

# REVIEWS

REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND." By Charles E. Clark. Chicago: Callaghan & Co., 1947. Pp. iv, 310. \$6.00.

THIS second edition of Judge Clark's classic little book is designed to serve the same purpose as the first: to bring clarification to that peculiarly obscure body of doctrine and practice known as the law of "rights in the land of another." The first edition was hailed, despite its brevity, as one of the few great law books of our time;<sup>1</sup> this new edition merits and is receiving similar acclaim.<sup>2</sup> In the first edition the author, restricting himself largely to the problem of "the transferability of those non-possessory interests in land traditionally known as incorporeal hereditaments," announced his aim as being "to state clearly the conflicting views of policy" and "to set forth a more accurate historical perspective, particularly in the law of covenants running with the land where it is believed that false notions of history have hampered the development of a consistent modern doctrine."<sup>3</sup> In the present edition he elaborates his purpose as, not "reform or rewriting," but "clear exposition," "exposition and clarification through analysis of precedents."<sup>4</sup> This objective will not be scorned by scholars and practitioners who are concerned to preserve the widest possible scope for private agreement and to make private agreement a more effective instrument of land planning and development in individual and community interest.

In structure and thought the book remains much the same, though its substance is vastly enriched by a new chapter, three appendices, new critical comments in the old text, and extensive new citations to cases, statutes, articles, and books. The original chapters on licenses, the running of easements and profits, the running of real covenants, party-wall agreements as real covenants, the running of equitable restrictions, and the running of rents, are presented in their original order, without important change, and the principal instruments of clarification are still incisive use of Hohfeld's dichotomy between "operative facts" and "resulting legal interests," a vigorous scalpel on "false notions of history," and a Connecticut Yankee's wise intuition of relevant community policy. The new chapter, on "Legislative Restriction of Running Interests," eloquently urges reform by way of statutory time limit on restrictions of all

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1. The reviews are collected in Farnham, Book Review, 33 CORN. L. Q. 153 n. 1 (1947).

2. Farnham, note 1 *supra*, and Tefft, Book Review, 15 U. CHI. L. REV. 490 (1948). See also Book Reviews by Sims, 33 A.B.A. J. 1130 (1947); Jones, 61 HARV. L. REV. 376 (1948), Schuyler, 42 ILL. L. REV. 833 (1948); Bailey, 64 L. Q. REV. 272 (1948); Carnahan, 7 LAW. GUILD REV. 232 (1947); Rapacz, 32 MINN. L. REV. 94 (1947); Conard, 23 N.Y.U.L.Q. REV. 371 (1948); Roberts, 96 U. OF PA. L. REV. 301 (1947).

3. Preface (1st ed.), p. v.

4. P. 9.

forms.<sup>5</sup> The appendices contain the author's magnificent demolitions, previously published in this Journal<sup>6</sup> and the *Cornell Law Quarterly*,<sup>7</sup> of some of the ill-founded archaisms of the Restatement of Servitudes. With pardonable pride, the author observes "all conclusions previously stated have been thoughtfully reconsidered; but, whether because of the author's obstinacy of belief or because of their fundamental soundness, such a reconsideration afforded conviction that no changes of substance should be made in those conclusions."<sup>8</sup>

It is obvious, however, that the author's "conclusions" have not succeeded in bringing clarification to this important domain of doctrinal strife. Apart from unslaked bewilderment in judicial opinion and decision<sup>9</sup> and the insistent demand of reviewers of the new edition for still further clarification,<sup>10</sup> the most striking and compelling evidence of continued confusion is that prime object of the author's animus, The Restatement of Property, Division V, Servitudes. Prepared after the appearance of Judge Clark's first edition and published with all the authority of the American Law Institute, this volume offers a complicated body of black-letter doctrine which utterly ignores the Hohfeld distinction between "operative facts" and "legal consequences," rejects Judge Clark's policy preference for reasonable restrictions as instruments of land planning, and invents some new and "false notions of history" all its own. Thus, this authoritative volume distinguishes between "possessory" and "non-possessory" interests by the "presence or absence of the exclusive privilege of occupation" and,<sup>11</sup> similarly, distinguishes between easements and licenses by criteria in which the purported distinguishing characteristics are the very questions in issue. An easement as defined by the Restatement is an interest in land in the possession of another which (a) entitles the owner of such interest to a limited use or enjoyment of the land, (b) entitles him to protection as against third parties, (c) is not a normal incident of the possession of any land possessed by the owner of the interest, and (d) is capable of creation by conveyance.<sup>12</sup> A license is said, in supposed contrast, to denote an interest in land in the posses-

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5. Note how the author's discussion and recommendations in this chapter cut across all traditional categorizations.

6. 52 YALE L.J. 699 (1943); 53 YALE L.J. 327 (1944).

7. 30 CORN. L. Q. 378 (1945).

8. Preface (2d ed.), p. iii.

9. Some of the cases are collected in McDUGAL AND HABER, *PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING, AND DEVELOPMENT* c. IX (1948). For excellent example, see *Frye v. Sibbett*, 145 Neb. 600, 17 N.W. 2d 617 (1945), noted, 13 U. CHI. L. REV. 202 (1945).

10. See note 2 *supra*. Note especially Jones and Tefft who renew Chafee's earlier demand for a clarifying statute. Chafee, Book Review, 43 HARV. L. REV. 334 (1929). It is sometimes forgotten that legislation cannot bring rationality to practice in the absence of a real clarification of community interests, the de-mystification of technical ambiguities, and the establishment of agencies of administration competent to give effect to clarified policies.

11. RESTATEMENT, PROPERTY 2897 (1944).

12. *Id.* at § 450.

sion of another which (a) entitles the owner of the interest to a use of the land, (b) arises from consent, (c) is not incident to an estate in the land, and (d) is not an easement.<sup>13</sup> When the issue before a court is whether a party has the privilege of exclusive occupation, or whether an interest entitles the owner to protection against third parties, or whether an interest is subject to the will of the possessor of the land, these criteria are not likely to be very helpful; on other issues, the probabilities that courts might reach such and such results on these issues may or may not be relevant. The Restatement's strong hostility to private agreement as an instrument of land planning appears at its boldest in some of the sections in Part III, "Promises Respecting the Use of Land." Here are stated, as Judge Clark tellingly documents, inhibitory requirements of "privity of estate" and "touch and concern" such as were never before seen in book or opinion.<sup>14</sup> These requirements become somewhat farcical, however, when in subsequent sections there are stated doctrines for "equitable obligation" which explicitly reject both antiquated mysticisms.<sup>15</sup> It can safely be ventured that Judge Clark, with all his strong language, has only begun to probe the vulnerabilities and clarify the obscurities of the Restatement of Servitudes.

With all deference to a great educator become one of our greatest judges, it may be suggested that Judge Clark himself does not always escape the bogs of semantic confusion. Though in many instances he explicitly recognizes that "easements," "licenses," "profits," "covenants running with the land," "equitable servitudes," and so on, are largely functional equivalents in comparable contexts,<sup>16</sup> the basic organization of his book is still, as indicated above, in terms of these traditional technical distinctions. In defining "license" he insists upon a clear distinction between "physical operative facts" and "resulting legal interests" and states a preference for a definition in terms of "operative facts," but overlooks that it is courts who make facts "operative" and offers a five-fold classification of licenses ("mere license," "always 'revocable'"; privilege plus a power of extinguishing a legal interest; privilege accessory to exercise a power, etc.) which is in considerable measure in terms of legal consequences.<sup>17</sup> He apologizes for the distinction between easement, "considered as if attached to the land itself so as to pass with it," and real covenant, "passes only to successors to the estate," as one "in theory,"<sup>18</sup> but does not pursue his insight. He makes "possession" (fact or legal consequence?) the test of a "possessory interest" and in denying the creation of such an interest in certain instances he suggests that "historically it would seem clear that the seisin of the servient estate would not pass in such situation" and explains that "this appears

13. *Id.* at § 512.

14. *Id.* at §§ 534, 537.

15. *Id.* at § 539 *et seq.* We do not ignore an attempted distinction between liability as "promisor" and liability in equity. The confusion in this distinction is particularly transparent in Rundell, *Judge Clark on the American Law Institute's Law of Real Covenants: A Comment*, 53 *YALE L. J.* 312 (1944).

16. Pp. 24, 36, 173, 176.

17. Pp. 15, 25.

18. Pp. 65, 93.

to be as satisfactory an answer as is possible, since the line must be drawn somewhere."<sup>19</sup> Though he inveighs admirably and mightily against "privity of estate," apparently he would preserve that other barnacle, "touch and concern." He approves a verbalism taken from Dean Bigelow as "a scientific method of approach to the problem which seems to afford the most practical working tests." The method is described as "a measuring of the legal relations of the parties with and without the covenant: If the promisor's legal relations in respect to the land in question are lessened—his legal interest as owner rendered less valuable by the promise—the burden of the covenant touches or concerns that land; if the promisee's legal relations in respect to that land are increased—his legal interest as owner rendered more valuable by the promise—the benefit of the covenant touches or concerns that land."<sup>20</sup> It should be reasonably obvious that this test is completely circular: if the court holds a covenant enforceable, the promisor's legal relations are lessened, his interest as owner rendered less valuable, and the promisee's legal relations are increased, his interests as owner rendered more valuable; aliter, if the contrary decision. Certainly there is nothing in the formula which offers any intelligible policy for drawing a line between agreements which should and should not run. Though, for a final example, he recognizes that "there will be numerous cases where the doctrines of covenants and restrictions overlap, and where the plaintiff should have a remedy under either doctrine,"<sup>21</sup> he does not equate "legal" and "equitable" interests in the comprehensive way that our procedural and recording reforms, and any rational policy, demand.

All this continued confusion suggests that such instruments as the Hohfeld dichotomy, a few pungent lessons in legal history, and a simple contraposing of polar policies of "unincumbered titles" and "permanence of development of land," as useful and as advanced over previous insights as they are, are not alone adequate to bring clarity and rationality into the obscurities and vagaries of "rights in the land of another." A more comprehensive theory and something more than theory, to wit, new institutions of administration, may be required. Elsewhere the reviewer, with others, has suggested the vague outlines of such a theory and measures.<sup>22</sup> This theory begins with the recognition that the traditional technicalities, "possessory interest," "easement," "license," "profit," "covenant running with the land," "equitable servitude," and so on, make a completely confused reference to facts, to official responses to facts, and to relevant policies, and that operational meaning can be given to such technicalities only by locating them in context. This context includes community officials responding to a great variety of *controversies*, where the identifications

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19. Pp. 90, 91.

20. P. 97.

21. Pp. 131, 131.

22. McDUGAL AND HABER, *op. cit. supra* note 9, c. IX. The inadequacies of Hohfeld's dichotomy are indicated on p. 28.

and demands of the parties are quite different ("cases between the immediate parties when the issue was whether an enforceable agreement ever had been made, cases where it was assumed that an enforceable agreement had once been made between the original parties but raising questions of what protection should be given to this agreement against third parties, cases involving the assignability of the benefits of an agreement, cases requiring a determination of the rights and duties of the parties with respect to matters which they did not anticipate in their agreement, cases involving the termination of a once enforceable agreement, and cases concerning the subjection of private agreements to specific claims or general regulation by the community"), about *agreements* purporting to segmentize in infinite ways the continuum of possible uses of land that the community will protect, on *facts* involving very different kinds of *uses* (habitation, productive, servicing, governmental) and hence very different *objectives* of the parties, or different forms of "*land*" (surface, air, light, water, minerals, oil, sub-surface, etc.), or different *durations* (temporary, specified period, indefinite, permanent), or different numbers of *users* (public generally, specified private parties) or different forms of *evidence* of the agreement (non-verbal behavior, oral permission, action in reliance, unsealed writing, sealed writing, language of promise, language of grant), and using the traditional technicalities now as semantic equivalents, and again as opposites, to effect various distributions of individual and community values. An exposition which seeks to clarify the objectives of community intervention in this process, making wise choice between, and giving concrete detail to, such high level prescriptions as "unincumbered alienability" or "reasonable permanency in land planning and development," must make at least the minimal discriminations indicated above and identify such other variables, in different specific institutional contexts, as may be significant for determining what wise community policy may be in such contexts. Once policies are so clarified, an observer—making the same discriminations—may study in detail trends in official response, appraising their compatibility with such clarified policies, and noting with a new precision any differences in response that vary with different technical and policy arguments or with other environmental and predispositional factors. With the trends and conditions of official decision, and incompatibilities with community policies, so ascertained, it may become relevant to consider, not doctrinal purification alone, but a whole range of alternatives as rational means to a more effective securing of individual and community interest. It could be found that what private agreement needs most to make it efficient is an effective framework of public controls (to set basic design and minimum standards and to prevent irrational movement away from basic design), and that the task of clarifying and implementing community objectives is not one which can be performed once and for all, by rigid doctrinal prescriptions such as arbitrary time limits, but requires rather flexible doctrine and a continuous, expert supervision of constantly changing variables. The most effective reform of "rights in the land of another" might be the adminis-

tration in the first instance of private agreement, from creation to termination, by the same public officials who are charged with the duty of effecting a rational general plan by public controls. It is unlikely that Judge Clark would disagree with these proposals.<sup>23</sup> It is to be hoped that in his third edition he may bring his surpassing acuity and powerful rhetoric to their militant advocacy.

MYRES S. McDOUGAL†

THE LEGACY OF SACCO AND VANZETTI. By G. Louis Joughin and Edmund M. Morgan. New York. Harcourt Brace & Company, 1948. Pp. xvii, 598. \$6.00.

MORE than twenty years have passed since Nicola Sacco and Bartolomeo Vanzetti, convicted of murder in connection with a payroll holdup twelve miles south of Boston, were put to death by the Commonwealth. A generation new to the facts and concerned with the administration of justice from a moral and social point of view is now presented with a highly readable and scholarly study and evaluation of a case which still has profound reverberations and significance on current issues.

In an unusual type of collaboration, Professor Joughin of the New School for Social Research, a scholar in the field of literature, and Professor Morgan of the Harvard Law School, bring historical perspective to bear on the case. They examine respectively the social and literary impacts and the legal aspects of the case. Conclusions arrived at and formulated separately about the law, society and literature receive integrated consideration in a concluding chapter and are presented, with cautious avoidance of overstatement, as "the beginnings of historical judgment."

In dealing with the legal features of the case, Professor Morgan analyzes in some detail the records of the Plymouth and Dedham trials, the numerous motions for a new trial, the two hearings before the Supreme Judicial Court of Massachusetts, the petition for executive clemency and the hearings and decisions of the Advisory Committee which was headed by President A. Lawrence Lowell of Harvard. His conclusion is that Sacco and Vanzetti "had a trial according to all the forms of law, but it was not a fair trial"; they were "the victims of a tragic miscarriage of Justice."<sup>1</sup>

The failure of the legal system in the case is ascribed by Professor Morgan to a tragic combination of an incompetently handled defense, a biased and prejudiced judge, and "an astute and able prosecutor whose ideals and practice did not require him either to present before the court or to disclose to counsel for the defense competent and testimonially qualified witnesses whose evidence would help the accused and damage the claims of the state—a prosecutor who

23. Note his comments on "Possibilities of Reform in the Law," pp. 9-12.

† William K. Townsend Professor of Law, Yale Law School.

1. P. 157.