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Alvin E. Evans  
*University of Kentucky*

James W. Martin

W. Lewis Roberts  
*University of Kentucky*

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BOOK REVIEWS

RESTATEMENT OF THE LAW OF PROPERTY, VOLUME V (SERVITUDES).
BY THE AMERICAN LAW INSTITUTE PUBLISHERS, St. Paul, May 12, 1944, pp. iii-3354.

This is the last of five volumes restating the law of Property. Volume I applies to Freehold Interests. The second and third volumes deal with Future Interests. The fourth volume is concerned with Perpetuities and other Social Restrictions.

That leaves it for this volume to embrace the law of Servitudes, and includes easements, their creation, their extent, their transmission and extinguishment. The third part covers the problems involved in promises respecting the use of land and the running of benefits and burdens.

It is rash for one who has been a long time away from this subject matter to attempt to weigh the work of experts. With this apology, this reviewer submits certain observations for whatever they may be worth.

First, the reviewer regrets more than is readily expressible, the fact that no such analysis was in existence when he was a student and in his earlier years when he was attempting to teach Property and Equity courses involving servitudes.

This treatise clarifies the law of servitudes. For busy courts and practicing lawyers, it affords a succinct and readable, though exhaustive, discussion of the various situations that arise or are likely to spring up, and a rationalization of the rules that have been applied in the past. For law teachers and students it affords a mine of materials for speculation. It also makes possible a grasp of the larger problems involved which is probably never obtained from a mere study of the limited number of cases and authorities possible in Property courses. The authors have manufactured pat illustrations in practically all situations in preference to the use of the actual decisions. This practice tends to create a false impression of simplicity. The authors, however, wished to frame an understandable text and there is indeed merit in that. On page 3017 there is a good example of the application of the objective construction of language.

Two sections, 534—“Privity between Promissee and Promisor,” and 537—“Relation between Benefit and Burden,” and perhaps a third, section 540—“Running of Burdens,—Liability to Lien,” have given rise to a somewhat heated controversy between Reporter Rundell and United States Judge Charles E. Clark, former Dean of the Yale Law School. Judge Clark, having written a small book several years ago on “Covenants and Interests Running with Land,”

Cf. p. 3032.
was one of the group advisers on servitudes and has always been critical of American Law Institute methods.³

Section 534 deals with succession to burdens running with land and binding on the title holder. Rundell and the Restatement maintain that the burden of promises cannot run unless there is some relationship between the original promisor and the original promisee at the time when that promise was made. This relationship is called "privity of estate." Thus, the running of burdens differs from the running of benefits, which latter does not require privity of estate. Judge Clark declares that privity is not required in either case and insinuates that Rundell has made up his law out of his own concepts of policy, which concepts are not supported by the case law. In his rebuttal he makes short shrift of a New Jersey case quoted at length by Rundell⁴ as setting out his own reasoning. Clark speaks of being governed by the dictum of a New Jersey judge many years ago, expressing vague and unreal fears of encumbrances.⁵ He cites the authority of Mr. Justice Holmes in his work on the Common Law against the requirement of privity.⁶ Mr. Rundell replies, however, that Holmes was concerned primarily with the running of benefits, with which Section 52 (now Sec. 534) is not concerned. "Hence while what Justice Holmes said may have some logical relevancy to the rule of Section 52, it can have little historical connection with it." Clark thinks⁷ that Lord Kenyon who, in Webb v. Russell,⁸ by way of dictum, says Clark, asserted that there must be privity, was "a reactionary and dullish judge." Presumably Clark believes this is sufficient to condemn the proposition. On the other hand, Rundell⁹ says that, although he may have been reactionary, Lord Campbell found him to be "a man of wonderful quickness of perception" and credits him with being a "skillful conveyancer." And so it goes.

Respecting Section 537, Rundell thinks that in order for the burden to run against the owner of one tract, there must be a benefit to some land resulting from the performance of the promise, that is, the promise must touch and concern land. Clark says: "It is not now usual to lay down general rules making the validity of land interests turn on such speculation, or, indeed, to outlaw out of hand, and before the case has arisen, what parties naturally and under-


⁵ Clark, The American Law Institute's Law of Real Covenants (1943) 52 YALE L. J. 699, at 705.


⁷ Clark, supra, n. 5, at 705.

⁸ 3 T. R. 393 (K. B. 1789).

⁹ Rundell, supra, n. 3, at 324.
standably may wish to do." To this Rundell rather sensibly replies: "The problem is not 'what can parties do with their own' but 'what can parties to a promise do to persons who are not parties?'"

Another divergence in point of view is the emphasis placed by the Restatement upon the difference between promises running in law and those running in equity only. Clark minimizes this, which to Rundell seems to be significant. Again Rundell believes that Clark minimizes the importance of the device of a lien to secure the performance of a promise, which problem is the burden of Section 540.

Probably no one outside the membership of advisers is really qualified to pass on these issues. To this reviewer, however, Rundell seems to speak advisedly and Clark's criticism seems to be somewhat captious. The illustrations at the bottom of page 2993 (and see page 2997) seems to suggest that morning perambulations across one's neighbor's lawn might have a different result from similar crosscuts made in the afternoon. The illustration (page 3002) suggesting that an adverse use for a footpath by a family (presumably of two) may develop a right to use the same by five families (perhaps of eight children and two parents to each family) is interesting. The word "permitted" (line 10, page 3077) seems unusual. Why speak of "permitting" an owner to abandon an easement? The matter of giving legal effect to an abandonment is scarcely a question of permitting one to abandon.

One would probably not infer from the Restatement and the always pat illustrations in it, that the promises with which this treatise deals are practically limited to four classes, as Clark urges they are: (1) Promises to keep physical structures in repair; (2) promises for adjusting rights in party walls; (3) promises likewise for the adjustment of water rights and charges; and (4) promises to pay assessments to cover any of these matters.

A few stylistic qualities are noted. "A promise is a promise," says the Restatement. On one page, for example, the word "promise" is used 14 times and frequently interspersed along are also the words "promisor" and "promissory." Conceivably this may be unavoidable, but it is boresome. The authors are friendly to the split infinitive, nor do they show disfavor to the "all is not gold that glitters" type of denial, e.g., "all things are not" intended to mean

*Clark, The American Law Institute's Law of Real Covenants (1943) 52 YALE L. J. 699, at 702. See also Rundell, supra, n. 3, at 328.

+ Rundell, supra n. 3, at 314.

Cf. Clark, supra, n. 9, at 702-704.

See Rundell, supra, n. 3, at 317-319.

See Clark, supra, n. 9, at 713; Rundell, supra, n. 3, at 319-322.

P. 3258, 3259 and elsewhere.

P. 3294.

P 2977.

P. 2955.
“not all things are.” In illustration 6, page 3107, wouldn’t it be better usage to omit “of” before “whether” or else insert the words “the question” before “whether”?

If this review were not too long already, it would be a pleasure to comment upon certain matters involved in the discussion of adverse possession, the refusal to indicate the better view where caveats are inserted, and the matter of apportionment,10 which seems to involve the possible issue of a splitting of a cause of action.

All in all, this volume is a fine specimen of legal writing in a difficult terrain and is a creditable product of the efforts of the American Law Institute.

Chancellor Kent once said: “A new digest of the whole body of American law upon the model of Comyn’s Digest would be very pleasing.” It would be interesting to know what Kent would say about the American Law Institute’s treatises.

Alvin E. Evans


To meet the demands of practicing lawyers, The Lawyers Co-Operative Publishing Company is offering a thirteen hundred page treatise on the rights and benefits of veterans. The book contains all federal legislation on the subject enacted prior to January 1, 1946; federal regulations developed under federal enactments; a summary of all state laws pertaining to veterans; and addresses and lists of officers and agencies connected with the enforcement of such rights and benefits.

The following chapter headings give some idea of the scope of the principles covered: 1. General Provisions and Principles Governing Benefits; II. Administration of Benefits; III. Discharge; IV. Payments and Settlements Upon Discharge; V. Employment Rights and Preferences; VI. Unemployment Benefits; VII. Education, Training and Rehabilitation; VIII. Loans; IX. Insurance; X. Payments and Settlements Upon Death in Service; XI. Burial of Servicemen and Veterans; XII. Property Effects and Estates; XIII. Pensions and Compensation; XIV. Retirement Pay; XV. Hospital, Medical, etc. Care; XVI. Rights Relating to Taxes and Fees; XVII. Protection Against Legal Proceedings, etc; XVIII. Miscellaneous Benefits; and XIX. Crimes and Penalties. The authors have given, under these heads, a complete statement of the law covering veterans’ rights and benefits and have shown how veterans can avail themselves of them. The text material is well supplied with footnotes and citations. All necessary forms are set forth.

Any lawyer will find this volume well worth having.

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10 Secs. 536 and 551.

This book, just off the press, together with another of 1277 pages, published also in 1946, purports to embrace the statutes, regulations, forms and procedure relative to the various privileges of veterans arising from their service. There are twenty-one chapters, among the more important being the veterans insurance, reemployment and employment preferences, civil relief, income tax, provision for dependents, disability compensation, surplus property, and perhaps naturalization and military and naval academy appointments. This reviewer, as adviser to one of the selective service boards, finds the book a ready help in time of trouble.

Alvin E. Evans


This pamphlet, in a manner calculated to aid an attorney in advising clients, sketches the federal tax implications of several business problems, among the specific issues discussed from the tax angle are these: (1) Should a partnership or a corporation be organized; in either case, what sort? (2) What fiscal year should be selected? (3) What should be the capitalization structure of the corporation? (4) Under what circumstances should the form of business organization be changed? (5) What are the benefits of foreign trade? (6) How should one plan for the protection of his estate? (7) What precautions should be observed in buying or selling a business?

James W. Martin

Le Problème Du Droit International Américain, Etudie Spécialement À La Lumière Des Conventions Panaméricaines De La Havane, Par M. M. L. Savelberg, Avocat À La Haute Cour Des Pays-Bas À La Haye, A. A. M. Stols, Éditeur, 1946.

The author, M. M. L. Savelberg, should be equipped to study the problem proposed by him, being avocat à la Haute Cour des Pays-Bas à la Haye. In the first chapter he raises the question whether there exists an American international law. Then follow chapters on the evaluation of American efforts toward the codification of international law, and the convention of Rio de Janeiro relative to the situation of foreigners, the nine articles of which are reproduced.

Then comes the convention of the Pan American states on treaties with each other, held in 1928 at Havana. This is declared to be the first of its kind in history. This chapter is the longest and it reproduces all the twenty-one articles of that treaty.

Then we find chapters on the conventions regarding diplomatic agents, on consular agents, on maritime neutrality, on asylum, and on the rights and duties of a state in the case of civil war.

The author concludes, in chapter ten, that he is now ready to answer the question whether there exists a distinct American inter-
national law. He says his conclusion must be in the negative. These regulations "ne sont pas d'une importance suffisante pour justifier l'emploi de l'expression, droit international Americain dans le sens que nous y attachons."

The volume is also valuable by affording a convenient text of all the above named conventions.

**POSTWAR TAXATION AND ECONOMIC PROGRESS.** By Harold M. Groves. 1946, pp. xiv, 432.

*Postwar Taxation and Economic Progress* is one of several works promoted by the Committee for Economic Development. It covers our federal system of taxation in a thorough manner, reviews the results reached in the past and suggests changes to bring about improvement for postwar days. To bring about full production in the days to come, the author emphasises the fact that taxation should not handicap business. In summarizing the results of his labors, he says: "Taxation may be regarded as nothing but warfare between the rich and the poor, each seeking to shift a burden on the other. However, this book has sought to view it as an attempt to involve a program in the social interest—a program that will be to the advantage of all groups in the long run." (p. 378)

Professor Groves thoroughly discusses corporate taxation, a tax that has always been very popular with legislators as a method of plucking the feathers with the least squawks. He states that there are two views as to corporate taxation; (1) a tax on stockholders, (2) a sales tax in disguise, shifted to consumer, to wage earner—resulting in lower wages. He points out that it is "a double load of taxes on enterprise income, while other income bears only one such load, imposes a special penalty at a particularly strategic spot in the economic process." (p. 31) He calls our attention to the fact that the English did not make use of a business tax (a corporate tax) until 1937 and then only at a very low rate. He gives consideration of treating corporations somewhat as we now treat partnerships, an integration of business and private income taxation. He concludes that business taxes should be largely confined to undistributed profits, an element reached by the personal tax system sooner or later. After all a corporate tax is an individual tax indirectly. (p. 376)

In conclusion, the author lays down nine principles that should characterize a tax system: It should be fair, should reduce inequalities, should conserve human resources, should preserve a wide market, should preserve incentives, should be as direct as feasible, direct taxes should be widely shared, taxes should be adequate, and finally, tax reductions should be reserved for depressions and tax increases should be applied, as far as possible, during prosperity.

This is an excellent study of our federal tax system. It contains much sound advice for those drawing our tax statutes.

University of Kentucky

W. Lewis Roberts

College of Law