the reason being that the covenant was discharged by the one assent to an assignment. So presumably after the assent was given neither the benefit nor the burden of the covenant could run, but prior to an assent the benefit of the covenant could run if the reversion were assigned.

As stated above, the court in the *Easley Coal Co.* case stated that this covenant could not run in the absence of a legislative enactment. The reason for this was that it did not run at common law, and being a part of the common law, the rule was made a part of the law of West Virginia by the constitution of this state.²⁵⁸

is that the rule in *Dumpor's Case*, a part of the common law in West Virginia, discharges the covenant upon the lessor's giving one consent to an assignment. This rule does not apply to covenants not to sublet without consent. *German-American Savings Bank v. Gollman*, 155 Calif. 683, 102 Pac. 932 (1909); *Fidelity Trust Co. v. Kohn*, 27 Pa. Super. 374 (1904); *McKildroe v. Darracott*, 13 Gratt. 278 (Va. 1856). *But see* *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N.W. 47 (1890), where the court stated that a license once given removes the restrictions forever where there is a covenant not to assign or sublet without the consent of the lessor. In that case the court indicated that the consent to a subletting would have discharged the covenant had the consent been given in the form contemplated by the lease.

²⁵⁷ 13 Gratt. 278, 286 (Va. 1856).

²⁵⁸ See note 236 *supra*.

Although the court did not mention the fact, there was a legislative enactment on the subject in existence at the time the case was decided. But that statute, if it did anything toward modifying the common law in regard to the running of the covenant not to assign without consent, made only the benefit run. That statute was substantially like our present section 11, article 4, chapter 36, above mentioned, in that it provided, in part, as follows:

"In a deed of lease, a covenant by the lessee 'that he will not assign without leave,' shall have the same effect as a covenant that the lessee will not, during the term, assign, transfer, or set over the premises, or any part thereof, to any person without the consent in writing of the lessor, his representatives or assigns."²⁵⁹

So apparently, at the time that the *Easley Coal Co.* case was decided, we had a situation in regard to this covenant in West Virginia where the benefit of a covenant would run and the burden would not. But singularly enough, when the burden of the covenant was gone so was the benefit, since the thing that destroyed the burden of the covenant, the consent, discharged the covenant. However, as has been pointed out, the court intimated that even the burden of the covenant could run if it could be shown that it was not the intent of the parties to destroy or discharge the covenant, and in that event, presumably the benefit would also run after an assignment.

Granting that the law in West Virginia in 1922 was that the burden, at least, of the covenant not to assign without consent did not run with the land unless assigns were named, this does not necessarily mean that such is the law today in view of our statute making all the covenants named in article 4, chapter 26 of the Code of West Virginia, one of which is this particular covenant, run with the land, when used in a conveyance of land.²⁶⁰ This statute purports to make each of the covenants named in the article run with the land when used in a conveyance of land unless a contrary intent shall be apparent from the conveyance. The covenants named in the article include various covenants of title and, as mentioned before, the lease covenants to pay rent and taxes, to repair, quiet enjoyment, covenant (or condition) to allow reentry for breach of covenant, and not to assign without the consent of

²⁵⁹ W. VA. CODE c. 72, § 21 (Barnes, 1918). This part of this statute was made a complete statute by the revisers in 1931. A few words were added, including "or sublet", so as to make the statute read "that he will not assign or sublet without leave". See W. VA. CODE c. 36, art. 4, § 11 (Michie, 1949).

²⁶⁰ *Id.* § 16.

the lessor. As mentioned before, the only one of these covenants likely to be affected by this statute is the last named covenant.

In order to determine whether this statute altered or modified the common law in regard to the covenant in question, it is necessary to determine whether a lease is a conveyance of land; since if it is, the covenant is within the meaning of the statute.

There is considerable authority for the view that an instrument of lease is a conveyance,²⁶¹ but there is also authority to the contrary.²⁶² Some cases distinguish between leases for a term not exceeding three years and those exceeding three years.²⁶³ But certainly a leasehold interest is an interest in land,²⁶⁴ and by the instrument of lease that interest is transferred.²⁶⁵ Our court in *Nickell v. Tomlinson*,²⁶⁶ in speaking of an inchoate dower interest, stated, "Surely such an interest can not be properly spoken of as the subject of a conveyance, an 'estate in land' being the only legitimate subject of conveyance."²⁶⁷ So apparently our court would say that a leasehold interest could be the subject of a conveyance if it is an interest in land, but that would not be conclusive in regard to the question of whether the conveyance of a leasehold interest is a conveyance of land within the meaning of that phrase as used in the above-mentioned statute.

In analyzing the phrase "when used in a conveyance of land", it is necessary to turn to the West Virginia statute setting out rules to be observed in the construction of statutes, and there it is provided that when the word "land" is used it includes "lands, tenements, and hereditaments, and all rights thereto and interests therein except chattel interests".²⁶⁸ It can safely be said, therefore,

²⁶¹ *Hancock v. Elkington*, 67 Idaho 542, 186 P.2d 494 (1947); 1 TIFFANY, REAL PROPERTY § 74 (3d ed. 1939).

²⁶² See *In re Tuohy's Estate*, 23 Mont. 305, 309, 58 Pac. 722, 724 (1899), where the court, citing and quoting *Sullivan v. Barry*, 46 N.J.L. 1 (1884), stated "but neither the word 'convey' or 'incumber', according to its ordinary significance, is expressive of the act of creating a tenancy for years in lands. The former of the terms is appropriate to the transfer of title to freehold; . . . That the word 'conveyance' does not, when standing without assistance in a statute, signify its applicability to the passing of a chattel interest in realty is clearly indicated in the case of *Kinney v. Watts*, 14 Wend. 23, and *Tone v. Brace*, 8 Paige 598 (11 Paige 566)." See also State Board of Examiners v. Walker, 67 Ariz. 156, 192 P.2d 723 (1948) for the view that the word "conveyance" in its strict legal sense means a transfer of legal title to land, and *Perkins v. Morse*, 78 Me. 17, 2 Atl. 130 (1885) to the same effect.

²⁶³ See *Stearns Lighting & Power Co. v. Central Trust Co.*, 223 Fed. 962 (6th Cir. 1916); *Shraiberg v. Hanson*, 138 Minn. 80, 163 N.W. 1032 (1917).

²⁶⁴ *Fidelity Trust Co. v. Wayne County*, 244 Mich. 182, 221 N.W. 111 (1928).

²⁶⁵ 1 TIFFANY, REAL PROPERTY § 74 (3d ed. 1939).

²⁶⁶ 27 W. Va. 697 (1896).

²⁶⁷ *Id.* at 720.

²⁶⁸ W. VA. CODE c. 2, art. 2, § 10(p) (Michie, 1949).

that in West Virginia an instrument of lease is a conveyance within the meaning of the statute in question if a leasehold interest is an interest in land other than a chattel interest.

A leasehold interest is an interest in land of some sort,²⁶⁹ and it is an estate less than a freehold estate, for a freehold estate is an estate for life or in fee.²⁷⁰ Certainly as an original proposition such interests were not considered to be land, or even estates in land, for the owner of such an interest was considered as merely having a right of action against the lessor for wrongful ejection, while, as against persons other than the lessor who had ejected him, he had no remedy whatever.²⁷¹ Later, however, the owner of such an interest was allowed to recover the land by an action analogous to that which the owner of a freehold estate was entitled to maintain.²⁷²

But, in spite of such increased rights, the owner of such an interest continued to have an interest uncertain as to character. The Michigan court stated in one case that, "But, without any good reason therefor, the estate for years continued to be classified as personal property. Mr. Jenks, in his History of English Law, says: 'It stands midway between real and personal property—neither wholly real, nor wholly chattel.'"²⁷³

The leasehold interest has been said to be a chattel real; a hybrid estate deriving its legal characteristics from both real and personal property, yet actually neither; being personalty, it is also an interest in land.²⁷⁴ These interests are to be distinguished on the one hand from things which have no concern with the land, such as mere movables and rights connected with them such as chattels personal, and on the other hand, from a freehold which is realty.²⁷⁵

The West Virginia court, after stating that chattels real are such as concern or savour of realty, as a term for years, stated, "and these are called real chattels, as being interests issuing out of, or annexed to, real estate: of which they have one quality, *viz.*, immobility, which denominates them *real*, but want of the other, *viz.*,

²⁶⁹ Fidelity Trust Co. v. Wayne County, 244 Mich. 182, 221 N.W. 111 (1928).

²⁷⁰ Intermountain Realty Co. v. Allen, 60 Idaho 228, 90 P.2d 704 (1939).

²⁷¹ Fidelity Trust Co. v. Wayne County, 244 Mich. 182, 221 N.W. 111 (1928); 1 TIFFANY, REAL PROPERTY § 73 (3d ed. 1939).

²⁷² Fidelity Trust Co. v. Wayne County, 244 Mich. 182, 221 N.W. 111 (1928).

²⁷³ *Id.* at 185, 221 N.W. at 112.

²⁷⁴ Continental Supply Co. v. Marshall, 152 F.2d 300 (10th Cir. 1945).

²⁷⁵ Lincoln National Bank & Trust Co. of Fort Wayne v. Nathan, 215 Ind. 178, 19 N.E.2d 243 (1939).

a sufficient legal, indeterminate duration; and this want it is that constitutes them chattels".²⁷⁶

Although an occasional statement may be found in the cases that a transfer of a leasehold interest is a conveyance of real estate,²⁷⁷ practically all the cases hold that it is only a conveyance of an interest in real estate,²⁷⁸ and that interest is a chattel interest or a chattel real,²⁷⁹ and passes to the personal representative of the lessee as part of his personal property rather than to his heirs as real property.²⁸⁰ In West Virginia this is consistent with the statutory definition of personal property which is to the effect that the words "'personal estate' or 'personal property' shall include goods, chattels, real and personal, money, credits, investments and the evidences thereof".²⁸¹

The question of whether the transfer of a leasehold interest is a conveyance of real estate has often been before the courts of other jurisdictions in connection with statutes providing that no covenant for quiet enjoyment shall be implied in any conveyance of real estate. While there is a split of authority on the issue of whether this prevents a covenant of quiet enjoyment from being implied where there has been a transfer of a leasehold interest,²⁸² this does not mean that those cases holding that such statutes prohibit such a covenant from being implied in a lease would hold that an instrument of lease is a conveyance of real estate. They base their holdings upon another section of the statute which defines a "conveyance" as including leases for terms of more than three years and hold that the statute prohibiting the implication

²⁷⁶ *Harvey Coal & Coke Co. v. Dillon*, 59 W. Va. 605, 610, 53 S.E. 928, 930 (1906).

²⁷⁷ See *State v. Phillipsburg*, 58 N.J.L. 506, 33 Atl. 852 (1896); *Routt County Mining Co. v. Stutheit*, 101 Colo. 254, 72 P.2d 692 (1937).

²⁷⁸ *Guerin v. Blair*, 33 Calif.2d 744, 204 P.2d 884 (1949); *Campbell v. McLaurin Investment Co.*, 74 Fla. 501, 77 So. 277 (1917); *Lincoln National Bank & Trust Co. of Fort Wayne v. Nathan*, 215 Ind. 178, 19 N.E.2d 243 (1939); *Miller v. Hart*, 122 Ky. 494, 91 S.W. 698 (1906); *Showalter v. Lowndes*, 56 W. Va. 462, 49 S.E. 448 (1905).

²⁷⁹ *Guerin v. Blair*, 33 Calif.2d 744, 204 P.2d 884 (1949); *Fifth Avenue Bldg. Co. v. Kernochan*, 178 App. Div. 19, 165 N.Y. Supp. 122 (1917); *State v. Kirchner*, 185 Okla. 126, 90 P.2d 1055 (1939); *Charter v. Maxwell*, 132 W. Va. 282, 52 S.E.2d 753 (1949); *Harvey Coal & Coke Co. v. Dillon*, 59 W. Va. 605, 53 S.E. 928 (1906).

²⁸⁰ *Guerin v. Blair*, 33 Calif.2d 744, 204 P.2d 884 (1949); *Olsen v. Frazer*, 154 Kan. 310, 118 P.2d 505 (1941); *Ex parte Gay*, 5 Mass. 419 (1809); *Bramwell v. Hutchinson*, 42 N.J.Eq. 372, 7 Atl. 873 (1886); *Charter v. Maxwell*, 132 W. Va. 282, 52 S.E.2d 753 (1949); *Lamp v. Jones*, 94 W. Va. 586, 119 S.E. 676 (1923).

²⁸¹ W. VA. CODE c. 2, art. 2, § 10 (f) (Michie, 1949).

²⁸² The court in *Fifth Avenue Bldg. Co. v. Kernochan*, 221 N.Y. 370, 117 N.E. 599 (1917), took the view that there is an implied covenant for quiet enjoyment in a lease in spite of such a statute, but the court in *Koeber v. Somers*, 108 Wis. 497, 84 N.W. 991 (1902) took the opposite view.

of this covenant are applicable to leases for terms greater than three years.²⁸³ One of these jurisdictions has held that in spite of the statute there exists an implied covenant for quiet enjoyment in every lease for a term of less than three years,²⁸⁴ on the theory that leases for more than three years come within the statute only because the statutory definition of "conveyance" puts them within it, and that otherwise an instrument of lease is not a conveyance of real estate.

There is no statutory definition of the word "conveyance" in West Virginia, but there does exist the aforementioned definition of the word "land" to the effect that it shall "include lands, tenements, and hereditaments, and all rights thereto and interests therein except chattel interests".²⁸⁵ In Michigan the statutory definition of "land" or "real estate" is that these words "shall be construed to include lands, tenements, and real estate, and all rights thereto, and interests therein".²⁸⁶ It will be noted that this definition is similar to the West Virginia definition so far as it goes, but that the Michigan definition does not include the phrase "except chattel interests" as does the West Virginia definition. The Michigan court held that under their statute a lease is an interest in real estate and comes within a statute prohibiting implied covenants in conveyances of real estate.²⁸⁷

But the West Virginia statute which defines "land" provides that that word shall include all interests in land except chattel interests and it has consistently been held in this case that a leasehold interest is a chattel real,²⁸⁸ and this has the same meaning as chattel interest, that is, an interest in real estate less than a freehold interest,²⁸⁹ and in at least one case the court stated that an oil and gas lease was a simple lease conveying a chattel interest.²⁹⁰ Therefore, it is evident that a leasehold interest should not be considered land in West Virginia, but should be considered personal property, and an instrument of lease is not a conveyance of land. It therefore follows that a covenant contained in an instrument of lease is not a covenant used in a conveyance of land and

²⁸³ See *Koeber v. Somers*, 108 Wis. 497, 84 N.W. 991 (1902).

²⁸⁴ *Hannan v. Harper*, 189 Wis. 588, 208 N.W. 255 (1926).

²⁸⁵ See note 268 *supra*.

²⁸⁶ MICH. STAT. ANN. c. 8, sec. 3 (9) (1948).

²⁸⁷ *Minnis v. Newbro-Gallogly Co.*, 174 Mich. 635, 140 N.W. 980 (1913).

²⁸⁸ *Charter v. Maxwell*, 132 W. Va. 282, 52 S.E.2d 753 (1949); *Lamp v. Jones*, 94 W. Va. 586, 119 S.E. 676 (1923); *Harvey Coal & Coke Co. v. Dillon*, 59 W. Va. 605, 53 S.E. 928 (1906).

²⁸⁹ BLACK'S LAW DICTIONARY 299 (4th ed. 1951).

²⁹⁰ *Harvey Coal & Coke Co. v. Dillon*, 59 W. Va. 605, 621, 53 S.E. 928, 935 (1906).

chapter 36, article 4, section 16 of the Code of West Virginia, above quoted, does not make the lease covenants mentioned in this article run with the land. Those covenants will only run with the land in West Virginia if they ran at common law. This conclusion is consistent with the language of section seventeen of this article.²⁹¹

This conclusion seems to be true in so far as regular leases for the use of property are concerned, but there is a good argument for the view that it is not true where coal, oil or gas leases, mineral leases, are concerned. In such leases the lessee does not purchase the use of the land only, with the lessor expecting to get the premises back at the end of the term in substantially the same condition as at the beginning of the term, reasonable wear and tear excepted; but on the contrary, the lessee bargains for and gets the right to take valuable minerals out of the ground. There is ample authority, especially in West Virginia, that such minerals are a part of the real estate,²⁹² and minerals in place are included in the general term "land".²⁹³ In fact, a conveyance of land without any reservation includes the underlying minerals as a part of the land.²⁹⁴

So it would seem that in a mineral lease a part of the land is conveyed, and it has been held than an oil and gas lease, investing the lessee with the right to remove all the oil and gas in place in the premises, is, in legal effect, a sale of a portion of the land,²⁹⁵ and the same has been held to be true in the case of timber, coal or iron ore.²⁹⁶ So a guardian, who has ordinary power to lease any of his ward's property of such character as makes it the subject of a lease,²⁹⁷ cannot lease the land of his ward for the purpose of developing the oil in the land without the approval of the court, as required by statute for the sale of the ward's real estate.²⁹⁸

A further argument in favor of the view that mineral leases are to be distinguished from conventional leases for the use of land

²⁹¹ W. VA. CODE c. 36, art. 4, § 17 (Michie, 1949). In this section it is provided that the legal scope and effect of the covenants mentioned in the article and the persons by and against whom they may be enforced shall be determined according to the rules of law applicable to such cases.

²⁹² Selvey v. Grafton Coal Co., 72 W. Va. 680, 79 S.E. 656 (1913); Reynolds v. Whitescarver, 66 W. Va. 388, 66 S.E. 518 (1910); Wilson v. Youst, 43 W. Va. 826, 28 S.E. 781 (1897).

²⁹³ Kennedy v. Ohio Fuel Co., 84 W. Va. 585, 591, 101 S.E. 159 (1919).

²⁹⁴ *Id.*

²⁹⁵ Jamison Coal & Coke Co. v. Carnegie Natural Gas Co., 77 W. Va. 30, 87 S.E. 451 (1915); Wilson v. Youst, 43 W. Va. 826, 28 S.E. 781 (1897); Williamson v. Jones, 39 W. Va. 231, 19 S.E. 436 (1894). See also Updegraff v. Blue Creek Coal & Land Co., 74 W. Va. 316, 81 S.E. 1050 (1914)

²⁹⁶ Rymer v. South Penn Oil Co., 54 W. Va. 530, 46 S.E. 559 (1904); Williamson v. Jones, 39 W. Va. 231, 19 S.E. 436 (1894).

²⁹⁷ Logan Planing Mill Co. v. Aldredge, 63 W. Va. 660, 60 S.E. 783 (1908).

²⁹⁸ Lawson v. Kirchner, 50 W. Va. 344, 40 S.E. 344 (1901); Wilson v. Youst, 43 W. Va. 826, 28 S.E. 781 (1897).

is found in the West Virginia Statute of Conveyance where it is provided as follows:

“No estate of inheritance or freehold, or for a term of more than five years, in lands, or any other interest or term therein of any duration under which the whole or any part of the corpus of the estate may be taken, destroyed, or consumed, except for domestic use, shall be created or conveyed unless by deed or will.”²⁹⁹

The legislature, in this statute, saw fit to distinguish between a lease granting the power to take a part of the land, as is granted in a mineral lease, from one merely giving the right to use the premises, by placing the former type in the same category as a conveyance of an estate of inheritance or freehold, while the latter type, if for a term of five years or less, can be created or conveyed by an instrument of lesser dignity than a deed or will. This same distinction between the two types of leases is made in the statutes which provide that certain conveyances are void as to creditors and purchasers until recorded.³⁰⁰

However, at the same time that the West Virginia court was holding that the lessee's interest in a mineral lease was land or real property,³⁰¹ it was also holding that such an interest was a chattel real or personal property.³⁰² These holdings are not altogether inconsistent in view of the nature of a chattel real interest, since such an interest is neither real nor personal property and has some of the elements of both.

There is undoubtedly one flaw in holding that a mineral lease is a sale of the minerals in place, and that is apparent in the language of the court in *Lawson v. Kirchner*,³⁰³ where the court stated,

“The second objection that the court was without the power to lease, but could only sell infant's real estate or some portion thereof is met by the fact that the lease of a tract of land for oil and gas purposes is a conditional contingent sale of the oil and gas in place; that is real estate. *Williamson v. Jones*, 39 W. Va. 231; *Wilson v. Youst*, 43 W. Va. 826. The title is inchoate and dependent on the finding of the oil and gas by the purchaser in a limited number of days. The sale never becomes absolute and fully consummated until the conditions thereof are fulfilled, and the contingency on which consum-

²⁹⁹ W. VA. CODE c. 36, art. 1, § 1 (Michie, 1949).

³⁰⁰ *Id.* c. 40, art. 1 §§ 8, 9.

³⁰¹ See cases in note 295 *supra*.

³⁰² *Toothman v. Courtney*, 62 W. Va. 167, 58 S.E. 915 (1907); *Harvey Coal & Coke Co. v. Dillon*, 59 W. Va. 605, 53 S.E. 928 (1905); *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S.E. 688 (1896).

³⁰³ 50 W. Va. 344, 40 S.E. 344 (1901).

mation depends happens, and if they fail by reason of the default of the purchaser the sale is at an end. *Steelsmith v. Gartin*, 45 W. Va. 27. While it is a sale of real estate so far as the lessors are concerned, it is only of such part thereof as the lessee may be able to find and convert into personalty.³⁰⁴

This case recognizes the fact that, at the most, a mineral lease is not an unconditional sale of real estate or a part thereof. The court had previously held that what title as was passed in such a lease was an inchoate title; and if no minerals were found, no estate would vest in the lessee. His title, whatever it was, ended when the unsuccessful search was abandoned.³⁰⁵

The language of the court in the cases holding that a mineral lease is a sale of real estate seems to be too broad. While this type lease is of an entirely different character from the conventional type lease, it is not to be distinguished on the ground that it constitutes a conveyance of real estate while the conventional lease constitutes a conveyance of personal property. For example, not only is a sale of the oil and gas in place impossible, since the owner of the land has no property in, or title to, the oil and gas until it is reduced to possession, and he cannot pass title to something which is not ascertained or determined;³⁰⁶ but he does not purport to sell it or pass title to it, but only the right to take the oil and gas. There is not even an apparent intent in a mineral lease to pass a defeasible title to the minerals. If, indeed, there was a sale of the oil and gas, or coal, in place, and in the case of the last named mineral such a sale is possible, there would be no reversion in the grantor as there certainly seems to be as to any minerals not reduced to possession at the end of the term.

So, logically, a mineral lease is only what it purports to be, that is, a right for a period of time to enter and search for minerals and convert them into personalty.³⁰⁷ And the later West Virginia cases hold that such leases create for the lessee a chattel real or personalty.³⁰⁸

³⁰⁴ *Id.* at 347, 40 S.E. at 345.

³⁰⁵ *Steelsmith v. Gartin*, 45 W. Va. 27, 29 S.E. 978 (1898).

³⁰⁶ *Blanchard v. Law*, 164 Mass. 118, 121, 41 N.E. 118, 119 (1895).

³⁰⁷ In *Harvey Coal & Coke Co. v. Dillon*, 59 W. Va. 605, 621, 53 S.E. 928, 935 (1905), the court stated, "We have always thought that these instruments, whatever their form, since they only give the right to produce minerals out of the owner's soil, leaving him to all intents still the owner of the land and all minerals still in the ground, though the land may be leased, were simple leases, conveying chattel interests. . . ."

³⁰⁸ *Charter v. Maxwell*, 132 W. Va. 282, 52 S.E.2d 753 (1949); *Drainer v. Travis*, 116 W. Va. 390, 180 S.E. 435 (1935); *Lamp v. Jones*, 94 W. Va. 586, 119 S.E. 676 (1923); *Fruth v. Board of Affairs*, 75 W. Va. 456, 84 S.E. 105 (1919).

The view that the lessee in a mineral lease has a chattel interest or personal property, and that the instrument of lease in such case is not a conveyance of land but a conveyance of a chattel interest in land, is not necessarily inconsistent with the above-mentioned statutes.³⁰⁹ Those statutes do not show a legislative intent that a conveyance of an interest or term under which a part of the corpus of the estate may be taken should be considered a conveyance of real estate, but rather evidence an intent that such a conveyance should be made by an instrument having a certain dignity or formality and, since it affects the value of the estate in the hands of future owners, it should be recorded to protect creditors and purchasers. The same intent is shown in regard to leases for terms of more than five years, since they too take a substantial bite out of the fee.

Therefore, it is submitted that leases, whether they be of the conventional type or mineral leases, are not conveyances of land within the meaning of chapter 36, article 4, section 16 of the Code of West Virginia, and that that statute does not, of itself, make any covenant in leases run with the land.³¹⁰

That this statute applies only to those covenants in the article having to do with conveyances of freehold estates is further borne out by the fact that this statute was suggested to the legislature by the revisers of the code, and the revisers' note following the statute states,

"There is a conflict of authority in the United States as to whether certain covenants, such as those of 'right to convey' and 'against encumbrances' can be enforced by anyone except the original grantees. Many of the states by statute, and others by decision, have adopted the view that these covenants would be more useful if they would run with the land. The same observation applies to the covenant of seisin, which, while not mentioned in our statute, might be used in a deed."³¹¹

From this note it appears that the revisers intentionally limited the effect of the statute by inserting the phrase "when used in a conveyance of land", since all the covenants mentioned by the revisers in their note have to do with conveyances of freehold estates and not leases, and since the revisers spoke in terms of certain covenants "such as" those covenants, probably meaning

³⁰⁹ See notes 299 and 300 *supra*.

³¹⁰ But see 5 MICHIE'S JUR., Covenants §§ 12, 17 (1950), where a contrary view is apparently taken without an analysis of the statute.

³¹¹ See note 252 *supra*, for authority that revisers' notes are entitled to weight where the language of a statute is obscure.

those covenants and others of the same class. A further indication that this was the intent of the revisers lies in the fact that there is a split of authority in the United States as to whether the covenants they named, the covenants of seisin, right to convey, and against encumbrances, run with the land. The view that they do run has been adopted by the textbook writers, and occasionally a statute specifically provides for their running.³¹² The same is not true in regard to the lease covenants mentioned in this article of the Code.

Conclusion

As a result of the foregoing discussion, it seems reasonable to conclude that the common law rules in regard to the running of covenants in leases prevail in West Virginia, since they have apparently not been changed by any legislative enactments in that field.

As a general proposition, it can be said that both the benefits and the burdens of such covenants run with the land in West Virginia since they both ran at common law, but it is possible in certain instances for one to run without the other running.

The rule in *Dumpor's Case* to the effect that where there is a covenant in a lease not to assign the lease without the consent of the lessor coupled with a condition subsequent giving the lessor a right to reenter and terminate the lease in case of a breach of this covenant, or where there is a condition against assignment of the lease without the lessor's consent, one consent by the lessor will ordinarily discharge the covenant or condition whether assigns are named in the lease or not, is a part of the common law and is effective here.

Chapter 36, article 4, section 16 of the Code of West Virginia, could be so amended as to include expressly the lease covenants mentioned in that article, and the only changes in the law of running of covenants would be a repudiation of the rule in *Dumpor's Case* and the covenant not to assign without the consent of the lessor would run with the land in certain instances where it does not do so now. This would probably be consistent with the intent of the parties in many instances. A repudiation of the rule in *Dumpor's Case* would be, in the writer's opinion, a progressive move. As has been seen, that rule has been criticized in some jurisdictions, repudiated in others and misunderstood and mis-

³¹² 4 TIFFANY, REAL PROPERTY § 1022 (3d ed. 1939).

applied in many instances; and the rule has been abrogated by statute in England where it originated.³¹³

The West Virginia court, in its consideration of the cases in this field, has generally reached the correct result in its holdings, although there is language in the cases which might very well lead to incorrect results in the future if the court is inadvertently persuaded that that language represents correct statements of the law.

³¹³ See notes 196, 197 and 200 *supra*.