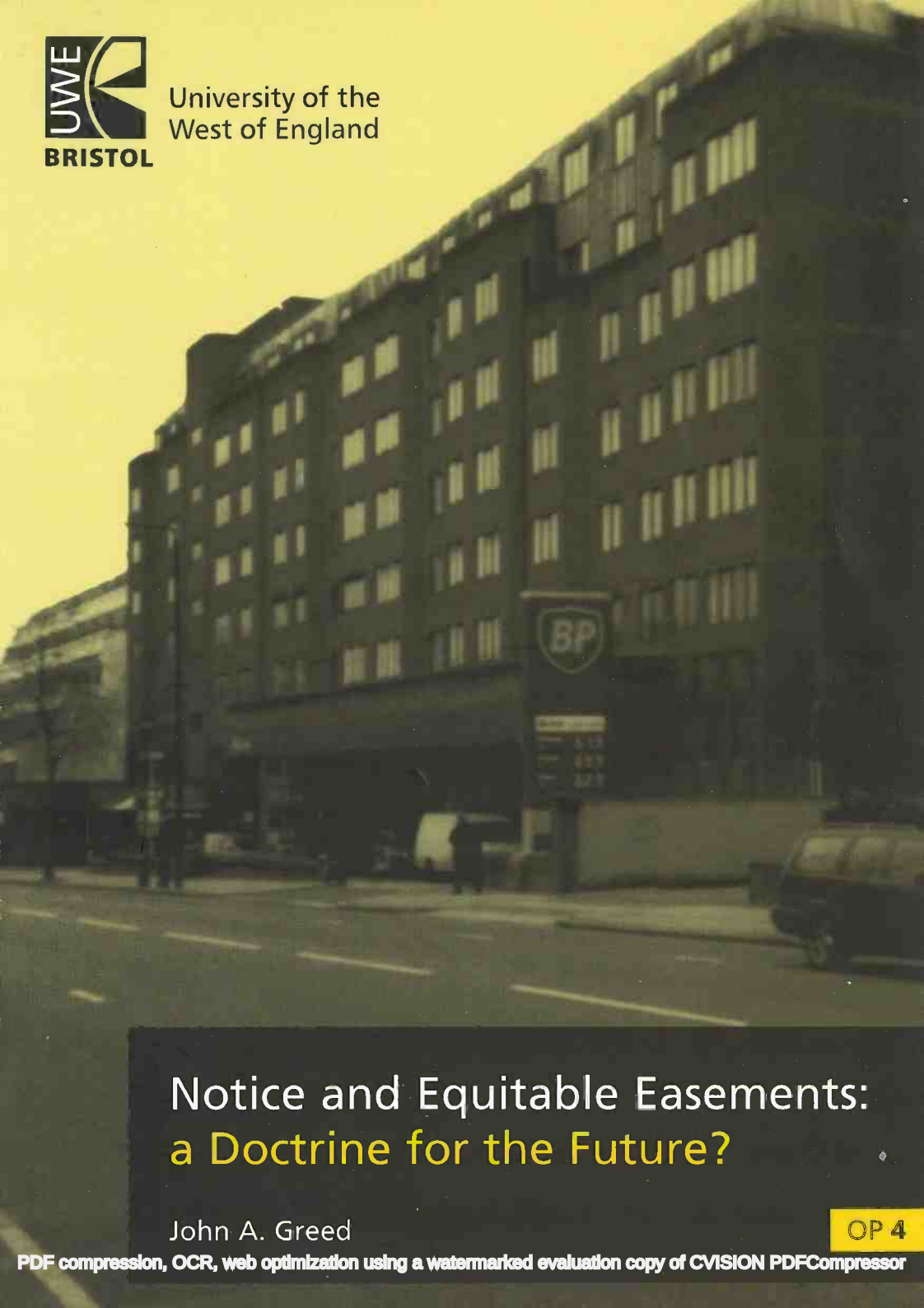

Notice and Equitable Easements: a Doctrine for the Future?

John A. Greed

OP 4

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a Doctrine for the Future?

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Cover photograph, by Dr. Clara Greed MRTPI, shows Cavendish House, near Regent's Park, London - the property which was the subject of the *Celsteel* case described on page 44 of this paper.

Notice and Equitable Easements:

a Doctrine for the Future?

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ALPHABETICAL TABLE OF STATUTES

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ALPHABETICAL TABLE OF CASES

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Preface

The argument in this paper is based on that in the writer's successful PhD dissertation, "Notice: an investigation into the area of law bounded by the doctrine of notice, protection of rights by entry of a Notice or other protection on the register at H. M. Land Registry, and overriding interests, with a suggestion for a way forward based upon estoppel" [1] but the writer has tried to put this paper into simple non-technical language, readable without too much effort though standing up to rigorous criticism. (And he expects it to get some!) He hopes he has pitched it at a level at which it will be of interest to general readers as well as to lawyers. There is no assumption that the reader will have legal knowledge beyond that set out in the "note on legal terminology" which follows this Preface.

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A note on legal terminology

Easements are rights over someone else's land. They may be rights of way or rights for N's drainage or water pipes or other services to cross O's land (N being neighbour, O being owner).

continued overleaf

1 University of Reading, 1998

Easements divide into legal and equitable easements. Legal easements are normally made by a deed. A deed is a formal legal document. Until 31st. July, 1990, all deeds had to be signed and sealed. Any deed made since that date needs no seal, but it must contain a declaration that it is a deed and must be signed in the presence of a witness. - Easements by prescription (i.e. used for more than twenty years without any permission in writing or otherwise at all) also count as legal easements.

Easements made by informal documents (such as contracts) are equitable easements. Until 1875, the common law Judges would not recognise these. They could only be enforced by the Court of Chancery (the court of Equity) sitting in London. Today, all Judges recognise them, but, for historical reasons, the rules applying to them are not the same as those for legal easements. - If an easement is made between two neighbours who are good friends and they do not bother to consult their solicitors, the chances are that the document they both sign[2] will not amount to a deed, and so the easement will be an equitable one.

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2 If only one of them has signed (and it would not be unusual to find that O has signed it but N has not) the document will not satisfy section 2 of the Law of Property (Miscellaneous Provisions) Act, 1989, which requires that agreements for sale of any interest in land must be signed by *both* parties. In that case, N might be well advised to base his claim on estoppel (see page 86 below) rather than on the arguments in Part 1 of this book. There is however an argument (which will not be explored in this book, and which the present writer thinks is unlikely to prevail) that although the written document signed by only one party fails to create an equitable easement, it is still sufficient evidence of an agreement to make a grant of easement which Equity could enforce by an order for specific performance. See the article by Alison Clarke, "Formalities and the nature of equitable interests", in *Current Legal Problems 1995 Part 1, ed.* R. Rideout and J. Jowell, *publ.* Stevens, page 138 at pages 141-142, for details.

Other rights. There are many other rights over land besides easements, but in this paper let us concentrate on easements, to avoid becoming lost in a maze of different rules about different rights. To bring in grazing rights, squatters' rights, occupiers' rights, fishing rights, mining rights, beneficiaries' rights under trusts, future rights, and rights by virtue of covenants and licences etc. would make this paper unreadable - though some of these will be briefly referred to in these pages from time to time.

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Unregistered land. This is the "old" conveyancing system. Every time a property changed hands, a deed was drawn up and added to the bundle of existing deeds for that property. This system is now being phased out, but an estimated three million properties (including houses, shops, factories, farms, playing fields, stately homes etc.) are still on it.

Registered land. This is the "new" conveyancing system. Details of ownership and all mortgages, easements etc. *currently* affecting the property are kept on the Land Registry's computer and appear in a "Title Certificate" which replaces the whole bundle of deeds. Current easements etc. are in the certificate; outdated matters are deleted from the computer and no longer appear anywhere. - When a property changes hands, a Deed of Transfer is drawn up, usually on a printed Land Registry form. This is then sent, with the certificate, to the Land Registry which updates its records and issues a new certificate which replaces the transfer-deed and the old certificate. More than sixteen million properties have been brought onto this system, so far.

Registries. With registered land, the ownership and mortgages and easements etc. are registered at the Land Registry. With unregistered land, the ownership has not been registered - it is shown by the deeds - but certain matters such as equitable easements, which may not show up from the bundle of deeds, need to be registered in a different registry, called the Land Charges Registry.[3]

Take care not to get confused between (i) registration of land (also known as registration of title) which happens at the Land Registry, and (ii) registration of rights over land, which takes place at the Land Registry if the rights run across registered land, and at the Land Charges Registry if the rights run across unregistered land.

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Notice. "Notice" basically means that P knew (this is "actual notice") or should have known ("constructive notice") or P's solicitor or surveyor or other agent knew or should have known (this is "imputed notice"). - "Notice" in this branch of English Law does *not* mean a written document such as a notice to quit a rented flat. That sort of notice is not what this paper is about.

Notice with a capital "N". With regard to some of the matters referred to in this paper, it is possible to enter a written Notice on the records at the Land Registry. In this paper, that type of Notice will always be spelt with a capital "N".

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3 Registration is carried out by filling in a form and sending it to the appropriate Registry. A fee is usually payable.

Notice and Equitable Easements: a Doctrine for the Future?

Part 1

Notice as a stand-alone Doctrine

Chapter 1

The Quest

This argument is a quest for the holy grail - the holy grail in this context being the fairest possible practicable balance between the rights of a purchaser of land and the rights of a person with an easement or other interest over that land.

The person claiming the easement will in most cases be a neighbour, so let us call that person N, and let us call the owner of the land O, and the purchaser of the land P, throughout this paper.

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The Problem of Conflicting Rights

The example which is set out overleaf illustrates the nature of the problem:-

N bought himself [1] a right to run a drainage pipe across O's land. This is an easement, and N paid O the sum of £1,000 for it. - Later, O died. The executors of O's Will (who knew nothing of this agreement that O had made with N) sold the land to P, who also knew nothing of it. Now, N and P are in dispute. P, digging foundations, has come across N's pipe, which is in the way and has brought P's work to a standstill. P claims he is entitled to cut the pipe off, as *he* never agreed to it. N wants to carry on using it. The gradient of this land prevents the pipe from being re-routed. The question is: *Is P legally entitled to stop N's right or not?*

Answering this question (with an explanation of the legal rules, cases, arguments, theories and implications which it involves, together with some suggestions for improvements to the law) will take up the rest of this paper.

The person taking action against the right will not always be a purchaser. Sometimes it may be a mortgage lender, trying to stop a right affecting a property that it is going to sell as mortgagee, or trying to gain priority over another mortgage.

One preliminary point, not always realised by people outside the legal profession, needs to be made clear. The fact that P has Planning Permission for the work he is doing does not mean he can cut off N's easement, if by the rules of Land Law the easement is enforceable. - On the other hand, if the easement is not enforceable, the fact that this easement is the only drainage N's house has, so N and his family will have to move out if the easement is stopped, is no reason to give N a right he is not otherwise entitled to by Land Law.

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1 N may be "he", "she", "it" (e.g. a limited company) or "they" (co-owners). Where the text requires "he or she", the writer will use "he or she". Where the text requires "he, she, it or they", the writer silently regrets the lack of a suitable impersonal pronoun in the English language, and makes do with "he".

If the easement is stopped and the drain is physically blocked, the local council will probably declare the house unfit for habitation (which will alarm N's Building Society as well as upsetting N) and that is how the situation may remain until N buys a new easement, or instals a septic tank, or makes some other arrangement satisfactory to the local Environmental Health Officer.[2]

A purchase of land is usually a costly transaction for which P would be well advised to use the services of a solicitor or licensed conveyancer. A purchase of a right over land (such as a right of way or a right to lay a pipe) is likely to be a financially far smaller transaction - the agreed price may be less than £100, though equally possibly it may be much more - and N (silly fellow!) may have thought it unnecessary to see a solicitor about this small agreement with his trusted friendly neighbour O.

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The Background

Before 1926, when there was very little registered land except in London, the general rule was that purchasers were bound by legal rights whether or not they had notice of them, and were bound by

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2 In *Wong v. Beaumont [1965] 1 QB 173*, a contract for the sale of a property to Wong *for use as a restaurant* (as the contract expressly stated) did not include a grant of an easement for a ventilator pipe which was essential for the restaurant kitchen. The Court of Appeal decided that Wong was entitled to an easement by implication, because the property could not be used *as a restaurant* at all without it. But this is not exactly parallel to the example above, for Wong was originally granted no easement, whereas in the example above it may be that N had an easement but it became void against P through N's own fault for failing to comply with legal requirements which we shall see in this book.

equitable rights of which they had notice.[3] The basic question was, "Did P, or P's agent, *know* (or, if not, *should* that person have known) of the equitable right?" If the answer was "Yes", P was bound by the right, and if "No", P was not bound, which seemed fair. ("Equitable" in a broad sense means "fair".)

So, to take our typical example: O died, and the executors of his Will sold his land to P. And later, P complained: "N says he has a right of drainage across the land. Apparently O granted it to N as an easement, before O died. I find it very inconvenient and it lowers the value of the land, and when I bought the land I did not know of it, because the executors did not tell me - because they did not know of it either". - Could P stop N from using the drainage pipe? The answer depended on whether the easement was legal or equitable. If it was legal - made by a deed - P was bound to allow N to go on using it. P should have seen the deed before he bought the land. But if the right was equitable (made by an informal document, which quite possibly would not have been put into the bundle of deeds) the question was whether P should have known of it. If he should, he was bound by it, but if not (e.g. he did not know of it, *and* there was no reasonable way that he could have discovered it) then P could stop N from using it. That was fair to P - though N might have felt he had been treated unfairly if he thus lost the right that he had paid good money for.

That was the rule until 31st. December, 1925. But then the rule was changed. The new rule was in the Land Charges Act, 1925, and is now repeated in the Land Charges Act, 1972. For easements made over unregistered land *since* 31st. December, 1925, the question is no longer, "Did P know?" but, "Did N register his equitable right, at the Land Charges Registry?" If he did, P should have seen the

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3 See the note on legal terminology on page ix above if you are uncertain of the difference between legal and equitable easements.

entry on the register, and is bound by it. But if N did not register the equitable right (which is likely, if he bought the easement without taking legal advice, and had never heard of the registration system) P can stop him from using it, whether P knew of the easement when he bought the land or not. That is the rule today under the "unregistered land" system.

In the "registered land" system (the "new" conveyancing system, which is the dominant mode of conveyancing today, though it was certainly not so in 1926) it was thought, until the case of *Celsteel Ltd. and others v. Alton House Holdings Ltd. and another [1985]*,[4] that a similar rule applied.

So the situation could arise in which P knew of N's right - possibly because N or O had told him - but as soon as P had bought the land he could turn on N and tell him, "Your right is not registered, so I am going to stop you from using it". - To the present writer, this situation seemed so manifestly unfair that he set out to show that the change made at the end of 1925 was an error of judgment that ought to be reversed. In fact he has not shown it at all: and in Part 1 of this paper he sets out his reasons for concluding that the system requiring registration of rights is better (in its present form in the "new" conveyancing system) than the system based purely on notice. He does not expect that all lawyers will agree with his reasons, but he claims that his reasoning follows on from the web of events and circumstances (outlined in Chapters 2-5 of this paper) which has led up to our present law on this topic. In Part 2 of this paper he will suggest a possible way forward based on the rule known as "estoppel".

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4 *[1985] 1 WLR 204, [1985] 2 All ER 562* - see page 44 below for details of this case.

"Did P know?" seems a simple question. But now let us look at a dozen cases which will illustrate the awful complications that the court found itself having to face in trying to answer it.

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Chapter 2

Chancery: Cases and Complications

The concept of notice began as an attempt by the Court of Chancery to administer fairness. But by the nineteenth century, the court had become engulfed in the complexities resulting from its own efforts, and the Real Property Commissioners, who produced a series of four Reports on Land Law between 1829 and 1833, described notice in their 1830 Report as "a system of great subtlety and refinement".[5]

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Notice in 1830 through the Cases

A body of case law on notice existed in 1830, much of it being as to notice of deeds which had not been registered in the Deeds Registries which then existed in Yorkshire, Middlesex and Ireland. (Only the Irish one survives today.) Two general points are to be gleaned from these cases. First, they show the extent to which the Court of Chancery treated it as fraud if someone went ahead with a purchase or other transaction despite knowing of an unregistered deed. Secondly they show a "progression" - they show how the doctrine of notice grew from a straightforward means of doing justice into a sophisticated system of daunting complexity with fine distinctions. A brief outline of the "progression" will be given here.

First, the basic rule:- In 1722 it was decided that attempting to obtain priority over an earlier unregistered deed of which there was

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5 page VII of 1830 Report

notice was fraud, in the Irish case of *Forbes v. Deniston.*[6] (It appears likely that the *intention* in this instance, in making the later deed, knowing the earlier one was unregistered, was to eject the tenants, which was a fraud on the tenants.) A similar decision was reached in *Chival v. Nicholls (1725)* [7] and in *Blades v. Blades (1727).*[8]

It was decided in *Bedford v. Bacchus (1730)* [9] that registration (in the Middlesex Deeds Registry) was not notice, and this was confirmed in *Morecock v. Dickins (1768).*[10] The decision meant that if there was a registered equitable mortgage, a later mortgagee (lender) who did not know of it (because, although it was registered, he had not seen the registration) could "leapfrog" the first mortgage and gain priority over it. The method was that he would buy the legal freehold of the property and would then show that he had not known of the other mortgage at the time he made his loan and so he was entitled to treat his own mortgage as the first: so the other lender was the loser if the value of the property was not enough to pay off both mortgages. But it was not so in Ireland, where, by the Registration of Deeds (Ireland) Act, 1707, deeds were to be "good and effectual, both in law and equity, according to the priority of time of registering".

The question of what was sufficient *evidence* of notice soon arose. Strong suspicion (but no proof) that someone had had notice

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6 *(1722) IV Brown 189, 2 ER 129* - Ireland. Commented on at length in the reports of *Le Neve v. Le Neve (1747)* by Atkyns, Vesey senior and Ambler - see footnote 12 below.

7 *(1725) 1 Strange 664, 93 ER 768* - Middlesex

8 *(1727) 1 Eq cas abr 358, 21 ER 1100* - Yorkshire. This case is referred to also by Atkyns and Ambler in their reports of *Le Neve v. Le Neve (1747).*

9 *(1730) W Kel 5, 25 ER 466; 2 Eq cas abr 215, 22 ER 516* - Middlesex

10 *(1768) Amb 678, 27 ER 440* - Middlesex

was held to be insufficient evidence of notice in *Hine v. Dodd (1741).*[11] It was held also in this case that there *could* be cases where there was notice without fraud, but "the proof must be extremely clear".

The basic rule seen in *Forbes v. Deniston (1722)* above, was confirmed in *Le Neve v. Le Neve (1747)* [12] in which it was said that "The taking of a legal estate after notice of a prior estate ... is a species of fraud, and *Dolus Malus* itself". *(Dolus Malus? - it means Wicked Deceit!)*

Notice to *agents* next had to be considered: later mortgagees were unaware of a previous unregistered mortgage, but they were held to be bound by it because their agent had notice of it, in *Sheldon v. Cox (1764).*[13]

Conflict of evidence, as to whether the notice had been given before or after execution of the mortgage, arose in *Plumb v. Fluitt (1791).*[14]

The next case, *Jolland v. Stainbridge (1797),*[15] really raises two questions, though they are not separated in the Report:- (i) What information is sufficient to put the purchaser on notice? and (ii) What evidence is sufficient to satisfy the court that the purchaser had such information? Loose talk was held insufficient to give the purchaser

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11 *(1741) 2 Atk 275, 26 ER 569* - Middlesex

12 *3 Atk 646, 26 ER 1172; 1 Ves sen 64, 27 ER 893; Ves sen supp 50, 28 ER 453; Amb 436, 27 ER 291* - Middlesex. All these Reports are dated 1747 except Atk (Dec. 1748) which seems to be an error.

13 *(1764) Amb 624, 27 ER 404; 2 Eden 224, 28 ER 884* - Middlesex

14 *(1791) 2 Anst 432, 145 ER 926* - non-register county

15 *(1797) 3 Ves jun 478, 30 ER 1114* - Middlesex

notice in this instance. The case arose because there was a fault in the title. (It was an unbarred entail: the details of that are not important here.) But the evidence of *notice* of this was that Stainbridge's book-keeper gave evidence that, about the beginning of 1790, Mrs. Stainbridge told him in Stainbridge's presence that Mrs. Jolland had told Stainbridge that the estate belonged to her daughter and that the person about to dispose of it had no right to sell. (No-one seems to have objected that this evidence was only hearsay.) This was corroborated by one Elizabeth M'Neale, who swore, "A few days previous to the sale Anne Jolland called to Stainbridge, as he was passing by the door; and told him, she heard, he was going to purchase the said estate; and therefore thought proper to inform him, that the title thereto was not good; upon which he appeared displeased; and said, *Poh, Poh;* and went away". - Sir R. P. Arden, Master of the Rolls, gave judgment: "It does not appear to me that the plaintiff has made out a case. ... There is no sufficient evidence of any knowledge ... of any defect in his lessor's title. ... To prove notice, it is not sufficient to assert that some other person claims a title; yet all the evidence given here is of that sort." - That was the sort of messy evidence the court had to deal with in answering what had seemed to be a simple question: "Did the purchaser *know* of the fault in the title?"

The status of an unsatisfied judgment which was not docketed, but of which there was notice, was the point at issue in the next case, *Davis v. The Earl of Strathmore (1810).*[16] Holding the judgment to be binding, the Lord Chancellor Lord Eldon made the point that, if it were not so, cases in Middlesex (a register county) and in Essex (a non-register county) would have to be decided opposite ways. But it was established in 1861 that in Middlesex the priority rule between a

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16 *(1810) 16 Ves jun 419, 33 ER 1043* - the property was in a non-register county.

registered judgment and a known earlier unregistered judgment differed from the rule between a registered mortgage and a known earlier unregistered judgment. *Benham v. Keane (1861).*[17] Complicated? Confusing? Yes!

Then came an early "contributions" case. A property (a chapel) had a sole owner, but there were other contributors to the purchase price. An assignment of the Equity of Redemption of the chapel mentioned an insurance policy, and in that policy it was stated that there were "other proprietors". (So the evidence was not in the title deeds at all. It was in an insurance policy, the existence of which happened to be mentioned in one of the title deeds.) Did this give a purchaser notice of the contributors' rights? The court held it did not. *Wyatt v. Barwell (1815).*[18]

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So the requirement was fraud, or notice (unless there was extremely clear proof that this was without fraud) to the principal or to the agent - and the court had faced some difficulty over conflict of evidence and over what was sufficient notice (loose talk being insufficient, and registration being no notice, though the practical result of this was not the same in England as in Ireland) and what was sufficient evidence that there had been this notice (mere suspicion, though strong, being insufficient). The requirement might be taken to be: proof of notice so clear that to go ahead in spite of it would amount in the eyes of the Court of Chancery to fraud - and this may amount to circularity: "If there was notice, Chancery will protect the right; and if Chancery protects the right, that shows there was notice". The simple question, "Was there notice?" was proving complex.

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17 *(1861) 3 DeGF&J 318, 45 ER 901; 1 J&H 685, 70 ER 919* - Middlesex

18 *(1815) 19 Ves jun 435 at 439, 34 ER 578 at 580; 2 Ves jun supp 586, 34 ER 1239* - Middlesex

By this time, the court was regretting that it had ever given effect to notice at all. The words of the Master of the Rolls Sir William Grant in 1815 in *Wyatt v. Barwell* [18] sum up the situation: "It has been much doubted, whether courts ought ever to have suffered the question of notice to be agitated as against a party, who has duly registered his conveyance: but they have said, 'We cannot permit fraud to prevail; and it shall only be in cases, where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected'".

Notice had thus been equated with fraud, though no differentiation between "fraud in the legal sense" and "morally culpable fraud" had yet been made. It was quite possible to find that you had done something which *legally* counted as fraud, although in all honesty your conscience was clear. In the words of Lord Justice Bramwell in the much later case of *Greaves v. Tofield (1880)* [19] "That third person may have been perfectly honest, he may have done his best to ascertain whether the prior contract existed and ought to be enforced, and may have come to the conclusion that it did not exist and could not be enforced, but notwithstanding that, his conscience is said to be affected, and he finds himself let in for a lawsuit because somebody told him a heap of untruths which he was unfortunate enough to believe."

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The early case of *Jennings v. Moore, Blincorne and others (1708)* [20] is an example of another type of trap into which a purchaser could fall. "Blincorne having notice of an incumbrance, purchases in the name of Moore. ... Though Moore did not employ Blincorne, nor

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19 *(1880) 14 ChD 563 at 578*

20 *(1708) 2 Vern 609, 23 ER 998*

knew anything of the purchase till after it was made, yet Moore approving of it afterwards, made Blincorne his agent *ab initio*, and therefore shall be affected with the notice to Blincorne." [21]

It is because of such cases as these that the Real Property Commissioners said in their 1830 Report (of which we shall see more later) that notice was a "system of great subtlety and refinement". [22] They commented further: "A suit in equity ... is ... notice to all persons of the claim raised by it, although the purchaser of the estate and his agents may never have heard of such suit. ... It is held generally, that ... when a man has sufficient information to lead him to a fact, he shall be deemed to know such fact. When a title is made out through a deed, the purchaser has constructive notice of every fact to the knowledge of which that deed leads ... immediately or remotely. So a purchaser who has notice of a deed, has constructive notice of all its contents, though his advisers may not have thought it necessary to examine or require the inspection of the deed. Where an estate is in the occupation of tenants, the purchaser is deemed to have notice, not only of their actual leases, but of any agreements relating to the property, which the tenants may have made with their landlords. It must be obvious, from what we have stated with regard to the doctrine of notice, that there must be numerous cases in which a fair and even vigilant purchaser may be deprived of the protection of the term." [22] [23]

The Real Property Commissioners concluded, in their 1830 Report, that a system should be introduced in which all deeds were to

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21 The quotation comes from Hardwicke LC's reference to this case in *Le Neve v. Le Neve (1747) Amb 436 at pages 439-40, 27 ER 291 at page 292; (1748) 3 Atk 646 at page 649, 26 ER 1172 at pages 1173-4*

22 page VII of 1830 Report

23 "Term" refers to a "satisfied mortgage term" as explained on page 22 below.

be registered in a Deeds Registry, and a purchaser could ignore an unregistered deed regardless of the question of whether he had notice of its existence. So the doctrine of notice - and all these problems that we have seen going with it - would no longer apply. The writer thinks they were justified in this conclusion, for the times and circumstances in which they lived, in view of the tangled state of the doctrine of notice at that time.

Keep that 1830 Report in mind. In 1857 another body of commissioners - the Title Commissioners - adopted the 1830 decision on notice into their 1857 Report which became the basis of our present-day registered land system. So we are going to see more about that 1830 Report in our next chapter.

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1836 - and the situation gets worse

In 1836 came the case of *Hargreaves v. Rothwell* [24] which increased the subtlety and refinement of the doctrine of notice still further.

The facts of *Hargreaves v. Rothwell* were:- The executors of a Will lent money on first mortgage to a Mr. Nuttall. A solicitor named Woodcock acted for mortgagor and mortgagee. - At the instigation of Nuttall's business-partner, Kay, Nuttall took a second mortgage on the same property, from the plaintiff. Woodcock acted for mortgagor and mortgagee. The first mortgagees were not informed of the second mortgage. - Then the executors lent Nuttall a further £2,000 on the security of the same property (Woodcock again acting for both parties) and the question which arose was whether notice to Woodcock of the plaintiff's mortgage was notice to the executors. Woodcock, at the time of the last mortgage, did not give the executors

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24 *(1836) Donnelly 38, 47 ER 211; 1 Keen 154, 48 ER 265; 5 LJ Ch (NS) 118*

notice of the second mortgage. He admitted, however, that he had had that mortgage in his recollection at the time he was employed in the last transaction, but that he considered it Kay's debt, and that there was no occasion to mention it.

This was before the advent of official law reporting, but the case was reported by two private reporters, Donnelly and Keen.

What the judgment lays down is that *a solicitor employed by two mortgagees, who has in mind the earlier mortgage at the time of the later one, fixes the second mortgagee with notice of the first mortgage.* - But that is not what the headnote in the report by Donnelly says. The headnote reads: *"A solicitor employed by two Mortgagees, fixes the second Mortgagee with Notice of the first Mortgage"* - and this sweeping mis-statement appears to have been taken as the meaning of the case.

Keen's report is more accurate, but is again very sweeping, and it applies the rule to "transactions" and not merely "mortgages".

So, going back to our example of N and his claim to a drainage right: the unfortunate P could find that he was treated as having notice of N's equitable easement - even though P had never heard of it - because P's solicitor (or the solicitor's clerk) had heard of it at some time in the past in connection with a completely different transaction for another client. - This rule was not abolished until 1882.

In 1834 it had been held in *Kennedy v. Green* [25] that notice to the agent was notice to the principal, even though it was the agent who had perpetrated the fraud which was the cause of the trouble.[26]

And in 1852 Sir John Romilly, openly wishing that his predecessors had never developed the doctrine of notice, laid down a guiding principle in *Ford v. White*,[27] "Nobody regrets more than I do the effect of the decisions ... *[but]* ... they must not be departed from, otherwise many titles would be destroyed".

In 1853, whether notice of a tenancy was notice of the title of the lessor was discussed in *Barnhart v. Greenshields*.[28]

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And even worse in 1856!

In 1856, *Hervey v. Smith* [29] - the case of the house with fourteen chimney pots - was decided.

The facts were:- O had sold to N the right of using two chimney flues in the wall of O's house. P purchased O's house without any knowledge of this easement. Sir John Romilly, Master of

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25 *(1833) 6 Sim 6, 58 ER 497; and on appeal (1834) 3 My & K 699, 40 ER 266* - not a "registration" case. (*locus:* Kennington - not within a register county)

26 In due course, a distinction was drawn between types of "solicitor fraud" cases: the client had notice of an incumbrance (such as a mortgage) known to his solicitor, even if the solicitor was fraudulently concealing it; but he did not have notice of a fraud committed by the solicitor in the past.

27 *(1852) 16 Beav 120, 51 ER 723* - a Middlesex case on priorities of mortgages, in which the third mortgagee registered before the second.

28 *(1853) 9 Moore 18, 14 ER 204* - a Privy Council case on appeal from Canada

29 *(1856) 22 Beav 299, 52 ER 1123*

the Rolls, stated: "Here the defendant buys the house and finds twelve flues in it, but fourteen chimneys on the wall. ... He might not have thought fit to count them, but I think he was put on inquiry, and that he cannot now say that he had no notice of the agreement...".

Professor Cheshire, in the early editions of his book, "Modern Law of Real Property", speaks of the "terrors" of notice,[30] and on the face of it, "terror" is a fair description of such a pitfall, but in an earlier (1855) Report concerning this case [33] - reporting the hearing of an interlocutory motion for an injunction to prevent the obstruction of the easement until the case could be tried - Sir William Page Wood, Vice-Chancellor, granting the injunction, said,[31] "The defendant had two chimney pots on the top of his house *which were continually smoking* [32] and had been in use since 1844, and the question is whether he had not such notice of the right of the plaintiffs as to put him on inquiry...".

An unexplained *smoking* chimney on one's house cries out for inquiry in a way that a bare chimney does not. Thus the principle of the case is that there is constructive notice of a circumstance which cried out for inquiry.

But the 1856 Report of the case does not mention smoking at all, and gives the impression that bare chimneys should be noticed. Thus a reasonable principle, that something noticeable to any prudent purchaser should be noticed, has been read as requiring a very unobtrusive item to be noticed. Judges were not quick to follow this latter requirement.

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30 G. C. Cheshire, *Modern Law of Real Property*, 2nd. edition, 1927, Butterworths, page 93. (Professor Cheshire's reference was to constructive notice but the present writer applies the term to notice in general.)

31 *(1855) SC 1 K&J 389 at page 394, 69 ER 510 at page 512*

32 my italics

So the doctrine of notice was in a sad state - and getting worse.

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The Five Terrors of Notice

Professor Cheshire referred to the "terrors" of the doctrine of notice: and Lord Wilberforce in *Williams & Glyn's Bank Ltd. v. Boland [1981]* [33] used the term "hazards" which is equally appropriate. These "terrors" can be analysed into five classes:-

1: Notice where there should have been registration,

2: Notice of a prior mortgage (or other prior financial right such as a judgment) in a non-register county,

3: Constructive notice of "family" rights,

4: Constructive notice of "commercial" rights,[34]

5: Notice to agent in a previous transaction.

Nearly all the cases which have been considered above fall into classes 1 and 2, though *Hervey v. Smith (1856)* is in class 4, and the source of the terror of class 5 (which was eventually removed by the Conveyancing Act, 1882) was *Hargreaves v. Rothwell (1836).* That leaves class 3 outstanding. It needs a brief mention as part of the background against which the 1830 and 1857 Commissioners had to work - even though its terror was largely removed by s.23 of the Law of Property and Trustees Relief Amendment Act, 1859.

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33 *[1981] AC 487 at 503G*

34 Class 2 applies to those "commercial" rights which under the pre-1926 law were known as land charges. Class 4 applies to those (such as equitable easements) which have only been land charges since 1925.

First, a word of explanation. Equitable interests divide into two classes: (i) "commercial" - such as equitable easements, restrictive covenants and other equitable rights that N might buy from O - and (ii) "family" rights, which are usually within a family. For example, it was fairly normal in 1830 that the eldest son of the Lord of the Manor would have a future right (which his father could not take away) to receive the manor house and lands when his father died. Often such rights would be held on the son's behalf by trustees. Today a similar "family" interest exists if a house is registered at the Land Registry in the joint names of H and W (husband and wife) but G (Grandma) who lives with them provided part of the purchase money. Today the trustees H and W can sell the property but must see that the beneficiary G receives her share of the proceeds of sale. If she is not paid, she can sue the trustees.

The rule until 1859 was different. When a purchaser bought from trustees, it was the *purchaser's* responsibility to see that the trustees handed over the purchase-price to the right persons (beneficiaries and/or creditors) if he was in a position to find out who they were (but not otherwise). The principle was that the purchaser should be liable for what a prudent purchaser could by reasonable inquiries ascertain. But this was subject to other rules of law, such as the rule referred to in the ancient case of *Culpepper v. Aston (1682)* [35] that if there was a Pending Court Action in which a bill had been filed, this was sufficient notice in law, because "as it is a transaction in a sovereign Court of Justice, it is supposed all people are attentive

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35 *(1682) 2 Ch cas 115, 22 ER 873*

to what passes there". [36] The purchaser legally "knew" of it, even though he had never heard of it.[37]

A Comment:- It had become apparent that the simple question, "Was it known?" could result in the bringing of very complicated chains of events before the court. It was also subject to many variations of circumstance: notice and acts amounting to fraud, clear and distinct notice, clear notice to agent, notice of tenant's (but not landlord's) title, information given by strangers, strong suspicion of notice, notice of something the court knew you had never heard of but it had to treat you as knowing of it anyway... The problem which arose again and again was that the Chancery Court had laid itself open to having to apply the doctrine to an extremely complicated set of facts and rules, as well as to the difficulties of conflict of evidence. The court was spending much time and energy on distinctions so fine, so numerous and so complex, that, whichever way the decision went, the losing party would not understand them and would feel that justice had not been done. - Yet we must remember the other side of the argument, which is that it offends against one's sense of justice when a person with a later right, knowing distinctly that a neighbour has an earlier unregistered right, deliberately gains an advantage over him by beating him to the registry.

That tangled web was the situation when the Title Commissioners sat down to prepare a scheme for title registration in 1857. That was the background against which they had to work.

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36 *per* Kay J in *Price v. Price (1887) 35 ChD 297 at page 301* (in which *Culpepper v. Aston* was cited)

37 After 1859, a receipt signed by the trustees was sufficient to absolve the purchaser from these responsibilities - as long as he had paid the right trustees. (Woe betide him if he had paid the wrong persons, thinking they were the trustees!)

Chapter 3

1857 - The Foundation of Today's System

The 1857 Report

In 1857, the Title Commissioners produced a Report which is the foundation of our present land registration system. (This is the Report in which the principle was first set out, that registration, with a certificate showing what was registered, should take the place of the bundle of title-deeds.) But what did these Commissioners say about notice, in this Report? They stated: "We propose that fraud in obtaining a transfer of the registered ownership shall defeat the title of the person who becomes registered owner by fraud, but that notice of unregistered rights shall not merely as notice have any such effect. ... We concur generally in the reasons adduced by the Real Property Commissioners in their (1830) Report in favour of excluding the interference of courts of Equity on the ground of notice". [38]

This was not comparing like with like - though it will turn out that this does not matter too much. The 1830 Report had recommended the setting up of a national Deeds Registry - not a Title Registry with Title Certificates replacing the deeds as we have with registered land today, but a Deeds Registry in which brief details of every deed would be entered, to make it impossible to hide or tamper with a deed. - The 1830 Commissioners had concluded that a purchaser should not be affected by a *deed* which was not registered at the *Deeds Registry*, even if he knew of it: and the 1857 Commissioners accepted this conclusion in respect of *rights* which

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38 paragraph LXXIII of 1857 Report

were not registered at a *Title Registry.* (The systems differ fundamentally. A deeds registry gives evidence that a deed exists, but if a deed is unregistered, it is still quite likely to be found in the bundle of deeds: whereas, with a title registry, the Title Certificate replaces the whole bundle of deeds, and if there is an unregistered deed, no-one is likely to see it. On that basis, registration of that unregistered deed should be *more* necessary in title registration than in deeds registration.) But that 1857 recommendation, accepting the 1830 conclusions as they stood, is the basis of much thinking on this topic today, though the debate in 1830 was in the context of a conveyancing system fundamentally different in principle from our present-day registered land system. So we need to back-track at this point and take a closer look at just what it was that was recommended in 1830 and accepted without alteration in 1857.

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A closer look back at the 1830 Report

Though the 1830 Commissioners considered notice carefully,[39] they only did so by the way, as one aspect of the problem they were dealing with. That problem was the "assignment of satisfied terms" - which needs to be explained. So here is an example of the conveyancing system as it existed at that time:-

Tom (a landowner) mortgaged his land. He used the form of mortgage by which rights to the land for the next 3,000 years were granted to the lender. - When Tom paid off the mortgage, the 3,000 year period did not end, but it was transferred to Tom's friends Tam and Tim, to hold it as trustees for Tom. Later, when Tom sold the land to Dick, the 3,000 years also had to be handed over. It would be transferred from Tam and Tim to Dick's friends Mick and Nick, who

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39 pages XXV-XXVII of 1830 Report

would hold it as trustees for Dick. - Maybe Dick would then mortgage the land, and when *that* mortgage was paid off, the rest of its term would be granted to two more trustees, Rick and Vic, to hold it for Dick. (And that is putting it simply! There is a case on record in which no less than 23 mortgages had to be transferred in this fashion.)

Suppose, *after* all that, Dick sold a right over the land to Zebedee. (This particular right is not an easement. It is a "future interest" saying that Zebedee can have the land as his own as soon as Dick dies.)

And later still, Dick (or his heir after his death) sold the land to Harry, who was not told about Zebedee's right. (This could happen for three reasons: either Dick genuinely forgot it, or Dick was dishonest and kept quiet about it, or Dick is dead and his heir genuinely did not know about it.)

Harry would also have made sure that the two mortgage terms were transferred, from Mick and Nick and from Rick and Vic, to friends of Harry who would hold them as trustees for Harry.

Then along came Zebedee and claimed his right.

Harry's ownership (his freehold) was subject to Zebedee's right. But the mortgage terms dated from before the grant to Zebedee, so they were not subject to his right. Harry could reply to Zebedee, "Your right is a good one, but I have 3,000 years free of it before you can use it!"

These transfers of satisfied terms (i.e. paid-off mortgage terms) were one of the things that made early nineteenth-century conveyancing almost incredibly long-winded. How to shorten this long-windedness was the problem the 1830 Commissioners were asked to solve.

But (and here comes the point, at last!) the 3,000 years were being held for Harry by trustees. (They could not be in his own name, or they would dissolve into his freehold like sugar dissolving into tea.

They *had* to be in someone else's name.) So they were held for him by trustees, and Harry was the beneficiary of the trust. But beneficiaries' rights could only be enforced in the Court of Chancery, which would always ask whether Harry had *notice* of Zebedee's right. And that is how the 1830 Commissioners found themselves having to discuss the doctrine of notice. It was not what they had initially come together to discuss.

Their *conclusion*, as we saw in the last chapter, was that a law should be passed that all deeds had to be registered in a Deeds Registry, and unregistered deeds should not count against people such as Harry even if they knew of them. The point was, that if there were such a rule, then the situation outlined above could never happen. *Either* Zebedee's deed would be registered and Harry would discover it and decide not to buy the land, *or* Zebedee's deed would not be registered and Harry could ignore it even if he happened to hear of it. The Commissioners also added a proposal by which contracts could be noted on the register.

The 1830 Report contained several reasons in favour of giving effect to notice of an unregistered deed, and several against.

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Arguments in Favour of Notice, in the 1830 Report

The main arguments in favour were:- The principal object of a Register is to protect fair purchasers against prior secret deeds; this protection is not wanted against a deed which is known. A law which should assist a fraudulent person against a fair purchaser who had not registered, would be a law in favour of fraud. If delay occurred in registering a deed, a later deed might get registered first. This, if done to defeat a just right, would be fraud. Neglect of registration would occasionally happen, and every instance in which a person with full notice should by means of the new law defeat a just purchaser, would be considered as a proof of the unjust rigour of the law, and tend to

render it odious. And finally, deference to moral feeling: it just will not seem right that a person should be legally entitled to take advantage of another's ignorance or forgetfulness in this way.[40]

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Arguments against Notice, in the 1830 Report

The Commissioners' chief arguments against giving effect to notice were:- A person omitting to comply with a formality required for the public good has no ground for complaint if left unprotected. It is his own fault. *[But not if he has not been told of the existence of the formality. JG.]* Applying notice will lead to much uncertainty, particularly with regard to constructive notice (the question, *"Should* it have been known?"). It frequently depends upon presumption, arising from evidence liable to suspicion; it leaves a wide opening for conjecture, and may be a most fruitful source of litigation. - Failure to register is unlikely, and the cases, where this failure and the existence of a fraudulent intention to take advantage of it concur, must be so rare that they may be safely disregarded. *[Experience has shown us how wrong that is! JG.]* - But then comes a powerful argument:- If effect were given to notice, no purchaser would know where he stood. Year after year, all purchasers would forever live in fear that someone might put forward a claim to a right, of which they had never heard: and so they would be faced with a lawsuit: and if the court said that they should have known of it, they would lose their case and maybe also their land.[41] *[But that possibility is not such a powerful argument when a purchaser who knew full well that there was an unregistered right is using the law to gain advantage over the innocent person claiming the right. JG.]*

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40 page XXVI of 1830 Report

41 pages XXVI and XXVII of 1830 Report

A Conclusion

Generally, the arguments against giving effect to notice commend themselves to the present writer less than those in favour of so doing. Nevertheless, on a view of the whole picture, the arguments "against" outweigh those "for", because a rule, "If no registration, then no right", gives an answer which is clear and immediate. It will not always be justice, but the alternative rule, "If no registration, then no right unless the purchaser had notice of it", gives an answer after much doubt and dispute and perhaps litigation causing such delay and expense that this in itself may amount to injustice. And even if this was *not* a case between two innocent parties, caused by fraud of a third party who had disappeared - so one innocent party had to lose - the result of the litigation might not be justice, because the court in 1830 was hamstrung by all those difficult previous cases which the Commissioners were not in a position to abolish except by abolishing the need to apply the doctrine of notice...

The question amounts to this: "Does the benefit of certainty (with its attendant saving of time and litigation-costs) justify the disbenefit of having some occasional injustice?" The question answers itself: "Nothing can justify injustice: the very suggestion is a contradiction in terms" - but the Commissioners had to be more practical than that. In view of the doubt, delay and difficulty to which applying notice could lead at that time, the writer thinks that *on balance* the 1830 Commissioners were justified in recommending that notice of the existence of an unregistered deed should not affect the purchaser's priority over that deed.

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1857 again

That conclusion of the 1830 Commissioners, to do with registering *deeds* in a *deeds* registry, was accepted by the 1857

Commissioners as their basis for recommending a similar rule regarding registration of *rights* in a *title* registry. And incidentally, no Deeds Registry was ever set up in England and Wales, except in Middlesex and Yorkshire and a small part of Bedfordshire: and by the Satisfied Terms Act, 1845, the system of transferring satisfied terms to trustees was phased out - so the 1857 Commissioners were considering a conveyancing system which was materially different in this respect from what the 1830 Commissioners had been faced with.

Like the 1830 Commissioners, the 1857 Commissioners had not gathered together to discuss notice. They were gathered to inquire into what would be the best type of title registration (several systems were suggested, some of them more detailed and complex than others) and the doctrine of notice was a problem that got in the way of their deliberations.

Should the Commissioners, in 1830 or in 1857, have said, in such a case, "If Zebedee's deed is not registered, it shall have no effect against Harry *unless Harry knew of it"?* Probably not. In view of the terribly complex state that the doctrine of notice was in, in 1830 (and by 1857 it was worse) the opinion of the present writer is that the Commissioners both in 1830 and in 1857 were justified in saying that notice - the whole question of whether Harry knew of the right - should be ignored. Whether we, today, are justified in saying it, will be considered later in this paper.[42]

One other point must be mentioned. Although the 1857 Commissioners accepted the 1830 recommendations about notice and applied them to rights in general, they made one major exception. They recommended that easements should hold good without registration in their title-registration system. - But this was in 1857 when equitable easements could only be enforced through the Court of Chancery, which would be sure to ask about notice. So the 1857

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42 see page 52 below

recommendation seems to have been that legal easements should hold good without registration, just as they did on unregistered land; and equitable easements should hold good without registration *except* against a purchaser in good faith who had no notice of them - just as they did on unregistered land.[43] Equity, being based on the concept of fairness, would always ask whether the purchaser had acted in good faith and without notice.

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43 Para LXIII of 1857 Report, enacted in s.18 of the Land Transfer Act, 1875.

Chapter 4

From 1857 to 1925

The government in 1862 thought it knew better than the 1857 Commissioners, and by the Land Registry Act, 1862, it set up a more sophisticated system than the one they had recommended. This 1862 system turned out to be such a dismal failure that after thirteen years, Parliament passed the Land Transfer Act, 1875, replacing the 1862 system with one based on the 1857 recommendations.

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1875 legislation

The Land Transfer Act, 1875, came into effect on 1st. January, 1876. On the day Parliament passed it (13th. August, 1875) Equity was still only available through the Court of Chancery: but the Members of Parliament knew that by the Supreme Court of Judicature Acts, 1873 and 1875 (the second of which they had passed just two days previously, on 11th. August, 1875) the common law courts and the Court of Chancery would be consolidated together into one court - the High Court, with an appeal to the Court of Appeal - from 1st. November, 1875, onwards. That is our present system, in which the High Court Judge delivers both common law and Equity. But this reform of the way the courts were organised only changed the system of administering the rules - it did not change the rules. Sections 16, 23 and 24 of the 1873 Act make that very clear. (See footnote 44 overleaf.) And there was nothing in the Land Transfer Act, 1875 (nor in its amendment in the Land Transfer Act, 1897) to say that equitable easements should be binding without notice - which would have been a radical change to the 1857 recommendations.

So the rule enacted in 1875 (it is s.18 of the Land Transfer Act, 1875) placing easements outside the registration system, must be interpreted to mean that legal easements were binding without registration, and equitable easements (easements enforceable only through the rules of Equity) were binding without registration except against a purchaser in good faith without notice, because, in any dispute between N and P, the 1873 Act required the High Court Judge to apply the same rules, requirements, rights and remedies as the Court of Chancery would have applied, and in the same manner.[44]

The 1875 registration system is the direct forerunner of our present registered land system. But by 1875, most solicitors were anti-registration, so the new system was scarcely used at all.

Soon, the dispute between the pro-registrationists and the anti-registrationists became sour. Solicitors pointed out the defects of the system (and indeed the system used from 1875 to 1925 did have defects - and so does the system in use today, which is in need of reform, though it is an improvement on the pre-1926 version). On the other side, many people, including certain Lord Chancellors who were not experienced conveyancers, could not see the difficulties that could arise in conveyancing. They seemed to think that registration just amounted to entering names and details in a book and that it would solve all conveyancing problems. (It was estimated that such a book would contain 70,000 entries per year. Would that give Harry, who had never heard of Zebedee, a fair chance of discovering Zebedee's right if nobody told him what to look for? - But if purchasers could always be sure they would be told what rights they needed to look for, there would be no need to have a registration system for those rights!

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44 Section 16 of the Supreme Court of Judicature Act, 1873, says the High Court is to exercise the jurisdiction of the former courts; s.23 says this jurisdiction "shall be exercised as nearly as may be in the same manner" as before; and s.24 says that both the plaintiff and the defendant shall be entitled to the same Equity as before.

Yet claims were made that, if there were such a book, purchasers would not need to use solicitors, because the purchasers could simply go to the Registry and look up the position for themselves in the book!) Solicitors were accused of opposing the system for the sole purpose of ensuring that they would be able to continue to charge high fees.

The merits or otherwise of the doctrine of notice became just one facet of this acrimonious dispute about the merits or otherwise of the 1875 title registration system.

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The Start of compulsory Registration - 1897

By the Land Transfer Act, 1897, title registration was made compulsory for London. Every purchaser of a property in London had to send his purchase deed, and the bundle of old deeds, to the Land Registry, which (if it was satisfied with them) would replace them with a Title Certificate. Henceforth there would be no need to look through the old deeds. All information currently relevant would have been copied from the deeds into the certificate. In theory, that is a good system.

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1911 - a Report

In practice, certain aspects of the registration system worked so badly that a Commission had to be set up to look into the problems. It reported in 1911. - Its Report included a recommendation by the Commissioners, stating,[45] "We think that

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45 paragraph 73 of the "Second and Final Report of the Commission on the Land Transfer Acts" *cmnd. 5483*

legal [46] rights and easements should be treated as paramount" - i.e. they should hold good without registration. But what does "legal rights and easements" mean? Does it mean "legal rights and all easements" or "legal rights and legal easements"? The present writer thinks, from the context, that it means the latter. So the recommendation was that legal easements should be good without registration, and (by implication, though not expressed) equitable easements should need to be protected on the register. Here - 1911 - is the beginning of the idea that equitable easements ought to require registration.

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1914 - Lord Haldane's Bill which nearly became Law

Lord Chancellor Haldane (who was an expert conveyancer) then drew up a Parliamentary Bill (1914) containing a new conveyancing system which nearly became law, but Parliament had to drop it because of the outbreak of the first World War in 1914. After the war there was a further Report (1919) followed by the passing of an extremely long Act, the Law of Property Act, 1922.

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1922 - the Preparation for the 1925 Legislation

The Law of Property Act, 1922, did not immediately come into effect: its purpose was to give parliamentary draftsmen something to work on. They took this Act, and all the relevant parts of older land law statutes that were not repealed by this Act, and divided this whole mass of law into six parts which Parliament then passed as six Acts:- the Law of Property Act, Settled Land Act, Land Registration Act, Land Charges Act, Trustee Act and Administration of Estates Act, all dated 1925. All six Acts came into force at the same moment, as the

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46 The italics are in the Report.

bells chimed in the new year on 1st. January, 1926. These six Acts are the foundation of our present Land Law. They are a hotchpotch: Lord Halsbury's 1914 proposals would have brought registered and unregistered conveyancing into two parallel closely-similar systems, but by the time the early drafts of the 1922/1925 legislation appeared, the target had changed from assimilation of registered and unregistered conveyancing to assimilation of the laws of real property (freehold land) and personal property (all other property) - and eventually, neither of these aims was carried out.

Applying Lord Haldane's proposals to a system in which all freeholds were subjected to the same rules as leaseholds, or a system in which all freeholds became million-year leaseholds with the Crown as landlord, *could* have achieved both these objectives; but that is not what happened. (And there would have been side-effect problems - such as what to do about the rule that prescription[47] does not apply to leaseholds.) But let us be fair. Today's Land Law is like the M25 - a great improvement on what we had to use previously.

In the Law of Property Act, 1922,[48] the list of matters good without registration (known today as "overriding interests" but known before 1926 as matters which "shall not be deemed incumbrances") still included all easements. Whether they were legal or equitable easements was of no importance, for if an easement was not a legal interest, through lack of compliance with some formality, it applied as an equitable easement and was thus not to be deemed an incumbrance.

That was not precisely what was wanted for easements. By the 1925 legislation, the doctrine of notice with regard to equitable easements over *un*registered land was to be replaced with a requirement of registration at the Land Charges Registry: and similarly

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47 the "twenty years use" outlined on preliminary page x above

48 Law of Property Act, 1922, 16th. Schedule, Part I, paragraph 5

on registered land equitable easements must cease to be overriding interests and must be made subject to a requirement of entry on the register at the Land Registry. But all other easements over registered land (i.e., "easements not being equitable easements required to be protected on the register")[49] would continue to be good without registration in the same way as before.

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Case Law - a sea-change

A "change in direction" in the case-law about notice had occurred by this time. In the case of *In re Monolithic Building Co. [1915]* [50] a first mortgage registrable under the Companies (Consolidation) Act, 1908, had not been registered, due to a misunderstanding caused by a mis-statement in a legal textbook. The company borrowed further money, on a second mortgage, from a Mr. Jenkins. He knew of the first mortgage: he was the company director who had actually put the company's seal onto the first mortgage: and he believed that the first mortgage had priority over his mortgage. But later, Jenkins sub-mortgaged his mortgage, to Calway: and Calway's solicitors claimed priority for Calway over the first mortgagee. The Court of Appeal decided the case in Calway's favour, stating: "It is not fraud to take advantage of legal rights, the existence of which may be taken to be known to both parties". The later mortgagee had not initially had any *intention* of obtaining priority over the earlier mortgage of which he was fully aware: but, finding himself in a position of advantage when there were insufficient funds to pay both mortgages, he was entitled to take that advantage. This is a far cry

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49 This phrase comes from s.70(1)*(a)* of the Land Registration Act, 1925 - see pages 67 below.

50 *[1915] 1 Ch 643*

from those old cases in it was considered that claiming such an advantage despite notice would probably amount to fraud. Today, there are two possibilities: (i) if the later person *engineered* the advantage, that would be fraud; but (ii) it is no fraud to use an advantage which the law presents to you, whether you had notice of the unregistered right or not.

In a 1981 case about property on the "old" conveyancing system, *Midland Bank Trust Co. Ltd. v. Green*,[51] (in which a mother, knowing her son Geoffrey had not registered his option to purchase a farm, bought it herself, thus preventing him from buying it) it was argued that there are *three* possibilities: (i) engineering the advantage, which is fraud; (ii) the *Monolithic* situation: "I see you have not registered, and as events have turned out there is a shortfall so that one of us will have to suffer loss: and I choose not to be that one" - which is not fraud and is permitted; and (iii) the *Green* situation: "I see you have not registered. I could leave you alone but I choose to take advantage of you". Is (iii) unconscionable and unacceptable conduct, though falling short of fraud?

In *Monolithic*, both parties had paid money in good faith, and one of them had to lose. The one with the "lifebelt" should win: and this was the decision reached. In *Green*, there was no *necessity* for Evelyne Green (mother) to become involved at all. It was her action that *precipitated* the problem. The argument is that the *Monolithic* rule should only apply if the need for the advantage arises from an independently-precipitated crisis. It should not apply if the purchaser, with notice of the circumstances, caused the crisis. The fundamental question is:- How far is it legitimate to take deliberate advantage of a person's failure to protect his rights?

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51 *[1981] AC 513 in the House of Lords; [1980] 1 Ch 590 (and see particularly page 617A) in the Court of Appeal*

By the time the *Green* case reached the House of Lords, the son and the mother had both died, but the son's widow stood to gain or lose a large sum from the decision. Counsel for the plaintiffs (who were the son's executors) had argued in the Court of Appeal: "Though it is not fraud to take advantage of one's legal rights ... it is fraud to seek to use one's legal rights to inflict deliberate damage on some other person" - and in the House of Lords he added: "The very object of the transaction was to defeat Geoffrey's right". So he distinguished between levels (ii) and (iii) but called level (iii) "fraud", as against "conduct unconscionable but not fraudulent, outside the *Monolithic* precedent". Counsel for the defendant (mother's executor) focussed upon only two levels, "fraud" and "no fraud".

The House of Lords' decision was that what the mother had done, knowing her son's right was unregistered, was not fraud, and there was no way of knowing whether she had had good honest reasons for doing it, so no-one could show that she had not acted in good faith: therefore she had done nothing unacceptable.[52] - The concept in level (iii) (i.e. that it was conduct not amounting to fraud, but nevertheless unconscionable and therefore unacceptable) was not argued except as a species of fraud, and *as such* was rejected by the court.

This argument, that level (iii) conduct is unconscionable and is therefore unacceptable even though not amounting to fraud, is not dependent on whether or not the land is registered land. So it cannot become law, even on registered land, unless the House of Lords is willing either to go against what it said in this respect in *Green*, or to find that in *Green* this question was not argued except as a species of fraud, and though it was held not to be *fraud*, the question of whether it was unacceptable unconscionable conduct was not argued and remains open. Unless that happens, the conclusion to this point has

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52 see particularly Lord Wilberforce's speech, *[1981] AC 513 at page 531A*

to be that conduct coming within level (iii) of the three levels outlined above is not fraud and is not regarded by the courts in England as unacceptable.[53]

Incidentally, the difficult problem of "good faith" that arose in *Green* (requiring a consideration of the unanswerable question of *why* she chose to do what she did) would not arise in a system which gave effect to notice. Under such a system, if P knew of the right he would be bound, and if he did not know of it, he could not be in bad faith regarding a right of which he did not even know - unless he were in bad faith as to the whole transaction generally.

The mortgage in the *Monolithic* case in 1915 required registration because of Company Law, but such matters as equitable easements, restrictive covenants and options to purchase did not require registration before 1st. January, 1926. From that date onwards, they did.

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53 This principle can be applied to four cases which we shall see later in this book, namely *E. R. Ives Investment Ltd. v. High [1967]* on page 87 below, *Celsteel Ltd. v. Alton House Holdings Ltd. [1985]* on page 44, *Thatcher v. Douglas (1996)* on page 45 and *Lloyds Bank plc v. Carrick [1996]* on page 88. In all four cases, no-one engineered the situation that arose: but Ives Ltd. and Mr. Douglas chose to attempt to take an advantage, whereas in *Celsteel*, even if the ground-floor tenant (Mobil Oil) should have known of the right, it does not appear that anyone deliberately chose to provoke an unnecessary conflict. In *High* and in *Thatcher v. Douglas*, the taking of advantage was seen as grounds for estoppel (an unconscionable denial of a promise, relied on to detriment - see page 86 below). In *Celsteel*, an injunction was granted on different grounds. And *Carrick?* The situation falls firmly onto the same level as *Monolithic*. The Bank had a right (and a duty to its investors) to act as it did.

Summing up the position in 1925

The situation immediately before the 1925 legislation, therefore, was that on both unregistered land (the "old" conveyancing system) and on registered land (the "new" conveyancing system, which was compulsory in London but was scarcely used at all elsewhere) legal easements were binding on a purchaser whether he knew of them or not, and equitable easements were binding on him unless he were a purchaser in good faith without notice.

In other words (going back to our original example on page 2 above) if N's easement was a legal one, P was bound by it. If N's easement was an equitable one, P was bound by it if he knew or should have known of it, but not otherwise, whether the land was on the "old" conveyancing system or the "new" one.

When the 1925 legislators considered whether to give effect to notice, they had to consider it in the light of all this background. And notice was just one item among dozens of matters on their agenda.

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Chapter 5

1925

The 1925 new Law

By the 1925 legislation, which gives us our present-day Land Law, the situation became as follows:-

On unregistered land

For easements made before 1st. January, 1926, the rules remained as set out above. (There are still pre-1926 equitable easements today, in respect of which the doctrine of notice still applies and so a purchaser's solicitor needs to look out for what his or her client ought to be aware of.)

For *legal* easements created since the end of 1925, the rule remains as before: the deed creating them makes them binding - P is bound by N's right - whether the right was known to P at the time of P's purchase or not. There is no registration system for these.

For *equitable* easements created since the end of 1925, there is a new rule. The question is no longer, "Did P know?" but "Did N register his right at the Land Charges Registry?" We have seen, on page 5 above, the injustice which can flow from this if P, fully aware of the equitable easement, takes advantage of the fact that N (through forgetfulness or ignorance) has failed to register it.

Such unregistered rights, incidentally, are not completely void. They are good against the person who granted them, and against anyone who receives the land by gift or inheritance. But a *purchaser* can generally ignore them whether he knew of them or not.

On registered land

On registered land, the rules are less clear. It is recognised today that the draftsman was much less expert on registered conveyancing than he was on the "old" system.

Section 20 of the Land Registration Act, 1925, states that registered land is subject to the incumbrances and other entries, if any, appearing on the register, and is subject to overriding interests (see below) but is free from all other interests.

("Incumbrances", by the way, means things like N's easement. The easement is a right and an advantage for N and his land, but it is an incumbrance and a liability against P and his land.)

It was generally accepted until the *Celsteel* case (1985) which will be considered below, that the effect of s.20 was that all easements made in writing, whether made by deed or made by an informal document, had to be put onto the register, and a purchaser was entitled to ignore any written easement not on the register.[54]

Easements by prescription (easements which have been used for more than 20 years with no permission in writing or otherwise at all) and easements of necessity (implied, without any writing, to give access to landlocked land) are overriding interests. An overriding interest is a right that holds good without registration. An interest which is not overriding, and therefore needs to be put onto the register, is known as a minor interest.

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54 In registered conveyancing today, an easement created by a deed which has not been registered does not count as legal. It is therefore equitable. *Contrast* the pre-1926 rule, under which it was legal.

Overriding Interests

Some types of overriding interest are very rare. The types most frequently encountered, which are to be found included in the list in s.70(1) of the Land Registration Act, 1925, are the following:-

s.70(1)*(a)* easements (except those equitable easements that have to be protected by an entry on the register)

s.70(1)*(f)* squatters' rights,

s.70(1)*(g)* rights of anyone in actual occupation, "save where enquiry is made of such person and the rights are not disclosed". [55] (This differs in a subtle way from the doctrine of notice, as explained in the "footnote on s.70(1)*(g)*" at the end of this chapter.)

s.70(1)*(i)* local land charges - e.g. an order by the local council that a house is unfit for habitation. (These are registered in the council's own registers and appear on the results of a Local Search. This is a different registration system from those systems described in this paper.)

s.70(1)*(k)* tenancies and leases not exceeding twenty-one years. (Longer ones have to be registered.)

The rationale behind overriding interests is common sense. There are a few matters which, on any registration system, are likely to be missed because of their nature. Squatters' and prescriptive rights are in this category: no-one ever *arranges* for their property to be subject to a squat or a prescription: these are things that happen

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55 The spelling "enquiry" here and "inquiry" in s.199 (as to notice) of the Law of Property Act, 1925, creates an insuperable spelling dilemma when both sections have to be referred to together. The writer will generally use "inquiry" in that situation.

because no-one raises a hand to stop them. That is why they are overriding interests. - A tenancy at a weekly rent, and the rights of Grandma who lives with the householder and his family, will usually not involve a solicitor: so short leases and the rights of persons in actual occupation have been made overriding interests. Orders made by the local Council appear in the Council's own registers and are usually not registered at the Land Registry, so they too have been made overriding interests. Compare this paragraph with the above list and you will find that the five matters just mentioned are matters on that list. But there are also neighbour-to-neighbour rights, informally made without a solicitor. These may be licences, contracts, easements, profits à prendre and covenants. A licence (e.g. "You can walk across my land: I don't mind,") can be revoked at any time, by O telling N to stop doing it. A purely-personal contract ("You can walk across my land for £*n*,") is a person-to-person right, which ends if O dies or sells his house. Easements, profits and covenants are more permanent. An easement ("For £*n* you can cross my land for the rest of your life" or "for 99 years" or for some other period, stated in a deed or a contract) is an overriding interest by the rule in *Celsteel.* A profit à prendre (a right of taking something: e.g. "For £*n* you can put your horses on my land to take and eat the grass for 25 years") is also an overriding interest, by s.70(1)*(a)*, and/or by *Celsteel.* Covenants are not overriding, nor should they be, because if a covenant were not on the register, there would be no guaranteed way of checking its wording. The exact words of covenants are important: a covenant "not to keep vehicles on the property" prevents the keeping of caravans, whereas a covenant "not to keep motor vehicles" does not; and a covenant "not to keep motor vehicles yachts or speedboats on the property" will not prevent N from parking a twelve-metre cabin cruiser on a four-wheeled trailer on his lawn. An *easement* for N to cross O's land, on the other hand, assumes a path or way that is wide enough to get through, and no-one is likely to bother about whether it is 1 metre or 2 metres or 3.4 metres wide, unless part of it is inconveniently

blocked as in *Celsteel* - or unless N suddenly decides to take his cabin cruiser that way!

Consideration of overriding interests reveals an opposite side of the problem we have been considering. Up to now, the alleged unfairness has been that P can stop N's right, even though P knew of it, because N omitted to register. But now we see another side to the problem: P may be bound by a right he could not possibly have discovered - he is bound by it if it is an overriding interest. (But that is no worse for P than the rule about legal easements on unregistered land, on page 39 above.)

Rights of anyone in *actual occupation* of the land are overriding interests, by s.70(1)*(g)* of the Land Registration Act, 1925. So, if a tenant on the land has been granted an option to purchase the freehold, and has not registered that option, it holds good because the tenant is in actual occupation and so the right is an overriding interest. (The theory is that a prospective purchaser should see anyone in occupation, and ask them their rights.) - An option to purchase is an equitable interest. But an option to purchase *unregistered* land needs to be registered at the Land Charges Registry, or a purchaser of the land can defeat it. There is no provision protecting rights of persons in actual occupation of unregistered land.[56] (This is believed to be a mistake in the legislation: it is thought that s.14 of the Law of Property Act, 1925, was intended to cover this point, but in fact it does not do so.)

As the *Celsteel* case will be referred to constantly in the next few pages, an outline of it, and of the case of *Thatcher v. Douglas (1996)* in which the *Celsteel* decision of 1985 was followed, will be given at this point, though strictly these cases are out of context here as they occurred much more recently than 1925.

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56 as in *Midland Bank Trust Co. Ltd. v. Green [1981]* on page 35 above

Celsteel

In *Celsteel Ltd. and others v. Alton House Holdings Ltd. and another [1985]* [57] the planning permission for the tall London block of flats shown in the illustration on the front cover of this paper stated that the ground floor was to be a petrol filling station and the upper floors residential. A driveway (one-way system) served the underground parking and a row of surface garages. In due course the ground floor was leased to Mobil Oil Ltd., together with part of the driveway on which to erect a car-wash. This would have the effect of narrowing the driveway from nine metres to just over four metres. The combined effect of the one-way system and the car-wash was that the lessee of the end garage (who was one of the four plaintiffs claiming the full-width right of way in this case) could no longer back his car into his garage, though he could drive in and blindly back out. It happened that the conveyancing for the lessee of this garage was not in order: it appeared that although a 120-years lease (undated) granting him the garage had been executed, this lease had never been submitted to the Land Registry. This lessee was in occupation of this garage and of an upstairs flat: but he was not in actual occupation of any of the land included in the lease to Mobil, so s.70(1)*(g)* (rights of persons in actual occupation) would not help him. - But Rule 258 of the Land Registration Rules, 1925, states,

> Rights, privileges and appurtenances appertaining or reputed to appertain to land or demised, occupied, or enjoyed therewith or reputed or known as part or parcel of or appurtenant thereto, which adversely affect registered land, are overriding interests within Section 70 of the Act, and shall not be deemed incumbrances for the purposes of the Act.

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57 *[1985] 1 WLR 204, [1985] 2 All ER 562*

So his right of way, openly used, over the whole width of the driveway was an overriding interest. With reference to s.70(1)*(a)* of the Land Registration Act, 1925, which sets out the rule (details of which we shall see on page 67, below) about what types of easements are overriding interests, this is an equitable easement good without requiring to be protected on the register. An injunction was therefore granted, which prevented Mobil from installing the car-wash in that position.

Celsteel is a High Court case, decided by a sole Judge. (It later went to the Court of Appeal on a completely different point, but what is outlined above still stands, and was not re-considered by the Court of Appeal.)

In *Thatcher v. Douglas (1996)* [58] the Court of Appeal accepted and followed the rule in *Celsteel* - but partly because counsel for the defence in *Thatcher v. Douglas* gave no argument against it. *Thatcher v. Douglas* was a claim to an easement of launching boats over a neighbour's slipway which had been built partly on the plaintiff's land. (In this respect, the case had similarities to *E. R. Ives Investment Ltd. v. High [1967]* [59] mentioned on page 87 below.) As *Thatcher v. Douglas* has not been widely reported, it is summarised in the footnote below.[60]

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58 *146 NLJ 282 (1 Mar. 1996) and LEXIS*, but not in any of the main series of Reports.

59 *[1967] 2 QB 379*

60 *Thatcher v. Douglas (1996) 146 NLJ 282.* Nos 33 and 35 Eastoke Avenue (mis-spelt Eaststoke Avenue on LEXIS) on Hayling Island back onto a creek of the Solent. In 1966, Mr. Williams, owner of No.35, had built (but not completed) a slipway, of which the foundations encroached onto the neighbouring land, No.33. An oral agreement was therefore made at that time between Mr. Williams and the plaintiff (owner of No.33) to share the slipway, and the plaintiff helped Mr. Williams complete *(Footote continues overleaf.)*

Now to return to the main argument.

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The Status of Overriding Interests - are they invincible?

On *registered* land it is generally accepted that all overriding interests, whether legal (like prescription) or equitable (like options) are absolutely overriding - invincible - regardless of whether a purchaser had notice of them. *The writer takes issue with this*, and argues that the correct interpretation of the legislation is that overriding equitable "commercial" interests (such as unregistered easements) are invincible *except* against a purchaser in good faith without notice of the right. That was the rule until 1925 (as we noted in the previous chapter)[61] and the 1925 legislation did nothing to change it. The two sections of the Land Registration Act, 1925, which say that notice *does not* apply are s.59(6) and s.74, but s.59(6) does not apply to overriding interests at all, and s.74 applies only to beneficiaries' rights under trusts, which are "family" and not "commercial" interests. (See pages 18 and 19 above, for the difference between "family" and "commercial" interests.) The House of Lords case of *Williams & Glyn's Bank Ltd. v. Boland [1981]* [62] in which the House of Lords appears to regard all overriding interests as invincible, was only concerned with a "family" interest.

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its construction. Mr. Williams later sold No.35 to a Commander Whetstone, and after two further changes of ownership it was purchased by the defendants, Mr. Douglas and his wife, in 1976. - The plaintiff continued to use the slipway unhindered until 1989 when, after a disagreement over another unconnected matter, Mr. Douglas told the plaintiff to cease using it. - The Court of Appeal held the plaintiff had a contract for a permanent easement, supported by part performance, which was an overriding interest by Rule 258.

61 See pages 30, 33-34 and 38 above.

62 *[1981] AC 487*

In the Court of Appeal in *Paddington Building Society v. Mendelsohn (1985)* [63] Browne-Wilkinson LJ (now Lord Browne-Wilkinson) said (Lord Donaldson MR agreeing) "Mr. Hawkins, for the mother, submitted that once it was shown that the mother had an equitable interest and that, by virtue of s.70(1)*(g)* of the Act of 1925, her equitable interest was an 'overriding interest' that is the end of the matter. By operation of the statute, her interest overrides that of the Society. He relied on *Williams & Glyn's Bank Ltd. v. Boland* to support this contention." (The facts were that Mendelsohn had not made his mortgage payments; but his mother, who lived with him and had contributed part of the purchase money, claimed to have an overriding interest under s.70(1)*(g)* preventing the Building Society from evicting her.) Browne-Wilkinson LJ continued: "Looking at the matter first as a matter of statutory construction I would have no hesitation in rejecting Mr. Hawkins' submissions. Section 70(1) deems the registered land to be subject to certain rights which 'override' the rights appearing on the register. The rights referred to in paragraph *(g)* are "the rights of every person in actual occupation". There is no doubt therefore that the registered land is subject to the rights of such person. But the essential question remains to be answered: 'What are the rights of the person in actual occupation?' If the rights of the person in actual occupation are not under the general law such as to give any priority over the holder of the registered estate, there is nothing in s.70 which changes such rights into different and bigger rights. Say, in the present case, before the acquisition of the flat a trust deed had been executed declaring that the flat was held in trust for the mother but expressly subject to all the rights of the society under the proposed legal charge. The effect of s.70(1)*(g)* could not in my judgment have been to enlarge the mother's rights so as to give her rights in priority to the society when, under the

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63 *(1985) 50 P&CR 244 at 248*

trust deed, her rights were expressly subject to those of the society. Her rights would be 'overriding interests' in that the society would have to give effect to them, but the inherent quality of the mother's rights would not have been such as to give them priority over the society's rights. So in the present case, once it is established that the imputed intention must be that the mother's rights were to be subject to the mortgage, there is nothing in s.70 of the Land Registration Act 1925 which enlarges those rights into any greater rights. - I can see nothing in *Williams & Glyn's Bank Ltd. v. Boland* which conflicts with this view."

This argument is not as to notice, but it is relevant here. The position, and the present writer's argument stemming from it, can be summarised as follows:-

1. Section 74 says a purchaser shall not be affected with notice of a trust.
2. This was interpreted in *Boland* to mean that the overriding interest of the beneficiary of the trust was binding: notice was of no effect.
3. The judgment in *Mendelsohn* was (i) that by s.70(1)*(g)* the Building Society was subject to the beneficiary's right: but (ii) the nature of this right was that it was subject to the mortgage, and there is nothing in s.70 that enlarges it into any greater right. - This has nothing to do with s.74 or with notice: it makes no inroad at all into s.74.
4. But the point is, s.74 only applies to rights under trusts. It does not apply to easements. Therefore it can be argued, from this basis, that if an equitable overriding interest is *not* shielded from the effect of notice by s.74 as in 1 and 2 above, because it is not under a trust (e.g. it is an easement as in *Celsteel)* there is nothing in s.70 or any other legislation or judgment that enlarges it into any greater right. It remains an *equitable* overriding interest, and as such, subject to notice.

5. The definition of overriding interests in s.3(xvi) of the Land Registration Act, 1925, gives no argument against this which is not answered by the judgment in *Mendelsohn.*

The point was raised again in argument in the House of Lords in *Abbey National Building Society v. Cann [1991]* [64] which was another case in which part of the purchase price had been provided by the borrower's mother who lived in the mortgaged property. - Lord Oliver in *Cann* stated: "Actual occupation merely operates as the trigger, as it were, for the treatment of the right, whatever it may be, as an overriding interest. Nor does the additional quality of the right as an overriding interest alter the nature or quality of the right itself. If it is an equitable right it remains an equitable right." [65] - but he goes on to hold that Mrs. Cann's constructive trust, being carved out of the purchaser's right which was itself only an Equity of Redemption (a legal estate subject to the mortgage) was subject to the mortgage irrespective of any question of notice. Regardless of any argument about s.74 or about notice, the very nature of Mrs. Cann's overriding interest was that it was carved out of a legal estate which was already subject to the mortgage.

It has been suggested to the writer that his argument is untenable because of the opening words of s.70(1) of the Land Registration Act, 1925: "All registered land shall ... be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto..." (and the list, from s.70(1)*(a)* to s.70(1)*(m)*,[65] then follows). - The writer's answer to this objection is:- What is the nature of the right? In *Celsteel*, and also in our example of N, O and P (in which N's right holds good by the rule in *Celsteel* if the land which P has purchased from O is registered

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64 *[1991] 1 AC 56 (The passage quoted is from page 87E-F of the Law Report.)*

65 The list originally ran from s.70(1)*(a)* to s.70(1)*(l)*, but s.70(1)*(m)* as to coal was added to it by the Coal Industry Act, 1994.

land) the right is an *equitable* easement, good against everyone except a purchaser in good faith without notice. *That* is what is overriding: and *that* is what the property is subject to by s.70(1). And being overriding makes it into nothing more invincible than that.

Another argument against the writer is that by the Land Registration Act, 1925, the requirement of registration replaced the doctrine of notice, and overriding interests are good without registration, so they are good regardless of notice: in other words, the Land Registration Act, 1925, has made the doctrine of notice inapplicable. - But the writer's reply to that argument is that the Land Registration Act, 1925 (and indeed the entire 1925 legislation) did no such thing - and nor was it intended to - in respect of overriding equitable "commercial" interests. Neither s.59(6) nor s.70(1) nor s.74 nor any other provision achieves this. The House of Lords may appear to have done so in its decision in *Boland*, but that case was about an equitable "family" interest under a trust, to which s.74 applies. It was not about a "commercial" interest.

The trouble is that the word "overriding" (first used by Lord Haldane) has been taken to have the same meaning as "omnipotent" and "invincible", and in the context of overriding equitable "commercial" interests, it does not have that meaning. The "accepted wisdom" that registration was meant to supersede the doctrine of notice has been allowed to obscure this point. The writer's argument on it can be summarised as follows:-

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Summary of the Writer's Argument on Overriding Interests

1 The 1857 Commissioners deliberately excluded easements from their registration scheme. Legal easements were to be binding without registration, but those easements which were only enforceable in a court of Equity ("equitable easements") would have been subjected, by that court, to the condition that they

would not be enforceable against a purchaser who had no notice of them.

2 The Land Transfer Act, 1875, creating a title registration system based on the 1857 recommendations, said (in s.18) that easements were to be good without registration - which is just what the 1857 Commissioners had said. The 1857 recommendation is what was enacted in 1875, and was law from 1875 to 1925.

3 In 1925 it was enacted that equitable easements need to be shown on the register. - But for equitable easements *not* coming within this category (and today that means all those equitable easements which are overriding interests by the rule in *Celsteel)* nothing has been enacted to change their nature from "subject to notice" to "invincible". Neither s.59(6) nor s.70(1) nor s.74 (which are the three sections of the Land Registration Act, 1925, most closely connected with this argument) have done this. Subsequent cases prior to *Celsteel* asserting that overriding equitable interests are not subject to notice, were on "family" rights, about which this assertion is true by s.74.

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To make registrable but unregistered rights valid if there was notice of them would be to increase the work and worry of conveyancers, who would have to inquire after them. The writer is not proposing that. His argument is that equitable "commercial" overriding interests - which are interests the conveyancer has to inquire about at present, because there is no other way to check on them - *should not* be binding on the purchaser if not discoverable by reasonable inquiries. This takes a burden off the conveyancer's shoulders. There would no longer be the risk that the purchaser might find himself saddled with an equitable easement which had been totally undiscoverable at the time he bought the land. There would no

longer be the worry of whether he should insure against such a contingency. There would sometimes be cases on whether a right had been totally undiscoverable or not, but the writer thinks those cases would not be more traumatic than such cases as *Boland* and *Cann* on whether a right was an overriding interest or not.

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Overreaching and Overriding

Under the 1875 Act - and more so after 1882 - if a right concerning registered land was lost for non-registration it was generally "overreached", which meant that the loser received compensation in money for the loss of the right. Under the Land Registration Act, 1925, that is what happens today with "family" rights: the trustees can sell the trust property, but the beneficiaries receive the money when they become entitled - e.g. when they reach the age of 18. But it appeared (until the *Celsteel* case in 1985) that an unregistered *easement* would be "overridden", i.e. lost without compensation. - If this were correct, then the writer would argue that this was a 1925 error of judgment, and that a proviso saying, "except where the purchaser had notice of the right", should be added to the legislation, to restore the balance to what it was before 1926, even though this would potentially resurrect the difficulties of those cases we saw on pages 7-11 above (except that the writer's "burden of proof" proposal set out on page 62 below would minimise this danger). But now it appears that an unregistered easement usually will not be overridden, because by the decision in *Celsteel* it will count as an overriding interest.

Some rights (such as options to purchase) will not be saved by the rule in *Celsteel* and will still be overridden. So if the neighbour N had an unregistered option to purchase O's land, and O sells the land to P, P is entitled to override N's option even if O had told P of its existence. (N, unlike the tenant in the example on page 43 above,

is not in actual occupation of O's land, so s.70(1)*(g)* will not protect his right.) - But then N could sue O (provided O is still alive) for breach of contract: "You sold me an option, and now you have sold the land to P in breach of your contract with me!" (This happened in the unregistered-land case of *Midland Bank Trust Co. Ltd. v. Green (No.2) [1979].*[66]) It will probably be a great shock to O who may have forgotten that he ever gave N the option, and probably will not have insurance to cover the compensation he will now have to pay to N. O should have foreseen this and put a clause in his contract with P, to require P to indemnify O against any such claim, but he is unlikely to have done so.

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The Status of Interests which are overriding by Rule 258

The High Court Judge in *Celsteel* was of course aware of the generally-accepted view that all overriding interests are invincible. He said,[67] "If equitable easements in general are not within the exception in s.70(1)*(a)* it would follow that they would rank as overriding interests and be binding upon registered proprietors of servient land even though such proprietors did not have and could not by any reasonable means have obtained any knowledge of them. That result could not possibly be supported." In his judgment, he then made the

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66 *[1979] 1 WLR 460,* concerning the same land as the *Green* case on page 35 above. Geoffrey Green lost his claim in Land Law against his mother because his option was not registered at the Land Charges Registry, but he also sued his father. Father, who had granted Geoffrey the option, had sold the land to Mother because he had changed his mind and now did not want Geoffrey to have it. Geoffrey succeeded against him in a claim for breach of contract. Geoffrey also alleged that there was Conspiracy by his parents to deprive him of his option. He also successfully sued his solicitors for the tort of Negligence, for failing to register the option.

67 *[1985] 1 WLR 204 at 220D, [1985] 2 All ER 562 at 575d*

point that this right that he was recognising under Rule 258 was openly used. But he only stated this as a fact; he did not say that it was a *necessary* requirement. So we are left in some doubt: Rule 258 requires that the right must be "appertaining or reputed to appertain" to land. A right that cannot be discovered by reasonable inquiries cannot be "reputed to appertain" - something unknown cannot have a reputation of any sort. But can an undiscoverable right *appertain* to land? Possibly it can: it depends on how the word "appertain" should be interpreted. It is also possible that it would be discoverable to anyone buying N's land, though not to anyone buying O's land.

So there are three alternative conclusions possible, which will be referred to, for convenience, as the "invincibility" conclusion, the "openness" conclusion and the "notice" conclusion:-

(a) *The "invincibility" conclusion.* If what has just been said is correct, and so a right can appertain secretly to land, then an unregistered equitable easement which was totally undiscoverable would bind a purchaser even though he could not have known of it. It is overriding and therefore omnipotent and invincible.

This would be a trap for developers, who might buy land and then discover that it was subject to a right which prevented them from carrying out their development: and it is the very thing that the Judge in *Celsteel* said "could not possibly be supported".

(b) *The "openness" conclusion.* If the wording of Rule 258 can be taken as requiring "open" use of the right (which needs us to assume that "appertain" means "discoverably appertain") the equitable easement is an overriding interest if openly and discoverably used. This would not be a trap for developers.

This is more or less equivalent to notice, but there are differences. A neighbour who crosses O's land furtively, when he knows that O is not looking, is crossing it not openly but surreptitiously. But consider the neighbour who works in a night-club,

to whom O has granted an equitable right of way. This neighbour crosses O's land regularly on his way home from work, which happens to be at 3.00 a.m. He is not acting surreptitiously, but no-one ever sees him, and P, buying the land from O's executors after O's death, cannot discover the right by reasonable inquiries (unless there are footmarks to be seen on a bit of soft ground) because the executors do not know that O made this agreement. So this unregistered equitable easement is not surreptitious but it is also not discoverable. Is that "open" use of the right? - And there is the further question of whether "open" means "openly used now" or "openly used when it began". Many a drain or water or gas pipe was laid openly at the time it was put in, but is now invisible under the ground. (This is parallel to the requirement in prescription that the right must be *nec clam*, meaning, not in secret at the time it began.) The rule of notice, on the contrary, requires the right to be discoverable *now*, and if a purchaser cannot reasonably discover it he is free of it. Which way Rule 258 should be interpreted in this respect is unclear. So the requirement under Rule 258 is not identical to the doctrine of notice, though it has similarities to it.

(c) *The "notice" conclusion.* If the writer's interpretation of the Land Registration Act, 1925, is correct, the pre-1926 rule that overriding equitable "commercial" interests (such as equitable easements) are subject to the doctrine of notice has never been abolished. So an unregistered equitable easement which was made overriding by Rule 258 would hold good against everyone except a purchaser in good faith without notice of it. So this would not be a trap for developers.

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The Background to Rule 258

It is said that a series of wrongs do not make a right, but in the context of Rule 258 and *Celsteel*, this seems to be what has happened.

The *Celsteel* case (which has given us a useful balance of justice, though criticised by legal theorists) relies on Rule 258 which itself appears to be the offspring of a 1925 mistake or misunderstanding. Here is what happened:-

In the Land Transfer Rules, 1898, there was no provision equivalent to Rule 258: but in the Land Transfer Rules, 1903, the following two Rules appeared:

254 The registration of a person as proprietor of land shall vest in him, together with the land, all rights, privileges, and appurtenances appertaining or reputed to appertain to the land or any part thereof, or, at the time of registration, demised, occupied, or enjoyed therewith, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

255 Rights, privileges and appurtenances appertaining or reputed to appertain to land or demised, occupied, or enjoyed therewith or reputed or known as part or parcel of or appurtenant thereto, shall not be deemed incumbrances within the meaning of the Land Transfer Acts, 1875 and 1897.

(Compare that Rule 255 with the present Rule 258 on page 44 above, and see what is missing from the fourth line.)

It was clear in the 1903 Rules that Rule 255 applied to the same subject-matter as Rule 254. In other words, it was dealing with the benefit of the right, not the burden. It is saying that N does not have to register the benefit of this right on the registration of his own land. (So anyone buying N's land will get the benefit of the right, even though it is not on N's Title Certificate.)

If the properties of both O and N were registered land, those rules applied, and if neither piece of land was registered land, those rules did not apply because they were only applicable to registered land. If O's land was registered land and N's was not, the rules did not apply. But if O's land was unregistered land and N's was

registered land, did the rules apply? Could there be an overriding interest in respect of a right which ran across land which was not registered land? It was not clear.

In the Land Registration Rules, 1925, the old Rule 254 became the present Rule 251, and the old Rule 255 became the present Rule 258. Six other rules have been inserted between them and so the connection between them is no longer clear. It is no longer obvious that Rule 258 is dealing with the benefits that Rule 251 deals with. And, to deal with the uncertainty pointed out in the paragraph immediately above, the words "which adversely affect registered land" have been inserted into Rule 258 - and people not knowing the background to the rules have seized upon these words and concluded that Rule 258 is intended to apply to the burden - the liability - of the right. So, instead of being interpreted as meaning that N does not need to register the benefit of his right on the registration-record of his own land, it has been taken to mean that N does not need to register his right against O's land, to which this right is a burden or liability. So it has been taken to mean that P, the purchaser of O's land, will be bound by this unregistered liability, as an overriding interest.

But, taken in the context of Rule 251, Rule 258 does not say that the *burden* of the right shall be an overriding interest at all! But now we have the decision in *Celsteel*, which says that Rule 258 *shall* be taken to mean that.

CONCLUSION: the intended subject of the rule was benefits.

But wait! It seems that that argument is not the whole truth. *(Here comes a second attempt at the argument! The second of four!)*

The 1903 Rule 254 is to do with benefits. The 1903 Rule 255, directly following from Rule 254, is to do with *these same* benefits - but *sees them also as burdens*, since one property's benefit is another property's burden, and the word "incumbrances" which appears in the old Rule 255 and the present Rule 258 must surely refer to the

servient land's burdens rather than to the dominant land's benefits, unless the draftsman has got his terminology mixed up.

The 1925 Rule 251 is identical to the 1903 Rule 254 except for the addition of a reference to s.62 of the Law of Property Act, 1925. That section says that a purchaser who buys land with buildings on it receives also "all outhouses, erections, fixtures ... sewers, gutters, drains ... liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land" - it is a sort of legal shorthand, so that it is not essential to mention all these things in the purchase-deed. But a right which has become void does not "appertain" to the land. (So, if N has several rights over O's land, P is subject to them by the rule in *Celsteel* when he buys O's land. But suppose that for some technical legal reason, one of those rights does not hold good against P. When N later sells his land to M, M automatically receives the benefits of all those rights - but not the void one.)

Once the 1925 Rules 251 and 258 are read together, it can be argued that the draftsman regarded Rule 258 as extending only to what we might call "typical s.62 rights" - the sort of thing that passes *only* by s.62, which would not include such matters as easements made by express written grants which do not need the aid of s.62. (But if he thought and intended that those matters - or at least the burden of them - would be outside Rule 258 and would need registration, and would be void against P if not registered, he did not say so.) And he added the words "which adversely affect registered land" to avoid any possibility that this rule might be applied to unregistered land subject to such rights. Let "s.62 matters" burdening registered land be dealt with under this rule, but let "s.62 matters" burdening unregistered land be dealt with under the general law. And if they burden registered land, let them be overriding interests by Rule 258, whether they are a species of right that would be overriding anyway by s.70(1) or whether they are not.

CONCLUSION: the intended subject was both benefits and burdens. The draftsman may have had it in his mind that the rule would be limited to "typical s.62 rights" only, but the wording of the rule does not say so, and it is applicable widely and includes written easements such as that in *Celsteel.*

There are three possibilities which follow from this conclusion: *either* (1) the draftsman did not realise that Rule 258 would extend so far as to enforce the burdens of such easements as the one in *Celsteel*, *or* (2) he realised but he forgot to exclude these rights from the operation of Rule 258 (which he could have done by adding to it the words "except easements created by contract or deed independently of Rule 251") *or* (3) he deliberately wrote it the way it is, knowing that this would leave a discrepancy between Rule 258 and the Land Charges Act, but knowing also that registered land and unregistered land would be non-corresponding systems anyway. (The two systems approach the registration requirements from opposite directions. "Old" conveyancing has a list of incumbrances which *need* to be registered at the Land Charges Registry. "New" conveyancing is based on registering the whole title at the Land Registry, but has a list of overriding interests which *need not* be registered.)

But wait again! *(Here is the third attempt at the argument!)* To allege that the reference to "incumbrances" signifies that the rule applies to burdens, is a weak argument. The phrase in both the old Rule 255 and the present Rule 258 is "shall not be deemed incumbrances". This phrase and the phrase "declared not to be incumbrances" are the phrases that were used in the 1875 Act to describe what we would today call "overriding interests". These phrases have no more connotation of specifically meaning "burden" than has the phrase "overriding interest" (used indiscriminately whether the reference is to the benefit or the burden of the interest) today.

CONCLUSION: there is nothing to suggest that the intended subject of the rule was anything other than benefits.

Not entirely so! *(Here is fourth and - for the time being - final attempt!)* The phrase "shall not be deemed incumbrances" is the phrase used in s.18 of the 1875 Act, and is almost identical to the phrase "shall not be treated as incumbrances" used in the opening words of s.70(1) of the Land Registration Act, 1925. These are the two sections which give the lists of the matters to which registered land is to be subject. Both sections begin with the words, "All registered land ... shall be deemed to be *subject* to..." That can only apply to "burden". So the same phrase in Rule 258 must at the very least be regarded as *capable* of including "burden" as well as "benefit".

CONCLUSION: the argument that the intended subject of the rule was benefits, to the exclusion of burdens, is unsustainable.

So Rule 258 *can* extend to burdens, whether the draftsman intended it to or not, and that includes burdens of written easements such as that in *Celsteel*, whether the draftsman intended it to or not.

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The Balance of conflicting Rights

Let us leave this narrow point and look more generally at the 1925 changes. What balance did the 1925 draftsman intend to achieve in the Land Registration Act, 1925? Probably he intended three things:-

(i) that legal easements made by deed should be overriding[68] - good without registration - just as before 1926 (which the writer would accept, but it is not what the draftsman has said) and

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68 See pages 61-62 and 68 below for an enlargement of this assertion.

(ii) that the benefit of rights appertaining to land should be good without registration (which the writer accepts, because it is parallel to what s.62 of the Law of Property Act, 1925, provides for the "old" conveyancing system, in which a purchaser from N would automatically receive the benefit of the equitable easement, provided N had registered it against O at the Land Charges Registry before O sold to P) and maybe the draftsman meant this to extend to burdens as well; and

(iii) that equitable easements by informal document should need to be put onto the register (which the writer sees as a balance of justice inferior to the pre-1926 system, because it enables P to take advantage of N's ignorance of the law).

That, the writer believes, is what was intended. But what the words say (or what they are interpreted by the courts as saying) is what matters. So what was the result?

(i) By the 1875 land registration system, easements by deed were legal because they were by deed, and were "overriding" (though that word was not used in the 1875 and 1897 Acts) because they were easements. But the 1925 legislation has removed *both* of those struts. Legal easements are overriding, by s.70(1)*(a)* of the Land Registration Act, 1925, but the combined effect of making equitable easements subject to a registration requirement, *and* a rule that an easement by an unregistered deed was not a legal easement but was equitable, took away both supports. If the deed had held good at law as it would have before 1926, s.70(1)*(a)* would have protected the easement; or if the deed were only recognised as a grant in equity but s.18(3) of the 1875 Act (making all easements s.18 interests) had remained in force, the easement would have been protected; but with *both* these props removed, the easement falls - except that since 1985 it is saved by the rule in *Celsteel.* The writer argues that this was a 1925 error (either of drafting or of judgment) which the decision in *Celsteel* has largely corrected. - The fact that rights by unregistered deeds are

now equitable is (in the writer's opinion) not what the draftsman intended.

(ii) The rule (Rule 258) that rights appertaining to land shall be good without registration has been read to mean that the burden is good, as an overriding interest. We have seen on pages 56-60 above that this is arguably a valid interpretation, and anyway it now has judicial authority by *Celsteel.*

(iii) Equitable easements informally made (which the writer thinks the draftsman intended to need registration, just as he did with unregistered land) and equitable easements by unregistered deed (which the writer thinks the draftsman meant to be legal and therefore overriding, but he slipped up) are all, by virtue of *Celsteel*, overriding interests. So long as we add to that a requirement of openness, as in the "openness" conclusion on page 54 above, or a requirement of notice for the equitable rights, as in the "notice" conclusion on page 55 above) the result is, in the writer's opinion, a *better* balance of fairness between N and P than the draftsman was aiming at! (Or was the draftsman looking at our present-day balance all the time? Had he intended from the beginning that unregistered equitable easements would be saved by Rule 258 unless they were undiscoverable, but it took the rest of the legal profession sixty years to realise it? I like to think so - though I doubt it!)

Let us leave well alone! The writer strongly recommends that this balance of fairness should not be changed. But he adds one proviso, namely:-

burden of proof

In all cases, whether N is the claimant suing for his right, or whether P is the claimant seeking an injunction to stop N's activity, the burden of proof of the case should always fall upon N, for it is due to his failure to register that there is a case at all. And for the same reason, in cases where there is real doubt, the court should not

get into complexities such as those we saw in the cases on pages 7-13 above: it should declare N to be the loser. (This will be referred to below as the writer's "burden of proof" provision.) That is opposite to the present rule, which is demonstrated by the case of *Re Nisbet & Potts' Contract [1905].*[69]

Nisbet in 1901 bought land from X and Y who had bought it from Headde who had a squatter's title to it going back to 1878. Nisbet did not know that it was subject to a restrictive covenant, not to build anything except houses on it, though he would have discovered this if he had insisted on exercising his right of seeing old deeds dated 1867 and 1872. Nisbet contracted to sell the land to Potts who intended to build shops on it, and the owner of the covenant complained. The court's decision was that the covenant was binding, for it was up to Nisbet to prove that there was no reason why he should have known of it, and he could not do so.[70] - Today, restrictive covenants need to be registered and the writer's suggestion is that where a restrictive covenant or equitable easement or other equitable right has not been registered, let the owner of that right lose it unless he can prove that the purchaser of the land should have known of it despite its non-registration. Put the burden of proof on the claimant of the right and not on the purchaser of the land. And in doubtful cases, let the claimant of the right fail: it is his own fault for

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69 *[1905] Ch 391* and on appeal *[1906] Ch 386*

70 It is difficult to give the right shade of meaning here without doing violence to English grammar. The opposite of *"he ought* to have known" required here is not *"he ought not* to have known" (which would imply a duty to avoid finding out) but *"he did not ought* to have known" or "he was not in a position where he ought to have known". Nisbet lost the case because he could not prove that there was no reason why he should have known of the covenant, when he purchased the land. The point is, the burden was on him to prove it, not on the other party to show he should have known.

not registering it. That is the present writer's recipe for avoiding a return to the problems of those cases we saw on pages 8-11 above.

balance of fairness

Easements such as N's may often be made between neighbours who do not see any need to consult a solicitor over a small, friendly, over-the-fence transaction, so they do not register the easement because they do not know of the registration system. The writer's aim in this paper is to give due protection to N; but only where N can show that P knew of N's right, or that the right was evident for *any* purchaser to see.

What if P or P's solicitor inquires but O says there are no incumbrances and does not tell him of N's right? In a system in which effect is given to notice, it is likely that N's right would hold good but P could claim compensation, probably for misrepresentation, from O. P should have been able to discover the unregistered right, and it was O's fault that he could not. But if O had died and the executors of his Will did not know of N's right, N is going to lose that unregistered right unless he can show that he himself told P of it, or that P should have known of it from some other source or from inspection of the land. (If it were apparent on inspection, it would probably hold good under Rule 258.) If N cannot show this, and so his claim fails, he has only himself to blame. He should have registered his right while O was still the owner of the land.

choices

Of the three alternatives, the "invincibility", "openness" and "notice" conclusions on pages 54-55 above, the courts are more likely to accept the "openness" conclusion than the "notice" conclusion. (They might accept the "invincibility" conclusion, which would be unfortunate for developers, or the House of Lords might reverse *Celsteel* altogether, which would be unfortunate for justice. Or they

might even read this paper and conclude that Rule 258 applies only to benefits, and so *Celsteel* was wrongly decided - in which case this writer will have been misunderstood and will have done justice a bad turn!)[71] Assuming that the courts can be persuaded to accept the "openness" or "notice" conclusion, where does that leave us today? The next section explains:-

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The present-day Situation

1. *Easements and other rights created before 1926*

Outside London, rights created before 1926 will almost always have been made over unregistered land. They will have been picked up (or will in due course be picked up) by the Land Registry on the occasion of the first registration of the land over which they run - unless one of them was an undiscoverable equitable right, in which case it will have become void for lack of notice, at a date prior to first registration of the land at the Land Registry.

In London, there are rights which were registered at the Land Registry under the pre-1926 registered-land system (the Land Transfer Acts, 1875 and 1897) but these hangovers from a past age are a specialised matter which will not be dealt with in this paper. This book focusses primarily on easements, and until the end of 1925, all the easements over registered land were overriding interests.

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71 Since this paragraph was written, a Law Commission consultation paper (Law Com No.254, see pages 95 and 121 below) has recommended the revocation of Rule 258: so this paragraph may be overtaken by statutory changes before long - or then again it may not. In the proposal described and tested in Chapters 8 and 9 of this paper, the assumption is made that Rule 258 is revoked.

2. *Rights over unregistered land today*

Though it is estimated that there are still more than three million properties unregistered, this number grows less every year, because the purchaser of any unregistered property is now required to register it within two months after buying it. So let us now discount unregistered land - the "old" conveyancing system - from this argument. It has serious faults, but let it fade away. Its equitable easements are picked up by the Land Registry on First Registration of the land, unless there is one which is undiscoverable, in which case it will have become void either for lack of notice (in the case of one created pre-1926, as mentioned above) or for lack of registration of the right at the Land Charges Registry (in the case of one created post-1925) at a date prior to first registration of the land at the Land Registry.

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3. *Rights over registered land today*

(i) *A legal easement made by deed and registered.* This is good against the whole world.

(ii) *An equitable easement made by an informal document which has been noted on the register.* This is good against the whole world. The question of whether a purchaser has notice of it does not arise, because the entry on the register counts as notice to the whole world. (*Contrast* the old rule in *Bedford v. Bacchus (1730)* - page 8 above - in which registration did not count as notice.)

(iii) *Legal easements by prescription, and implied easements such as ways of necessity to landlocked land.* These, which have nothing in writing, are overriding interests, good without registration. They come within the list of overriding interests in s.70(1)*(a)* of the Land Registration Act, 1925.

Before we add the final two items, (iv) and (v), to this list, we need to look at s.70(1)*(a)*. It deals with easements and similar matters. Matters which are overriding interests by s.70(1)*(a)* include:-

> "Rights of common, drainage rights ... rights of way, watercourses, rights of water, and other easements not being equitable easements required to be protected by Notice on the register".

What is the meaning of those last thirteen words, "not being equitable easements required to be protected by Notice on the register"? Do they mean that *all* equitable easements need to be protected by being noted on the register? Or do they only refer to *such* equitable easements as need to be protected - implying that there are some which do not?

To make that grammatical point clearer, compare the phrases, "horses, which are large", and "horses which are large". The first phrase (with a comma) means that all horses are large. The second (no comma) means only those horses which are large: it excludes the small ones. That is the point in the paragraph above: does it mean all equitable easements or some equitable easements? By strict grammar it should be the latter, as there is no comma after easements. - In *Celsteel* the words are given the latter interpretation:- Easements "not being [such] equitable easements [as are] required to be protected by Notice on the register" - and an unregistered equitable easement which openly "appertains" to land and "adversely affects registered land" is not such an easement as needs to be protected on the register - because it is an overriding interest by Rule 258 as interpreted in *Celsteel.*

That ties in with the historical background:- Under the 1875 Act, even if an easement was not legal, it was equitable, and therefore "shall not be deemed an incumbrance". The present writer argues that this means it was outside the registration system but does not mean it

was good against a purchaser in good faith without notice. But the 1925 legislation would change that. In the case of unregistered land, the doctrine of notice would not apply to equitable easements created after 1925: they would need to be registered at the Land Charges Registry. And registered land would be put onto the same footing: equitable easements made by informal documents and not otherwise protected would no longer be rights which "shall not be deemed incumbrances" but would need to be protected by Notice on the register. But all other easements ("easements not being equitable easements required to be protected by Notice on the register") would continue to be as good without registration as before.

Now we can add items (iv) and (v) to the list above.

(iv) *Easements made by a deed which has not been registered.* These appear at first sight to be legal easements and therefore overriding interests by s.70(1)*(a)*, but that is not so, for they do not count as legal because the deed has not received the formality of registration. It therefore takes effect as a minor interest,[72] and any right it creates can only be counted as equitable - as if made by an informal document - and therefore must come within (v) below. The writer has said on page 61 above that he believes this was a mistake by the 1925 draftsman: but the letter of the law is what applies.

(v) *Equitable easements, not protected on the register* - either made by a deed which has not been registered, or made by an informal document such as a contract which has not been shown on the register. (There are other types of equitable easement, such as an easement lasting for someone's lifetime, but we shall not consider that complication in this paper.)

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72 s.101 of the Land Registration Act, 1925 is interpreted as having this effect, though the present writer is not convinced that this is what the draftsman intended.

Until 1985 it was generally assumed that as such an easement was not on the register, it failed against a purchaser. It was the sort of easement that the final thirteen words of s.70(1)*(a)* prevented from being an overriding interest - or so it was thought. Thus: N bought and paid for an easement over O's land. O sold the land to P who was told of the easement, but P could then promptly stop N from using it, because it was not registered. To the present writer it seemed most unjust and inequitable. But then came the decision in *Celsteel*, based on Rule 258 which many lawyers had never heard of until then. Virtually all these unregistered easements "appertain" to land, and they "adversely affect registered land". (We are not considering unregistered land, which is being phased out.) So they are all overriding interests by Rule 258. So what do those cryptic final thirteen words in s.70(1)*(a)* mean? They can only mean that those equitable easements needing protection on the register (i.e. those *not* made into overriding interests by Rule 258 or any other provision[73]) must be noted on the register. They mean that easements made by informal documents and not otherwise protected (e.g. protected by Rule 258) need to be protected by an entry on the register.

That series of items - the paragraphs numbered (i)-(v) above - is the present law.

So these "Rule 258" equitable easements, which through forgetfulness or ignorance do not appear on the register, do not fall: they stand as overriding interests. And as long as they stand *subject*

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73 A possible "other provision" might be s.70(1)*(g)* if N were in occupation of O's land on a six-months tenancy, but he also had a permanent (but unregistered) right of drainage across it for the benefit of the neighbouring land which he owned. If P were to buy O's land, subject to the tenancy, N could presumably claim that the unregistered easement is an overriding interest, because he is in actual occupation.

to a rule of openness or a rule of notice - as in the "openness" and "notice" alternative conclusions on pages 54-55 above - they are not a threat to developers and purchasers. P must look out for them, and is bound by them - unless they are undiscoverable, in which case, P should be free of them and able to stop them. (By the "notice" conclusion this would be so; by the "openness" conclusion it would be so except in rare cases such as that of the night-club worker on pages 54-55 above; but by the "invincibility" conclusion P would be bound, which would sometimes be hard and possibly financially disastrous for him; and if the rule in *Celsteel* were done away with, it would be hard on N if P chose to take unfair advantage of N's ignorance of the law.)

With all legal problems, it is essential to identify clearly the nature of the problem. Consider this one. O has a house with a side garden. He sells the greater part of the garden to P as a building plot with Planning Permission for a bungalow. O's drains do not run exactly where he thinks they run (assuming he gave them a thought). He thinks they are under the land he has retained; but in fact they are under the edge of the plot he has sold. So he should have reserved an easement of drainage for his house, and he has not done so. - If O had sold the *house* and kept the *plot*, the purchaser of the house would have been entitled to a drainage easement by implied grant, the case on this being *Wheeldon v. Burrows (1879)* [74] - and in support of this rule, he would have an easement under Rule 258, good without registration, corresponding with s.62 of the Law of Property Act, 1925, which we saw on page 58 above. But that rule only rescues purchasers, not vendors. So, in this example, O has sold the plot to P and has kept the house, and now has no right to use the drain which runs under the edge of the plot - though neither O nor P realise this and so O continues to use it every day.

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74 *(1879) 12 ChD 31 CA*

P builds a bungalow and sells it (freehold) to X who lives in it for several years and then sells it to Y. Meanwhile O has sold his house to A who later sells it to B. Years pass ... and then a tree-root grows into the drain under the edge of the plot and blocks it. Y insists he had no notice that the drain was there, and he becomes awkward. *Has B a right against Y?*

If more than twenty years have passed, B has a right by prescription. But if only sixteen years have passed, what is B's position? - It would be clear to any drainage engineer that the pipe is much more than twenty years old: and there may be no evidence that less than twenty years previously, the two pieces of land were both in the same ownership, because O, P and X are all dead by this time, and the Land Registry keeps no history of either property: it can only report that the present proprietors are B and Y.[75] So B may quite wrongly succeed in a claim that he has an easement by prescription. If so, he has been lucky - because strictly he has no right and is at Y's mercy. Rule 258 will not help B. That rule makes an unregistered easement good, but does not create an easement where there is no easement.[76]

Y had no notice of this situation when he bought his bungalow. And B probably did not know of it when he bought his house, though it is arguable that his surveyor should have spotted the course of the drain and alerted him. But notice is not a relevant point here. B's problem is a problem about the law of creation of easements, and not

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75 On the other hand, the Land Registry *will* have a record of the deed made between O and P sixteen years previously if that deed contained a restrictive covenant, such as a covenant not to use the land for business: and it may become painfully obvious that that deed did not include a reservation of a drainage easement.

76 But B should have a look at *Peckham v. Ellison (1998)* in *The Times, 26 Nov. 1998* and in *Law Society's Gazette, 10 Dec. 1998 page 30.*

about notice or registration or Rule 258, none of which will offer solutions to this problem. (B's problem does not really belong in this paper at all!) Contrast B's situation with the situation in *Celsteel*. In that case, there was an easement which had not been registered, but Rule 258 saved it. In this present example, there is no easement, because there was never one created, and Rule 258 cannot save something which does not exist.

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Conclusion and Recommendation

The writer sees paragraphs (i)-(v) above as giving a pretty fair balance between the rights of P who is taking a risk if he does not use the services of a solicitor or licensed conveyancer, and the rights of N who may not have done so.

So the writer's recommendation is that to make no change at all to this law would be a good course to follow! More by accident than design, the balance is good. But this is subject to his proviso as to "burden of proof" on page 62 above.

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A footnote on s.70(1)*(g)*. Rights of persons in actual occupation are overriding interests by s.70(1)*(g)* subject to certain "saving" words. There are three basic ways that these "saving" words could have been worded. The wording could have been

(1) "save where, if reasonable enquiries had been made, the right would have been discovered"

or (2) "save where reasonable enquiries were made and the right was not discovered"

or (3) "save where enquiry is made of such person and the rights are not disclosed".

Alternative (3) is the wording in the Act.

The point to bear in mind is that a registered title is guaranteed, except for overriding interests.

Alternative (1) is a "notice" provision. On such wording as that, if there was some right which would *not* have come to light by reasonable enquiries, that right would be an

overriding interest - and so the Registry would not be liable to compensate the purchaser. - The wording is confusing: but the steps are as follows:-

1(i) Rights of persons in actual occupation are overriding interests.

1(ii) Where such rights are discoverable by reasonable enquiries, they are not overriding. *(What follows from this is not that the purchaser escapes, but that the purchaser is bound by his notice - actual if he inquired, constructive if he did not.)*

1(iii) Where they are *not* discoverable by reasonable enquiries, and are not disclosed - so there is no notice of them - they are overriding.

With such wording, the Registrar would be happy - but purchasers would not! They would be subject to these rights of which they had no notice. Wording was needed to cover the situation where the purchaser had made reasonable enquiries but had not been told of the right.

The wording that purchasers needed was alternative (2) above. The steps of *this* argument are:-

2(i) Rights of persons in actual occupation are overriding interests.

2(ii) Where such rights are not disclosed, in reply to reasonable enquiries which *were made*, they are not overriding.

But that would not suit the Registry, because if reasonable enquiry was made and the purchaser was *not* told of the right, it was *not* overriding, so the Registry became liable. With that wording, if there were some totally unforeseeable and outlandish right that would not come to light by *any* reasonable enquiry, then so long as reasonable enquiry *was made* and the purchaser was not told of the right, it was not overriding, and if on a later rectification the purchaser's title had to be incumbered with it, the Registry was liable. The last thing the Registrar wanted was a provision whereby the Registry would be liable for the very rights that would *not* appear on reasonable enquiry - being perhaps rights of which the Registry itself could not have known.

The point is that if through a later rectification that right had to be put onto the register, it would saddle the purchaser with a liability which at the time of his purchase had not been on the register and which was not an overriding interest. The purchaser would not have what s.20(1) of the Land Registration Act, 1925, says he must have (see page 40 above) and the Registry would be liable.

Alternative (3), which is the present wording, requiring actual enquiry of one or more specific persons, relieves the Registry of the burden, so far as s.70(1)*(g)* is concerned. And a purchaser's solicitor who identifies these specific persons and directs enquiries to them has nothing to fear. But if there is some relevant person of whom no enquiry is made, that person's rights are overriding: the purchaser is subject to them and (even if

they later have to be entered onto the register by way of rectification) the Registry is not liable for compensation. The steps are:-

3(i) Rights of persons in actual occupation are overriding interests.

3(ii) Where such rights are not disclosed, when enquiries have been directed to these specific persons, they are not overriding and so they fail against the purchaser. But if an enquiry was not made, the right is overriding.

So the wording of s.70(1)*(g)* is not equivalent to a requirement as to notice.

Acknowledgment:- The above paragraphs of this footnote are largely based on information found in J. Stuart Anderson's *Lawyers and the Making of English Land Law 1842-1940*, Clarendon, Oxford, 1992, pages 276-280.

It is stated in *Abbey National Building Society v. Cann [1991] 1 AC 56 at pages 88C, 88E, 89C, 104E and 105A* that the words "save where enquiry is made" imply that there must be an opportunity to make that enquiry. The wording of the judgments is confusing. They *appear* to say:-

4(i) Rights of persons in actual occupation are overriding interests.

4(ii) The exception is: if enquiry was made and the right not disclosed, the right is not overriding.

4(iii) But the enquiry must be one capable of being made. Therefore, if the enquiry was *not* capable of being made, the exception does not apply and so the right - Mrs. Cann's alleged right in this case - is overriding!

That is the opposite of what was decided. But in the context of the entire judgments in the case, what is clearly meant is that if no enquiry was made because it was not reasonably possible, then this too shall mean that the right is not overriding - it is a judicial "second saving" to be added to s.70(1)*(g)*. The intended meaning is clearly:-

5(i) Rights of persons in actual occupation are overriding interests.

5(ii) Where an enquiry was put to the specific person and the right was not disclosed, it is not overriding.

5(iii) If the enquiry could not be put and the right is not disclosed, this right too is not overriding.

And that is the very situation that the Registrar and the legislators in 1925 were trying to avoid. That would not matter if future policy were to be for the Registry's indemnity also to cover overriding interests, for the Registry would then be liable anyway, but in the consultation paper of September, 1998 (see page 121 below) it is recommended that the proposal for the Registry's liability to be thus extended should be abandoned. This leaves the Registry with a problem.

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Chapter 6

Proposals

Let it stand

The writer's general proposal, stated as the conclusion to the previous chapter, is to make no change in the balance of fairness at all, subject to his "burden of proof" proviso on page 62 above.

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Tell the People

Improved publicity is desirable. Ideally, the registration system should be so generally known to the general public, and understood by them, that *morally* anyone not registering should lose his right - though that goal may be impossible to achieve.

There are certain formalities that *everyone* should know. - A seat may be reserved on a train by a simple formality whereby a ticket is attached to the back of the seat, but if you neglect the formality, leaving your gloves and an informal written note on a vacant seat gives you no priority to it. - At some bus-stops in France, there are (or used to be) rolls of numbered tickets attached to the bus-stop sign, and if on arriving at the stop to catch the bus a prospective passenger did not take a ticket, he lost his priority. His moral right to priority was overridden because the system was so well known that it was fair that he was the one left behind. - At a pedestrian crossing, he who neglects to press the button and wait for the green man has no priority and is at risk. The system of registration of rights needs to be as well known as these systems.

Registration (or protection) of an incumbrance at the Land Registry should be no more daunting or difficult than registration of change of ownership of a motor vehicle at DVLC - and if it follows from this that every year several thousand forms would have to be sent back for correction, is this not part of the service that should be provided if the law requires a non-legally-trained public to participate in a registration system? In Victorian times, a landowner was unlikely to be without a family solicitor to whom he could turn as a known friend for advice on many matters: today the majority of households own the freehold or long leasehold of their home, and many of them are unlikely to have any other contact with a solicitor. In 1925, registration of a large variety of rights over land became *for the first time* a fundamental part of the general system of conveyancing. It seems to have been assumed at that time that persons needing to register would be persons with ready access to sufficient legal advice. Today, that assumption is not true. The public are penalised if they do not use a system about which they have not been informed, and on which they cannot obtain adequate advice without initiative and effort.

A procedure is needed whereby members of the public can easily protect their rights without having to take that unfamiliar step (which may not occur to them) of going to a solicitor. Modern Land Registry forms are far more user-friendly than those of a few years ago, but a suggestion for an additional form is set out below.

What is needed is a simple form available from the Post Office, the Public Library and the Citizens' Advice Bureau on which the name of the claimant and the postal address - or a map - of the property would be required (with the name of the owner and the Land Registry number *if known*) and on which the reason for the registration would be given in such words as the ones suggested in the following "specimen" form:-

tick boxes applicable	
I supplied part of the money to buy the premises.	[ ]
I have paid some of the mortgage payments.	[ ]
I have done extensive work to the premises on the understanding that I have an interest in them.	[ ]
I have an option or a right to purchase the premises, or part of them.	[ ]
I have a pipe/wire/right of way, running across the land.	[ ]
I have a right to lay a pipe or wire across the land but I have not yet done so.	[ ]
There is a restrictive covenant giving me the right to prevent .... on the land. *(There is no need to register covenants made between a landlord and a tenant in a lease or a tenancy agreement.)*	[ ]
I am legally married to the owner and I claim the right to occupy the premises under the Family Law Act, 1996.	[ ]
The legal owner has signed a mortgage in my/our favour affecting this land.	[ ]
other	[ ]

Comments on the last two alternatives in the above list:-

As to the mortgage: This line could be used by a private second mortgagee, but could also be used by those shops supplying

goods on an instalment-payment basis which use a form of contract which includes a clause charging the purchaser's home with the debt.

As to the final line of the list: This provides for registration of any other registrable rights (such as charges for Inheritance Tax and for annuities).

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Completion of such a form would have an effect comparable with a Caution: if any question arose (whether raised by a purchaser or mortgagee, or arising through a dispute) the claimant of the right would not lose his case for non-registration, but would be called upon to explain and to make good the claim.

This provision is suggested as a form of protection to be available in addition to the present methods of protecting such matters on the register. An addressed envelope should be supplied with the form: delivery to any District Land Registry should suffice.

Use of the form would not create rights, it would only prevent them from being void against a purchaser for lack of protection on the register. Thus its use in "family" cases would make no difference - except that under the Trusts of Land and Appointment of Trustees Act, 1996, it could put purchasers on notice of an unregistered restriction on the trustees' power to sell, or it could be used to protect the financial interest of a contributor not in occupation.[77] But it would not have helped Mrs. Cann, whose right was carved out of the Equity of

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77 In the *Boland* case on page 46 above, Mrs. Boland only won because she was in actual occupation and so her equitable interest (her contribution of part of the purchase money to buy the house, which was registered in her husband's sole name) was an overriding interest by s.70(1)(*g*). The writer's suggested form could be used to alert a purchaser or mortgagee in a case where the wife had left her husband (or partner - they need not be married) and was therefore not in actual occupation at the time when he mortgaged the house.

Redemption which was *already* subject to the mortgage. (In *Cann* [78] and also in *Mendelsohn*,[79] the purchase and the mortgage were on the same day. Without the mortgage, there would have been no purchase. In *Boland* [80] and also in *O'Brien*,[81] the mortgage - to finance the husband's business in both cases - was made long after the purchase.)

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Second system still needed?

There will be those who say, "I do not understand, so I shall not fill it in". Is there a need, even with such a simple form, for a proviso that notice shall apply in respect of those rights which do not get registered? It can be argued that there is not, and that there is no moral duty to protect those who do not fill the simple form in. But the law needs to allow for such persons as the eighty-five year old N, leaning on his zimmer-frame, who bought a right of way to avoid a flight of steps, and who insists, "*Of course* I didn't register - because I don't know this new-fangled system and I didn't have a registration form and I didn't know how to get one and I couldn't see to fill it in if I did - but anyone with half an eye can see my pathway and I've paid for it *and* I paid for the workmen to knock that big hole in the garden wall and put a gate in it with two oak gateposts and a handrail, so *don't interfere!*" - Yet this is partly a question of publicity, for that irascible old N would never *dream* of omitting to licence his car or his television: but at present the need to register easements is not as generally known to the public as the need to licence a television;

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78 page 49 above

79 page 47 above

80 page 46 above

81 page 85 below

and the concept may be less easy for the public to grasp, because an easement is less tangible than a television.

But testing the argument with an example based on the facts of *Allen v. Greenwood* [82] reveals a problem. Allen had a greenhouse, and his neighbour deliberately blocked the sunlight with a high fence. The owner of the greenhouse would never have thought of registering such a right as an *easement of direct sunlight to his greenhouse*, until the neighbour unexpectedly blocked the sunlight. That case was decided (in Allen's favour) on the basis of prescription, but if the neighbour had acquiesced in the enjoyment of direct sunlight for a number of years (less than twenty) and had stood by while expensive irrigation apparatus was installed in the greenhouse in reliance on the sunlight - so estoppel, which we shall encounter in the next chapter of this paper, would be applicable - it is scarcely likely that the owner of the greenhouse would have thought to register. Indeed he would have nothing to register, for there is neither express nor implied grant nor prescription: yet he may be protected by estoppel if the sunlight is blocked by the neighbour - or by the neighbour's successor if he knows that expense was incurred in buying irrigation equipment in reliance on the sunlight.

A claim based on notice would run into difficulties here, because, if there is no prescriptive right and also no express or implied grant, N can hardly argue that he has an easement of which P should have known. Estoppel, on the other hand, is a rule of evidence by which O and (arguably) P will not be allowed to say that N has *not* a right.

Dalton v. Angus [83] is another example of this problem. Angus' building was built right on the boundary of his land, so it was to some

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82 *[1980] Ch 119*

83 *(1881) 6 App cas 740*

extent supported by the soil of the neighbour's land. Angus made structural alterations, removing walls and taking the weight of the upper part of the house onto girders which were set into a chimney stack on the edge of the land - so a very heavy weight which had been spread along a wall was now concentrated onto the chimney stack. When the neighbour dug a cellar, the chimney stack collapsed and brought down almost the whole of Angus' building. The House of Lords construed the right as "a new and enlarged easement of support ... going to be acquired" [84] by virtue of the structural conversion. Yet who would have thought of registering such an easement? No conveyancing took place at the time of the construction-work, so legal advice would not have been forthcoming.

In *Allen* and in *Dalton*, the claim made was by prescription, because the alleged right had been used for more than twenty years; but if claims to such rights (used for less than twenty years) were made as claims to an easement by estoppel, there would have been no registration, because they began by acquiescence - no-one gave the matter a thought - and yet the landowner, by doing nothing while his neighbour expended money in reliance on the supposed right, gave tacit encouragement. A simple registration form available to the public would not have helped the claimants in these two instances, and an estoppel binding a successor in title might cover the situation.

So the writer concludes that there is a need for a secondary system, based (he suggests at this point) on estoppel. (He may yet try to revert to basing it on notice and/or Rule 258 by the end of this paper!) And this raises the question of whether this secondary system will result in uncertainties and consequent necessary inquiries which will *slow the conveyancing process down.* This question is addressed below, in Part 2 of this paper.

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84 *(1881) 6 App cas 740 at page 801, per* Lord Chancellor Selborne

the end of Part 1

Part 2

Notice as an Ingredient of Estoppel

Chapter 7

A possible Way forward?

Many members (perhaps a majority) of the legal profession would disagree with the writer's view that through notice or openness or some other provision N's unregistered easement should be saved. They would advocate, conversely, that the registration requirements should be tightened up, and that the rule in *Celsteel* should be reversed by statute. Except for the overriding interests in the Land Registration Act, 1925, which should be reduced to a minimum, the rule should be, "If no registration, then no right". This would make for easier and quicker conveyancing, for there would be no need to spend time asking questions about whether there were unregistered rights such as the one in *Celsteel*, but this would be efficiency at the expense of the person whose right had not been put onto the register. It is a cost-benefit question: is the benefit of faster and more efficient conveyancing worth the disbenefit of causing innocent persons (who through ignorance have not registered) to lose the rights for which they have paid?

In these days of increased computerisation of conveyancing, the advocates of efficiency, at the expense of the unregistered right, may win the day - particularly as the joint committee of the Law

Commission and the Land Registry has adopted this view in its 1998 consultation paper.[1] Rights registered at the Land Registry can now be flicked up on a screen in the solicitor's office for a fee of £2, but no computer can answer the question, "What unregistered rights are there that the purchaser ought to be aware of?" - and the result would be delay while questions were asked.

But if such questions are not to be asked, the losers will be such persons as the eighty-five year old N on page 79 above with his zimmer-frame.

If only there were a way that such unregistered rights could remain good, without them holding up the conveyancing process... - Well, *perhaps there is.*

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The House of Lords' wider Application of "Notice"

So far in this paper, all the rights we have seen, such as N's easement of drainage, and his later easement of way with his zimmer, and Zebedee's future right on page 23 above, have been interests over land. N's easements, if made by informal and/or unregistered documents, can be defined as "equitable interests over land". And we have seen that the question of whether an easement will stand or fall depends today on two criteria: (i) Is it on the register? and (ii) Is it an overriding interest, good without being on the register? - The question of whether P had notice of it is not relevant (except that the

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1 Law Com No. 254, published in September, 1998, "Land Registration for the twenty-first Century". See pages 95 and 121 below. But the committee acknowledges (in its paragraph 3.47) "that there is a need for some form of 'safety valve' in the registration system, for cases where parties cannot reasonably be expected to register their rights". One such "safety valve" could take the form outlined in Chapter 8 of this book. Overriding interests are another "safety valve".

writer has argued that P is free from an overriding equitable "commercial" interest of which he had no notice). But in *Barclays Bank plc v. O'Brien [1994]* [2] the House of Lords applied the concept of notice (in the broad sense of "Should the Bank have known?") to something which is not an equitable interest. It decided that the defendant, Mrs. O'Brien, had an equitable right to set aside a mortgage that her husband had unfairly talked her into signing (to finance his business) because the Bank had notice of the unfairness.

This "right of setting a transaction aside" is not an equitable interest like an equitable easement. (It is not a right over land at all.) It is an *equity*. The point is: a *mortgage* is a right over land, but a *right of avoiding the consequences of a document I was unfairly persuaded to sign* has nothing to do with land at all. It is an *equity* The document could be on any subject - it might be a mortgage, an I.O.U., a contract or a guarantee for the purchase of a car or ... anything.

There is no registration system for mere *equities*. But the House of Lords recognised the right and allowed Mrs. O'Brien to escape from the consequences of her document - so the Bank could not sell the house - because the House of Lords regarded the Bank as having *notice of the circumstances* under which the mortgage was signed. In situations like this, if a mortgage lender does not see the wife in a separate interview, and point out the financial risks, and urge her to take independent legal advice, the lender will be treated as having *notice* that her husband unfairly persuaded her to sign.[3] So the

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2 *[1994] 1 AC 180*

3 In *Royal Bank of Scotland v. Etridge (No.2) [1998] 4 All ER 705*, the Court of Appeal ruled that even if these precautions were taken, the ultimate issue is whether, in the light of all the information in the Bank's possession, there was still a risk that the wife had entered into the transaction as a result of her husband's misrepresentation or undue influence.

outcome of the case does not depend on whether the mortgage has been registered. (It will have been registered, in most cases.) The outcome depends on whether the lender is to be treated as having had *notice* of what went on. This wider type of notice applies whether or not the land is registered land.

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Estoppel and Notice

The writer argues that the rule known as "estoppel" also provides or amounts to an *equity* and is dependent on notice. He has no precedent case on registered land to back this up (and also none against it) but it accords with the decision of the Court of Appeal in *E. R. Ives Investment Ltd. v. High [1967]* [4] on unregistered land. And this could be made to form the basis of a method whereby unregistered rights of which in all conscience the purchaser should have taken note could be made binding on the purchaser, without holding up the conveyancing process. (From this point onwards we shall no longer be dealing with notice as a stand-alone doctrine: we shall be dealing with it as one of five ingredients necessary for "estoppel" to apply.) But first, *what is estoppel?*

Estoppel is a principle whereby if X made a promise to Y (whether the promise is enforceable in court or not) and Y acted on that promise, to his detriment (e.g. he spent money, relying on the promise) and X stood by and let him do so, the court will refuse to hear evidence that the promise cannot be relied on. In a nutshell: if X promised, and Y relied on the promise and X let him do so, then X is not allowed to say that the promise cannot be relied on.

The five necessary ingredients for estoppel are:- (1) There was a promise (or it could be an acquiescence as we saw in the

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4 *[1967] 2 QB 379*

penultimate paragraph of the previous chapter). (2) It was relied on. (3) This reliance was to the detriment of the person who had received the promise. (4) The promise is now denied. (5) The purchaser knew of these circumstances in such a way that his conscience should be affected. These points will be abbreviated in this paper to (1) promise (2) reliance (3) detriment (4) denial and (5) the purchaser knew of these circumstances.

The case of *E. R. Ives Investment Ltd. v. High [1967]* [4] (a case about a right claimed under the "old" conveyancing system) gives us an example of this. High's neighbour Westgate built a block of flats, and it was then found that the flats' foundations encroached about a foot (30 cms.) onto High's land. High and Westgate came to a friendly arrangement which included a promise to High that he could drive his car across the yard at the rear of the flats. (If that amounts to an equitable easement, High should have registered it at the Land Charges Registry, and he did not. It seems likely that he had never heard of the Land Charges Registry.) - Relying on the promise, High built a garage several years later in his back garden. The only vehicular access to it was across the yard, as anyone who looked could see. By this time, Westgate had sold the block of flats and the yard to Mr. and Mrs. Wright. They saw High building the garage, and they complimented him on it. - Several years after that, the Wrights sold their property to E. R. Ives Investment Ltd., who told High to stop crossing the yard. - The Court of Appeal held that even if any equitable easement which had been granted to High was void against the Ives company for non-registration, the company could not say so. A promise had been made; High had spent money building a garage in reliance on the promise and the owners of the yard had approved: and after that, the court would not hear evidence to say there was no right to cross the yard. The company was "estopped" from giving such evidence.

So (in our original example on page 2 above) if O tells N, "You can run a drain across my land", and N, relying on this, builds

himself a swimming-pool for which this drainage outlet is vital, while O looks on and raises no objection, O cannot afterwards say there is no right of drainage. Whether P, who buys O's land with knowledge of this situation, is similarly barred from saying it, is a different question. On unregistered land, P clearly *is* estopped from saying it: *E. R. Ives Investment Ltd. v. High* shows us that.[5] But on registered land, the position is much less certain. *Five* alternative arguments (labelled from (a) to (e) over the next five pages) can be offered:-

(a) An estoppel (as distinct from an easement or other right awarded by a court in satisfaction of that estoppel) is not an interest in land and does not run with the land. If this is so, P is not bound by it, but such an interpretation would not accord with the position on unregistered land laid down in *E. R. Ives Investment Ltd. v. High.*

Note that there are *three* matters to be distinguished and considered, namely an estoppel, a potential easement by estoppel, and an easement awarded by the court as a result of estoppel.

1: An estoppel. If O promised N a right of way for N's life, and N therefore spent money on a gate, gateposts and a handrail, the court

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5 In *Lloyds Bank plc v. Carrick [1996] 4 All ER 630 CA*, which, like *E. R. Ives Investment Ltd. v. High*, was about non-registration and estoppel in respect of an unregistered right claimed over unregistered land, the verdict went against the claimant. The facts were that Mrs. Carrick had an equitable interest in a flat, and she was evicted when the flat was sold by the mortgagee. But estoppel was inapplicable here because the promise had not been broken. Mrs. Carrick received what she was promised - an equitable interest (which she omitted to register) in a flat - and there had been no promise that the legal estate would not be mortgaged. When a situation arose similar financially to that in *Monolithic* (see page 34 above) the Bank had a right (and probably a duty to its investors) to use the advantage which the law gave it. The Bank came within level (ii) of the three possibilities outlined on page 35 above, and the Court of Appeal said, "It cannot be unconscionable for the Bank to rely on the non-registration of the contract".

can refuse to hear evidence that the promise is worthless. A refusal to hear evidence is not an interest in land and is not registrable.

2: A potential easement by estoppel. In N's words: "If I went to court, I would win and I would be awarded an easement". But N cannot be certain of winning a case which is dependent on conscience and judicial discretion, and even if he wins he may be awarded damages in lieu of the hoped-for easement: so whether this is an interest in *land* or only in *money compensation* (or whether it will turn out to be no right at all) is currently unanswerable and it is therefore in principle not a proper matter for registration. Any requirement that it should be registered would be contrary to this principle.

3: An awarded easement by estoppel. An easement awarded by the court at the successful conclusion of a case on estoppel should be registered, immediately after the conclusion of the case, unless it is an overriding interest by s.70(1)*(g)*.

(b) *(the second argument on estoppel)* An estoppel, whether or not it is an interest in land, can run with the land but is outside the registration system. - This would mean that it is neither a minor interest nor an overriding interest, but is a residuary matter of Equity, subject to the doctrine of notice (or notice of circumstances by which P's conscience should be affected). Textbooks since 1925 have said there is no such residuary class as an interest of which there is notice, in registered conveyancing; but a right (an equity of setting aside) of which there was notice was enforced by the House of Lords in *O'Brien.*

(c) An estoppel is a minor interest. - This gives the following result:- A builder informally assured the purchaser of one of the first houses on his development, *"You have a right"*. The purchaser spent money in reliance on this. Now a neighbour, who, as a later purchaser of a nearby plot, is a successor of the builder, seeks to deny the

validity of that right. From the builder, the court would not hear such a denial; but such judicial deafness will not extend to the successor, because the early purchaser did not protect the totally-informal assurance by an entry on the register. The right fails for non-registration. - Against this, the Recorder in the County Court in *Thatcher v. Douglas* [6] said that if he had not found that there was an agreement, "It would have been inequitable to deny Mr. Thatcher's rights and I would have found that there had arisen an equitable estoppel not requiring registration". [7] This was noted (and included in the Law Report) [8] by the Court of Appeal without confirmation or denial of its correctness.

(d) An estoppel is an overriding interest. - In many cases, particularly where the right claimed by estoppel is more akin to a trust than to an easement, the claimant will be in actual occupation and will allege that the estoppel and the right claimed thereunder are overriding interests by s.70(1)*(g)*. In the case of an easement, can the right be an overriding interest under s.70(1)*(a)*, or under Rule 258 of the Land Registration Rules, 1925, on the principle laid down in *Celsteel?* Rule 258 states that rights appertaining to land may be overriding interests.[9] The estoppel cannot thereby be overriding, as it is not a right over

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6 *(1996) 146 NLJ 282* - see page 45 above

7 In *Thatcher v. Douglas* there was knowledge that the slipway was used, but no knowledge that it was used by an enforceable easement as against a revocable licence. Nevertheless the Recorder stated that he would have been willing to find that an estoppel had arisen. The test appears to be, "Would it be unconscionable to stop the right?"

8 at page 5 of the 13 page LEXIS printout. At page 12 of the printout, the Court points out that it agrees with the Recorder as to the nature of the agreement and therefore does not need to consider the case on estoppel.

9 See page 44 above for the full wording of Rule 258.

land, but it appears that the easement or right *claimed* by estoppel might be overriding by this rule. The alleged right was used openly. An equitable easement like that in *E. R. Ives Investment Ltd. v. High* would be an example of such an overriding interest; but a contractual personal licence [10] would not, because that is a person-to-person right only.

Comment:- The writer does not see an estoppel as an overriding interest - and equally it is not a minor interest - for it is not an "interest" in land at all, in the sense in which the word "interest" is used in s.70(1) of the Land Registration Act, 1925.[11] On this basis, it is submitted that it is an *equity*, and *therefore* - just like the equity in *O'Brien* - it is subject to notice of the unfairness, whether the land involved - if any - is registered land or unregistered land. If that is so, the rule in *E. R. Ives Investment Ltd. v. High [1967]* (that a successor is bound by the estoppel if he had notice of the circumstances enough to affect his conscience) should apply whether the land is registered land or unregistered land. Parallel with *O'Brien*, this is not a question of notice of the right, but of notice of the circumstances which had occurred. *Therefore* the writer favours argument (b) in this list of five alternative arguments. But let us not forget the general principle, that P's conscience must be affected. "Notice is not enough to impose on somebody an obligation to give effect to a contract into which he did not enter" - *Ashburn Anstalt v. Arnold [1989].*[12] It is not enough that P knew what O had promised N. But if P knew *and* in all the

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10 as in *Ashburn Anstalt v. Arnold [1989] Ch 1* - see *per* Fox LJ *at pages 15H and 22B-C*. By *Ashburn Anstalt v. Arnold at page 24D*, a contractual licence is not an interest in land. - But it is a personal contract appertaining to land, as against a right of setting aside which need have no connection with land at all.

11 *cf.* footnote 10 on this page

12 *[1989] Ch 1 at 26A*

circumstances it is fair comment that morally he ought to comply with the agreement, that is a different situation, to which the writer argues that estoppel should apply.

(e) An estoppel depends on unconscionable conduct. - Instead of arguing the points in paragraphs (a)-(d) above, ask whether P's conduct has been unconscionable. This may raise the question of whether he had notice, but is more flexible than the doctrine of notice. - Arguments stemming *ab initio* from unconscionability are excluded from this paper, because to consider them would involve a break in the continuity of the theme which has been followed through from 1830 or earlier, and would require an argument *commencing* from a moral judgment - and that can become "palm-tree justice" or the Judge's personal opinion. The test of whether P has obtained an "unjust enrichment" is similarly excluded from this paper, for the same reason.[13] But arguments with a "curtain" or "gateway" of a question of fact (i.e. "'Was there notice?' or 'Do the requirements for estoppel exist?' and *if so*, would it be unconscionable to deny the claimant his right?") are included, and are fundamental to the argument of this chapter.

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Facts and Moral Judgments

"Was P's conduct unconscionable?" is a moral judgment. Similarly with the question, "Was there unjust enrichment?" - the question of whether P was enriched is a question of fact, but whether his enrichment was unjust is a moral judgment. Conversely, "Was a certain right registered?" is purely a question of fact. So is "Was it an

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[13] Unjust enrichment is a narrower concept than unconscionable conduct. One can act unconscionably without receiving any unjust enrichment; but to retain unjust enrichment which one has received is *per se* unconscionable.

overriding interest?" Again, "Did he know?" is a question of fact, and so is "Should he have known?" for what are reasonable inquiries is not a question of his morals, though the doctrine of notice was much refined, particularly before 1882. "Should he have acted on what he knew?" is a moral judgment, the failure to act being morally reprehensible, whereas the failure to know may be no more than stupidity. Similarly "Should he have proceeded despite this notice?" is a moral judgment.

A purchaser with traditional constructive notice must bear the consequences of his stupidity, because in Equity "his conscience is said to be affected",[14] even if morally his conscience is clear: but that does not accord with the writer's present argument. The difference is between (i) "The *fact* is, he should have known (or, notice is imputed to him) and *therefore* his conscience is said to be affected" (this is constructive notice) and (ii) "The *fact* is, he should have known (of the broken promise) and *therefore one must ask whether* his conscience was affected".

A test of "notice plus what he did with it" is in effect a question of whether, in view of the notice, his conduct was unconscionable, but is not *primarily* a moral judgment. It has the "gateway" of the factual question of whether he had notice. Similarly with estoppel: "Was there a promise?" and "Was there detriment?" are questions of fact, even though, if O encouraged the belief that there was a right, and then O or P denied it, the questions arising could lead to a consideration of whether that person's conduct was unconscionable (or - better - whether in all the circumstances of the case it will be unconscionable to deprive the claimant).

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14 *per* Bramwell LJ in *Greaves v. Tofield (1880) 14 ChD 563 at page 578* (previously quoted on page 12 above)

An Estoppel is a Refusal

The writer argues that estoppel is still a rule whereby something will not be heard in evidence.[15] It has nothing to do with the property and is therefore subject to no registration requirements and it neither affects nor is affected by s.20 of the Land Registration Act, 1925.[16] The property is subject to what is on the register, and overriding interests, and is free of all other interests *but the proprietor is estopped from saying so* and therefore cannot stop the enjoyment, unless he is a successor who bought without notice of the promise. - An estoppel is a *refusal*, by the court, to allow something to be stated in evidence. It is an equity of prevention of a denial. It may operate against an individual or against him and his successors in title, but a *refusal* cannot be a right over land, particularly as the outcome of any litigation on the matter will not necessarily be enforcement of a right - it may be monetary compensation given *in lieu* thereof. Therefore, surely, it would not be right for it to be registrable as an interest in land. See the judgment of Winn LJ in *E. R. Ives Investment Ltd. v. High.*[17]

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15 As to estoppel being a rule of evidence which has expanded into a wider principle, see the Australian case of *The Commonwealth of Australia v. Verwayen (1990) 170 CLR 394, at pages 411 lines 12-15 and 412 line 23 per* Mason CJ, *page 454 lines 26-27 per* Dawson J, *and pages 500 lines 11-14 and 501 line 9 per* McHugh J.

16 See page 40 above for this section.

17 *[1967] 2 QB 379, per Winn LJ at pages 405C-D:* "I do not regard myself as saying anything contradictory of the proposition ... that the equity or equitable easement, as distinct from the estoppel, was rendered void... It is no anomaly that a person should have a legally valid answer to a claim and yet be estopped from asserting that answer..." *and at page 405G* "Nor do I think that an estoppel could be registrable" (under the provisions of the Land Charges Act).

Estoppel and the Law Commission

In recent years, the Law Commission has made use of estoppel in three contexts - the making of contracts concerning land, the priorities of interests (registered and otherwise) over land, and the advent of electronic conveyancing.

In its Report No. 164 (Formalities for Contracts - 1987) it saw estoppel as providing a remedy where the requirement of two signatures for a "land" contract had not been complied with. Following this Report, Parliament enacted the Law of Property (Miscellaneous Provisions) Act, 1989, by which a contract for the sale of an interest in land is void unless made in writing signed by both parties.[18] - And in the proposed Bill appended to the Law Commission's Report No. 173 (the Fourth Report on Land Registration - 1988) it is stated in clause 9(7), dealing with priorities between interests, that "Nothing in this section shall be taken to prevent the application of any rule of law relating to fraud or estoppel".

Thus, on both these formal defects - non-signature and non-registration - estoppel is seen by the Law Commission as a remedy. But whether this remedy is effective against a successor in title of the grantor or promissor depends on the five arguments on pages 88-92 above. The writer prefers argument (b) - and relies on it in his next chapter - but which of the arguments the courts would currently accept is not at all clear, and is in need of judicial clarification as soon as a suitable case comes before the courts.

The third context - estoppel in the context of electronic conveyancing, considered in the Law Commission's Report No. 254,

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18 s.2

"Land Registration for the twenty-first Century" (1998) - will be looked at on page 121 below.

Estoppel could be made to provide a better-balanced solution than one based on notice, for it looks at the conscience of all parties, and not merely the question of whether P knew. And it is favoured by the Law Commission. If there is to be a change in this area of the law, a change in which effect is specifically given to estoppel, as in clause 9(7) of the proposed Bill appended to the Law Commission's Report No. 173 (1988) is what is likely to come.

In its Report No. 254, the Law Commission provisionally sees equities arising by estoppel as minor interests. Thus they come within (c) instead of (b) in the list of five alternatives on page 89 above. The result of this would be that N's right would fail against P for non-registration. This would be "burning the lifeboat". Not only does N's easement, that he paid for, fail against P for non-registration, but his claim by estoppel, which is his "lifeboat", is also void against P for non-registration. The writer has urged the Law Commission to ensure that N has a right by estoppel against P (if P with knowledge of the circumstances has behaved unconscionably) either by the method (b) suggested on page 89 of this paper or in some other way. If it cannot do so, the writer fears that Land Law for the twenty-first century could be seen as being actually inferior in this respect to the Land Law of the eighteenth century, in which the doctrine of notice gave a safeguard against the harshness of the law and would have given N a right against P.

The effect of the European Convention for the Protection of Human Rights and Fundamental Freedoms would have to be considered here. Article 1 of the First Protocol of the Convention states that:-

1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

If N ends up losing the right that he paid for, the question of whether he has thus been deprived of one of his possessions, on the grounds that he would *not* have lost it if the land had still been under the "old" conveyancing system (as is evidenced by *E. R. Ives Investment Ltd. v. High)* is a very open question. In *S. v/ the United Kingdom (1984)* [19] the Commission decided that a right to the benefit of some restrictive covenants and receipt of a "fee farm rent" of £100 per year on a Belfast property was a "possession" within the meaning of Article 1.

On the other hand, if N is given a right by estoppel against P, Land Law for the twenty-first century will have achieved a commendable balance, having speedy electronic conveyancing without denying justice to N who has not registered: and the writer's "burden of proof" provision on page 62 above, if it were to be adopted, should prevent cases on estoppel from getting into such deep water as the cases on notice got into.

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19 *European Commission of Human Rights, Application no. 10741/84, 13 Dec. 1984, 41 Decisions and Reports 226 at 232* (the first four paragraphs of page 232 being particularly relevant here)

We now turn to the subject of how this system of protecting unregistered rights by means of estoppel, without slowing the conveyancing process down, would actually work.

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Chapter 8

"Gateways"

The Problem

The problem is how to have a secondary system without it slowing the primary system (the registered conveyancing system) down.

Saying that notice shall apply provides the claimant with a means of escape where the primary system (based on registration) gives him no way of escape. It is like providing a house with a second exit: and if a house has a second exit, the householder must check it every time he or she goes out. Purchasers' solicitors would be unable to rely on their (computer-generated) search certificates, but would have to ask themselves, "What do I or should I know?" - and make further inquiries accordingly.

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The suggested Solution

A secondary system based on estoppel should not be likened to a second exit, which needs to be checked: it is better likened to the escape ladder kept at the ready at the fire station. The householder gives it no thought and certainly does not check it: it has no relevance in any normal day: but it can be brought into use to provide an additional exit if the occasion arises.

The writer's suggestion is:- The secondary system, based on estoppel, shall be wide-ranging (accepting the relevance of a wide set of circumstances, being available as a "shield" or "sword" - i.e. being

available both to a defendant and to a claimant - and having a wide definition of detriment, and extending to apply to a purchaser who is shown to have had notice of the circumstances) but **this secondary system shall be kept out of the conveyancing process just as completely as beneficial rights under trusts are kept off an Abstract of the legal title.** (In lay persons' language, that means that the purchaser's conveyancer would not have to look at it.) How this could be done will appear below.

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A wide Estoppel

Though a very wide doctrine of estoppel is looked for, this is not solely a question of whether the conduct was unconscionable. It is not "palm-tree justice". The five "ingredients" or points of fact would need to be proved by the claimant of the unregistered right:- (1) promise (2) reliance (3) detriment (4) denial and (5) the purchaser knew of these circumstances. This is not a circular argument that "Estoppel shall only apply if the purchaser has behaved unconscionably; and unless estoppel is established the question of whether the purchaser behaved unconscionably will not be investigated"; the suggestion is, "Estoppel shall only apply if the purchaser has behaved unconscionably; and unless *the possibility of applying estoppel* is established (by showing these five facts) the question of whether the purchaser has behaved unconscionably will not be investigated".

As to the five points of fact:-

(1) Was there a promise? This should be construed in wide terms to include a gratuitous promise, a promise unenforceable for lack of protection on the register, a promise in a contract

which is void for non-compliance with the Law of Property (Miscellaneous Provisions) Act, 1989,[20] etc.

(2) Was the promise relied on? In *Lloyds Bank plc v. Rosset [1991]* [21] Mrs. Rosset had converted a near-derelict house into a comfortable house - but the House of Lords concluded that she did not do it in reliance on any promise of a financial interest in the house; she did it to provide a comfortable home for her family. But in a situation where *both* these motives could to some extent apply, the writer suggests that the court should be generous to the claimant, rather than restrictive.

(3) Was there detriment? This should be construed in wide terms to include a bad bargain: in the words of Dixon J in *Grundt v. Great Boulder Pty Gold Mines Ltd. (1937)* [22] - an Australian case - "The real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of rights against him then, if it is allowed, his own original change of position will operate as a detriment."

(4) Has the promise now been denied? The denial may be either by the promissor or by the purchaser - either O or P.

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20 see page 95 above

21 *[1991] 1 AC 107*

22 *(1937) 59 CLR 641 at 674* (High Court of Australia)

(5) Did the purchaser know, or should he have known, of these circumstances? (This needs to be kept in check by the "burden of proof" proviso.[23]) He need not have known the details, as long as he is shown to have had sufficient information for him to consider whether his conscience should be affected by his decision to go ahead.[24]

If this series of five facts is proved, let this trigger the possibility of such a wide-ranging investigation (into whether, in all the circumstances, it would be unconscionable to deny the claimant his right) as no conveyancer's set of questions could guard against. *First*, show the five facts, and *then*, when and if they have been shown, consider unconscionability.

The courts already adopt this two-stage process,[25] but the writer would keep not one but *both* stages of this process outside the conveyancing procedure. - For the courts, the "five-barred gate" of these five points must be opened before they will investigate the wide question of unconscionability: but for conveyancers, both the "five-barred gate" *and* the question of unconscionability shall be kept off the title, on the principle set out below.

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23 page 62 above

24 These conditions are meant to be less restrictive than those laid down in *Willmott v. Barber (1880) 15 ChD 96 at 105*. They are close to the requirements (1)-(6) laid down by Brennan J in the Australian case of *Walton Stores Interstate Ltd. v. Maher (1988) 164 CLR 387 at 428-9.*

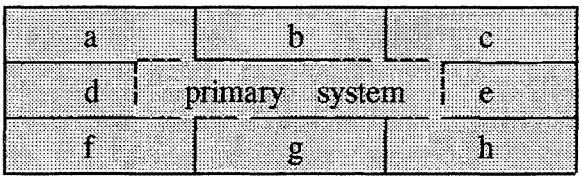
25 See for example the Australian case of *The Commonwealth of Australia v. Verwayen (1990) 170 CLR 394 at page 444*, where Deane J, in his numbered paragraph 4, lists four specific requirements for unconscionable behaviour, before considering it in terms of "all the circumstances of the case".

Keeping the Secondary System off the Title

Where is the logic in rejecting notice because it slows the primary system down, and advocating a "wide-ranging estoppel" which includes notice?

Notice could be of innumerable indefinable rights and interests. With estoppel, on the other hand, the question is not as to a multitude of matters. A specific promise has been broken, and the question is, whether there was notice of *that* situation. If there was, then the court could hear very wide evidence as to whether in all the circumstances it would be unconscionable to deny *that* right.

So this suggestion is both wider and narrower than notice - wider because it looks at several angles, not just one; it looks at whether there was detriment, etc. - and narrower because the purchaser need not fear an attack from *any* direction, but only from that direction, or sector, in which he has "crossed the threshold" by denying a promise, or where he knows the vendor has done so. This suggestion can be shown diagrammatically:-

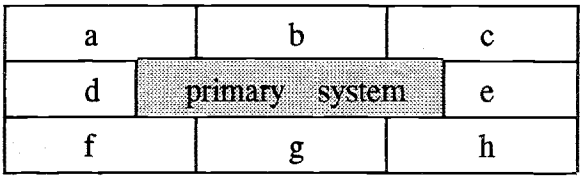


Purchaser inquires about all matters (symbolised by a-h in this diagram) of which he might be held to have notice.

The compartments from a to h indicate matters of which (if they exist) it might be truly or falsely alleged that the purchaser had constructive notice. In the diagram above, which represents a system

in which effect is given to notice of unregistered rights, the thresholds or gateways to all these compartments are open: the purchaser's conveyancer asks what matters there are and raises inquiries about them all.

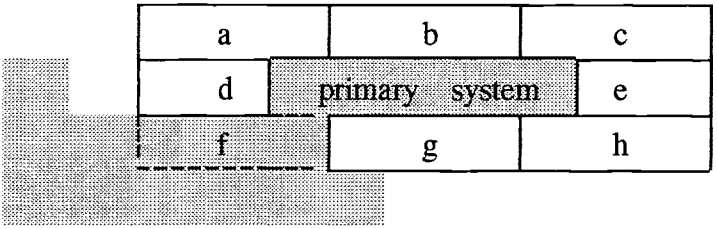
In the second diagram, all gateways are closed: if a right is not protected on the register, it fails against the purchaser. The purchaser's conveyancer does not raise inquiries about them.



Purchaser makes no inquiries about a-h.
No registration, no right.

In the third diagram, the conveyancer makes no inquiry as to any of these matters: all the gateways are closed - except that it has subsequently come to light that, in respect of one of them, the purchaser has denied a promise which he knew had been relied on (or he had notice when he bought that the vendor had done so). Once the five points of (1) promise (2) reliance (3) detriment (4) denial and (5) the purchaser knew or should have known of these circumstances, have been proved by the claimant, *that* "five-barred gate" is opened

and the claimant is given a remedy if in all the circumstances of the case it would be unconscionable to deny him one.



No conveyancing inquiries are made as to a-h. But if it transpires that on a particular matter a promise, relied on, to detriment, was denied (to the knowledge of the purchaser) the court may hear such evidence as it shall deem necessary, to decide whether it would in all the circumstances be unconscionable to deny the right.

Thus, in the conveyancing process, no inquiry would be made. Then, after completion - probably after registration of the purchase and of the purchaser's mortgage - the claimant complains of a broken promise on which he had relied to his detriment, and he alleges that the purchaser knew of these circumstances. That complaint, if substantiated, opens *that* gateway, enabling the court to hear of whatever it wants to hear of, relevant in any way whatever, to reach a decision on whether in all these circumstances it would be unconscionable to deny the claimant the right.

The purchaser's Building Society, being without notice of the circumstances, could sell as mortgagee free from the claimant's right.

If the claimant complains before completion, the purchaser can tell in his own heart whether, in principle, it will be unconscionable for him to go ahead: this is not a matter on which he needs legal advice, although if he wishes to discuss it with his solicitor, the latter could re-assure or warn him, for an agreed fee.

Adopting a broad-based doctrine of unconscionability will result in estoppel cases being long, with wide and deep analyses of the facts, but the present writer aims to keep these analyses strictly separated from the conveyancing process. The courts, applying estoppel and conscience instead of the conveyancing process, should be the body to delve into such problems.

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The Essential Principle behind keeping the Secondary System off the Title

The "five-barred gate" analogy, used above, is imperfect, for here there are not five bars but four bars and a link (notice being the link, to the next person in the chain of title). And that distinction is the reason why this suggestion would work in a system based on estoppel, and not in a system based on notice. In present-day conveyancing (of registered or unregistered land) it would be nonsense to say that everything of which the purchaser has notice should be excluded from the conveyancing process and yet should bind the purchaser. Either it does not bind (as in "no registration, no right") or the conveyancer needs to investigate. - In a system based on estoppel, one can say that denial (by the grantor) of a promise which was relied on to detriment is a matter against the grantor's conscience - not a technical conveyancing matter but an act which a lay bystander would see as potentially improper. It is not *essentially* unconscionable: there may have been adequate alternative arrangements, or there may be other relevant circumstances: *that* question would remain to be considered: but the point is, a lay person would see it as potentially improper. It is plain for right-thinking persons to see, and needs no professional to point it out. Having thus taken the matter out of conveyancing into the realm of social conscience, the question of whether the purchaser had notice of that situation is also in that realm. (The secret of this scheme is that before applying notice, the writer imposes a limitation whereby all the

situations to which the notice might be applicable are matters outside the conveyancing process.) This suggestion separates notice from conveyancing. The four bars (promise, reliance, detriment, denial) put the matter into the realm of the grantor's conscience, and out of the conveyancing process, *before* any consideration of notice takes place. If there is notice (i.e. notice of these circumstances which are upon the grantor's conscience irrespective of the conveyancing process) the state of the *purchaser's* conscience forms part of the general question of whether in all the circumstances of the case it would be unconscionable to deny the right.

Without that separation, the writer's conclusion would have had to be *either* that effect should be given to notice (with the delay and uncertainty in conveyancing that would result) *or* that the conclusion reached in 1830, and acted on in 1925, cannot be bettered, for one cannot say directly that notice of rights shall be excluded from the conveyancing process and yet shall apply.

A "progression" can be noted here:-

(i) Until the end of 1925, the question was whether P knew of N's equitable easement (or should have known - which was widely interpreted, in accordance with the precedents in the cases we saw in Chapter 2 above).

(ii) Since 1925, on registered land, registration of easements counts as notice, non-registration counts as no-notice except in the case of overriding interests.

(iii) Since *Celsteel [1985]*, equitable easements over registered land have counted as overriding interests and binding (except that the writer has argued that overriding equitable "commercial" interests are not binding on P if he had no notice of them).[26]

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26 pages 46 and 50 above

(iv) In an "estoppel" claim, the question is (or should be) whether there was a promise by O to N, relied on by N to his detriment, and now broken by O or P in circumstances in which P should have known (by lay person's common sense and conscience, outside the conveyancing process) that even if N's right was unregistered, to stop it would be wrong.

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Keeping the Secondary System off the Title - in Practice

In normal conveyancing, the primary system - registration - is all that would need to be looked at. (A detailed example, showing how these proposals might apply in practice, is worked through in Chapter 9 below.)

From the purchaser's conveyancer's standpoint, the only relevant question (and it is put to the purchaser) should be, "Have you done anything, or do you know of anything done, which might be interpreted as sharp practice? Or anything dishonest, or unconscionable, or overstepping the bounds of what is currently acceptable to society? If so, you take the risk that it might not prevail, for we are dealing with Equity at its most flexible. If you are sued on this point which is seen as sharp or unacceptable practice, the conveyancing process will not protect you. You will not be able to rely on the state of the register, nor on the Land Registry's indemnity fund, nor will you be able to allege that your solicitor was negligent. It is not a matter on which your solicitor can advise you: your own conscience must advise you."

If the sequel is such an apparent grievance that the claimant of an alleged right starts a court case (or takes matters into his own hands and the purchaser seeks an injunction against him) in circumstances where the person claiming the alleged right has suffered detriment, so he is not merely claiming as a matter of principle but can prove that

the answers to all these five questions (as to promise, reliance, detriment, denial and notice) are in the affirmative, *then* the court shall view, in a wide-ranging fashion, whether the purchaser's conduct was unconscionable; or - better - whether it would be unconscionable now to deny the right. The question for the court should not be "Should N win?" or "Should P win?" but the balanced "*Which one* should win, in view of the purchaser's conduct, the claimant's failure to register, the consequences of loss of the case to each of them, and all the circumstances?" But the burden of proof should be on N who caused the problem by failing to register.

Though the area which the remedy of estoppel would potentially cover should be extremely wide, the actual application of the remedy should not be easy to obtain. It should be less trouble to register than to make such a claim. A general situation in which claimants would be encouraged to "try their luck" is to be avoided. Estoppel should only extend to situations in which right-thinking lay persons would feel confident in saying that the purchaser's conscience was affected. It need not apply where a money payment would fully compensate. (But a market-value money payment does not compensate for the loss of a right which lowers N's quality of life and which he would not voluntarily give up at any price). And in all cases of doubt, the claimant, who has failed to register, should lose.

And how many conveyancers who seldom go to court are going to advise their client to proceed with a claim by estoppel anyway? The case will not be won by a once-a-year advocate proving a list of facts. It needs argument to persuade the court that N has the moral high ground and deserves the exercise of the court's *discretion* in his favour. Many a client will have to be advised that "no registration" means no right, or else a long, hard, far-from-certain fight.

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A Pitfall to be avoided

There must be no opportunity to allege negligence or constructive notice against the purchaser's conveyancer on the grounds that "You only had to ask the vendor's conveyancer". There needs to be a provision similar to that in s.44(8) of the Law of Property Act, 1925,[27] or a provision that it "shall not be necessary or proper" for a purchaser's conveyancer to make such inquiries. The purchaser would thus be free of the unregistered right unless the claimant proves that the purchaser should have known of it (and of the claimant's reliance on it) independently of the conveyancing process: and if the claimant fails to do that, the loss falls onto the claimant who has failed to register.[28] But if the purchaser's conveyancer is actually told of such a right, without asking (or because he or she asked an unwise question) notice would be imputed to the purchaser.

A possible analogy is the local search. Just as it is no part of the conveyancing process to investigate all planning proposals in the neighbourhood in case they might affect the purchaser, so it would be no part of the conveyancing process to investigate these "potential estoppel" matters.

These points need to be seen (by conveyancers and the courts) as outside the conveyancing process, so that the conveyancer can say to the purchaser (and to mortgagees) "I would no more check these points than I would check the accessibility of the property to the city centre. I check that you have access to the road: what happens beyond that is your affair. It is not my responsibility to check for traffic-jams: you must find them out for yourself. - Similarly I check

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27 A purchaser shall not be deemed to have notice of any matter before the root of title, unless he actually investigated or inquired about it.

28 But see pages 53 above and 138 below for the claimant's rights for breach of contract against the grantor.

what is registered. Anything you know of (or by layman's common sense and prudence should know of) beyond that, which might be seen as improper - which is a wide and flexible term - is your affair. But if you could not know of this matter, the analogy with the traffic-jam breaks down: you are free of it." Clients should however be expressly advised that such items will not be investigated.

But those matters which today are not inquired of in normal conveyancing - the traffic-jam a mile away, the factory to be built half a mile away, the convenient supermarket a quarter of a mile away which (as the vendor has omitted to mention) is about to be closed down - none of these matters are incumbrances on the title. Matters before the root of title are incumbrances but they are fading into history. The writer is suggesting that matters very much closer in their nature to incumbrances than the three examples above, and not fading into history, should be added to the list of matters outside the scope of conveyancing. But a principle of "no registration, no right", does the same thing, to a greater extent than the writer's suggestion. By a principle of "no registration, no right", the unregistered matters are not binding on the purchaser. - And by the writer's present suggestion, they are still not binding on the purchaser unless the purchaser should know of the circumstances by his own information or common sense.

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"Gateways" and Conveyancing of the Future

In the rest of this chapter, the way the writer's "gateways" proposal would interact with current proposals for computerised conveyancing - particularly *(i)* conveyancing using the National Land Information Service for which a pilot scheme is at present running in Bristol, and *(ii)* electronic conveyancing which is proposed in the Law Commission's Report 254, "Land Registration for the twenty-first Century" - is considered.

Conveyancing by NLIS - the National Land Information Service

At the time of writing (1999) NLIS conveyancing (conveyancing using the National Land Information Service) is only available for properties in Bristol, but it is expected that it will be extended to other districts of England and Wales where the necessary computer facilities are available: it is likely to be made available in several local authorities' areas over the next few months. It stems partly from the Citizen's Charter of 1992. In the White Paper of November, 1992, the then government proposed to "explore ideas for completing the land register *and bringing together information held by the Land Registry and other public bodies*". [29]

Arguments on notice and/or on estoppel need to be relevant to the conveyancing of the future, rather than to that of the past, so an outline of NLIS conveyancing is needed here.

NLIS will bring far more information to the conveyancer's fingertips. Much of this will need to be kept out of the conveyancing process if conveyancing is to proceed without undue complication. An approach with an eye on practical consequences will be needed. To exclude "potential estoppel" matters is no less logical than to exclude these matters.

But, to understand NLIS conveyancing, we need to know first what is meant by GIS (Geographical Information Systems) LIS (Land Information Systems) LPGs (Land and Property Gazetteers) and NLIS (the National Land Information Service). All of these are information systems, not registration systems.

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29 my italics

geographical information systems - GIS

Geographical information systems have been developed by local authorities and private firms, for such matters as development control, collection of Council Tax, chain-stores' location analysis and advertising homes for sale on the Internet. GIS can show (for example) all properties within a given price range or floor-area range, in a neighbourhood.

land information systems - LIS

Land information systems, on the other hand, provide information on a particular specified property.

In the past, such systems were not co-ordinated - for example, there was no attempt to see that the local authority's LIS and the water authority's LIS would be based on similar or even compatible computer systems. These data-sources for a city or a district are now being co-ordinated into a form accessible on a single personal computer.

land and property gazetteers

The Land Registry, the Ordnance Survey at Southampton, the Valuation Office and the Bristol City Council now have a co-ordinated computerised addressing system complying with British Standard 7666, for nearly all Bristol properties. This is a Land and Property Gazetteer - an LPG. The Bristol one is the prototype. LPGs should eventually be linked into one national LPG - an NLPG. In Australia and in Sweden (where a system serving over 25,000 terminals is running) the development of such systems is more advanced than in Britain.

the National Land Information Service

These LPGs will be the basis of a National Land Information Service - the NLIS. (A possible analogy is that the LPGs are like books, and the NLIS is like the bookshop which supplies - and charges for - the books.) Bristol was the pilot scheme for NLIS. Using the Bristol LPG as the "key", further data-providers such as Bristol Water, Wessex Water, the British Geological Survey and the Environment Agency have come onto the NLIS. Three firms of Bristol solicitors, a firm of chartered surveyors and the Bristol & West Building Society have been put on-line to all this linked data.

applying NLIS - the Bristol conveyancing pilot

NLIS is an *information* service, though the information available on NLIS will include all "open" Land Registry data. Several applications have been identified for it. Insurance location risk analysis is one of them; environmental assessment is another; conveyancing is another. Information for emergency services is another: Manchester Fire Brigade hopes to fit terminals into fire engines, to identify key-holders and the presence of chemicals while *en route* to a fire, and perhaps to see instant floor-plans of commercial and industrial buildings to which the brigade is called.

A trial period, applying NLIS to conveyancing of Bristol properties, was officially launched on 1st. July, 1998.

The advantage of NLIS conveyancing is that the purchaser's solicitor can make all searches by one visit to his or her desktop computer-terminal. Instead of filling in forms and writing cheques and posting them, the solicitor types in his or her name and password, and the machine asks what property is to be dealt with. The solicitor types in the title number *or* the postal address *or* the O.S. grid reference, and a plan of the property (based on the Ordnance Survey map)

appears on-screen. For nearly all properties in Bristol, the O.S. and Land Registry maps and plans have been made to correspond.

The solicitor touches the "enter" key to confirm that the plan shows the right property, and a menu of "data providers" against which a search can be made appears on-screen. The menu at present offers eleven choices: Bristol City Council, Bristol Water, British Geological Survey, Coal Authority, Companies House, Highways Agency, H.M. Land Registry, Land Charges Department (for bankruptcy searches) Lord Chancellor's Department, Valuation Office and Wessex Water.

Moving the cursor with a "mouse" and clicking onto one of these names applies for the search and automatically charges the appropriate fee against the solicitor's account with that body. For a Local Authority Search a couple more clicks are necessary, because the machine will offer a choice of forms: LLC1 (Application for Local Search) Con 29 (Local Authority Enquiries) and a selection of additional enquiries. The aim of getting instantaneous replies on-screen has not yet been achieved, but replies from most of these "data-providers" should be received within 48 hours.

The British Geological Survey responds with a word-processed Report on Radon gas at £7.50 + VAT, or a Homebuyer's Report which also gives an inventory of the geology around the property at £20 + VAT. The Coal Authority is developing a plan-based system to replace its original word-processed response. The Land Registry shows, on screen, Current Entries in the Property, Proprietorship and Charges Registers, confirmed by Office Copies which arrive in the post the next day. The Water Authority provides a map showing pipes.

Statutes can be seen by clicking onto the Lord Chancellor's Department in the menu: and if the machine is used like the LEXIS law-computer and is asked which statutes contain a word such as "subsidence" it will give that information.

There is no limit to the amount of information that could be added to the NLIS. It seems likely that the private sector will be allowed and encouraged to add data. Small firms of surveyors, unable to invest in comprehensive data individually, will thus have access to a "pooled" data source. Such data, provided by surveyors and made available to each other and to the public for a fee, could potentially include property prices (which the Land Registry currently does not reveal) as well as rents, rent-free periods, rent review provisions, premiums, reverse premiums etc. Building Societies and architects might add data. Large firms might enter floor-plans, subject perhaps to a password to make them more easily accessible to the fire brigade than to burglars. Over six hundred potential data providers have been identified.

Separately from NLIS, more than eight hundred solicitors and other professionals throughout England and Wales now have DA - Direct Access - to the Land Registry's computerised registers. (This is not the same technology as NLIS. NLIS is via an Internet web browser. DA is not.) On a personal computer in their own offices, they can view registers on-screen, apply for Office Copies and apply for Official Searches. Thus they receive the result of their search on their desk-top terminal instantly without the need for any human intervention at the Land Registry.[30]

The logical next step is for the purchaser's solicitor's computer to be programmed to generate the Land Registry search the day before the completion of a purchase, and to give a warning if any result other than "no entries subsisting" is received. Thus, neither the solicitor's office nor the Land Registry will have any human involvement in the making of the search.

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30 Austrian lawyers have had on-line access to the Austrian Land Registry for several years, and the Hong Kong Registry introduced a Direct Access service in 1994.

Comment. The writer sees two problems which will need to be faced. The first is the old problem that some matters (such as N's equitable easement) will not be registered. The second is that *so much* (maybe too much!) data will be on record.

(1) *as to items not registered:*

Giving effect to notice of unregistered rights could have a most adverse effect on the developments which have just been described. Acceptance of a search revealing no entries could no longer be automatic: it would be necessary in every case for a human agent to consider the question, "Is there anything unregistered of which I am or should be aware?"

But is this not true anyway in respect of overriding interests? The property may (for example) be subject to a prescriptive right, an easement overriding by Rule 258, an easement of ventilation of necessity as in *Wong v. Beaumont* [31] and an occupier's right. The answer is: the prescriptive and Rule 258 rights are discoverable by the purchaser's solicitor or surveyor on inspection of the property, being openly used (though the prescriptive right may currently be non-apparent and could be a latent defect of title which the vendor may be under a duty to reveal) and the occupier's right is discovered by inquiry. If the ventilator-pipe for which there is a right has not yet been installed, this will be not at all apparent on inspection: but in that case it is a latent defect. The vendor who did not reveal it is liable for compensation - and there is no injustice in that. - Such matters do not present any major conveyancing difficulty: but if it were necessary to inquire for unregistered minor interests of which it might be said that the purchaser should have known - and they range from a neighbour's unsuspected option to purchase part of the garden, to an unregistered restrictive covenant - this would not make for speedy

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31 *[1965] 1 QB 173* - and see footnote 2 on page 3 above.

conveyancing, particularly if the inquiry put to the vendors received the reply, "We know of none but we suggest you ask all the neighbours". [32]

It is concluded that the doctrine of notice would be an obstacle to current developments in conveyancing, unless it can be separated from the conveyancing process; but there should yet be a "long stop" remedy in cases where there is notice of the right, or rather, notice of circumstances giving rise to an estoppel.

(2) *As to data on record on the NLIS:-*

All this additional information, some of which will be more comprehensible to a surveyor or an engineer than to a solicitor, will be available at the touch of a button (or click of a mouse) on the conveyancer's personal computer. Conveyancers will have faster access to the data that is revealed by searches, together with access to lots of other information that they would not normally acquire.

The additional information is "recorded", not "registered". The distinction is important. For matters that the law requires to be registered, registration is the official way of declaring their existence to the world. To those matters, the arguments as to whether effect should be given to notice of a known unregistered right, or whether the rule should be strictly "no registration, no right", apply. "Recorded" data, on the other hand, will be recorded *for information.* It is there for anyone who is interested enough to pay for it. This

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[32] A particularly nasty pitfall (but one which fortunately is likely to be very rarely encountered) is the covenant in *Poster v. Slough [1969] 1 Ch 495,* which was a covenant by a landlord that the tenant could remove buildings at the end of the lease. The court held that this was not registrable at the Land Charges Registry and so the doctrine of notice applied. On registered land, the tenant would normally be in actual occupation (or in receipt of rent from a sub-tenant) in which case the right would be an overriding interest by s.70(1)*(g)*, or it could be registered under s.49(1)*(f)* of the Land Registration Act, 1925.

information may be financial (e.g. rents) statistical (e.g. distance from bus route, and crime statistics useful to insurers[33]) or structural (floor plans) or records of chemical storage, chemical contamination and very many other matters. On Sweden's equivalent of this system, census data is included. All this information (or should I say *most* of this information - bear that chemical contamination in mind!) is of no relevance to conveyancers, and there will be no guarantee that all of it is accurate and up to date.

If a Judge were to hold that because an entry is there to be seen, a conveyancer who does not see it and act on it will be liable (on a basis either of negligence or of constructive notice) a problem would arise. (To say that the conveyancer should find the information because it is all available through one computer is no better argument than to say that for many years past the conveyancer should have found it because it was all available over one telephone. But the question here is what the position would be if a Judge held that a conveyancer should discover, and act upon, it.) The situation would be comparable to that which applied to settled land (such as stately homes and their grounds) from 1883 to 1925, when a solicitor acting for a purchaser of an acre of settled land had to read the whole settlement, perusing page after page of irrelevant provisions about land far away and about financial provisions for the aristocratic landowner and his family, in case one relevant point was hidden in the verbiage. The writer suggests the same solution as was adopted in 1925: unnecessary matters should be kept out of the conveyancing process.

Guidance upon this question of what is ordinarily to be expected of a conveyancing solicitor is to be found in *Hurlingham Estates Ltd. v. Wilde & Partners [1997].*[34] The case was about a

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33 These are already available for certain areas, on GIS.

34 *[1997] 1 Lloyd's Rep. 525*

conveyancing transaction which had unnecessarily saddled the plaintiff with a £69,000 tax liability. The Judge, Lightman J, stated in his judgment that unless some special circumstance is known or mentioned (such as, "I am employing a separate tax adviser for this matter") a lay client is entitled to expect his lawyer to advise and warn him on matters of law. Thus a conveyancing solicitor *is* under a duty to warn of a statutory tax or pollution liability.

But the fundamental unanswered question remains:- Just because, somewhere in the mass of data on NLIS, there is a fact which would alert the solicitor to a legal problem, should the solicitor see that fact? There needs to be a limit set on what, in the multitude of data, the solicitor is to be expected to peruse.

As Lightman J observes, solicitors normally advise on matters of law and not of business.[35] - So, if a remediation notice (ordering the removal of contamination from the land) has been served by the Local Authority, the purchaser's solicitor should discover it and should at least advise the client to have the position checked by a competent person.[36] But if the only note on NLIS of contamination is one put on by Property Intelligence plc (a professional body in the private sector providing a computerised property-information service called "FOCUS" for surveyors - but not an "official" body) the writer argues that this should come within the category of casual conversation for which the solicitor is under no duty to hunt, though the client should be told of anything that is actually heard of. The solicitor's duty, as now, is to look at matters which a competent conveyancer would look

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35 *[1997] 1 Lloyd's Rep 525 at page 530 col. 1*

36 Under s.78E and s.78F of the Environmental Protection Act, 1990 (inserted into that Act by s.57 of the Environment Act, 1995, and expected to come into force in July, 1999) the purchaser may be liable for the cost of cleaning up the contamination. In certain circumstances the cost of doing so might exceed the value of the land.

at - and NLIS makes it easier to look. Whether a *surveyor* should have seen a commercially-recorded entry will probably depend on the question, "Would a normal competent surveyor have been expected to see it?"

How does this balance compare with the balance advocated in the writer's "gateways" suggestion? - An unregistered easement is a matter of law rather than of business: but knowledge of it (if any) is by informal unofficial communication, casual conversation or even rumour. Therefore (the writer suggests) conveyancers should be under no duty to hunt for such matters on NLIS or anywhere else (and should tell their clients that this is so) though they *should* be under a duty to tell the client of anything they actually hear of. This would be parallel with the judgment in *Hurlingham.* - But the client's conscience would still be affected if there were some breach of faith which should be apparent to the client as a lay person: thus estoppel could apply, but the conveyancer's duty on this point would only have been to warn the client to look out for himself.

To require conveyancers to look for unrecorded (or "non-officially" recorded) matters would cause doubt, difficulty, expense and delay, whereas a system in which the conveyancer should not look for such matters (but a purchaser in bad faith and with notice could be estopped) would give justice without causing conveyancing problems and delays. - That is the theory: it will be tested by an example in the next chapter.

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The 1998 Consultation Paper

In September, 1998, the Law Commission and the Land Registry jointly published a consultation paper, "Land Registration for

the twenty-first Century". [37] The paper, more than 300 pages in length, made numerous proposals for amending the registered land system, to improve the system and to pave the way for electronic conveyancing, which the authors of the paper see as likely to come within the next ten years: but three proposals are of particular relevance here:-

1 All expressly granted easements and profits à prendre shall need registration,

2 Rule 258 of the Land Registration Rules, 1925, shall be revoked,

3 All overriding interests shall be subject to the law of fraud and estoppel.

The present writer hopes that proposal 3 can be taken to be a general principle. If it were limited to overriding interests, it would not help N, whose unregistered easement ceases to be an overriding interest by proposals 1 and 2. But although the consultation paper says "overriding interests" (the reason apparently being that this proposal happens to be in the section of the paper which is dealing with overriding interests) it refers back to clause 9(7) of the draft Bill attached to Report No. 173,[38] which applies to interests in general.

Estoppel was considered in some detail in paragraphs 3.33-3.36 of the consultation paper, but the present writer regards his conclusion on page 91 above (that estoppel is an equity comparable to the equity in *Barclays Bank plc v. O'Brien)* as preferable by far to the proposal in paragraph 3.36 of the paper, by which an equity arising by estoppel would be a minor interest unless the person claiming it were in actual occupation, in which case it would be an overriding interest by s.70(1)*(g)*.

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37 Law Com No. 254, published in September, 1998.

33 page 95 above

As N in our ongoing example is not in occupation (being of course the neighbour, in occupation of the house next door) he would not be protected by s.70(1)*(g)* and would be likely to lose the right for which he has paid, and in respect of which he has also paid for a gate, with two oak gateposts and a handrail.

Estoppel is a matter of evidence and court procedure, not limited to Land Law or registration, and will apply unless the proposed new Land Registration Act expressly says it will not - but does not a provision that "an equity arising by estoppel ... should be regarded as a minor interest" [39] do just that? The writer hopes that before legislation is passed, it will be accepted that the estoppel itself should not be regarded as a minor interest or an overriding interest. In particular, to regard it as a minor interest is against legal principle, for a *refusal* cannot be an interest in land; and it is against justice, for it deprives vulnerable members of society (e.g. disabled 85 year old N) of their just rights; and as a result it is likely to be against public opinion.

What arguments are there *against* the writer's view? Four spring to mind, which might be termed (i) the "mirror" principle, (ii) the "interests" principle, (iii) the "technology" argument, and (iv) the "efficiency" argument. Each of these can be answered.

(i) *The "mirror" principle.* This is a fundamental principle of title registration, that *the register should be a mirror of the title.* It should, as far as possible, show the whole title. That is what it is for. - Now if a mirror (a security-mirror for example) is meant to show everything in a room, but certain items cannot be seen in the mirror, there are three possible solutions:- (a) move those items so that they appear in the mirror, (b) destroy those items, or (c) move those items out of the room. - Applying that analogy to our present problem of N's

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39 Law Com No. 254, paragraph 11.12(1) and footnote 36 thereto.

rights, not appearing in the mirror on account of their non-registration, the first solution is not available, because the root of the problem is that *always* there will be some people who will omit to register, and so their rights will not appear on the mirror of the title. The second solution cuts down the truth to fit the mirror: it gives accuracy at the expense of truth and justice. The third solution is the one recommended in this paper: N's right is moved outside the title, so the mirror retains its accuracy and N's right is not a matter the purchaser's conveyancer will need to look for. As a matter of conscience, P may be bound (through estoppel) if he knows of it - but that is no part of the title.

(ii) *The "interests" principle.* This principle says that an equity must be either a personal right or an interest in land, and if it is the latter, it must be either an overriding interest (good without registration) or a minor interest (void against P unless protected on the register prior to P's purchase). But the House of Lords has already destroyed that principle, in *Barclays Bank plc v. O'Brien.*

(iii) *The "technology" argument.* God forbid that any legal system should ever be "driven by the software", compromising justice to satisfy the requirements of a computer! But there is no suggestion of this, and N's claim is outside the technology as well as outside the conveyancing. The technology has no effect on it.

(iv) *The "efficiency" argument.* The speed and efficiency of conveyancing is not affected by N's right, which does not need to be considered (except in P's conscience if he happens to know the situation) during the conveyancing.

Let us not be constrained into imagining that these principles and fetters should prevent Parliament from enacting a law which would be both efficient and just.

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An alternative possibility mentioned in the consultation paper, that P might be regarded by the court as a constructive trustee for N, since he knew of N's right, is not explored in any detail in this paper. In very many cases, though not necessarily in N's case, it gives the same result as an argument based on estoppel, but one difference needs to be highlighted here.

By s.20 of the Land Registration Act, 1925, P takes the property subject to the entries on the register, and to overriding interests, and free from all other interests whatsoever (unless he is estopped from saying so; but in this paragraph we are not discussing estoppel, we are considering the constructive trust as an alternative to estoppel). But if the contract between O and P expressly states that P is to take the property subject to N's unregistered right,[40] P may be held to his contract. The contract is between O and P, so N cannot sue P for breach of the contract, but he *can* claim that by the terms of the contract, P is a trustee for N. That's a constructive trust, and P will be liable for breach of trust if he obstructs N's right. But note the difference of fact between this and what we have discussed earlier. There is a material difference between P *knowing of* N's right (possibly saying he doesn't mind, or maybe making no comment at all) and P *putting his signature to a contract which includes a clause stating that P takes the property subject to* N's right. The *latter* is a constructive trust.

The law of trusts is not an ideal vehicle for carrying easements, and the writer prefers to keep trusts (and the intricacies of how s.74 of the Land Registration Act, 1925, as interpreted in the *Boland* case, applies to them) out of this argument. Interests under trusts can be overreached, so P and Mrs. P as two trustees could sell the property free from N's right, leaving N with compensation but no easement.

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40 as in *Lyus v. Prowsa Developments Ltd. [1982] 1 WLR 1044*

Electronic Conveyancing

Electronic conveyancing is not the same as NLIS conveyancing. The latter is obtaining information by computer, whereas in electronic conveyancing the deed itself is replaced by an entry on a computer.

The Stroud & Swindon Building Society, and (from March, 1999) the Nationwide Building Society, are currently operating a pilot scheme in which there is same-day registration of mortgage redemptions, carried out by E-mail, but the application has to be backed up with paper confirmation. We must prepare for a time when the electronic communication, without paper back-up, will be the "document".

At the moment of completion of the transaction, the "enter" key is typed in the conveyancer's office, and at that instant the transfer goes down the telephone line and is registered on the Land Registry's computer. This is "creation by registration". No longer will there be a paper deed signed and witnessed, and then posted to the Registry, and then registered. Instead of this threefold process of "execution, lodgment, registration", the aim of the Law Commission and the Land Registry is that there would be a single act of "execution electronially by registration". The electronic arrival of the entry into the Land Registry's computerised register is what would create the right.

Exchange of contracts, too, would be electronic, the moment the entry appears on the Land Registry's register being the moment the contract becomes binding. Similarly, grants of easements would be electronic, coming into existence at the moment of registration.

At present, the purchaser's and/or mortgagee's solicitor makes a final search at the Land Registry, which gives a thirty-day "priority period". Then completion takes place, with handing over of purchase money and keys and documents; the transfer deed is sent to the Inland Revenue with a cheque for the Stamp Duty, and when it comes back

it is sent to the Registry, with an application for registration, all with some sense of urgency because if it does not arrive there within the thirty-day "priority period" the purchaser and mortgagee are at risk, because if someone meanwhile has registered another right, that right would have priority. With electronic conveyancing, that "registration gap" between completion and registration would cease to exist. Completion would be *by registration.*

A parcel was recently delivered to the present writer by a mail-order van driver who said, "Sign here", and held out an electronic pad on which to sign. Having obtained the signature, he plugged the pad in to a socket on his van's dashboard, and the delivery was entered on the computer at his firm's head office. Let us imagine conveyancing carried out that way.

Here is the future.[41] (Please note that this is the writer's personal view and this may not be the system eventually adopted.)

O wants to sell his house. He has contacted an estate agent who has carried out a valuation that will be acceptable to all mortgage institutions.

Sunday. Mr. and Mrs. P call on O and agree to buy his house for £*n*. Whether they sign anything doesn't matter: it's not a binding contract if it's not registered.

11.00 a.m., Monday. O videophones his conveyancer X who takes particulars of names, addresses, price, unique number if O knows it (this number being the post-code-based number replacing the title number) and all the information about boundary fences etc. for the standard Seller's Property Information Form. Land Registry entries are

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41 The reader is invited to take the following account with the proverbial pinch of salt - about as much salt as should have been taken with the nineteenth-century assurances that persons dealing with registered land would have no need of solicitors, as people would be able to complete their transactions personally at the Registry.

immediately obtained through NLIS, and X's computer generates a standard draft contract and sends all this data down the line to conveyancer Y's computer, which stores it.

1.15 p.m., Monday. P, during his lunch break, visits Y and instructs her to act.

5.45 p.m., Monday. P, on his way home from work, visits Y again. By this time, NLIS has given Y the result of the Local Search, and P's Bank (ex Building Society) has cleared Mr. and Mrs. P and the property as "good risk". (In Sweden, it is normal for P to take over O's mortgage, and add to it.) P signs the contract - not on paper but on the electronic computer pad. Mrs. P does not sign, but the Bank has her specimen signature, locked behind passwords, amounting to her "electronic fingerprint", and by E-mail through her digital television she puts this fingerprint onto the contract. Y then attempts to link to X's copy of the contract: if O has not signed, the call will not go through. But O *has* signed: the computer-link triggers a DA link to the Land Registry's computer, and by 6.10 p.m. the contract has been noted on the register, whereby it becomes binding. - Y's computer does not then switch off: it knows it has a deed to draw.

8.30 p.m., Monday. Y, checking her computer-terminal at home, finds that the computer has drawn the deed of Transfer of Whole. There is no need to send a draft of it to X, as it is in standard format, so she E-mails it to Mr. and Mrs. P and gets their fingerprints, and next morning X approves it and gets O's signature or fingerprint. No printout on paper is necessary.

Now comes the delay. Neither party has made removal arrangements yet. How these people hold their solicitors up! (But in Sweden, there is often no solicitor involved: the estate agent draws the contract, and the Bank does the rest.)

At last, the waiting is over: completion day has come. Y calls up this transaction, makes a final search by DA which receives an instant "no entries subsisting" reply, and then presses "enter" on her

keyboard. This registers the transfer on the Land Registry's computer - it is this instantaneous registration which makes Mr. and Mrs. P the new registered proprietors - and automatically deducts the Land Registry fee from Y's account. Does that single action also trigger the payment of the Stamp Duty? (In Sweden it already does.) And whether that single press of a computer-key will also credit the purchase money to the vendor's solicitor's bank *and* print out a bank statement *and* prepare a PD (Particulars Delivered) form for the Valuation Office *and* authorise the on-line estate agent to release the keys to the purchaser, remains to be seen. Then Y can use DA as a check, and will see on-screen that Mr. and Mrs. P have been entered as proprietors.

This example does not include the commonly-heard comment, "The computer is down", nor does it address the possibility that this sale is part of a chain of transactions, and nor does it deal with the unnoticed typing error in the unique number, by which the contract purports to sell W's bungalow instead of O's house - because of which the Land Registry's computer has rejected it on the grounds that O is not the registered proprietor *and so there is no binding contract*, but it gives the general idea. And with conveyancing like this, Y does not want the uncomputerisable task of hunting about for unregistered rights of which it might be said that Mr. and Mrs. P should have known. "No registration, no right."

Yet - in a dispute, weeks or months or even years later - if it can be shown that O or the irascible eighty-five year old N actually told Mr. and Mrs. P of N's unregistered right, which O said N could have for the rest of his life and Mr. and Mrs. P said they didn't mind; Mr. and Mrs. P's joint conscience is affected if they try to stop N. Here, completely outside the conveyancing system, is a potential claim by estoppel.

One problem that can be foreseen is that on a strict "creation by registration" system, N would have no easement, so he would be

asking the court for creation of an easement, as against enforcement of an unregistered easement. (See pages 70-72 above.) The Law Commission has faced up to this problem, and proposes in paragraph 11.12(1) of the consultation paper that rights by estoppel *will* exist even though not registered. N's right will thus hold good against O. But it will be a minor interest, which will fail against the unconscionable P for non-registration, unless an enlightened view of estoppel is taken. - In summary, the writer sees four views of estoppel:

(i) It is a personal right. This gives N a right against O but not against P.

(ii) It is a minor interest. This makes N's right against P void for non-registration.

(iii) It is an overriding interest. It is said that this would seriously delay all conveyancing, while inquiries were made.

(iv) It is an equity like the one in *O'Brien*. This gives justice to N against the unconscionable P without delaying the conveyancing, and the writer has urged the Law Commission to adopt this view.

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An example, taking up almost the whole of the next chapter, will show how the writer's suggestion is intended to work. This example is more complex than a typical conveyancing transaction, in order to subject the suggestion to a rigorous test. (This is self-torture! - particularly as the example is not going to survive the test as well as the writer would like.)

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Chapter 9

Testing the theory

For the purposes of this example, let us assume that the Law Commission's proposals have come into effect, so that all expressly granted easements and profits à prendre need to be protected by being entered on the register, and Rule 258 has been revoked so the rule in *Celsteel* is no more.

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The Example

Tom's purchase

In 1983, Tom bought a freehold registered property.

1 In 1984 he granted an easement of light to his neighbour Nancy, by deed, duly registered.

2 Nancy also has a right of way across Tom's property, by prescription.

3 In 1988, when the new sewer was laid through the village, Tom granted Nancy a right of drainage across his property. This grant was by an informal written contract and it has not been entered on the register.

4 At the same time Tom granted another neighbour, Nellie, a similar right of drainage: this too was by an informal written contract and is not protected on the register.

Sale by Tom to Dick

Tom then sold his property, freehold, in 1990 to Dick, informing Dick of all these items.

5 Another neighbour, Nina, has a freehold house with a large garden: access to the garden can only be obtained through her house, unless she can be granted a right of way over her neighbour Dick's property. (The layout is similar to that in *E. R. Ives Investment Ltd. v. High*, except that Dick's property is registered land.) Nina owns a horse. For a substantial sum, Dick grants Nina a right of way across his land.

6 For a further sum, Dick grants Nina a grazing right for one horse upon part of his land.

7 For a further sum he grants Nina an option to purchase that part of his land.

Though the documents which they have both signed were informally drawn without legal advice, both the right of way and the grazing right are in words which make it clear that they are intended to be permanent rights "running with the land" and not merely person-to-person rights. None of the rights is protected on the register, but in reliance on the right of way, Nina builds a stable (with Planning Permission) in her garden.

Sale by Dick to Harry

Dick then sells his land, freehold, to Harry, informing Harry before exchange of contracts of the three agreements made with Nina, but omitting (either through bad faith or bad memory) to mention the others.

Between exchange of contracts and completion of Harry's purchase, Nancy approaches Harry and informs him of what she calls her "rights".

Summary chart

The rights are:-

1 Nancy: right of light: registered;

2 Nancy: right of way by prescription;

3 Nancy: right of drainage (informal grant, 1988) not registered, but she told Harry of it before he completed his purchase;

4 Nellie: right of drainage (informal grant, 1988) not registered, and Harry was not told of it;

5 Nina: right of way: not registered, but Dick told Harry of it: stable built in reliance thereon: *cf. E. R. Ives v. High;*

6 Nina: grazing right: not registered, but Dick told Harry of it;

7 Nina: option to purchase: not registered, but Dick told Harry.

In all seven cases, it is claimed that the rights run with the land and are not personal licences.

After completion and registration of his purchase, Harry decides to attempt to stop all of these alleged rights.

How would a "Protocol" conveyancing system based on a system of "no registration, no right" (with estoppel as a safeguard) work in respect of these claims?

In theory, Harry's conveyancer would be under a duty to discover items 1 and 2 (the registered right, and the right by prescription which is an overriding interest) and would be under no duty to look for the other five items, which would all fail unless protected by estoppel or some other protection. (To clarify:- The

purchaser's conveyancer would be under no duty to ask about them: not to do so would not be negligence or constructive notice. But if he or she is told without asking, this gives Harry imputed notice of these matters, and the conveyancer should advise Harry in general terms that if Harry did anything that a court might see as unconscionable, it would be at Harry's own risk.) But let us look further. It will be instructive to look at the steps taken by Harry's conveyancer - and by Dick's conveyancer.

Harry's conveyancer will not inquire whether there are any unregistered rights. On the other hand Dick's conveyancer has sent Dick a standard Seller's Property Information Form to fill in. This form contains a statement that it "will be sent to the buyer's solicitor and may be seen by the buyer". Question 3 on the form is as follows:

> 3.1 Have you either sent or received any letters or notices which affect your property...?
>
> 3.2 Have you had any negotiations or discussions with any neighbour or any local or other authority which affect the property in any way?

In reply to this question, Dick gives a somewhat inarticulate answer in which he mentions Nina's three rights (items 5, 6 and 7) and no others. (Dick will not know whether any or all of these rights are on the register, even if he understands the registration system.) If this reply is on the Property Information Form, it is sent to the buyer's conveyancer.

If the information is not given on the Property Information Form but is given to Dick's conveyancer separately, the conveyancer should advise Dick that if Harry is not told of these items, Harry may take the property free of them but Dick might then be sued in contract by Nina. (So Question 3 on the form should be asked. The buyer's conveyancer does not want to know this information, but the seller's conveyancer needs the information, in order to advise his or her

client.) Dick's conveyancer then either will or will not inform Harry's conveyancer, depending on Dick's instructions.

If these items are mentioned on the Property Information Form, Harry's conveyancer, comparing the information in the form with that in the Land Registry Office Copy Entries, should point out to Harry that he now has notice of these three unregistered alleged rights revealed on the Property Information Form, and that whether he would be estopped from preventing them is an open question. (*Note:* Harry has no notice of the fact that Nina built a stable in reliance on having a right of way.) Contracts are then exchanged.

These matters have come to light in the conveyancing process, although the buyer's conveyancer did not inquire about them: so notice to the conveyancer is notice to Harry. But if Dick had instructed his conveyancer not to reveal them (or if Dick had not mentioned them even to his own conveyancer) Harry would have no notice of them.

It was at this point, between exchange of contracts and completion, that Nancy approached Harry and informed him of her rights. Harry's conveyancer was already aware of item 1, which is registered. Item 2 (a prescriptive right openly used) is binding on Harry whether he had observed it on inspection of the property or not. Item 3 (drainage right, to be considered below) has come to his attention outside the conveyancing process, but he may wish to seek his solicitor's advice on it. *If* item 3 amounts to an inchoate right which the Court would enforce by estoppel, it is (surprisingly) not too late for Nancy to protect it on the register, despite the change of ownership from Tom to Dick, as they both had notice of the situation (i.e. notice of the equity, as in *O'Brien*). - *Contrast* the present rule, whereby the alleged right would be void against Dick, were it not for Rule 258. - The suggestion here is not a contradiction of s.20 of the Land Registration Act, 1925. The property is not subject to the right until the right is registered, but Tom and Dick and Harry will all be estopped from saying that there is no enforceable right, if in the

circumstances set out below (on page 140) estoppel can be made to apply here. So registration of the right at this late stage will make no difference to the position of Tom, Dick and Harry, but it will prevent a purchaser from Harry from being without notice of the right and of the situation.

Harry's purchase is then completed and registered. He then seeks to stop all the alleged rights. Items 1 and 2 (the registered right and the prescriptive right) cannot be stopped, but let us consider the other five, looking at Nina's three rights first.

as to Nina's claims - items 5, 6 and 7:-

The onus should be on Nina to prove that Harry knew of the rights and of the circumstance that she relied on them. The writer suggests that a wide view should be taken, in which any information (regarding the circumstances as a whole) which is sufficient to make a purchaser consider the question of whether he can proceed with a clear conscience, is sufficient to count as notice of those circumstances. But Nina will not know whether Dick informed Harry of her rights.

As to Nina's right of way, item 5. Nina spent money erecting a building in reliance on the promise, as did Mr. High. This is detriment, for there is no way of getting the money back if loss of the right of way renders the building useless for the purpose for which it was built. If Harry had notice of these circumstances (which he did not, unless Nina can show that he was told) he is estopped from denying the right of way if to deny it would be unconscionable in all the circumstances of the case. There would be (1) a promise (2) reliance (3) detriment (4) denial (5) with the purchaser aware of these circumstances. The gate would be open for the court to cross the threshold and explore all avenues of whether it would be

unconscionable to deprive Nina of her right.[42] The conclusion might be that it was not unconscionable - e.g. if Harry or Dick had offered compensation or some other arrangement which was an adequate alternative in all the circumstances of this particular case. The behaviour of all parties should be looked at. The remedy would not in all cases be to enforce the right: that might go beyond "the minimum equity to do justice". [43]

Under the present law, this right, made by a contract signed by Dick and Nina, would be a valid equitable easement - an overriding interest - under Rule 258 and the decision in *Celsteel.*

If the contract was not signed by Nina as well as Dick, it would be void for failing to comply with s.2 of the Law of Property (Miscellaneous Provisions) Act, 1989,[44] and it is presumably too late for Nina to sign it now, as Dick no longer owns the property: but in that case Nina would still have a claim by estoppel, as above. Failure to comply with s.2 would not prevent an estoppel claim - assuming that such a claim extends to bind Harry as well as Dick.

Under an estoppel-based system in which estoppel did not extend to successors, Nina would lose this claim - whether or not

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42 If this argument is applied to a spurious claim, in which Nancy, wishing to prevent her neighbour Dick from selling to Harry (whom she dislikes) made a trumped-up claim of a right by estoppel against Tom, and claimed that Dick knew of it - the effect on the transaction between Dick and Harry is extreme delay and uncertainty: but it is better to have this rare injustice than to have the more frequent injustice of people like Nancy losing their rights.

43 The phrase comes from *Crabb v. Arun D. C. [1976] 1 Ch 179 at page 198G, per* Scarman LJ (later Lord Scarman).

44 see page 95 above

Harry's conscience should morally be affected.[45] If Dick sold for the purpose of destroying her right, she would have a remedy against him in contract;[46] but if the sale were not malicious it would be hard if he were held liable after she had failed to protect her rights - for notice to Harry would not protect Dick. It might have been argued that Nina's right of way is only personal; it would be much harder to argue that Nancy's right of drainage is only personal. - It can be argued that if Dick contracted with Nina to grant her rights in perpetuity, and if Dick did not expressly subject Harry to these incumbrances, Dick is liable: privity of contract. (Similarly Nancy and Nellie have privity of contract with Tom.) Dick needs an indemnity from Harry. A practice would need to be developed, similar to that on covenants, whereby the buyer enters into a covenant with the seller to keep his promises and to indemnify the seller against all claims arising thereon.[47] Whether the sale was with or without "full title guarantee" should not affect this, any more than it affects the position on covenants. Sellers would need to think of these unregistered rights (which Dick has failed to do in respect of Nancy's and Nellie's drainage rights) and specify them, unless a general form of words could be used to cover "all matters of which the buyer has notice".

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45 unless it could be held that there was a constructive trust as in *Lyus v. Prowsa [1982] 1 WLR 1044*

46 *cf. Midland Bank Trust Co. Ltd. v. Green No.2 [1979] 1 WLR 460* - page 53 above

47 An example of this danger is *Hollington v. Rhodes [1951] 2 TLR 691.* In the report of that case there is no mention of any indemnity.

As to the grazing right, item 6. [48] Nina appears to have done nothing in reliance on this. (Nina's own large garden provides grazing around the stable.) Notice alone of the promise, without proof of reliance thereon to one's detriment, is insufficient. On this argument, the gate is not open for the court to cross the threshold to examine this situation: the right fails for lack of protection on the register without further investigation. (But if a wide view is taken of what is meant by detriment - to include the circumstance that Harry knows that Nina has paid money for what, if the right is denied, is a bad bargain - this gate also opens. If such a wide view is not taken, justice will not be done in such a case as *Celsteel.)* [49]

Under the present law, this would probably be an overriding interest under s.70(1)*(a)* of the Land Registration Act, 1925, though, in the context of the Act as a whole, the matter is not entirely free from doubt.

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As to the option, item 7. There is no detriment, only the loss of an anticipated benefit. The claim fails to open the gate. (But *contra* if the claimant has built substantial barns on her own land in reliance on the promise, and Harry knows that Dick stood by and let her do so.) The "moral feeling" that such a person, even if not in actual occupation, should have a remedy against a purchaser who has actual knowledge of the option, is not provided for here unless there

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48 This is not an overriding interest if the proposals in Law Com No. 254 are adopted.

49 see quotation from *Grundt v. Great Boulder Pty Gold Mining Ltd. (1937) 59 CLR 641* on page 101 above. But this would not save Geoffrey Green's claim (page 35 above) because he had not made a bad bargain. He had only paid £1 for his option, and he did not suffer a detriment: he lost an anticipated benefit.

is detriment. The claimant's remedy is against the grantor in contract, or against the conveyancer in Negligence.

Under the present law, this option would be an unprotected minor interest and would fail.

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Next: Nancy and Nellie:-

as to the "drainage right" claims - items 3 and 4

Nancy's drainage right, item 3. Harry was told of this, though not as part of the conveyancing process, after exchange of contracts. It may have taken him by surprise and he is in a dilemma. Is he to cut off the old lady's drain, or is he to let her drain frustrate his plans, in which case he must tell two of his workers that they are redundant? (No law is going to give a satisfactory answer to that problem.) This circumstance is an argument for priority to be based on registration of contracts. (Contracts will be made by registration, in electronic conveyancing.) Under such a scheme, Harry's contract would be registered, and if Nancy's was not, Harry would have priority. But as a matter of conscience there might be a need for estoppel to apply. Estoppel gives the court maximum flexibility, which could extend even to the question of whether there will be employees made redundant - which has nothing to do with Land Law.

Nancy needs to prove the five points of fact. (1) A promise. (It was a contract, and she will probably be able to show here that it was for an easement and not a personal licence.) (2) Reliance. (3) Detriment. (There is detriment if she shows she had the old septic tank removed in reliance on this drain.) (4) Denial. (5) Harry has been told of these circumstances. - Once these five facts are proved, the gate is open for the court to consider whether it will be unconscionable to deny her her right - and it is at this point in the case that the character of the argument changes:- Did Tom know she was

removing the tank in reliance on her new drain? If Tom did not know but Harry has now been told, can estoppel apply? Arguably it can, for Nancy had no need to state the position until there was a proposal to interfere with her drain, and Harry's conscience is now affected. Conversely, this is a contract into which Harry did not enter: his development plans may be adversely affected, and so may his employees' employment prospects, and their mortgages. The degree of notice (a general indication or a specific and detailed indication) and whether there was notice of the degree of user *(cf. Dalton v. Angus)* or the degree-of-importance of the consequences of stopping the user, may be relevant to the question of whether Harry's conduct was unconscionable. If Nancy wins, it is because Harry should have known (and in this case did know) the position, and the circumstances were such that his conscience should have told him not to obstruct her right.

If Nancy loses the case, she can claim in contract against Tom, if she can find him,[50] just as Geoffrey Green had a claim against his father.[51] It seems hard that Tom, who has done nothing wrong, and who will doubtless have no indemnity from Dick, should be held liable for not protecting Nancy when she has failed to protect herself. From Nancy's point of view, a remedy against Tom, not Dick, is not equivalent to a right against the proceeds of sale (overreaching) for Tom may be impecunious; and the right is one to which, by nature, overreaching could not satisfactorily apply.

Under the present law, this equitable easement, openly used, would be valid under Rule 258 and the decision in *Celsteel* - a far more straightforward procedure than that above, and giving a needed

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50 The contract is more than six years old, but it is argued that the claim is not barred by the Limitation Act, 1980, because it is less than six years since the cause of action accrued.

51 page 53 above

remedy even if detriment cannot be shown: and these are two reasons for retaining the present rule as an alternative to estoppel. A third situation in which Rule 258 is superior to estoppel will be seen on pages 147-148 below, and, for these reasons, the conclusion to be reached (which was to have been to accept a "no registration, no right" rule with an "estoppel" safeguard) will include a provisional reservation with regard to Rule 258.

Under an estoppel-based system in which estoppel did not extend to successors, Nancy would lose her case, even if Harry was informed of the right before exchange of contracts: and she could claim in contract against Tom.

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Nellie's drainage right: item 4. Harry completed his purchase, and registered, knowing nothing of this drainage pipe. But now Nellie opposes his plans for development of the site, on the grounds that the development will interfere with her drain. She claims that Harry should have known of her right: the inspection cover of her drain is on his property. He replies that he had concluded that the cover was part of his own and/or Nancy's drainage system. - Even though Nellie can prove detriment (she too having removed her septic tank) Harry knew nothing of this situation when he completed his purchase. Even if he should have known of the drain, he knew nothing of the circumstances and the detriment. (A surveyor would not discover the circumstances, and the point of this system is that Harry's conveyancer would be under no duty to raise inquiries as to whether there were matters, other than overriding interests, not on the register.) Harry knows *now* of the situation, but that does not alter his legal position. Nellie's claim to a right by estoppel fails. (A rule to the contrary would be more unconscionable against Harry than this rule would be against Nellie.) Whether Harry's conscience will persuade him to include a diverted drain for Nellie's property in his development (and for what consideration) is outside the present argument.

Under the present law, this would be an equitable easement, claimed to be valid under Rule 258 and the decision in *Celsteel* but with dispute as to whether there is a requirement of open user, and if so, whether this user is open. It is "open" in the sense of "not surreptitious" but not in the sense of "apparent". It is a trap for the purchaser - though no more than prescription is - unless "open" means "open and currently discoverable". And whether it was reasonably discoverable may be in dispute. Whether Rule 258 would extend to a right which was commenced openly but is currently not reasonably discoverable has never been made clear. Contrast Nancy's drain, user of which cannot be said to be other than open, because she has openly declared it.

The end of the Example

Whether this example is applied to a "no registration, no right" system based on current-style registered-title conveyancing, or to a system based on the speedy electronic conveyancing imagined on pages 127-129 above, the result is the same: the buyer will be subject to the registered right and the prescriptive right, and arguments over whether there are rights by estoppel may develop (probably after the completion and registration of the buyer's purchase) on the other five rights.

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STOP PRESS:-

As this paper goes to the printer, the latest in the series of cases concerning notice of circumstances, which began with *Barclays Bank plc v. O'Brien*, is the case (in the Court of Appeal) of *Abbey National plc v. Tufts (1999)* reported briefly on page 32 of the Law Society's Gazette of 24th. February, 1999. The facts were:-

Tufts was bankrupt, and he and his wife had lost their home through inability to keep up the mortgage payments. Tufts then obtained a mortgage for his wife, from Abbey National, by declaring that she was separated from him and that she was in receipt of an annual salary of £22,600 - both these declarations being untrue. (His wife signed the mortgage application form containing these declarations, without reading it.) False letters purporting to confirm the wife's salary were also provided. A property was purchased and was registered in the wife's name.

The mortgage payments fell into arrears, and at that point Abbey National discovered the fraud. The husband was sent to prison. Abbey National sought possession of the property from the wife. A defence put forward on her behalf was that if the lender had made proper inquiries it would have discovered the fraud, and therefore it had constructive notice of it. - The Court of Appeal held that the inquiries which Abbey National had made were sensible in the circumstances: and so it did not have constructive notice of the fraud, and it was therefore entitled to the possession order for which it had applied.

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Chapter 10

Conclusions

First, some Points arising from the Example we have just seen:-

1 The system tested by this example is not better than the present law, for it is too complicated.

2 Under the present law, items 3, 5 and 6 (Nancy's drain and Nina's rights of way and grazing) would prevail. Under an estoppel-based system there is doubt, with some likelihood that they will fail - with particularly serious results for Nancy.

3 (i) There cannot be a "clean break" between these matters and the conveyancing process, because much of the information for which buyers' conveyancers are under no duty to ask will be thrust at them. The *theory* is that the buyer's conveyancer receives only a printout of the Office Copy entries, but it will not work like that. Sellers' conveyancers will advise their clients to reveal matters, for the sellers' own protection (to prevent O from being sued by N).

(ii) And suppose the buyer's conveyancer inquires after such matters, either through abundance of caution or because the idea of a "clean break" is rejected and so there is a duty to ask. If the seller's conveyancer knows or suspects something that will put the buyer off, so that an affirmative reply will prejudice the sale and will not be in the seller's interests, and

a negative one may be a misrepresentation: the conveyancer replies, "The buyer must rely on his Surveyor's Report and his own inquiries".

(iii) So: under the system which aims at a "clean break" between these matters and the conveyancing process, such questions would not be asked but some of the information would be supplied anyway; and under a "no clean break" system, numerous standardised questions would be asked and some would receive useless answers. Some points (such as Nellie's drainage right, above) might be overlooked by the seller. The buyer's conveyancer would end up with approximately the same information by either system.

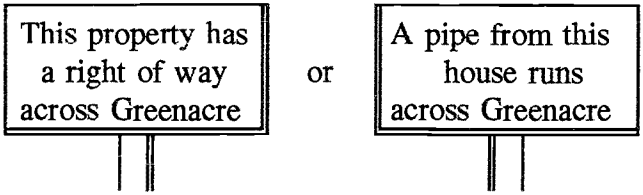
4 Nevertheless it would be essential that the buyer's conveyancer should be under no duty to inquire about such matters. Otherwise, whenever a claim was upheld, the unconscionable buyer would claim compensation from his conveyancer for Professional Negligence. If the search for unregistered matters was declared to be no part of the conveyancing process, approximately the same information would come to the buyer's conveyancer as would otherwise come; but the separation from the conveyancing process is needed so that in a case where the information did not come, the buyer's conveyancer could not be sued for Negligence for not exploring every likely and unlikely avenue to investigate every imaginable possibility. It is essential that when a buyer claims, "You were negligent in not advising me of this", his conveyancer can reply, "We are not talking of matters needing legal advice about their principles. We are talking of a set of circumstances - certain facts known to you or apparent for you to see - on which your conscience should have told you not to go ahead. That is no part of the conveyancing process."

5 The Law Commission favours estoppel, whereas notice has been seen since 1830 as a doctrine to get rid of. There has been no need for the writer to *defend* estoppel in the way that he has sought to defend notice. - But if estoppel is to be applied against successors, this will lead to more doubt and delay than the doctrine of notice, unless these matters are kept out of the conveyancing process.

6 In a strict "no registration, no right" system, a scrupulous buyer might complain, after completion, "The system is at fault. No attempt was made to inform me of these matters of which the seller knew. These matters interfere with my proposed development. The law says I am free of them, but if I touch my neighbour's pipes *my conscience will be affected.* The legal and moral balances are at variance, and I am the victim, left in the dark and now left with this moral dilemma." - The other side of the coin is that this is less inconvenience for the less scrupulous buyer, *who knew.* It is an inferior balance of fairness. Is it a sufficiently greater degree of efficiency to justify this? It appears not to be - particularly as the problem that if N cannot enforce his right against P, then N will sue O, who needs an indemnity from P, would arise.

7 An indemnity provision is needed, whether or not there is a "no registration, no right" rule, to protect a grantor sued in contract.

8 A clear rule on estoppel would not cover all eventualities. It would not necessarily cover the situation where N has an easement to use a path or a pipe across another's property, and, in his ignorance of the law, N has not registered his right but has erected a placard above the boundary fence:-



(The notices are different in nature: the first alleges a right; the second merely states the existence of a pipe which may be used by a revocable licence.) Rule 258 is superior to estoppel here. (An opposite argument is that where estoppel does not cover these situations, a widely-publicised easy-to-use registration form[52] would do so - or, if N neglects to use such a form, he deserves his fate.)

9 An inquiry will not necessarily reveal a neighbour's claim. For example:- N claims a right over O's land - maybe a right similar to that in *E. R. Ives Investment Ltd. v. High [1967]* or that in *Thatcher v. Douglas (1996)*. How is a prospective purchaser of O's land to know that N claims a right? If the purchaser hears of it at all, his legal adviser is likely to tell him it is a revocable licence, unless N (who does not know the property is changing hands) protects himself.[53] But putting an entry onto the register may be seen as a hostile act, at a moment when diplomacy and avoidance of hostility are paramount requirements. It may be impossible to make the public understand that to put one's rights or alleged rights on

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52 as on page 77 above

53 see footnote 7 (as to *Thatcher v. Douglas)* on page 90 above

record would be doing nothing more than holding the door open for future argument. Estoppel provides a flexibility which is necessary for dealing with such problems.

10 The example in Chapter 9 has been seen from the points of view of the claimant and the buyer. But the register is open. What of the developer who obtains Office Copies in connection with his land-assembly plans? He does not know of these unregistered rights. He might make plans for development of an extensive area which includes this property, only to be informed later, when he comes to buy the land, of an unregistered right which frustrates his plans. But this is a normal business risk, like the risk that the vendor may refuse to sell.

11 Valuation problems could arise. In the above example, on a sale of Nina's property the valuer cannot know whether her rights will prevail against Harry or not. But this poses no insuperable problem: alternative valuations can be given if necessary.

12 Priority based on registration of contracts could result in a simplification and clarification of the law. In such a system, if A entered into contracts with B and C, giving them rights which conflicted with each other, the first contract registered would give priority to the entire transaction. There would no longer be complex questions of, "Was B's contract made before C's? - But was B's transaction completed by deed before C's? - And was B's deed registered before C's? - And did C register his contract, before B completed his purchase, or alternatively before B registered his deed, so has C's equitable right the priority over B's legal right?" - etc. On a system of priority by registration of contracts, if B registered his contract first, B would have priority, and the subsequent registration of deeds,

though essential to transfer the legal estate, would merely be for the record, not affecting priority.

13 Increased publicity of the registration requirements, in respect of such matters as easements, is desirable for the future, but will not solve problems of existing unregistered rights.

14 An extension of the Tort of Nuisance, so that neighbours who do unneighbourly acts can be held liable in tort, might in many situations be a better way forward than trying to balance conflicting claims through principles of notice or estoppel.

15 The present law gives a good balance of fairness. What is needed is improved machinery to achieve the retention of that balance for the twenty-first century, and not a change of balance.

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No registration, no right?

If there could be a new start (e.g. a lunar or martian colony in which all inhabitants were intelligent trained personnel) the best system would be a system of registration of contracts, and "no registration, no right". More exactly, "no registration, no priority" or "no right against a purchaser or other successor". It need not be void against the grantor. On the other hand, the record would be more complete and accurate if an unregistered grant were void even against the grantor, time-lag before registration being no problem if registration can be instantaneous by on-line computer: and this is what the "creation by registration" proposal in the consultation paper "Land Registration for the twenty-first Century" [54] amounts to.

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54 Law Com No. 254 - see pages 121 and 126 above

But "no registration, no right" (with no secondary system) is not suitable for present-day English Law - there is too much ignorance and misunderstanding of the law.[55] The writer therefore concludes that the best way forward is to have a system of "no registration, no right", with estoppel as a safeguard. This would need to be an "improved estoppel" with a wide definition of detriment and applicable to successors.

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Rule 258 back in?

Rule 258 provides justice without undue inconvenience where estoppel does not. The example in Chapter 9 has shown that. Without it, such basic matters as drainage rights may be unenforceable against an ill-natured neighbour.

But wouldn't it wreck the whole concept of speedy efficient computerised electronic conveyancing? Not at all. The next five paragraphs explain why not.

What is our subject here? Are we trying to envisage unregistered rights that experienced lawyers might have to rack their brains to think of? No, we are not! Let such rights as those be void against P if they are not protected on the register! Our subject, here, consists of only two kinds of right: (i) easements [56] which from time to time are created without legal advice, and (ii) options to purchase, which occasionally are made without legal advice.

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55 And there cannot be instant registration of inherited rights, because of the time taken to obtain Probate.

56 The writer would also include profits à prendre here, if, by virtue of the recommendations in Law Com No. 254, expressly granted profits à prendre ceased to be protected in the manner in which they are at present protected by s.70(1)*(a)*.

easements

It is no more difficult nor more time-consuming to enquire about equitable easements than it is to enquire about easements by prescription, which have to be asked about anyway because they are overriding interests. Both enquiries would be on the same printed enquiry-form. Indeed it can be argued that the point is already covered (though not as specifically as it might be) by Question 7 on the Property Information Form: "Are there any other formal or informal arrangements which give someone else rights over your property?" - to be answered by a seller who in most cases will not know the difference between an equitable easement and a prescriptive easement anyway.

The equitable easement protected by Rule 258 is actually easier to find than the easement by prescription, because if the right under Rule 258 is not subject to a requirement of openness, it is subject to a requirement of notice, as argued on pages 54-55 above - unless you regard the equitable easement as overriding *and invincible*, which would be unacceptable. So the equitable easement must be discoverable *now*,[57] whereas the prescriptive right, *nec clam*, is required to have been openly used *when it began.*

The argument that having to enquire for unregistered equitable easements will cause delay, when it is necessary to enquire for prescriptive easements anyway, is parallel to the argument that having to go to the supermarket to buy cat-food will delay me, when I already have to go there to buy dog-food. They are both on the same shelf! The additional time involved is a few *seconds.*

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57 Though this is queried on page 143 above, this is probably the best interpretation of "open" in the context of Rule 258.

options

The unregistered option to purchase will remain unprotected, unless it is protected by s.70(1)*(g)* (grantee in actual occupation, e.g. as tenant) or unless estoppel is applicable. An option, which benefits a person - it does not benefit a piece of land - is not "appurtenant to land" and therefore cannot be expected to come within Rule 258. But options are less likely than easements to be made without legal advice.

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preserve the useful alternative

Even if estoppel is improved, to make it the *only* safeguard would be like closing down the cross-channel ferry services because there is now a tunnel. Useful alternatives should be retained, and Rule 258 with the decision in *Celsteel* has proved a useful and not-inconvenient route to providing a balance of fairness in respect of easements. If this route were closed and claimants were forced to go down the "estoppel" route, the result would be increased complexity, the decision arrived at would not be superior justice to what is available at present (for the "estoppel" route is already available, though in need of improvement), and would sometimes be inferior. - Saving Rule 258 puts easements back into conveyancing as overriding interests. But only easements.[58] No other rights. And the writer maintains that as these "Rule 258" easements would be subject to a requirement of discoverability, either through openness or through notice, they would be no more a source of delay or danger to purchasers and mortgagees than prescriptive easements.

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58 and profits à prendre as in footnote 56 above.

Rule 258 out again

It was not the writer's intention to bring these equitable easements back into the conveyancing process. Let us move them out again, acknowledging that Rule 258 in its present form is unlikely to survive. If there is no Rule 258, what will happen in such situations as those which we saw in the example in Chapter 9? The reader may have noted that the situations needed to be "forced" a little bit, with details such as demolition of old septic tanks, because otherwise there would have been no substantial detriment and it could have been argued that estoppel would not have applied and the rights would have been lost.

If such rights are not to be lost, Judges will need to recognise very slight works (such as re-directing a pipe from the septic tank to the new sewer) as detriment: and sooner or later, for the sake of justice, a Judge may find (or perhaps the legislature could decree) that in a case where no money at all has been spent in reliance on the right, *the loss of the expected benefit* is tantamount to detriment, for N has paid for a bad bargain.[59] (Old N with his zimmer on page 79 above would have needed this, if he had not paid for a new gate and gateposts and handrail; and the lessee of the garage in *Celsteel*, too, had suffered no detriment.)

What applies to an informal purchase of an easement also applies to an informal purchase of a house: but in *that* situation, detriment will need to be something more than loss of benefit - otherwise we shall have abandoned the principle that contracts for sale of land must require writing (which has been with us ever since the

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59 as in *Grundt v. Great Boulder Pty Gold Mines Ltd. (1937)* on page 101 above. But in that case there had been a "change of position" by the claimant, which N will find it difficult to show unless he gave up the chance of obtaining an easement over another neighbour's land because he had this right.

Statute of Frauds - 1677) and shall have made oral contracts for the sale of land enforceable generally.

If the requirement of detriment (in respect of easements enforceable by estoppel) were thus removed, the five points required for estoppel would be reduced to four: (1) a promise, (2) relied on, (3) denied, and (4) the purchaser knew of the situation, in such circumstances that his behaviour amounts to unconscionable conduct.

Let us compare those four requirements with the circumstances of the first of the cases we saw in Chapter 2: *Forbes v. Deniston (1722).*[60] What happened in that case was (1) a promise, (2) relied on, (3) denied, and (4) the purchaser had notice, which was seen as tantamount to fraud. - We shall have gone full circle, with a change of terminology from "fraud" to "unconscionable conduct", and with a change of requirement (4) from a principle of "proceeding despite notice of the right equals fraud" to "proceeding despite notice of the circumstances may be unconscionable conduct".

Have we gone full circle and arrived at where we were in 1722? If so, that is not a bad place to have arrived at, for the 1722 decision was based on justice. Yet this is not a return to the doctrine of notice. Requirement (4) here is notice of circumstances by ordinary knowledge, common sense and conscience, without recourse to registers and legal documents - as against something which only a trained person would discover: and *that* is what keeps it out of the conveyancing process.

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60 *(1722) IV Brown 189, 2 ER 129* - see page 8 above

If, on the second time round the circle, the Judges get the cases into less of a tangle than they did last time - and the writer's "burden of proof" provision[61] would help, here[62] - the doctrine of notice (as an ingredient of estoppel) has a future, without the unfortunate side-effects the doctrine had in the past.

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Using Notice rather than Estoppel as our "Gateway" - a Proposal rejected

If detriment is not essential, why stress reliance? To hold that it was sufficient that P knew that N had paid for the right, in circumstances where it would be unconscionable for it to be stopped, would reduce the four points to three. So this argument is moving back to focussing largely (but not solely) onto notice. Should we reduce it further, to nothing more than a question of whether P had notice, as long as it is notice of circumstances by common sense without the need to hunt for documents or search into registers? No, we should not. There needs to be shown at least (1) a promise, (2) denied, and (3) P knew the circumstances. This is needed for at least three reasons. First, to reduce these three points further would be to destroy the "gateway" and make this paragraph an argument for "palm-tree justice". Secondly, we *want* the all-round investigation to which estoppel gives rise, as against the one-sided question of "Did P know?" And thirdly, without a *clearly-defined* "gateway" to keep these questions of "notice by common sense" out of the conveyancing

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61 page 62 above

62 The balance would be that in a clear case, P is bound, because he knew (or by common sense and conscience should have found it obvious) that N had a right. But if there is any material doubt as to any aspect of the matter, P shall succeed, because the matter is unclear and (in the case of a registrable right) N is at fault because he could have registered and did not do so.

process, they could all too easily creep back into the conveyancing requirements, and result in delay, putting us "back to Square One".

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And finally - an Answer to the Question with which we began!

On the second page of Chapter 1 of this paper, we saw a problem involving N, O, P, and N's drain. It is time to answer it. The problem was that N had not entered the easement on the register, and so P was taken by surprise by it.

Under the present law, N has a valid easement of drainage (it is an overriding interest) by Rule 258 if two conditions are met:- (i) the agreement for this easement must have been signed by both N and O (or signed by O as a deed, duly witnessed) to satisfy the Law of Property (Miscellaneous Provisions) Act, 1989,[63] and (ii) there is probably a requirement of reasonable discoverability.[64] If condition (i) is not fulfilled, N may still have a right by estoppel if he suffered detriment in reliance on this right (e.g. if he carried out works for which this drain is essential) if in all the circumstances it would be unconscionable for his right to be obstructed - except that whether the estoppel is applicable against O's successor P, or only against O, is currently in need of clarification.

There is also the possibility that, if P had bought O's land expressly subject to a clause, in the contract between O and P, that P would respect N's right, this would make P a constructive trustee for N's benefit: in which case, P would be liable for breach of trust if he

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63 see page 95 above

64 see pages 54-55 above

obstructed the right.[65] (But two trustees could sell the property free of the right, by overreaching.) [66]

Under the Law Commission's latest proposals,[67] Rule 258 will no longer be available, but N's claims to a right by estoppel or under a constructive trust will remain as set out above.

On the facts stated, it appears unlikely that N suffered detriment or that the contract between O and P was expressly subject to N's right. Therefore N will lose his right. He has two stumbling-blocks: (i) the present too-narrow interpretation of "detriment", and (ii) the continuing doubt as to whether the successor P is bound at all by the estoppel. These two points need attention before any legislation on this subject is passed.

The writer's suggestion. What is needed, to retain the present fair balance of rights, and even to improve it,[68] is the addition of a provision that whether or not N has relied on the right to his detriment, P (who was aware of the circumstances - or alternatively they were obvious) shall be bound if by common everyday standards of morality it would be unconscionable for him to be able to stop N. - But there would still need to be shown (1) a promise, (2) denied, and (3) P knew or should have known the circumstances.

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65 see page 125 above

66 as on page 125 above

67 Law Com No. 254, Sept. 1998

68 The improvement is that the present "fair balance" available for openly-used easements by Rule 258 would be achievable under the rules of estoppel, and would therefore extend to easements claimed under informal writing signed by only one party - i.e. not complying with s.2 of the Law of Property (Miscellaneous Provisions) Act, 1989 - to which Rule 258 does not extend.

This suggestion may be seen as too wide, since it cuts out detriment altogether, but if that is unacceptable, then (at the very least) a toned-down version of it, or something like it, retaining a requirement of detriment but seeing the loss of a benefit as detriment, is *necessary*.

To summarise:- The writer supports the principle of "no registration, no right" as long as it is given greatly-improved publicity and is tempered by a safeguard based on an improved estoppel, which should have a very wide view of detriment and should extend to bind successors.

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If only N had registered his easement before O sold to P, none of these problems would have arisen: N's right would have been binding on P, but would not have taken P by surprise.

If people like N always registered, there would have been no need for this paper to be written. But they don't, *and they never will.*

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Index

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Notice and Equitable Easements: a Doctrine for the Future?

John A. Greed

In Part 1 of this paper, the history of the doctrine of notice is examined, commencing with the case of *Forbes v. Deniston (1722)*. It is argued, with reference primarily but not solely to easements, that despite the 1925 changes, the doctrine of notice is still applicable to overriding equitable "commercial" interests over registered land. This would avoid the danger of undiscoverable rights which is perceived as being inherent in the decision in *Celsteel Ltd. v. Alton House Holdings Ltd. [1985].*

In Part 2, a way is sought whereby known unregistered easements can remain valid without delaying the conveyancing process. A rule of "If no registration, then no right" is seen as acceptable, provided that in certain defined circumstances there is a "gateway" or "safety valve" opening the way to a right by estoppel, binding successors (with notice of the circumstances) as well as the original promissor - as in *E. R. Ives Investment Ltd. v. High [1967].*

John Greed gained an LL.B. degree with honours at the University of Bristol in 1959 and qualified as a solicitor in 1963. In the 1960s he gained conveyancing experience in the West Country and with Eversheds in Birmingham, and later with the Bristol & West Building Society. Since 1970 he has lectured in Land Law at the University of the West of England, Bristol (formerly Bristol Polytechnic). In 1998 he was awarded a Ph.D. degree by the University of Reading, and this paper is based on (but finally goes beyond) his research for that degree.

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