the American Law Institute as the agency most likely to solve the difficulties which Judge Clark had so ably brought to light.[1]

The second edition of Judge Clark's monograph, which has now become a classic, demonstrates that confusion, if not chaos, continues to dominate the American law of covenants. The text of the first edition has been reprinted with few changes for, as Judge Clark reports, "thoughtful reconsideration .... afforded conviction that no changes of substance should be made in those conclusions."[2] In addition to the 1929 text, the second edition contains a seventy-five page appendix entitled "Exceptions to the Restatement of the Law of Real Covenants." This, which is largely a reprint of articles by Judge Clark and by Mr. Henry Upson Sims which originally appeared in recent volumes of the *Yale Law Journal* and the *Cornell Law Quarterly*, is a vigorous and spirited, if not heated, attack upon the American Law Institute's *Restatement of the Law of Covenants* and its Reporter, Professor Rundell. Whether one agrees with Judge Clark or with Professor Rundell as to what are the rules which the American courts have developed, it must be evident that, in this instance, the attempt to restate the law has not yet served to clarify it. The failure of stare decisis, even though the cases have been subjected to the searching analysis of the American Law Institute, to afford a reasonably clear set of rules indicates, as Professor Chafee suggested in 1929, that comprehensive legislation is essential. In 1941, Judge Clark made a start by proposing legislation to limit the duration of covenants and related interests to thirty years.[3] In the second edition of *Covenants* he has continued his efforts toward this goal by the addition of a new chapter entitled "Legislative Restriction of Running Interests." None of the drafts thus far formulated covers the entire field of covenants and hence the need for a comprehensive statute to preserve the advantages and to avoid the defects of the common law remains unsatisfied. So long as this continues, many programs for the development of land will either be blocked or seriously impeded by antiquated restrictions or by doubt and uncertainty as to the rules of law which are applicable. It is to be hoped, therefore, that agencies which are both influential and enlightened will undertake the task of drafting a model comprehensive code of the law of covenants and related interests in land.

SHELDON TEFFT*

Right To Fly, The. By John C. Cooper. New York: Henry Holt & Co., 1947. Pp. x, 380. $5.00.

The principal theme of Mr. Cooper's book is that air power is the sum of military and civil aviation, and not military force alone. This seems to be a simple enough concept, and it would be surprising if anyone could be found to deny it. We can be sure that a true-or-false test on this issue would produce an almost unanimous answer of "true" from the militarist, the statesman, and the ordinary citizen. The difficulty is that too many of those in authority act as though it were not true. Mr. Cooper has done a real service in developing this point, since the future well-being of the world may depend upon a course of action that recognizes the inseparability of civil and military air power.

[1] 43 Harv. L. Rev. 334 (1929). [2] Preface.

[3] Clark, Limiting Land Restrictions, 27 A.B.A.J. 737 (1941).

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The aircraft that carries commercial cargo today is a prospective carrier of an atomic bomb or a capsule of deadly bacteria. Troops and their supplies can use the same airplanes as business and pleasure passengers. But what is less frequently appreciated is that airline operation and private flying provide a choice means of training large numbers of flight and ground personnel, of discovering and testing new appliances and techniques and of perfecting essential ground aids, all highly necessary for military purposes.

Mr. Cooper points out these facts. He also reminds us that at the end of the last war the allies were determined to eliminate Germany as a potential air power. Their failure to do so is traceable to President Wilson's insistence that Germany's civil aviation not be hampered. It was this carefully protected "civil" aviation that trained the Luftwaffe and provided the vehicles for the German paratroopers of World War II.

The three major air power problems that face the world today are listed by Mr. Cooper as 1) the future of German and Japanese air power, 2) the larger problem of universal disarmament, and 3) the control of commercial aviation "so that air transport itself does not become an instrument of unfair nationalistic competition or aggression and, thus, the source of international misunderstanding and dangerous ill feeling."

Consideration of these three problems constitutes the main burden of this book. In addition, several excellent chapters discuss the present and potential air power of the countries of the world. Mr. Cooper concludes that from a long range view, this country and Russia are the two great air powers, but that Russia's chance of achieving this position is dependent on the further development of its resources and the skills of its people.

On the first of the three major points, Mr. Cooper warns that the drafts of the currently proposed German and Japanese peace treaties echo the errors of Versailles. They seek to control only the purely military half of air power. Mr. Cooper suggests an international trusteeship of the German and Japanese airspace as the simplest and soundest method for regulating the total air powers of these axis countries.[1] "Under such a system, policing would be comparatively simple. No aircraft could use the airspace of the present enemy states until licensed by the United Nations agency. No military air force could be built up under the guise of a commercial organization."

Mr. Cooper's suggestion is a good one as far as it goes. The real difficulty will begin with operation under the trusteeship. Then the trustees will be faced with the same perilous alternatives that face us in Germany today—the choice between strict control and full economic rehabilitation.

Air power presents some special problems for universal disarmament because of the seemingly insoluble overlapping of what might be called legitimate and illegitimate uses, and the consequent inability to define military aviation. A battleship and an

[1] Aviation has forced the individual property owner to be satisfied with something less than the doctrine of *cuius est solum eius est usque ad coelum*, and until 1919 representatives of the various powers debated whether the air easement should be national or international. The national view of exclusive sovereignty over territorial airspace, with international freedom of the air over the high seas, came out of the Paris Convention of 1919 and is now accepted as the law.

A large part of *The Right To Fly* is devoted to a discussion of the establishment of the principle of the exclusive sovereignty of a nation over the airspace above it. The author concludes that the basis of national air power is a nation's exclusive sovereignty over its own airspace.

aircraft carrier are unequivocally instruments of war, but what is an airplane having a speed of 400 miles an hour, a capacity of ten tons, and a range of 10,000 miles? Understandably, Mr. Cooper does little more than to state the issue and to declare it should be clarified. It would appear to the reviewer that the physical tools of war are secondary to the mental and spiritual attitudes of the world's people. Most of us would sleep better in an arsenal with a peaceable man as company than in a soft meadow with an unarmed but vicious savage. A peaceful world requires something more than the grounding of airplanes that have possible military uses.

The third major point considered in this book, the control of international commercial aviation, is a subject that for many years occupied Mr. Cooper's attention as one of the chief executive officers of Pan American Airways. Mr. Cooper has written a thorough account of the international negotiations affecting commercial aviation and of the operation of airlines under the patterns determined by these negotiations. However, to understand the implications of the author's comments it is important to realize that he is by profession definitely committed to the point of view of a high-tariff "protectionist" and of a monopolist.

The protectionist position appears at several points, as for example:

> As to the economic advantages of the free right to trade claimed by Grotius under his view of the law of nations, I am not at all certain that the economically uncontrolled right of entry of foreign merchant vessels into national ports has always been a source of ultimate advantage to *world economy*. It may approach treason to make such a suggestion, but the world is in a state of transition, and it might be advantageous to reconsider world transport, both ocean shipping and air transport, as a single economic unit.
>
> When a merchant vessel, for example of British registry, enters a foreign port, for example American, and discharges its cargo and then offers for sale its available load capacity for the carriage of outbound American cargo, the British vessel is actually offering for sale in the American port a British product in direct competition with a similar American product (the load capacity of American vessels) and without the price protection of a protective or other tariff. . . . . [Italics added].

It is interesting to note that Mr. Cooper begins this thought by questioning the advantage of free trade to "world economy," and ends two sentences later by showing only a possible disadvantage to one small segment of the economy of one nation. Nowhere does the author recognize even the possibility of advantage to the rest of the nation, or to the rest of the world, of securing transportation at the cheapest cost.

The monopolist point of view appears throughout the work. This is developed as a part of Mr. Cooper's continually expressed concern that some sort of international control may be necessary "to prevent air transport from becoming an instrument of unfair nationalistic aggression and thus the source of serious international misunderstanding and dangerous ill feeling." Mr. Cooper does not elaborate on this concern, nor does he state why this problem is a special one for aviation. One would think that the race to acquire many natural resources, such as petroleum, uranium, bauxite, and others, presents similar opportunity for competitive aggression. We could extend the inquiry further to the rivalry between national producers of cotton, rubber, movies, automobiles, and so on. At this point it becomes clear that this sort of talk is the classic approach to cartels. This is exactly what Mr. Cooper has in mind, although he does not say so, for international aviation. By indirection, he wishes to leave the impression that it is necessary to do away with competition in international air transportation and to adopt the insidious chosen-instrument doctrine espoused by Pan American, in order to prevent this undefined "unfair nationalistic aggression."

The Right To Fly cites with apparent approval the British government plan of nationalizing its international aviation. Then in the final chapter we read:

> We must face the problem that all industry and air operations are nationalized in the Soviet Union, that international air transport operations, though not manufacturing aircraft, have been nationalized in many other countries, including Britain, France, Canada, and South Africa. Costs do not mean the same thing under nationalization as under free enterprise. A government can purchase success in an international competitive market at figures which free enterprise cannot meet. These things must be considered in planning for the future.

It is hardly necessary to defend here the system of free enterprise on which Mr. Cooper delicately casts doubt. Monopolists like Mr. Cooper believe that the fact that most European powers have a single international airline is an argument that should influence the conduct of our country. They neglect to point out that in every European country the railroads are also monopolies owned by the government. Our country, fortunately, is the world's symbol of free enterprise; what we do here is everywhere closely watched by other champions of freedom. That is particularly true of our international carriers that represent America in the major cities of the world as well as in many out of the way places. For that reason and for our own sake, it is hoped that neither our ways of life, our civil liberties, nor our economic theories will be altered merely because some other country has momentarily adopted different ways, liberties, or theories which have features that appeal to the ambitions of one of our commercial interests.

GEORGE A. SPATER*

La Jurisprudence des prises maritimes et le droit international privé. By R. Jambu-Merlin. Paris: Librairie Générale de Droit et de Jurisprudence, 1947. Pp. 335.

A maritime war usually necessitates an overhauling of prize law and procedure by the belligerents and prompts an increased interest on the part of admiralty practitioners and students of international law. This was the experience of World War I which repeated itself during the recent war. England,[1] Canada,[2] the United States,[3] France[4] and the enemy nations[5] enacted new rules and statutes relating to prizes

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[1] Prize Act, 2 & 3 Geo. VI, c. 65 (1939), amending the Naval Prize Act, 27 & 28 Vict., c. 25 (1864); the Prize Courts (Procedure) Act, 4 & 5 Geo. V, c. 13 (1914), and The Prize Courts (Procedure) Act, 5 & 6 Geo. V, c. 57 (1915), by extending the prize law to aircraft and extending the powers relating to the establishment of prize courts under the Prize Courts Act of 1894 to protectorates and mandates; Prize Court Rules, St. R. & O. No. 1466, 2798 (1939) (superseding the Prize Court Rules, 1914–1917, everywhere except in Eire and the Union of South Africa); Prize Salvage Act, 7 & 8 Geo. VI, c. 7 (1944).

[2] Canada Prize Act, 9 & 10 Geo. VI, c. 12 (1945), Can. Stats. (1945) 101.

[3] 56 Stat. 746 (1942), An Act to facilitate the disposition of prizes captured by the United States during the present war, and for other purposes; 59 Stat. 581 (1945), 34 U.S.C.A. § 1159 (Supp., 1946), An Act to facilitate further the disposition of prizes captured by the United States, and for other purposes; Prize Rules and Standing Interrogatories in Prize, U.S. Dist. Ct. for the S.D. of N.Y., Maritime Law Association Doc. No. 271 (1942).

[4] French Decree and Instructions on Maritime Prizes of Dec. 24, 1939, Journ. Off., 11351 (1939), translated in U.S. Dept. Commerce, 3 Comp. L.S. 319 et seq. (1940).

[5] See the Italian Law of War of July 8, 1938, arts. 213 et seq., 6–1 Raccolta Ufficiale delle leggi e dei decreti, 4294 et seq. (1938), and The Rules of Procedure for the Adjudications of