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Roscoe Pound once wrote that often "courts . . . take the rules . . . as a general guide, determine what the equities of the cause demand, and contrive to . . . render a judgment accordingly, wrenching the law no more than is necessary." [1] The process was well illustrated in the *Restrictive Covenant cases* which were considered by the Supreme Court in May, 1948.[2] The problem, which has been before the state and federal courts for more than fifty years, is whether the courts should enforce real estate agreements that bar a fellow citizen from occupying or owning this house or that because of the color of his skin, the nature of his religious beliefs, or the character of his national origin.

Whether wisely or not the court answered the problem by holding that judicial enforcement by state courts of covenants restricting the use or occupancy of real property to persons of the Caucasian race, to violate the equal protection clause of the Fourteenth Amendment. The court said, ". . . Conceding that the Amendment is directed against state action only and does not reach private conduct, however discriminatory, the judicial action, even though for the enforcement of private agreements, is state action, and so within the Fourteenth Amendment; and that the enforcement of restrictive covenants against certain races is none the less discriminatory because courts will enforce them against any race against whom they are directed, including the white race."[3]

Widespread Interest in Cases

At the outset it must be appreciated that the time was ripe for the decision in the *Restrictive Covenant cases*. In October 1947 the Report of the President's Committee on Civil Rights had roundly denounced judicial enforcement of these agreements. The committee recommended the enactment by the states of laws outlawing restrictive covenants, and there was renewed court attack, with intervention by the Department of Justice, upon restrictive covenants. The committee pointed out that the effectiveness of restrictive covenants depends in the last analysis on court orders enforcing the private

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[1] Pound, *An Introduction to the Philosophy of Law* (1922), as noted in 61 *Harv. L. Rev.* 927 (1948).

[2] *Shelley v. Kraemer* and *McGhee v. Sipes*, 334 U.S. 1 (1948); *Hurd v. Hodge* and *Uricola v. Hodge*, 334 U.S. 24 (1948) arising in Missouri, Michigan, and the District of Columbia, respectively. Hereafter, these cases will be referred to as the *Restrictive Covenant cases*.

[3] *Ibid.*, *Shelley v. Kraemer*, p. 10.

agreements. The power of the state is thus utilized to bolster discriminatory practices.[4]

While no accurate data is available, there were a substantial number of these cases pending throughout the country. The California Supreme Court had thirty such cases, and the state of Illinois had almost as many involving property in Chicago.[5] When the U. S. Supreme Court granted certiorari in two state and two District of Columbia cases, the litigation before the court became the focal point of nation-wide interest. Twenty-three briefs on behalf of *amici curiae* were filed with the court,[6] one of them by the Attorney General of the United States, urging that judicial enforcement of these restrictions violated the constitutional limitations on the power of the several states and the federal government.

There was a large attendance, and the proceedings of the trial were given wide publicity, and when the decisions were announced four months later they were generally hailed as a victory for equal rights of racial minorities and were regarded as likely to be far-reaching in their effects and "to serve to extend social and economic justice."[7]

The court apparently seems determined to make sure that the great generalities of the Constitution, and especially those of the Fourteenth Amendment, have realistic meaning and assure everyone, regardless of race, creed, color, or ethnic origin, the broad protections of the basic charter of our democratic republic. The scope of this paper will include an examination of the novel extension of the Fourteenth Amendment established by these decisions. This examination will embrace both the legality or illegality and the practicability or impracticability of certain schemes suggested to circumvent the ruling handed down by the Supreme Court. It must be remembered throughout this discussion that the crux of the decision rests upon state action in enforcing restrictive devices, rather than upon the use of such devices when not entailing the use of state judicial machinery.

Previous Cases in the Federal Courts

Popular use of restrictive agreements began in 1917, when the United States Supreme Court held unconstitutional [8] a city ordinance forbidding any

[4] Reported appellate decisions show that at least sixteen states and the District of Columbia provided judicial enforcement for restrictions on occupancy by particular racial, religious, and national groups, and ten of these jurisdictions also enforced restrictions on ownership. Colorado, under the decisions in *Chandler v. Ziegler*, 88 Colo. 1, 291 P. 822 (1930), approved in *Howard v. Cronan et al.*, 105 Colo. 393, 98 P. 2d 999 (1939), apparently had enforced both restrictions.

[5] William J. Mind, Jr., Racial Restrictions and the Fourteenth Amendment, 16 *Univ. of Chicago L. R.* 204.

[6] *Shelley v. Kraemer, supra*, at p. 3.

[7] *New York Herald-Tribune*, p. 22, col. 1 (May 4, 1948) and others.

[8] *Buchanan v. Warley*, 245 U.S. 60 (1917). See also *Harmon v. Tyler*, 273 U.S. 668 (1927), reaffirming *Buchanan v. Warley*.

white person or any Negro to move into and occupy any house in a city block where a majority of the houses were already occupied by persons other than their own race as a deprivation by the state of the property owner's right to dispose of the property to whomsoever he wishes. Such legislative action is forbidden by the due process clause of the Fourteenth Amendment.

While the decision in this case led to the popular use by white landowners of agreements, conditions, and covenants in deeds to exclude non-Caucasians from purchasing or occupying residential property, at least one reported case had even earlier considered constitutional problems in connection with the enforcement of restrictions on the sale or occupancy of land by members of a particular racial group.[9] In that case the deed under which plaintiff took title to the land involved in the litigation contained an agreement that the premises were never to be rented to a "Chinaman". The plaintiff having conveyed a part of the property to the defendant, suit was brought by the former to enjoin the latter from renting to "Chinamen", who were also made parties defendant.

In refusing relief, the court referred to the equal protection clause of the Fourteenth Amendment, and stated: "It would be a very narrow construction of the Constitutional Amendment in question, and of the decisions based on it, and a very restricted application of the broad principles upon which both the Amendment and decisions proceed, to hold that while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. Such a view is, I think entirely inadmissable. Any result inhibited by the Constitution can no more be accomplished by contract of individuals (citizens) than by legislation, and the courts should no more enforce the one than the other.[10] Prior to the *Restrictive Covenant cases*, Judge Ross's precedent [11] had been largely ignored, but sixty years later it has become the cornerstone of what may perhaps be one of the leading cases of our time. It is also significant to note that the court in this case relied upon the provision of a treaty with China to justify the decision. This was partly the basis for the decision in the *Hurd* case, which will be discussed later.[12]

Thirty years elapsed before the question of constitutionality of a restrictive agreement against a particular race arose after *Gandolfo v. Hartman*, 49 Fed. 181 (1892). This was the case of *Corrigan v. Buckley*,[13] which arose in the District of Columbia. This action was a suit to enjoin the defendant from selling a lot to a would-be colored purchaser, in violation of a restrictive covenant. The colored defendant took the position that the covenant was void in that it deprived him of due process of law. Following the state cases, the

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[9] *Gandolfo v. Hartman*, 49 Fed. 181 (C.C.S.D. Cal. 1892).
[10] *Ibid.*, p. 182.
[11] *Gandolfo v. Hartman, ibid.*
[12] *Hurd v. Hodge, supra*, note 2. While the court did not specifically mention the United Nations Charter, it is generally believed that it was intended when the court spoke of the national public policy.
[13] *Corrigan v. Buckley*, 271 U.S. 323 (1926).

court rejected his argument on the ground that the civil rights clauses of the Constitution do not apply to private arrangements among individual citizens.[14] On appeal, the Supreme Court said it did not raise a constitutional question sufficiently substantial even to support jurisdiction on appeal.[15]

Defenders of restrictive covenants, and the state and federal courts in enforcing them, had customarily relied on *Corrigan v. Buckley,* but in the *Shelley* case, the court held that it was not in point because the case being in the District of Columbia originated in the Federal court, and the Fourteenth Amendment applied only to state action. The court also distinguished it on the grounds that the only constitutional issue appellants had raised in the lower courts, and hence the only constitutional issue before the court, was the validity of the covenant agreement as such.[16]

Types of Restrictive Covenants

Most racial covenants include all non-Caucasians. Some specify Negroes, Mexicans, Spanish Americans and Orientals, and some include Jews. A few include Armenians, Hindus, Syrians, or former residents of the Turkish Empire. There is, obviously, no limit to their inclusiveness, save that of the current state of community prejudice. Recently international relations have influenced the application of these compacts in certain sections of the nation. In California, for example, the lower courts have refused to enforce racial covenants against Mexicans because such action is contrary to the "Good Neighbor Policy" at the same time that covenants specifying persons whose blood is not entirely of the white race have been interpreted to include American Indians. In the companion case to the cases under discussion, *McGhee v. Sipes,* the excluded class also included Orientals.[17] However, it is clear that restrictive agreements are directed primarily against Negroes, and it is noteworthy that the *Restrictive Covenant cases* all arose in transactions concerning this minority.

The scope of the decision in the *Restrictive Covenant cases* is very broad and was predicated upon almost ideal fact situations. Racial restrictive agreements were of three general types. One type restricted either sale, lease, conveyance to, or ownership by, any member of an excluded group. The second type prohibited use or occupancy by any member of such group. The third prohibited both ownership and occupancy.[18] Some of these agreements were limited in duration while others were to be perpetual.

The racial restrictive agreements which were joined and brought before the Supreme Court for decision illustrate all three of these general types of

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[14] *Ibid.*, p. 331.

[15] While *Corrigan v. Buckley* was not expressly overruled by the *Restrictive Covenant cases,* it no longer represents the law except to the proposition that restrictive agreements are not unconstitutional in themselves, but only when resort is had to state courts to enforce them.

[16] *Shelley v. Kraemer, supra,* at p. 8.

[17] *McGhee v. Sipes, supra,* note 2.

[18] This is a type that has been used in Colorado. See cases cited at note 4, *supra.*

discriminatory real estate devices. *Shelley v. Kraemer,* one of the state cases, involved a restrictive covenant limiting use and occupancy to the "Caucasian race" for fifty years. The condition ran with the land and was to be a condition precedent to the valid sale of the land. The owners of various parcels of land subject to the terms of the restrictive covenant brought action against a Negro purchaser (Shelley) who had bought without knowledge of the restriction. The owners asked for an injunction restraining Shelley from taking possession and for judgment divesting Shelley of title and revesting it in the immediate grantor or such person as the court might direct.[19]

Sipes v. McGhee contained a restriction limiting ownership to members of the Caucasian race, which was to run forever. In this case the Michigan Supreme Court affirmed a lower court decision directing the Negro purchasers to move from their property within ninety days and enjoining them from using or occupying the premises in the future.[20]

The third type of restriction was illustrated in *Hurd v. Hodge,* a case wherein appeal was made from the Circuit Court of Appeals for the District of Columbia. Here the prohibition was extended to sale, in addition to occupancy, and was to run indefinitely. The Circuit Court had sustained a judgment of the District Court declaring the sale to a Negro purchaser null and void, enjoining Negro purchasers from leasing or conveying the properties, and directing them "to remove themselves and all of their personal belongings."[21]

The Decisions

In rendering the decision the court pointed out that racial and religious restrictive covenants are directed not at the use made of the property; but rather at the user of the property, the prohibited racial group. Thus, it would appear that the court felt that there is no justification for such restrictions as there might be in the case of restrictions on the use of property for saloons, slaughter houses, and factories, which restrictions may have a reasonable relation to public health and safety.[22]

Then setting up the underlying philosophy of this decision, the court said, ". . . the historical context in which the Fourteenth Amendment became a part of the Constitution indicates that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the states based on considerations of race and color; and the provisions of the Amendment are to be construed with this fundamental purpose in mind".[23]

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[19] *Shelley v. Kraemer, supra,* note 2.
[20] *Sipes et al. v. McGhee et ux.,* 316 Mich. 614, 25 N.W. 2d, p. 638, (1947).
[21] *Hurd v. Hodge,* 162 F 2d 233 (D.C. App. 1947).
[22] For a very complete discussion of restrictive covenants see 24 *Notre Dame Lawyer* 2 (1949), p. 169 and 3 A.L.R. 2d 466.
[23] *Shelley v. Kraemer, supra,* at p. 10.

After laying the foundation for the interpretation of the Fourteenth Amendment as concerns state action, the court said, "These are not cases, as has been suggested, in which the states have merely abstained from action, leaving private individuals free to impose such discrimination as they see fit. Rather, these are cases in which the states have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the state has enforced, was defined initially by the terms of a private agreement. State action . . . refers to exertion of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this court to enforce the constitutional commands."[24]

Thus, in general terms and in a brief manner, but with unusual boldness, the court did what it has never done before and held that the action of a state court in construing a private contract, such as a restrictive covenant, was state action, if its effect is to lend the coercive power of judicial enforcement in a constitutionally prohibited manner. Restrictive agreements are not dead, since the court made it clear that the Fourteenth Amendment touches only state actions and does not provide a shield against "merely private conduct, however discriminatory or wrongful"; but a contract or property right without the protection of court action is illusory.

The compelling force behind the *Restrictive Covenant cases* is clear, and and it is also clear that the decisions open the way for attack on other inhibited civil rights. The doctrine that one of the civil rights intended to be protected against state action is the right to acquire, enjoy, own and dispose of property is very likely to be carried over into the segregation practices of the various states.[25]

Possibilities of Escape

Where the precise logical limitation on the broad sweep of this new doctrine will be applied must remain, for awhile, uncertain. It is to be expected, however, that since the court declared the restrictive agreements valid if resort to the court is not had to enforce them, devices will be developed to escape the effect of this decision, and in the following pages are discussed a few that have been or are being considered. In considering these devices two considerations must be borne in mind. First, are they in all respects legal? Second, are they practical from the aspects of financial considerations and enjoyment of ownership of property?

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[24] *Ibid.*, at p. 20.

[25] It is not within the scope of this paper to discuss the application of the decision in the *Restrictive Covenant cases* to other areas, and it is suggested here only to illustrate how broad the decision is, and its possible future use. For an interesting article on the application of this decision to segregation practices see 21 *So. Calif. L. Rev.* 16 (1949).

The first possibility is the ordinary legal remedy of a damage suit against a seller who has sold in violation of a restrictive covenant. It would appear that a defense resting on the illegality of such covenants would be within the scope of the *Restrictive Covenant cases*. It is interesting to note that there was a two thousand dollar penalty for breach of the covenant in the *Hurd* case, and the reason for that specific amount is that the identical amount was used in the *Corrigan* case; and since it met with approval when the case was before the court, attorneys in Washington, D. C. have been using it ever since.

The court in the instant cases disregarded the penalty provision entirely. Very frequently these covenants do contain provisions for liquidated damages, but it would appear that if state action were used to enforce such provision, it would run afoul of the decision. Further, there is the very important objection that an action for damages, liquidated or otherwise, would hardly suffice since the real objective of a restrictive agreement would require equitable relief in the form of an injunction. In addition there is the purely economic consideration that if liquidated damages were too high they would act as too great a deterrant to prospective purchasers, and finally, if they were high enough to obtain effective compliance with the agreement, the damages might be considered as a penalty. This is true in the case of liquidated damages or if a deposit or bond were posted.[26]

The deposit or bond has been suggested to guarantee compliance with the agreement. As has been pointed out, however, it is subject to the same infirmities as liquidated damages and an ordinary suit for damages. There is another difficulty here also if one party sued to recover the deposit. The adversary's defense would very likely put him within the scope of the *Restrictive Covenant cases* doctrine. Of course, there might then be urged the defense of pari-delicto, but this would not seem to be a very sound position because according to the rule of the cases, it is the enforcement of the agreement, and not its making or voluntary compliance with the agreement that is wrong. More important than the legal objections, however, is the fact that many purchasers would not be willing or able to make such a deposit. Thus, segregation under such a scheme would be possible only to the extent that parties are willing to pay for it. And finally, even if such a scheme were to be developed and deposits were posted in substantial amounts, some home owners in the group might find it profitable, or desirable for other reasons to sell their property to one of the restricted members.

Another idea which has been widely suggested is the insertion of a covenant giving the original subdivider of a real estate development power to approve or disapprove of future purchasers and occupants. The utility of this device is obviously confined to new areas. This scheme has the particular disadvantage of not being attractive to buyers and in addition might run into the problem of restraint on alienation. The use of this device assumes that there is a wide market for selection of buyers, which is probably true at

[26] McCormick, *Law of Damages*, (1935), p. 599.

the moment, but in times of economic distress the subdivider may be hard pressed to sell his property.

The Club Plan

The "club" plan has also been suggested as a way out. Title to the property is held by a club or association, and members are entitled to the right to occupy and maintain a particular dwelling and exercise the incidents of ownership. Here again, the lack of title in the purchaser or member of the club makes it difficult to transfer or use the property as a security device. There is another very important consideration, and that is that since the equitable title is in the purchaser, he could bring an action to free his title from inclusion in the group on the theory that the covenants violate the rule of the *Restrictive Covenant cases*. Of course, if the club membership requirement did not mention color, creed, or ethnic origin, then it might be difficult to prove that the rule applied. However, in view of the court's vigorous attitude towards this type of agreement, it is believed that the court would look through the form of the agreement and determine what the actual practice was.

The formal corporation is subject to the same criticism and weakness of the "club" plan, in that title would have to be surrendered and the further objection that ownership would be represented by shares or certificates, which, if transferred by a holder would have to be transferred on the corporation stock books.[27]

The use of the fee simple determinable may perhaps furnish an out for those who seek to escape the *Restrictive Covenant cases*. A conveyance vesting a fee simple in the grantee, until a certain specified event happens, at which time the fee automatically reverts to the grantor or his successors, is a fee simple determinable. While this device has been most frequently suggested as a means of by-passing the *Restrictive Covenant cases*, it suffers from a fundamental infirmity. Attention has already been called to the fact that the Supreme Court acutely distinguished in the *Restrictive Covenant cases* between a restriction on a class of purchasers or occupants (user) as opposed to one on the use of the property. Thus, if the one against whom the fee simple determinable operates refuses to vacate the premises after the sale to him which would be the event causing the determination of the fee, a writ of entry or suit for ejectment would be necessary. Judicial enforcement would be public action and as such subject to the same difficulty of violating the equal protection clause. Moreover, the sale price of property subject to this type of forfeiture clause would have to be set quite low to induce a future purchaser to buy under such onerous possibility of reverter and loss of ownership.

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[27] 12 Fletcher, *Corporations*, Sec. 5518 (1932). Colorado would probably permit an option in favor of the corporation to purchase the outstanding shares, but if there were several sellers, an excessive economic burden would be placed upon the corporation to take up all these interests. It might also be argued that restrictions on transfer are unreasonable and serve a purpose in violation of the public policy.

The same objections with perhaps more force apply to a fee simple subject to a condition subsequent, for breach of which the grantor has a right of entry, but ownership remains in the garantee until the grantor has exercised the right of entry reserved to him for breach of the condition subsequent.

The "Square Captain" plan is a proposal calling for appointment of "square captains" in the community each of whom would voluntarily be given options on the property in his block or area. If a property owner wishes to sell he would notify the captain giving him the name of the prospective buyer, and if he is found to be undesirable, the captain exercises the option and buys the house himself (in reality for another more desirable buyer). One objection to such a scheme is that resources may not be available to take up all the options, and further, if the property was sold in violation of the option and the captain brought action to set aside the sale, a court of equity might inquire into the purposes of the option, which would be fatal to his cause of action.

The "High Occupancy Standard" plan provides that covenants be inserted to require high occupancy standards, such as those governing the minimum cost of dwellings, the number of occupants per room, type of construction, etc. In the main such covenants are perfectly legal, and in fact, socially desirable in preserving the stability, appearance, and beauty of residential living. The trouble with this device as a restrictive scheme is that Negroes and other minority groups have college educations, economic capacity, and willingness to comply with such agreements.

Conclusion

While the schemes suggested are not the only means of escape, they are the most popular devices at the moment for attempting to avoid the decision in the *Restrictive Covenant cases.* It is apparent that in the final analysis all the schemes suggested may ultimately require state court action, and with the exception of the fee simple determinable and condition subsequent, are economically undesirable. It is generally thought that effective control of segregation will continue to remain with realtors and those responsible for financing homes.[28] In a rather bitter comment by Mr. Alfred Long Scanlon, the situation in this regard is well summarized when he states "Realtor 'ethics', discrimination in mortgage and construction financing, and high purchase prices are already holding the color line so well in such areas that any further protection would be merely gilding the white lily."[29]

Along with the attitude of this professional group will be the public

[28] 24 *Notre Dame Lawyer* 187 (1949).

[29] *Ibid.*, at p. 189. Mr. Scanlon also noted that the Code of Ethics of the National Association of Real Estate Boards provides that "(a) realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race, or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood." A member board which fails to enforce this Code of Ethics may be expelled from the Association. There is no doubt that in times of economic distress this code would be flagrantly violated.

opinion and attitudes of a particular community. While this attitude can no longer be manifested through court action, it will certainly be made clear by strict adherence to voluntary schemes of restriction. Further, economic and social equality has not been achieved to such a degree that there will be any wholesale attempts by minority groups to shift their housing and cultural identity, and social affinity will tend to concentrate them in areas of their own choosing.

Whatever form the community feeling may take, it is clear that the *Restrictive Covenant cases* have drastically changed the rights in property which assume the form of restrictive covenants. While these valuable property rights were not abolished, the moral recognition of them without resort to courts to preserve them makes them almost valueless. Whether the court wrenched the law more than was necessary, in setting up the Fourteenth Amendment as a standard in testing the particular devices in litigation and then deciding the case on their ideas of social desirability, may well be argued; but the vital importance of the decision cannot be denied. While the decision is slightly weakened by the fact that its legal basis is not clear as to what degree of participation is necessary to constitute state action, the decision is not only going to be a precedent in the field of restrictive agreements, but it may well be the point of attack upon all segregation practices now existing.[30]

Industrial Health Attorneys to Meet

The first Rocky Mountain Conference on Industrial Health, which will be held in the Denver Chamber of Commerce Building October 31 to November 2, will have one session devoted to the legal problems of industrial health for the benefit of attorneys.

The attorneys' session will be conducted on Monday afternoon, October 31 and will cover the following fields:

"Industrial Hygiene Codes and their Impact upon Manufacturing Operations"—MR. THEODORE C. WATERS.

"Legislation and Judicial Trends in Utah as they Affect Occupational Disease Compensation"—MR. LYNN S. RICHARDS.

"Compensation for Partial Disability in Silicosis"—MR. O. A. GLAESER.

"Compensation Law Trends in Colorado"—MR. S. ARTHUR HENRY AND MR. RICHARD M. DAVIS.

The conference, dedicated to the purpose of informing industry representatives of the need and scope of industrial health programs, is sponsored by the Division of Industrial Medicine of the University of Colorado.

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[30] Note that three Justices did not participate in this decision. It has been suggested that all three owned property upon which were restrictive covenants of the type in litigation.

Attorneys and the Community Chest

Attorneys have not only a responsibility to the community in which they practice their profession, but also the obligation to assume their fair share of responsibility for the profession as a whole.

You will soon be solicited by the Attorneys' Division, and your prompt and generous response will be appreciated greatly by the volunteer solicitor representing the profession.

Regardless of where you practice, support your Community Chest generously.

"PREDICTIONS OF THINGS TO COME"

The November and December issues of the new DICTA will contain a complete revision of the well-known and useful article by Percy S. Morris of the Denver Bar entitled "Curative Statutes of Colorado Respecting Titles to Real Estate." These statutes were first compiled and explained by Mr. Morris in 1939, in the February and March DICTA of that year. Now, with the many changes in law and the large number of lawyers who have been called to the bar in the past ten years, Mr. Morris has kindly yielded to our entreaties to revise his popular and profitable opus.

HAVE YOU PAID YOUR DUES?