

JUDGE CLARK ON THE AMERICAN LAW INSTITUTE'S LAW OF REAL COVENANTS: A COMMENT

OLIVER S. RUNDELL †

IN the September number of the *Yale Law Journal*¹ Judge Charles E. Clark, former Dean of the Yale Law School and the author of *Clark on Real Covenants*,² commented unfavorably upon the form and content of the Restatement of the law of "Promises Respecting the Use of Land",³ tentatively adopted by the American Law Institute at its Annual Meeting in May of last year. The principal point of attack is that part of the Restatement which deals with the problem of the succession to the benefit or the burden, as the case may be, of such promises through succession to the land respecting the use of which they were made. As the draftsman of the part of the Restatement toward which his criticism is particularly directed the responsibility for making the response which fairness to the readers of the *Journal* requires, seems to be mine. I accept it with reluctance.

Since Judge Clark's comments are specifically directed at sections 82 and 85 of the draft submitted to the Institute,⁴ I shall try, before discussing his criticisms, to point out what it is those sections are intended to do. In any discussion of them it should, however, be borne in mind that Judge Clark's criticisms are based upon reasoning which, if valid, would call for a radical change in the treatment of the entire subject of succession to promises respecting the use of land.

Both sections 82 and 85 are contained in a chapter which deals only with succession to the burdens arising out of promises respecting the use of land. It does not deal with the problem of succession to the benefits arising out of such promises. These sections, moreover, are included in a topic of that chapter which deals only with succession to liability as a promisor upon such a promise. By liability as a promisor is meant liability

† Professor of Law and acting Dean, University of Wisconsin Law School. Reporter for subject of Servitudes to American Law Institute.

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

2. The full title is CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND", INCLUDING LICENSES, EASEMENTS, PROFITS, EQUITABLE RESTRICTIONS AND RENTS (1929). This valuable little book consists, in substance, of a collection of suggestive essays written some years earlier and published in various legal periodicals. These essays are necessary reading for all who work in the field they cover, and I have received much of my instruction in that field from them.

3. The phrase "Promises Respecting the Use of Land" comprehends promises which constitute "real covenants", but is intended also to include promises which are not, technically at least, covenants.

4. RESTATEMENT, PROPERTY (2) (Proposed Final Draft, 1943).

to judgment for damages in a suit in contract form for breach of promise. In language more familiar than that which accuracy seemed to require for Restatement purposes, one would say that these sections are contained in a topic which deals only with the running at law of the burden of covenants respecting the use of land.

With these limitations to be borne in mind, what section 82 says is that the burden of promises respecting the use of land does not and cannot pass with the promisor's land to his successors unless there was between the original promisor and the original promisee, at the time the original promise was made, some relationship with regard to the land other than that arising out of the promise itself. That relationship is commonly expressed by the use of the phrase "privity of estate." Judge Clark denies the necessity of any such relationship on the basis of authority and insists that it has no justification in policy. I think that it is in accord with both authority and sound policy.

The thought which underlies section 85 and which it is intended to express is that, for the burden of a promise respecting the use of land to pass with the land of the promisor in such a way as to cause the successor to become bound upon the promise as a promisor, there must be a benefit in the use of some land resulting from the performance of the promise or from the carrying out of the transaction of which it is a part. The rule of section 85 is a rule of policy often comprehended in the meaning intended to be conveyed by the use of the phrase "touching and concerning" the land. That policy is that succession to the ownership of land ought not to be subjected to the hazards incident to the running with land of the burden of promises respecting its use, unless there is a compensating benefit in the use or ownership of that or other land. I believe the section fairly represents the authority upon the question involved and is in accord with sound policy. Judge Clark's criticisms of it show that he understands neither its purpose nor its intended effect. His lack of understanding is undoubtedly due to inadequate explanation on my part, an inadequacy indicative in no way of lack of effort.

I am not here defending the particular wording of these sections. Doubtless the rules of law they are intended to express might be better expressed by more skillful draftsmen. I am merely defending, as I have defended before, their essential soundness against what I believe to be grave error and oversweeping condemnation.

Judge Clark's attack is based upon an assumption so wholly different from that upon which I proceed that I find, and have found it, very difficult to discuss with him the problems involved upon the basis of authority. His assumption leads him to deny the validity of distinctions which I deem to be valid and which I think any adequate analysis requires. His refusal to recognize the validity of these distinctions leads him to make what is in my opinion an improper use of authorities.

He assumes that we are here dealing with a quite commonplace problem of the succession to incumbered property. This assumption is implicit in his entire discussion. It is perhaps made as explicit as anywhere in one sentence of his article where, after referring to weird academic cases which any one may think up, and which he is, of course, suggesting I have thought up, he 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 understandably may wish to do."⁵ Of course, the thought expressed in the language quoted is hardly exceptionable when properly directed. I have on occasion used similar language. But its use in this context shows that the writer had not really perceived the problem before him. That problem is not "What can parties do with their own?" but "What can parties to a promise do to persons who are not parties?"

It is, in general, still true, as it has always been true and, one suspects, as it will long continue to be true, that the only person who is liable as a promisor upon a promise is the one who made it. That a promisor has generously included others than himself within the intended obligations of his promise does not ordinarily bring them within the scope of the promissory liability created. To give to one a power to make another a promisor is, most of us would instinctively feel, a dangerous power. Is it the less dangerous because it is limited in its scope to the successors to property owned by the promisor? Probably so, but the limitation only makes it *less* dangerous. Certainly, no one has ever supposed that the owner of a chattel could make promises which would bind his successors merely because they were his successors. Nor, with one exception, does it make any difference that the promise is made in connection with land. The purchaser of land may promise with all possible solemnity that his successors will be personally responsible for the performance of his promise. A mortgagor of land may promise earnestly that his successor will pay the mortgage. No matter how solemnly or earnestly such promises were made, the successors do not have to perform the promise.⁶ Hence, the successor to the title to land knows that, while he may conceivably lose the land unless he pays either a possible unpaid balance of a purchase price or a mortgage agreed to be paid by his predecessor, he cannot be held personally responsible for any predecessor's unwise bargains or foolish borrowings.

But there is one situation in which there has come to exist the rule that one who makes a promise in connection with land can bind his successors as promisors. That is where a promise has been made respecting the use of land. It is promises of this kind that are dealt with in the Re-

5. Clark, *supra* note 1, at 702.

6. Citation of authority for this is hardly necessary.

statement which Judge Clark criticizes. Such a rule is certainly anomalous. It also has within it the certainty of increasing the hazards incident to the acquisition of title to land and thus the possibility of interfering with the freedom with which land is alienated. Although there may be reasons which prove the desirability of such an exceptional rule of law, its anomalous character and dangerous tendency call for a more critical examination of it than is likely to result or has resulted from the benevolent complacency with which Judge Clark regards it.

One of the distinctions made in the Restatement which Judge Clark's assumption leads him at least to belittle, if not to deny, is that between the succession to the benefit of promises respecting the use of land and the succession to the obligations created by such promises. He says:

“. . . there seems no a priori reason for making a complete differentiation between the running of the benefit and the running of the burden of real covenants. If, indeed, the objections to the running of the burden of real covenants are only logical and historical, they are equally applicable to the running of the benefit of real covenants. If the objections are truly on the ground of policy, it is submitted that we cannot know what is desirable policy until we have the concrete case. Just as there are cases where mutual property adjustments point to the desirability of the running of certain burdens, so it seems obvious that certain benefits should not be allowed to pass. The situation becomes particularly anomalous if the benefit is allowed to run while the burden is not, contrary to the parties' intent that both should run mutually. Suppose various landowners get together and make a covenant to provide for the expense of irrigating their respective pieces of land and for the payment of future upkeep and cost of the irrigation. X, one of the landowners, sells out to Y and departs to another country. An absolute rule of law to the effect that Y gets the benefit of all the covenants of his neighbors as to the irrigation, but assumes no contractual obligation in the premises, seems not merely highly anomalous, but quite arbitrary. The distinctions thus attempted are but modern and confused ideas which are not substantially buttressed in case authority and not deserving of perpetuation in an American corpus juris.”⁷

I can make no better response to this paragraph than to quote language used by Judge Beasley in *National Union Bank at Dover v. Segur*⁸ nearly seventy years ago:

“The doctrine with respect to what agreements will so attach to real estate as to devolve with the title, has been a fruitful subject of discussion in the text-books, as well as in judicial opinions, and, since the various resolutions in Spencer's case, has given rise to a

7. See Clark, *supra* note 1, at 704-05.

8. 39 N. J. L. 173 (1877).

long line of decisions, which, it must be admitted, it would be difficult entirely to harmonize. But I think this discord will be found, upon a careful examination of the authorities, to prevail chiefly in other branches of the subject than in the one in which the present case is to be classed. There is such an essential difference, in social effect, between permitting a *burthen* to be annexed to the transfer of land, and the giving to a *benefit* such a quality, that the subject will unavoidably run into obscurity, unless the distinction is kept constantly in view. The conspicuous impolicy of allowing land to be trammelled in its transfer, to the extent that previous owners may choose to affect it by their contracts, was pointed out and condemned in the case of *Brewer v. Marshall*, 3 *C. E. Green* 337; 4 *Id.* 537. In that case, the owner of real estate sold a portion of it, and covenanted with the purchaser that neither he nor his assigns would sell any marl from off the residue of the tract. The suit was against the alienee of the vendor, and the decision was that such a burthen would not follow the land into the hands of such alienee of the covenantor. The reason assigned for this conclusion was the public inconvenience that would result if incidents could be annexed to land "as multiform and as innumerable as human caprice." But when we turn our attention to the consideration of those covenants, which, instead of being burthensome to the land, are beneficial to it, we perceive at once that such objection does not apply. Such covenants do not hinder, but rather facilitate, the transmission of land from hand to hand, and, therefore, with respect to their transmissibility, the question of public convenience has no place. This being the case, it is not easy to see why any contract, which is of a nature to attach to the land, and which has a beneficial tendency, should not be considered assignable, by act of law, as against the covenantor, with the title. In every instance where the question, in this form, is presented, the suit being between the original covenantor and the alienee of the covenantee, if the making of the covenant be not denied, the sole point for solution would seem to be whether such covenant, in the legal sense, relates to or concerns the land, for, if not, by its quality, it passes as an incident to the property, and is enforceable in the name of the person who is owner at the time of its breach. When the covenantor has been the party sued, and the covenant admittedly related to the land, the alienee of the covenantee being the plaintiff, I think no considered case has held that such action was not maintainable."⁹

The reasoning of Judge Beasley seemed convincing to me when I first read it many years ago. It has remained convincing on each of the many times I have read it since. It is phrased in language I can understand. The paragraph quoted from Judge Clark is not.¹⁰

9. *Id.* at 184.

10. By this statement I mean that I disagree thoroughly with the general thesis of the paragraph quoted, not that it is entirely without meaning to me. The situation referred

Judge Clark also contends, in denial of the propriety of the separate treatment in the Restatement of the running of the burden of a promise "at law" and "in equity," that it is immaterial for the purpose of the rule stated in section 82 whether we are considering the running of the burden at law or in equity. His thought on this point is indicated by the following quotation:

"As a practical matter, it is hard to say whether financial ruin might be brought about more quickly by a judgment for damages for failing to repair a roadway or a fence than by one for an injunction (enforceable by a jail sentence for contempt) compelling the taking down of an apartment house built contrary to restriction.

"There can be little doubt that generally speaking an injunction has been considered a more drastic remedy than a judgment for money damages; indeed, the latter is favored largely for that reason, except where necessity points to the former."¹¹

The difficulty here is, as it seems to me, that Judge Clark is speaking from the point of view of a distinguished figure in the world of procedure. From that point of view, he is hostile to anything which suggests that a judge may not have at his command, when a case is presently before him, his choice of the most fitting relief then applicable.

Judge Clark seems to forget that most questions with respect to the running of covenants must be determined without resort to judicial aid. Doubts may be and often are resolved by a prospective purchaser in favor of a refusal to have anything to do with an uncertain title. He will simply shake his head when told that "It is not now usual to lay down general rules making the validity of land interests turn on such speculation, [as to whether a purchaser becomes subject to legal or equitable obligations]

to in the latter part of the paragraph is one that requires thoughtful consideration. I have considered it and have attempted to meet it. It is not met by the easy solution which says that if the benefit of a promise is permitted to run, the like permission should be allowed to the burden.

Perhaps one sentence of the paragraph is deserving of a little special comment. This sentence is: "If the objections [to the running of the burden of covenants] are truly on the ground of policy, it is submitted that we cannot know what is desirable until we have the concrete case." Clark, *supra* note 1, at 704. Does this mean that rules of law founded upon considerations of policy cannot be laid down to govern concrete cases in advance of their arising? There may be philosophies of law which assert this, but all law is a denial of it. Such a philosophy of law may have a certain attraction for a judicial theorist, but it is very rarely, indeed, that a judge avowedly acts upon it. No such philosophy can be expected to be attractive to conveyancers, who must pass upon titles before concrete cases have arisen.

That the rule stated in section 82 has its origins in considerations of policy, I admit. That policy is that the hazard of personal liability through succession to title to land on a promise made by someone else ought to be, and has been, strictly limited.

11. Clark, *supra* note 1, at 702.

or, indeed, to outlaw, out of hand and before the case has arisen, what parties understandably may wish to do."¹²

Despite all procedural changes which may have taken place, it is one thing to tell the successor to the title to land that he becomes liable by virtue of his succession as though he were a promisor on the promises his predecessor had made and another to tell him that he must act while owner as it is equitable to require him to act in view of the circumstances under which he acquired title to land respecting the use of which his predecessor had made a promise. It is this difference we, in modern times, intend to indicate when we speak today of "running at law" and "running in equity."

This difference is one that the nature of the promise itself as, on the one hand, a promise to pay for a benefit received in the use of certain land, or on the other, a promise that certain land will be used in a certain way, will usually, though not always, indicate. A promise to pay, as for water promised to be furnished, creates, in the successor to the promisor, if it runs, a personal liability which, as to payments falling due during his ownership, continues after that ownership ceases. Such a promise rarely calls for equitable relief. A promise to use land in a certain way, as not to build certain kinds of buildings upon it, is often, under general equitable principles, enforceable by injunction. Such a promise may so run as to create a personal liability; but it may also, independently of so running "at law" as to create personal liability, run "in equity" under general equitable principles.

These general equitable principles have little or no relation to the anomalous doctrine under which a promise so runs that a successor in title becomes liable as a promisor. They find their counterpart more nearly in the law of trusts and in the law of vendor and purchaser. They come under the general principle that the successor to the title to land, the former owner of which has made a promise so intimately connected with it and so enforceable as to create an equity in it, will take subject to that equity except insofar as he is entitled to the protection of the doctrine of bona fide purchaser for value.

If a promise runs only in equity the successor to the promisor is never liable as a promisor, and his obligation ordinarily ends when his ownership ends. If it runs at law, the liability of the successor is personal, and he continues liable for all breaches of promise that occur during his ownership until legally discharged by payment or otherwise. These differences are differences of substance and are not erased by any modification or liberalization of procedure.

The difference in the nature and the origin of the running "in equity" and "at law" makes inapplicable to the running in equity many of the

12. *Ibid.*

rules applicable to the running at law. An adverse possessor, not being a bona fide purchaser, may become liable in equity; not being a successor in title, he can not be held liable as a promisor. It has never been a condition of the liability of a successor in equity that the promise be made under seal. This once was, and still is, except as modified by the statutes relating to seals, a condition of the running of the liability at law.

These differences are recognized in the Restatement draft under discussion. That draft further states that privity between the promisee and the promisor is not essential to the running in equity of the liability of a promisor respecting the use of land. This has been recognized by the courts.¹³ Privity would not be necessary to the running of the liability of a promise to hold land in trust, nor is it required in the case of a promise that land shall be used in a certain way. The fact that privity is not essential to the running in equity of the burden of a promise respecting the use of land is irrelevant to the consideration of the problem of the running of such promises at law. Yet Judge Clark's "authorities" for the absence of the necessity of privity of the kind described in section 82, that is, privity in connection with the running of the burden of promises "at law," are largely "equitable" cases. Until convinced that the rules with respect to the running of personal liability and the running of equitable liability on a promise respecting the use of land are subject to like rules for like reasons, I must insist that this is a misuse of authority.

A final difference in viewpoint between Judge Clark and myself is suggested by his charge that the treatment in the Restatement of the subject of liens is illusory and misleading in character.¹⁴ His discussion indicates a failure to give adequate consideration to the usefulness of the lien as a device for procuring payment for services rendered or maintenance furnished in connection with the use of land. To me it is one thing to impose a personal liability upon a landowner as such for the making of such payments and another and a quite different thing to impose a lien on the land benefited by the services rendered or the maintenance furnished. The difference between the two things has so manifested itself

13. "It is strenuously urged, in behalf of the defendants and respondents, that there was no privity of estate between the mutual covenantors and covenantees, in respect of the premises owned by them respectively, and which were the subjects of the covenants and agreements, and that the covenants did not therefore run with the lands, binding the grantees, and subjecting them to a personal liability thereon. This may be conceded for all the purposes of this action. It is of no importance whether an action at law could be maintained against the grantees of Beers, as upon a covenant running with the land and binding them. Whether it was a covenant running with the land or a collateral covenant, or a covenant in gross, or whether an action at law could be sustained upon it, is not material as affecting the jurisdiction of a court of equity, or the right of the owners of the dominant tenement to relief upon a disturbance of the easements." *Allen, J., in Trustees of Columbia College v. Lynch*, 70 N. Y. 440, 448-49 (1877).

14. Clark, *supra* note 1, at 712-13.

in the cases that it would be inexcusable on the part of those responsible for a restatement of the subject of promises respecting the use of land to fail to take account of it.

Let us look at some of the cases. In two California cases, *Fresno Canal and Irrigation Company v. Rowell*¹⁵ and *Fresno Canal and Irrigation Company v. Dunbar*,¹⁶ suit was brought on covenants to pay for water to be furnished for irrigation. The promises in each case contained a provision that they "should run with and bind the land." Action was brought in each case against a successor to the land of the original promisor. In the first case, a judgment was rendered in the lower court in favor of the defendant; in the second, a personal judgment was given against the defendant, and a decree rendered enforcing a lien for the amount due. On appeal both judgments were reversed, the first because of the failure to enforce a lien, the second because a personal judgment had been given. The upper court was of the opinion in each case that the covenant could not run with the land because it was not contained in a grant of land, but was satisfied that the language used was sufficient to create a lien against the land to be irrigated.¹⁷ In 1895 the Supreme Court of Massachusetts¹⁸ held, where a grant in a deed poll contained a stipulation that the grantee, "his heirs and assigns . . . shall be held and obliged" to pay a share of the damage caused by the flooding produced by a dam, a common right in which was being granted, that the obligation imposed upon the grantee could be enforced against his successor, the defendant in the case, "as an obligation in the nature of a servitude upon the estate of the defendant, though not as a personal obligation of the defendant."¹⁹ In West Virginia, in 1903, it was said²⁰ that a covenant by a mill-owner to pay an annual amount for maintenance of the dams supplying the mill, though in terms purporting to bind the successors of the promisor, could not bind such successors personally because of lack of privity, but that the obligation "was clearly a lien in its terms as an equitable mortgage." In Nebraska,²¹ in 1912, it was held that a promise by

15. 80 Cal. 114, 22 Pac. 53 (1889).

16. 80 Cal. 530, 22 Pac. 275 (1889).

17. These cases were based on the provisions of the California Civil Code; but, in the mind of the court, they also followed the common law. Later decisions have construed the provisions of the Code to prevent the running of the burden of covenants at all except in cases especially provided for. This narrowing of the scope of the running of personal liability gives greater significance to the lien remedy where appropriate without weakening the authority of the cases cited upon the point actually decided by them.

18. *Whittenton Mfg. Co. v. Staples*, 164 Mass. 319, 41 N. E. 441 (1895).

19. The deed being a deed poll, the promises on the part of the grantee did not, according to the Massachusetts rule, constitute a "covenant" on his part and, hence, was incapable of so running as to create a personal liability against his successor.

20. *Hurxthal v. St. Lawrence Boom & Mfg. Co.*, 53 W. Va. 87, 44 S. E. 520 (1903).

21. *Farmers & Merchants Irrigation Co. v. Hill*, 90 Neb. 847, 134 N. W. 929 (1912).

a grantee in a "water right deed" to pay a minimum "maintenance fee" could not, under the circumstances of the case, create a personal liability for the payment of the fee against the successor to the land in connection with which the right was to be exercised, though the court assumed that the obligation to pay the maintenance fee was a charge upon the land. In 1923, in the case of *Ball v. Rio Grande Canal Company*,²² the Texas Court of Civil Appeals held that a lien expressly created on land for payment of sums agreed to be paid for irrigation service bound the land in the hands of those who succeeded to the title after default in the payments called for by the terms of the contract and could be foreclosed against such persons.²³ In *Lingle Water Users' Association v. Occidental Building and Loan Association*,²⁴ decided in 1931, the Supreme Court of Wyoming held that a promise to pay a minimum charge for water agreed to be furnished for the purpose of irrigating certain land did not, because of lack of privity, so run with the land as to create a personal liability on the part of the successors to the original promisor, despite the fact that the contract expressly provided that it should run. The contract also expressly provided that the obligation to make the payments called for by the terms of the contract should constitute a lien upon the land. The court indicated no doubt but that it did constitute a lien on the interest of the promisor; the difficulty was that that interest was subject to paramount claims which rendered the lien valueless.²⁵ In *Neponsit Property Owners' Association, Inc. v. Emigrant Industrial Savings Bank*,²⁶ a case which has been judicially noticed with approval by Judge Clark,²⁷ it appeared that conveyances by a realty company contained provisions whereby each grantee consented (1) to pay an annual charge in such amount as should be fixed by the grantor, its successors, and assigns, (2) that the obligation to pay

22. 256 S. W. 678 (Tex. Civ. App. 1923).

23. It was assumed in the case that even though the burden of the contract ran with the land there was no personal liability on the part of those who succeeded to the title after default, which is, of course, in accord with orthodox theory.

24. 43 Wyo. 41, 297 Pac. 385 (1931).

25. Judge Clark is critical of the *Lingle* case and doubts its wisdom in practical application, saying: "One wonders how irrigation can be developed in the arid parts of the West if a decision of this kind must obtain generally." Clark, *supra* note 1, at 721. Some wondering was done by Judge Blume who wrote the opinion. He evidently was acutely conscious of the impact of what his court was deciding upon the future of irrigation in his state. He said: "We doubt seriously that by holding the defendant personally liable in this case we should thereby encourage irrigation; we think the reverse would be true, for others would then be much more cautious before taking over such lands, and would resolve all doubts the other way." 43 Wyo. 41, 64, 297 Pac. 385, 392 (1931). It is hardly to be supposed that any judge in any western state would not, in a case like the *Lingle* case, be conscious of the effect of his decision upon irrigation in his state.

26. 278 N. Y. 248, 15 N. E. (2d) 793 (1938).

27. *Broadway Bldg., Inc. v. City Investing Co.*, 120 F. (2d) 813 (C. C. A. 2d, 1941), *cert. denied*, 314 U. S. 682 (1941).

should run with the land, and (3) that the annual charges should become a lien on the land against which they were assessed. The conveyances also contained a provision that the assigns of the grantor might include a property owners' association, which should provide the maintenance intended to constitute the basis for the charges to be made and determine the amount to be paid by each property owner. Pursuant to these provisions the plaintiff association had been organized and sought, as the assignee of the original grantor, to foreclose a lien upon the defendant's property for failure to pay charges imposed against it. It was held that the plaintiff was entitled to succeed.²⁸

The cases I have referred to constituted a part of the background of the section of the Restatement draft²⁹ dealing with the lien as a device for the enforcement of the payment of obligations arising out of a promise respecting the use of land, and constitute the justification of the section. They sufficiently prove that the paragraphs in which Judge Clark discusses the Restatement treatment of the device³⁰ indicate a serious lack of comprehension of its nature and, perhaps as a consequence, of its usefulness. I believe that it is much wiser social policy to let land bear the burden associated with benefits that it may receive than it is to impose, merely because he has succeeded to the ownership of land once owned by one who has made a promise, the personal liability of a promisor upon one who has never made a promise.

As I have pointed out above, it is very difficult to meet Judge Clark in a discussion of the authorities upon which section 82 of the Restatement draft is based, since he refuses to recognize the validity of the distinctions taken in the Restatement between benefit and burden, between liability to an injunction on equitable grounds and liability to a money judgment on a contract basis, and between liability to a personal judgment enforceable against all of the assets of the judgment debtor and liability to have particular property sold to satisfy a claim against it arising out of a promise made by a former owner. His refusal to recognize these distinctions results in his attempting to prove that section 82 (which, as I have said, is limited to the running of the burden of personal liability) is wrong by the citation of cases where the object was to foreclose an equitable charge or lien, of cases where the relief sought was an injunction rather than a money judgment, and of cases where the problem involved was the running of the benefit rather than the burden of a promise. Such

28. One may guess from the fact that in other cases similar relief on similar covenants has been sought in New York, that the device employed in the Neponsit development was not unique. See *Kennilwood Owners' Ass'n v. Kennilwood, Inc.*, 28 N. Y. S. (2d) 239 (Sup. Ct. 1939), *aff'd without opinion*, 262 App. Div. 750, 28 N. Y. S. (2d) 154 (2d Dep't 1941).

29. Section 88.

30. See Clark, *supra* note 1, at 712-13.

cases have nothing to do with section 82, and in respect to them the Restatement says that the rule of that section is inapplicable.³¹ This undiscriminating (as it seems to me) use of authority enables Judge Clark to cite in support of his condemnation of section 82 a formidable list of cases. Were he to confine his citations to the situation comprehended by section 82, his supporting cases would be found to be negligible in number, and the converse authority overwhelming. Until he is willing to limit, for the purpose of discussion at least, his cases to those dealing with the running of the burden of a personal liability on a contractual basis, or in other words, the running of the burden of a promise at law, a consideration of his authorities seems needless.³²

There is, it seems to me, such an amount and such a unanimity of American authority in favor of the requirement of privity attempted to be expressed by section 82 that one whose duty it is to restate law is bound by it irrespective of its historical justifiability or its social desirability.

Judge Clark questions the historical justification for any requirement of "privity of estate" between the original covenanting parties as a prerequisite to the "running" of their covenant. He cites the well known comment of Justice Holmes in *The Common Law*³³ doubting both on the basis of logic and of history the necessity of any such privity. He also throws doubt on the authority of Lord Kenyon whom he credits with initiating the heresy "that there must be a privity of estate between the

31. Section 88, comment *h*; section 87, comment *i*; and section 96.

32. Judge Clark has appended to his article an extensive citation of "American Privity Cases," Clark, *supra* note 1, at 731-36. This collection of cases is excellent source material for a study of the problem of section 82. Many of the cases cited are not, for the reason I have given, relevant to that problem, however. An interesting example is the case of *Dickinson v. Hoomes's Adm'r*, 49 Va. 353 (1852). Judge Clark appends to this case the note: "C. of warranty runs; extensive criticism of the requirement of privity." Clark, *supra* note 1, at 736. This case, as indicated by the note, involved the running of a covenant for title rather than a covenant respecting the use of land. The covenant sued upon being a covenant for title, the only problem of running which could be involved was the running of the benefit of it. The problem of the necessity of privity for the running of the benefit was relevant and was discussed. Successful counsel, following Judge Hare's American notes to *Spencer's Case* in *Smith's Leading Cases*, insisted that privity was not necessary for the running of the benefit of a covenant though at the same time declaring that to charge the burden of a covenant on land "there must be privity or tenure." *Dickinson v. Hoomes's Adm'r*, *supra* at 375. Judge Moncure, writing the leading opinion, agreed with the contention of counsel as to the absence of the necessity of privity for the running of the benefit of a covenant but followed the notes of the English annotator with respect to the running of the burden rather than the American notes, saying: "But while on the one hand it seems that the *benefit* of a covenant runs with the land, though the covenantor be a stranger to the land, so, on the other, it would seem that the *burden* of a covenant in no case runs with the land; in no case, I mean, in which the relation of landlord and tenant is not created by the deed." *Id.* at 403.

33. HOLMES, *THE COMMON LAW* (1881) 403, 404.

covenanting parties" by describing him as "a reactionary and dullish judge."³⁴

As to Justice Holmes, it should never be forgotten that he was primarily concerned with the problem of the running of benefits rather than with the problem of section 82. The law of running covenants began with the running of benefits. It was probably not until Lord Coke's time that the running of burdens was recognized;³⁵ and, in the English law, such running was and is limited to the relation of landlord and tenant. Hence, while what Justice Holmes said may have some logical relevancy to the rule of section 82, it can have little historical connection with it.

Reactionary Lord Kenyon seems to have been. He "successfully resisted Lord Mansfield's attempts to bring about a fusion of law and equity."³⁶ But Lord Campbell, admittedly not an enthusiastic admirer of Lord Kenyon, says that he was "a man of wonderful quickness of perception" and credits him with being a skilled conveyancer. The remark he made in *Webb v. Russell*³⁷ was but the repetition of what the successful counsel had said in argument and probably represented current notions of the theory upon which one not a covenantee could sue in covenant upon a promise made to another. The case was an action of covenant upon a covenant made by the defendant in a lease to him. The issue was whether one who was not the original covenantee could sue upon the covenant. Counsel had stated the not unfamiliar doctrine that between lessor and lessee there may exist both privity of contract and privity of estate, that the privity of contract is personal to the lessor and the lessee, but that their assigns may succeed to their privity of estate. Perhaps both counsel and Lord Kenyon were wrong in assuming the necessity of privity of estate between the covenanting parties as a prerequisite to the running of the benefit of a promise. It had long before been held that a promise made by a stranger to land could run with the land of the covenantee.³⁸ But the new rule of *Spencer's Case*³⁹ that the burden of a covenant could run was confined to a covenant between lessor and lessee and has continued to be so confined in England. The problem in the American cases has been to explain how the burden of a covenant can run where there is not that relationship. It has been solved, not by saying that privity of contract is sufficient, but by holding that the necessary "privity of estate" may exist in relationships other than that of lessor and lessee. Section 82 is an attempt to state the relationships which may fairly be said to be required

34. Clark, *supra* note 1, at 705.

35. 7 HOLDSWORTH, HISTORY OF ENGLISH LAW (1931) 289.

36. 4 CAMPBELL, LIVES OF THE CHIEF JUSTICES (1873) 52, n. 2.

37. 3 T. R. 393, 100 Eng. Rep. R. 639 (K. B. 1789).

38. Pakenham's Case, Y. B. Hil. 42 Edw. III, f. 3, pl. 14 (1368).

39. 5 Co. 16a, 77 Eng. Rep. R. 72 (Q. B. 1583).

by American authority as a requisite to the running of the burden of a covenant in other than landlord and tenant cases.

In respect to the question of policy involved Judge Clark and I seem hopelessly at odds.

I say that any rule of law which imposes a promisor's liability on one who never made a promise is a highly anomalous one; that the "privity of estate" concept which has been evolved to explain a rule which permits it to be done is highly artificial; that the extension of the rule permitting the application of this concept to relations other than those of landlord and tenant was of doubtful wisdom; that the courts, having made an initial mistake, have been wise in limiting the scope of its operation as they have; and that the Institute has been wise in following their lead.

Judge Clark thinks, as I understand him, that the owner of any land should be able to impose, by making a promise respecting its use, a promissory liability upon his successors without regard to any relation respecting the land between himself and his promisee other than that which arises out of the making of the promise, subject always to the assumption that the situation will be wisely handled if and when it comes before a court for adjudication. It is not usual he says "to outlaw, out of hand and before the case has arisen, what parties naturally and understandably may wish to do"⁴⁰ and, further, that if the objections to the running of the burden of real covenants "are truly on the ground of policy, it is submitted that one cannot know what is desirable policy until we have the concrete case."⁴¹

Such assertions baffle one. In attempting to meet arguments derived from or based upon them I have a feeling of helpless frustration. Why, under such reasoning, should there be any limit to the running of the burden of promises which is capable of being stated at all? Why should not promises of all sorts relating to land run? Why should not a promise to pay for land run with the land purchased? Why should not a promise to pay a mortgage run with the land mortgaged? Why, indeed, should not a promise run with things other than land? Why should not a promise respecting the use of an automobile run with the automobile?

The answer is that there is a rule of policy which can be expressed in the form of a rule of law that one man can not make another man legally responsible as a promisor; that there is an exception to that rule in the case of promises respecting the use of land; that that exception has limits; that those limits can be stated; and that section 82 is an attempt to state one of them.

The issue whether the limits attempted to be stated in section 82 really exist or are properly stated is one that I have found it impossible to discuss intelligently with Judge Clark in the face of his insistence that things

40. Clark, *supra* note 1, at 702.

41. *Id.* at 704.

that are different are the same thing. I am, however, quite willing to continue the effort to do so. An appropriate place to begin a continuation would be by having him show one jurisdiction in this country which has definitively repudiated both parts of the rule stated in section 82 as applied to the situation which it covers which is the running of personal liability on a promise respecting the use of land.

One final reference to section 85 should be made. Other than that the rules stated by sections 82 and 85 are limitations on the running of personal liability on promises respecting the use of land, the two sections have no relation to each other. Section 82 has to do with the relations of the parties to such promises. Section 85 says that, conceding that a promise respecting the use of land satisfies all other requisites to the running of personal liability, such liability will not run, unless the net result is to tend at least in the direction of increasing the use of some land which may be either the land of the promisor or the land of the beneficiary of the promise. This limitation on the running of the burden of a promise is based upon authority and good sense. One illustration is sufficient. Harvard Church of Charlestown sold its church to one Horan who covenanted that he would maintain the church clock substantially where it was. He later entered into a contract of sale. The vendee, having discovered the covenant, refused to complete the contract because of the incumbrance created by the covenant. The court held that, in the absence of a showing that Harvard Church had other land in the use of which it would be benefited by the retention of the clock in its position, the covenant would not bind a purchaser from Horan either at law or in equity and compelled the vendee to complete his contract.⁴² The law of running covenants assumes as a requisite to the running of the burden of a covenant in a lease a reciprocity of benefit between lessor and lessee. Section 85 is an attempt to state a corresponding rule in relation to the running of the burden of promises made by fee owners.

42. *Orenberg v. Johnston*, 269 Mass. 312, 168 N. E. 794 (1929).