REAL PROPERTY LAW FOR BEGINNERS

SECOND EDITION

Part 3

by John A. Greed

A ST. TRILLO PUBLICATION

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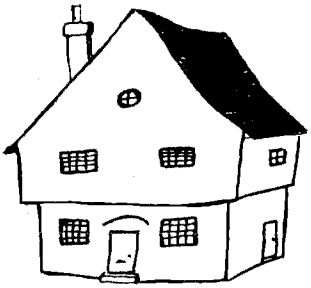
Rights over other people's Land



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Preliminary Note on Terminology:- *We all know by now that no-one is an owner of land under English Law; the most anyone can own is a fee simple estate in the land.*

But to talk about "the land X owns" is much more convenient than to talk of "the land in respect of which X owns the fee simple" or "the land of which X is estate owner" - so let us for the rest of this book refer to the land as "the land X owns", and let us refer to the fee simple owner as "the landowner". (But don't forget that strictly he only owns the estate!)

And let us not be too pedantic about that word "tenant": where he is a tenant in fee simple, let's call him the owner.

PART 3 (CHAPTERS 25 - 35)

RIGHTS OVER OTHER PEOPLE'S LAND

Section A (Chapters 25 - 28)

Incorporeal Hereditaments

CHAPTER 25

INTRODUCTION TO INCORPOREAL HEREDITAMENTS

OUTLINE OF CHAPTER:-

A: meaning of "incorporeal hereditaments"
B: meaning of "future interests"
C: meaning of "rights in alieno solo"
D: plan of approach to this subject

A: MEANING OF "INCORPOREAL HEREDITAMENTS"

The law sometimes uses long words to describe something fairly simple, so be not put off by the title to this chapter.

A hereditament is something capable of being inherited. So far as land is concerned, it is any estate or interest in land, other than one which lasts merely for someone's life.

"Incorporeal" comes from the same Latin word *(corpus)* as our word "corpse" - a body. Corporeal means having a body - something which can be touched. Incorporeal means something which cannot be physically touched.

So an incorporeal hereditament is a right which is capable of being passed on to the next generation, but which cannot be touched. There are two separate groups of them, namely future interests and rights *in alieno solo*.

B: Meaning of "Future Interests"

We need not spend time on future interests, because we have seen them already. One example will suffice. A house is granted "to John Jones for his life, and then to Fred Smith in fee simple". Fred has a future interest, and, being a fee simple (i.e. an Equitable fee simple absolute in remainder) it is inheritable.

Surely a house can be touched? Yes, but at present it belongs to John Jones. Until John dies, Fred has nothing he can touch. He has only the sure and certain knowledge (vested interest) that the house will come into his hands on John Jones' death.

A "future right to receive something" is a valuable but abstract legal concept - there is nothing to pick up and handle - thus future interests are incorporeal hereditaments.

C: Meaning of "Rights in Alieno Solo"

The second group of incorporeal hereditaments - which will occupy us for the next 105 pages - is rights *in alieno solo*. Again, do not be put off by strange-sounding words, this Latin phrase means rights over someone else's land (literally, rights in alien soil). These are encountered very frequently. My wife and I live in a house on a hillside. Our neighbour's drains run - by legal right - under our back garden. Similarly our water-pipe comes under his front drive. At the rear of our property there is no road, but our neighbour could provide us with a rear access by granting us a right of way through his garden. These drains, water-pipe and right of way are three typical examples of *easements* - an easement being an important type of right *in alieno solo*.

(Occasionally a student says at this point, "But a fee simple absolute in possession cannot be touched, because the land belongs to the Crown, and the owner only owns rights over the land, and not the land itself". Yes, I know. But I think you can easily see the difference between that sort of intangible right

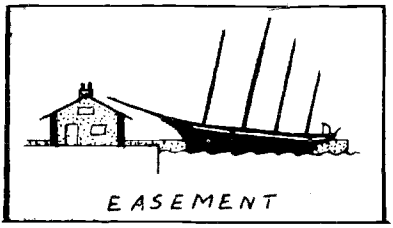
and an incorporeal hereditament:- If you stand on your fee simple and touch the land you can say, "The basic rights and control over this land are mine, here and now" - or, as Fred Smith would say in laymen's terms, "It's my land!" - whereas if you stand on your neighbour's garden, or on land over which you have only a future interest, you cannot truly say that.

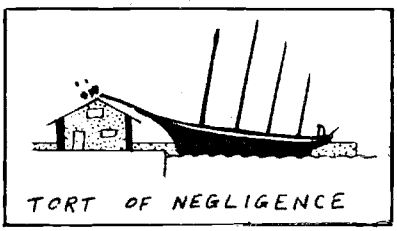
D: Plan of Approach

In the first edition of this book the chapter which dealt with these matters was 81 pages long! In the present edition this is divided into nine chapters: Chapters 25-33 inclusive. Types of right *in alieno solo* at which we shall look in this group of chapters are:-

(i) Easement (the right to *do* something on someone else's property) (Chapters 27, 29, 30 and 31)

e.g. to walk or to drive on a certain roadway,
to use drainage and other pipes, electricity cables, etc.,
to hang a clothes-line across,
to receive light to a window,
to stick a bowsprit across (see illustration)
etc.





(ii) Profit à Prendre (the right to *take* something from someone else's property) (Chapters 28-31)

e.g. to take grass, or gravel,
or firewood, or pheasants,
etc. - it includes hunting, shooting and fishing rights, and grazing rights on many occasions, though alternatively these may sometimes take the form of Licences (for which, see Chapter 32).

(iii) Rentcharge (the right to *receive some money* out of

someone else's property) (Chapter 26)

(iv) Advowson (Chapter 26)

(v) Tithe (Chapter 26).

There are various other types of incorporeal hereditament which we do not need to consider here. These include peerages, offices (e.g. Master of the Foxhounds), franchises (e.g. the right to hold a fair or a market) and others.

So if your uncle is an Earl, his peerage is a piece of Real Property, an incorporeal hereditament which he has in fee simple, or more likely in tail. Much of the Law of Peerages stems from Custom, based on the practice established over the centuries and resting on neither Statute nor Precedent Cases.

Licences and wayleaves are somewhat less developed rights which do not have the same historical development as the "traditional" incorporeal hereditaments listed above - though Licences are now a rapidly-growing part of our law. Licences are looked at in Chapter 32, and Wayleaves in Chapter 33.

Covenants are also rights affecting another person's land, but they have neither the same nature nor the same history as rights *in alieno solo* and are therefore separately dealt with - Chapters 34 and 35.

- - - - -

The reader should be finding by this time that different parts of Real Property Law are beginning to come together to form a coherent whole. For instance, it may not have meant very much to the student when on page 100 we saw five legal interests under the 1925 legislation, namely:-

(i) easements, rights and privileges (which includes profits à prendre)
(ii) rentcharges
(iii) legal mortgages
(iv) tithe
(v) rights of entry,

METRE

but these five interests tie in here:-

item (i) is the subject of Chapters 27-31;
items (ii) and (iv) fill the major part of Chapter 26.

[Item (iii) is dealt with in Chapter 39, and item (v) is on pages 534 and 535 in Chapter 40.]

SUMMARY

In this chapter we have seen:-

1. future interests,
2. rights *in alieno solo*.

Rights *in alieno solo* divide into:-

a) easements
b) profits à prendre
c) rentcharges
d) tithes
e) advowsons.

TEST QUESTIONS on Chapter 25:-

1. How is an easement different from
   (a) a rentcharge
   (b) a profit à prendre?

2. Paul owns "Hillside House" in fee simple subject to a rentcharge of £5 per year, together with rights for the services (gas, electricity, water and sewer) to run across "Valley Farm", over whose orchard "Hillside House" also enjoys grazing rights for ponies; but subject to rights for similar services for "Hilltop Manor" to pass through the grounds of "Hillside House", and subject also to rights for both "Hilltop Manor" and "Valley Farm" to fish in the trout stream which runs through the grounds of "Hillside House".

   How many rights *in alieno solo* affect "Hillside House"? State what they are.

CHAPTER 26

RENTCHARGES, TITHES AND ADVOWSONS

OUTLINE OF CHAPTER:-

A: Nature of Rentcharges
B: Creation of Rentcharges
C: Extinguishment of Rentcharges
  1. by Release
  2. by Merger
  3. by Lapse of Time
  4. by Statutory Discharge
  5. by the 1977 Rentcharges Act
D: Tithes
E: Advowsons

Our plan of action for studying rights *in alieno solo* is that we shall look at the less important ones, namely rentcharges, tithes and advowsons, in this chapter, and shall then look in much more detail at easements and profits à prendre in Chapters 27-31.

A: NATURE OF RENTCHARGES

We saw in Chapter 25 that an easement is the right to DO something on someone else's land, a profit is the right to TAKE something from someone else's land, and a rentcharge is the right to RECEIVE MONEY out of someone else's land. How this right which we call a rentcharge could arise we shall see in a minute.

The first point to note is that it is payable on a freehold. We are not talking in this Chapter of rent payable to a landlord on a leasehold.

The majority of rentcharges are being phased out under the 1977 Rentcharges Act (see below: page 348) but they will not be gone until the year 2037; and certain types, such as those known as "estate rentcharges" on freehold flats (see page 349) are not being phased out.

Rentcharges are only found in any large numbers

in certain areas. Bristol and Weston-super-Mare have them, and so do Manchester, London and a few other places. Elsewhere they are, generally speaking, a rarity, although some new building estates and freehold flats have had them imposed by developers who have realised that there are certain financial and other advantages in using them. Many rentcharges date from Victorian times and are for £5 per year (or sometimes an even smaller figure) but some modern ones are for much higher amounts.

Sometimes they are called rentcharges (or rentscharge: there is no fixed rule as to which plural form is correct) sometimes groundrents, occasionally fee farm rents. In Manchester they are called chief rents.

The name groundrent is misleading: it sometimes causes fee simple owners to conceive the notion, "I own my house but I only rent the ground". THIS IS NOT THE CASE. We know it as a basic rule (so basic that we saw it on page 7 and again on page 21) that whoever has the land has also the buildings. So if "Magpie Cottage" is subject to a rentcharge of £5 per year to Gigi, she is the fee simple owner of neither the buildings nor the ground: all she owns is the fee simple of a right in alieno solo - a right for her and her heirs in fee simple to receive £5 per year out of the land - the freehold land.

Let us be quite clear on this: we are not dealing with any relationship of landlord and tenant; we are dealing with a "rent" payable on a freehold.

(And let us avoid that word "groundrent" because it has two meanings: sometimes it is used as above, in which case some solicitors make their meaning clear by using the phrase "freehold groundrent" but others just say "groundrent"; but sometimes it is used to mean a rent payable by a tenant to a landlord - the very thing this section is NOT about. I shall use the word "rentcharge" which does not have this second meaning.)

Now let us see how such a right can arise. We saw (pages 36 and 80, etc.) that George sold five acres to the builder Gerry who erected fifty houses, one of which was "Magpie Cottage", now owned in fee simple by our old friends Fred and Florrie Smith. When Gerry bought the fifty building plots he was suffering from a difficulty with which many of us are familiar - shortage of capital - and his conversation with George went something like this:

Gerry: "That land of yours is just what I need, but I haven't got the money to buy it."

George: "I don't mind selling it in return for income instead of capital if that will help you."

Gerry: "What do you mean, sir?"

George: "I mean that instead of selling it to you at market price I'll sell it to you (in fee simple of course) for £0 plus a regular income - I want £5 per year on each plot for me and those after me, for evermore."

Gerry: "Sir, that solves all my immediate financial problems! I accept your kind offer!"

So Gerry agreed to buy the plots in fee simple for £0 (or some nominal sum) plus fifty rentcharges of £5 each (one on each plot) payable annually.

(We have seen in the example running through this book that George's land was Settled Land. We saw on page 238 that after 1882 George as tenant for life could sell the fee simple - but he does not get the money. So in this case the rentcharges became payable, annually, to the trustees of the Settlement, who could then pass the money on as income to George and then after his death to Gigi.)

Thus each plot became subject to the right of George, Gigi and so on to receive £5 per year out of it.

Gerry built "Magpie Cottage", but when he sold it for £200 the sale had to be subject to this rentcharge. "Magpie Cottage" today is worth £53,000 but the fee simple which Fred and Florrie own is still

subject to this annual £5 liability, which Gigi (having barred her entail after George's death) owns in fee simple.

A rentcharge is a piece of real property; it is possible to buy or sell a rentcharge, or mortgage a rentcharge, and until 1977 it was possible even to create a rentcharge on a rentcharge. But a rentcharge only provides a fixed income which does not increase with the cost of living.

Some developers (and vendors of existing houses) imposed a rentcharge on properties they were selling, until this practice was stopped by the 1977 Rentcharges Act which is phasing out most rentcharges. A house should have a slightly lower capital value if it is incumbered with a rentcharge, but in areas where there is a housing shortage this consideration often does not apply: if the property is in a convenient position many a prospective purchaser is willing to pay full price for the house whether it is subject to a rentcharge or not.

One of the reasons for the phasing out of most rentcharges is that there have been cases where purchasers have not realised, until too late, that here is a payment which has to be made not once only but year after year - they have thought that if they own the fee simple no rent of any description can be enforced, and they have failed to comprehend that even though they own the fee simple it can be incumbered by this right in alieno solo for someone to receive an annual sum of money.

In case of non-payment of the rentcharge, there are four remedies which we must note briefly:

1) There are certain rights for the rentcharge owner to sue for the debt.

2) "Distress" is a useful remedy: it means that the rentcharge owner can enter (peaceably) into the property, and take some article of approximately the value of the debt owed. He may hold it as a pledge (like a pawnbroker) and after fulfilling certain conditions as to Notice he can sell it.

The right to distrain arises (no court order being normally necessary in rentcharge distress cases) as follows:

(i) in the case of rentcharges created before 1882, as soon as in arrear;

(ii) in the case of rentcharges created after 1881, as soon as 21 days in arrear.

3) In the case of rentcharges created after 1881 the rentcharge owner has the right, after the rentcharge is 40 days in arrear, to take possession of the land until he is paid all the amount due, plus any costs incurred.

4) Where the rentcharge is post 1881 and is 40 days in arrear, the rentcharge owner may demise (i.e. lease) the property to a trustee for a term of years on trust to raise all money due, plus costs, by mortgage or any other reasonable menas. This remedy is rarely used.

Some deeds creating rentcharges expressly contain wider powers than these; for instance, a proviso for permanent forfeiture of the land - a fearsome remedy for dealing with an unpaid £5 rentcharge, and one which surely the Court would seek not to enforce except in the most uncommonly extreme case.

B: Creation of Rentcharges

Rentcharges could until 1977 (and still can in special cases such as "estate rentcharges" - see page 349 below) be created either at law or in Equity if they were for

a fee simple absolute in possession, or

a term of years absolute in possession;

they are Equitable if they were created for any other period. (Note the words underlined above: rentcharges differ from all other estates and legal interests in land in this respect. The position for the other estates and legal interests is as we saw on page 99.)

If the rentcharge was not created by deed (or

by will or by statute) it is not enforceable at law, but as long as there is some written document it can be recognised by Equity.

An example of a rentcharge created by statute was the tithe rentcharge; see page 351 below.

C: Extinguishment of Rentcharges

Prior to the 1977 Rentcharges Act, four methods of extinguishment of rentcharges existed:

1. Release
2. Merger
3. Lapse of time
4. Statutory discharge.

We must now add to these:

5. 1977 Rentcharges Act.

1. RELEASE

A complete release means that the rentcharge owner gives up his right to receive the rentcharge.

A partial release can mean either of two things:

(i) the rentcharge owner gives up his right to receive part of the rentcharge (e.g. agrees to accept £3 instead of £5 each year) or

(ii) part of the land is released from the rentcharge, the whole £5 (if it was a £5 rentcharge) remaining payable in respect of the other part.

2. MERGER

Suppose Gigi owns the right to receive a £5 yearly rentcharge out of all the properties in the picture on page 231. Subsequently she buys the fee simple of no. 13 ("Chez Nous"). As a rentcharge is a right in alieno solo it was not possible for her to have a rentcharge against her own property, so until 1925 the rentcharge would in this case have merged with the fee simple of the house and would have been

extinguished. (If Gigi subsequently sold the fee simple of the house the rentcharge did not come to life again, though she could if she wished create a fresh one.)

Since the 1925 legislation however it has been possible for a person to hold a rentcharge against his own property (this being an exception to the normal *alieno solo* rule) so the rentcharge would not now be extinguished unless intention to extinguish was shown.

3. Lapse of Time

A rentcharge is extinguished if for a period of twelve years there is no payment and no acknowledgement of the rentcharge owner's title. (See Chapter 43.)

4. Statutory Discharge

Under s.191 of 1925 LPA, the householder could redeem (i.e. "buy off") the rentcharge. The amount required to buy off a £5 rentcharge was basically the sum which would have to be invested in order to produce £5 per year interest.

This provision has now been replaced by a procedure under ss.8-10 of the 1977 Rentcharges Act which sets out a formula for calculating the redemption price and provides that a householder who pays this price shall receive a Redemption Certificate showing that the rentcharge has been redeemed. This procedure does not apply to "estate rentcharges" - see page 349.

Rentcharges may also be abolished by statute, as in the case of Tithe Rentcharges (page 351) abolished by the 1936 Tithe Act. And since the 1977 Rentcharges Act, most rentcharges which are not extinguished under (A), (B), (C) or (D) above are being phased out:

5. The 1977 Rentcharges Act

The 1977 Rentcharges Act provides that (a) no new rentcharges (except as mentioned below) can be

created since 1977, and (b) existing rentcharges (except as below) are to be phased out so that they will cease to exist in the year 2037 if not redeemed before then.

There are a couple of exceptional cases in which new rentcharges can still be created and existing ones are not being phased out: these are (i) certain rentcharges in connection with Settled Land (see page 231) or by statute or court order, and (ii) "estate rentcharges" which are explained in our next paragraph:

Estate Rentcharges: When we come to Chapter 34 (Covenants) we shall see that English Law has some severe deficiencies with regard to positive covenants, such as covenants to keep property in repair. This situation can have particularly serious consequences in blocks of freehold flats, where the covenant to keep the structure of the building in repair may be unenforceable.

For example, if Albert (who has the ground floor flat) sells his flat, freehold, to Boris, who later sells it to Cyril: and a pipe, built into the wall of the flat, and supplying the whole building with gas or heating oil, gets blocked - but Cyril, finding that this does not affect his flat, does nothing about it, and will not let any other person into his flat to deal with the problem. The other owners cannot bring an action for breach of covenant against Cyril: they can only take action against Albert. Albert could then act against Boris, and then Boris could sue Cyril; but the difficulty is that both Albert and Boris, having left the district, probably cannot be found.

But positive covenants supporting a rentcharge are not subject to these deficiencies, and therefore can be enforced against Cyril direct.

One therefore sometimes finds a block of freehold flats where each flat is subject to a rentcharge for a purely nominal amount (perhaps it could even be as low as 5p per year) and positive covenants to do repairs, to insure, etc. The intention of these covenants is to safeguard the block of flats. As such the covenants would become unenforceable against

subsequent owners such as Cyril. But the covenants support the rentcharge (because if the flats fall down the owners will be dispersed and the rentcharges will no longer be east to collect) and THAT makes them enforceable against Cyril direct, because covenants supporting a rentcharge can be enforced against the successors in title.

Such a rentcharge, created so that positive covenants will nominally support the rentcharge (when really the covenants are to safeguard the property) is known as an "estate rentcharge" and is excepted from the 1977 Rentcharges Act.

D: TITHES

The earliest record we have of tithes is in the Old Testament of the Bible, in which we are told (Genesis chapter 14 verse 20) that Abraham gave tithes to Melchisedek. Some Bible scholars date this event at about 1900 B.C. - and it was then already an established practice.

In New Testament times the practice still flourished (in Luke chapter 8 verse 12, the pharisee in the parable gave tithes of all he possessed) and the practice passed over into the early Christian Church.

"Tithe" means "one tenth".

By the ninth century A.D., tithes had become legally enforceable throughout England: a Statute made at Winchester in the year 855 by King Ethelwolf (the father of King Alfred the Great) laid the legal basis for charging one tenth as tithe throughout the whole of England, though there appear to have been earlier Statutes covering the majority of the country in the year 794 made by the Kings Offa of Mercia, Kenulf of the West Saxons and Aelfwold of Northumberland.

So the Rector had the legal right to receive one tenth of the produce of all land in his parish.

Payment was made in kind - i.e. in goods, which were placed in the tithe barns which even today are a feature of many of our villages and country towns.

Very often the local monastery was made the Rector, and

employed a Vicar to run the parish church. After Henry VIII dissolved the monasteries, very many - though by no means all - tithes passed into the hands of laymen. Many also passed to the Church of England.

The right to receive these tithes was treated as land and was held for an estate in fee simple or some other estate. Sometimes tithes were commuted to a money payment, but payment in kind was the normal mode until 1836.

By the 1836 Tithe Act, payment in kind was replaced by the payment of a rentcharge. The system was peculiar: a figure representing the annual payment was fixed, but what was paid was an amount over or under this, fluctuating as the price of corn rose or fell. (So it varied up and down something like today's General Rates.) This system continued until 1925.

By the 1925 Tithe Act the amount payable became fixed.

Difficulty was however experienced (as it had been also before 1925) with the collection of the tithes: in some cases farmers (the largest payers of tithe) who bore no allegiance to the Church of England refused to pay until compelled by a court order backed up by a visit from the local police. The 1936 Tithe Act was passed with a view to making this situation more satisfactory.

By the 1936 Tithe Act the tithe rentcharge was abolished: it was replaced with a "tithe redemption annuity", payable to the Crown and collected by the Commissioners of Inland Revenue. Some of these annual payments were only a few pence. (Note: all this is a generalisation. Tithe being a very ancient concept, there are various special cases, such as corn rents and Queen Anne's Bounty, outside the scope of this book.)

On all lands changing hands after 1st. October 1962, any tithe redemption annuity payable was compulsorily redeemable under the 1962 Finance Act. This meant that if land subject to tithe redemption annuity changed hands, the person receiving the land had to "buy off" the annuity by a lump sum payment. Thus within a few years after 1962 a large number of tithe redemption annuities had ceased to exist.

By s.56 of the 1977 Finance Act, those persons who were then still liable for payment of tithe redemption annuities had to make a final payment (double the usual annual payment) on

1st. October 1977 - and then from 2nd. October 1977 all tithe redemption annuities charged under the 1936 Tithe Act were extinguished for ever.

We can therefore say as a generalisation that tithe in English Law is a thing of the past. There are a few exceptions to this but they are very rare. For instance, there are just a few cases where the tithe apportionments - i.e. the amounts payable - were agreed but were never legally confirmed under the 1836 Tithe Act: so they were not changed from tithe rentcharges into tithe redemption annuities by the 1936 Tithe Act: and so they were not abolished in 1977 and therefore can still exist.

The present position therefore is that although the student may in practice sometimes come across documents relating to tithe, payments in connection with tithe have not been payable since 1977 - subject to the very rare exceptions mentioned in the paragraph immediately above.

Corn rents, though rare, are still payable. They were imposed in connection with local Inclosure Acts in the seventeenth, eighteenth and early nineteenth centuries. As well as the annual payment, corn rents can impose a duty to pay for repairs to the chancel (the east end, where the choir usually is) of the parish church. This can sometimes require a lump sum payment of thousands of pounds and is a trap for conveyancers because it may not show up from the deeds, and does not have to be registered, and is chargeable even against a B.F.P. of the land without notice of the liability to repair the chancel. The Law Commission has made proposals for these liabilities to be phased out over a twenty-year period, but these proposals are not yet law.

Quite separately from anything to do with Land Law, some Church members (of various denominations) pay a tithe, one tenth of their income, to the Church funds. Sometimes this is agreed by a binding contract (known as a Deed of Covenant - this makes a binding promise to pay it for a certain number of years: there is a tax advantage if this procedure is followed) and sometimes there is no such contract (in which case the payer can stop it at any time but there is no

tax advantage). But this kind of tithe is a personal matter for the individual: nothing to do with Land Law.

The tithe rentcharges payable until 1936 were a legal interest, one of the five legal interests in the list in s.1 of LPA which we learnt as METRE on page 100.

Those persons who until the 1936 Tithe Act were entitled to receive tithes have been issued (by virtue of the 1936 Act) with Tithe Redemption Stock, which is quoted on the Stock Exchange and can be bought and sold like any other Stock. It ranks as personal property.

A valuable legacy which the tithe system has given us is the TITHE MAP for each parish. When tithe was changed in 1836 from a payment in kind to a cash sum charged on each field or piece of land, it became essential to have accurate maps of the land; and in the period 1837-1840 a Tithe Map was drawn for most parishes. In many cases this was the first accurate survey of the parish that had ever been made. These Tithe Maps are now held by County Record Offices and old-established firms of solicitors, etc. Even today it is not uncommon, on the sale of a farm, to find that the only detailed description of the land in the deeds is a Victorian list of fields, based on the Tithe Map. As the Tithe Map's field numbers and the Ordnance Survey Map's field numbers do not correspond, it is sometimes necessary to inspect the Tithe Map to identify what land is included in the deeds.

E: ADVOWSONS

These are a strange oddity of Real Property Law. No land need be involved - so maybe they are not rights *in alieno solo* at all, though they are certainly incorporeal hereditaments.

An advowson is the right to choose the clergyman who shall be the next Vicar of the parish.

The advowson was in former times often held by the lord of the manor, and in many cases originated because it was the lord of the manor who built the church. It is a valuable right, for it enables its

owner to ensure that the appointment goes to the clergyman he prefers: high churchman, evangelical preacher, etc. – or in former times it often went to the lord of the manor's own brother or other relative or friend.

Subject to a right of veto on certain grounds, the Bishop is bound to appoint any duly qualified person presented.

The advowson is a piece of Real Property, an incorporeal hereditament held in fee simple or for some other period – the usual rules regarding legal estates and Equitable interests apply.

Today there are restrictions on the sale of advowsons (by the 1898 Benefices Act and by the 1923 "Benefices Act 1898 (Amendment) Measure"; and there are certain provisions whereby the Parochial Church Council can sometimes buy the advowson compulsorily.

SUMMARY

In this chapter we have seen:-

1. Rentcharges on freehold property (being phased out by 1977 Rentcharges Act, except estate rentcharges and certain others)
2. Tithes (abolished 1977)
3. Advowsons.

TEST QUESTION on Chapter 26:-

Fred and Florrie Smith bought "Magpie Cottage" in fee simple subject to a perpetual yearly rentcharge of £3 per annum, payable to Gigi in fee simple.

Florrie says, "We don't own our house, Gigi owns it".

Fred replies, "That's not true: we own the house, Gigi only owns the land it is built on".

Explain to them why both these statements are wrong.

Florrie asks, "Can we get rid of this rentcharge?" and Fred asks, "What happens if we just refuse to pay it?"

Explain the situation to them.

CHAPTER 27

THE NATURE OF EASEMENTS

OUTLINE OF CHAPTER:-

A: Definition and characteristics of easements
  1. must have a dominant and a servient tenement
  2. must accommodate the dominant tenement
  3. must have separate ownership or occupation
  4. must be capable of forming subject of a grant
B: Interim summary
C: The frequent use of easements today
D: Four additional notes:-
  1. on rights of way
  2. on rights of light
  3. on rights of water
  4. on the difference between easements and
    (A) quasi-easements
    (B) natural rights of support
    (C) public rights
    (D) licences
    (E) restrictive covenants
    (F) customary rights of fluctuating bodies.

A: DEFINITION AND CHARACTERISTICS OF EASEMENTS

We have seen that an easement is the right to do something on someone else's land. It can be legal or Equitable, depending on how it is made, as we saw on page 73.

One of the most typical of all easements is the right of way - the right to come and go over a set route on someone else's land - and in the following pages the right of way for Fred and Florrie Smith between the points X and Y in the picture on page 406 (which we saw previously on page 107) will be taken as our primary example - but the following rules apply to all easements, not just to rights of way. We saw some typical examples of easements on page 309.

To be an easement, the right must satisfy four conditions:

1. There must be a **dominant tenement** and a **servient tenement**.
2. The right must **accommodate** (i.e. benefit) the dominant tenement.
3. The dominant and servient tenements **must not both be both owned and occupied by the same person**.
4. The right must be one which is **capable of forming the subject matter of a grant**.

Let us look at each of these in turn.

1. THERE MUST BE A DOMINANT TENEMENT AND A SERVIENT TENEMENT

An easement is a right enjoyed by one piece of land (the dominant tenement) over another piece of land (the servient tenement). It is not merely for the owner's personal benefit; the intention is that if the land is passed to a new owner he too shall have the right. (In other words, the right "runs with the land".)

Thus if Alan had granted Fred and Florrie a personal right for Fred and Florrie and their family and friends to walk over the path X-Y in the picture on page 406 this might be a licence, or a right recognised by the Law of Contract, but it could not be an easement, and would not pass to future owners of "Magpie Cottage". But if the right is granted for the benefit of the *land* of Fred and Florrie, so that the right does pass with the land to any new owner, this can be an easement: "Magpie Cottage" is the dominant tenement (i.e. the land with the benefit of the easement) and Alan's property "Tiny Nook" is the servient tenement (i.e. the land subject to the burden of the easement).

(A "tenement", by the way, in this context, is any land held by a freehold or leasehold tenant – i.e. any land at all.)

Johnstone v. Holdway (1963) is an example showing the necessity of a dominant tenement.

2. THE EASEMENT MUST ACCOMMODATE *(i.e. benefit)* THE DOMINANT TENEMENT

To fulfil this condition, the right must be such that it makes the property (the dominant tenement) a more convenient property. If a householder Bertie in Birmingham travels daily to Coventry to work, and is granted a right of way over a path in Coventry, this right is not an easement, because (even if the deed of grant says it is for the benefit of Bertie's land) a right of way in Coventry cannot benefit a house in Birmingham, though it can benefit Bertie personally. But in our picture on page 406 the right of way X-Y "accommodates" the dominant tenement "Magpie Cottage" as it makes that property more convenient for the owner or occupier of that property.

The dominant and servient tenements need not necessarily adjoin each other; thus in the picture on pages 406 and 407 the existence of a right of way J-K for the bungalow "Sun Haven" accommodates the dominant tenement "Sun Haven" as it makes that bungalow a more convenient property: it has in a manner of speaking brought it nearer to South Road which is the road leading to the local shopping centre.

3. THE DOMINANT AND SERVIENT TENEMENTS MUST NOT BOTH BE BOTH OWNED AND OCCUPIED BY THE SAME PERSON

In our picture, if the dominant and servient tenements "Magpie Cottage" and "Tiny Nook" were both owned by the same person but were occupied by two separate persons (e.g. one is owner-occupied and one is tenanted) the right of way X-Y could be an easement.

Similarly the right could exist as an easement if the two properties belonged to two different owners but were occupied by one person - for instance if Fred and Florrie Smith, now that they have three children, have taken "Tiny Nook" on a tenancy as an annexe to "Magpie Cottage".

But if the same person has both ownership and occupation of both properties (e.g. if Fred and Florrie were owner-occupiers of both "Magpie Cottage" and "Tiny Nook") the right cannot exist as an easement - a person cannot have an easement over his own land: an easement is a right in *alieno* solo.

Any easement which had existed prior to the two properties' coming into single ownership and occupation is thereby extinguished.

Nevertheless there exists between the points X and Y a concrete path which would have been an easement if the two properties had been in separate ownership or occupation. This is known as a *quasi-easement*, i.e. a thing that looks like an easement.

4. THE EASEMENT MUST BE CAPABLE OF FORMING THE SUBJECT-MATTER OF A GRANT

We have seen (page 73) that an easement comes into existence sometimes by deed (usually it is thus a legal easement) and sometimes by informal writing (this is an Equitable easement) and we shall see later in this volume that a legal easement can arise without any agreement at all, simply on the basis that it has been used for many years. But, whether created by deed or not, to be an easement it has to be a type of right which *could have been* created by deed. This involves four requirements:

(A) There must have been someone capable of being the grantor.

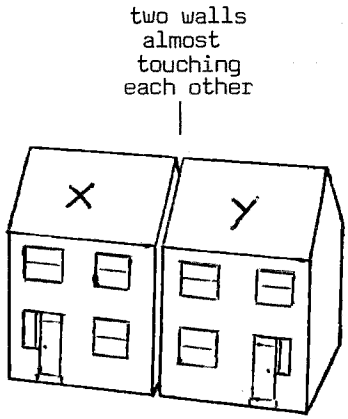
(B) There must have been someone capable of being the grantee.

(C) The right must be sufficiently definite. For example, the enjoyment of light to a specific window, and of air to a specific ventilator (as in *Bass v. Gregory (1890)* - ventilation shaft for cellar) can exist as easements; but the enjoyment of light to a field, and of air to a windmill on a hill (*Webb v. Bird (1862)*) cannot be easements,

for in these cases the whole question of exactly what is enjoyed and what would constitute a blockage is too vague and indefinable.

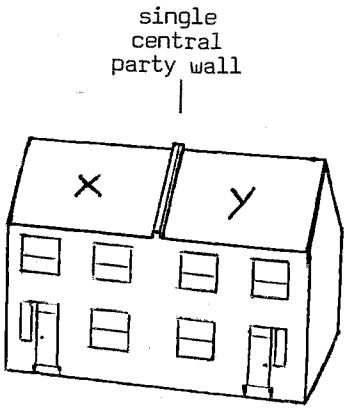
Similarly the enjoyment of privacy, and the enjoyment of a view, are regarded as too indefinite to be easements.

In *Phipps v. Pears (1964)* Lord Denning said in the Court of Appeal, "A right to protection from the weather is not a right known to the law", but in *Tollemache & Cobbold Breweries Ltd. v. Reynolds and another (1983)* a right to protection from the weather was recognised by the Court of Appeal. The difference between the two cases was that in the former case the properties were two separate structures, while in the latter case they were two parts of one structure:-



Phipps v. Pears

two separate buildings adjacent to each other: if Y wants to demolish, X has no right to have his wall protected by Y's property.



Tollemache ... v. Reynolds

single structure: X has a right against Y if Y exposes the party wall to the weather.

Rights which cannot exist as easements can sometimes be made enforceable by the use of restrictive covenants - e.g. a view might be protected by the imposition of a restrictive covenant not to erect any buildings more than one storey in height.

(D) The fourth requirement is: the right must be within the general nature of rights which can exist as easements. We saw half a dozen such rights on page 339, and we will now take the opportunity of looking more closely at what types of rights the courts will recognise as easements. They can be broadly divided into seven types:

(i) rights of way (see page 365)
(ii) "services": rights for drains, pipes, cables, etc.
(iii) rights of light to a specific opening (see page 366)
(iv) rights of air to a specific opening (as in *Bass v. Gregory* page 358 above)
(v) rights of support (see page 370)
(vi) rights concerning water (see page 369)
(vii) miscellaneous rights - in which the courts have included (inter alia) the following rights over another person's land:-

(a) to discharge gases or smoke over it,
Crump v. Lambert (1867)
(b) to cause noises or vibrations affecting it,
Elliotson v. Feetham (1835), *Ball v. Ray (1873)*
Sturges v. Bridgman (1879)
(c) to mix manure on it,
Pye v. Mumford (1848)
(d) to hang a washing line over it,
Drewell v. Towler (1832)
(e) to store barrels on it,
Attorney-General of Southern Nigeria v. Holt (1915)
(f) to extend bowsprits *(as on page 339)* over it,
Suffield v. Brown (1864)
(g) to use a coal shed on it,
Wright v. Macadam (1949)
(h) to cause mining subsidence to affect it,
Rowbotham v. Wilson (1860)
(i) to go onto it to open sluice gates,
Simpson v. The Mayor of Godmanchester (1896)
(j) to enjoy someone's pleasure ground (a *jus spatiandi* - a right to walk about: it is not a right of way as (i) it is not going anywhere, and (ii) it is not limited to a set route),
Re Ellenborough Park, (Weston-super-Mare) (1955)

(k) to nail a creeper to a boundary wall belonging to one's neighbour,
Hawkins v. Wallis (1763)

(l) to fix a signboard to the wall of a neighbour's house, *Moody v. Steggles (1879)*

(m) to use an airfield, *Dowty Boulton Paul Ltd. v. Wolverhampton Corporation (1973)*

(n) to use a neighbour's lavatory,
Miller v. Emcer Products Ltd. (1956)

(o) (probably the commonest right in this list) to go onto a neighbour's land to carry out repairs to buildings which stand close to the boundary of one's own land. (This is a right which Shylock would need for his side wall in our picture on page 406. Note that such a right is not automatic: it does not exist unless it is created as an easement.) *Ward v. Kirkland (1966).*

This list is not closed: as the ways of our society change the courts may add further types of right, as long as they are within the general nature of rights capable of existing as easements.

Just what this "general nature" is, is virtually impossible to define. One guideline is that none of the easements listed above involves the servient owner in any expense: and we can say that the court is unlikely to accept, as an easement, any right requiring the servient owner to spend money.

Yet even to this statement there is an exception: a right to require a neighbouring owner to repair his fences can exist - see Lord Denning's remarks on this in *Crow v. Wood (1970).* - . This right (which has been called "a spurious easement") and such rights as a right to use a pew in a church (described on one occasion as "an interest of a peculiar nature in the nature of an easement created by Act of Parliament") are not discussed in this book.

In *Copeland v. Greenhalf (1952):-* a right of car parking and vehicle repairing, on the neighbour's land, was held not to be an easement - because it amounted to a claim to joint possession of the land. We must draw a distinction between (for example) the right in *Miller v. Emcer Products Ltd.* to use the neighbour's

lavatory - which would only keep the neighbour off that bit of his own land for a few minutes at a time - and the right in *Copeland v. Greenhalf* which could keep the neighbour off that bit of his own land 24 hours of the day, depriving him of the use of it altogether.

Whether a right of parking *between certain hours* or *for a limited period* can exist as an easement would appear not to have been decided. Possibly it would not be within the general nature of rights recognised as easements, or might be too indefinite. In any case, a personal right of parking can be granted by contract, or as a licence (see page 423) or possibly could be provided by means of a restrictive covenant not to object to it.

Sometimes a right not amounting to an easement may be enforced under the doctrine that "a grantor must not derogate from his grant" - i.e. he must not do something which makes the grant useless. In *Aldin v. Latimer Clark, Muirhead & Co. (1894)* the grantor leased land to the grantee, knowing the grantee intended to use it for the drying and seasoning of timber, for which a good flow of fresh air is essential. The grantor then carried out building operations on other land adjacent to the leased land in a way which interrupted the flow of fresh air. The court held that even though the flow of fresh air to land is too indefinable to be an easement, the grantee was entitled to damages, because preventing the land from being used for what it was leased for was derogation from the grant.

B: Interim Summary

So, summing up what we have seen so far: we have seen four essential requirements for an easement:

1. dominant and servient tenement,
2. the right benefits the dominant tenement,
3. separate ownership and/or occupation, and
4. capable of grant by deed, i.e.
   (A) capable grantor,
   (B) capable grantee,
   (C) sufficiently definite, and

(D) within general nature of easements.

Under "general nature" we saw easements of way, water, services (drains etc.) support, light and air, and a miscellaneous fifteen easements which defy all attempts to contain them within any convenient classification.

We began with a definition, "an easement is a right to do something on another's land", but even this is not completely true, for an easement of light gives no right to do anything on the neighbour's land, it only gives a right to stop the neighbour from blocking the light.

So it seems our definition should be, "an easement is a right to do something on another's land, or to stop another from doing something on his own land" - and even this is not satisfactory, for we shall see in Chapter 34 that the latter part of this definition is, more often than not, a definition of a restrictive covenant rather than of an easement. To quote from Megarry and Wade's "The Law of Real Property": "the attempt to define an easement leads to a list of miscellaneous examples rather than to a precise definition".

Nevertheless there is not a great deal of difficulty in practice: it is usually found that rights either clearly satisfy the above four conditions, or clearly fail to do so.

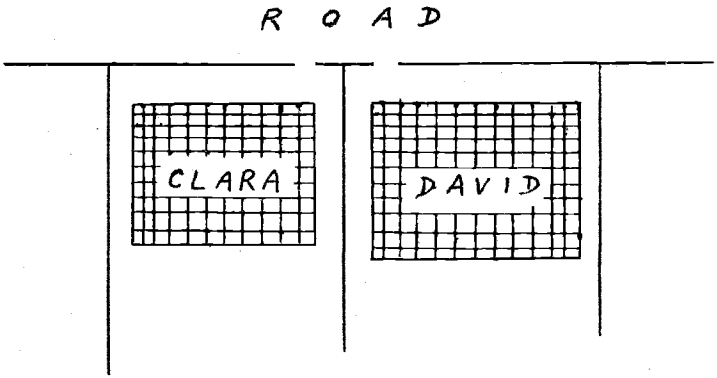
Some textbooks divide easements into positive easements (rights to do something: e.g. rights of way, drainage, etc.) and negative easements (rights to stop the servient owner from doing something: e.g. rights of light, support, etc.). The same rules as to enforceability of easements apply to both types.

A right which exists over land as an easement normally continues despite changes of ownership of the land. A right which is only personal normally does not pass to a new landowner.

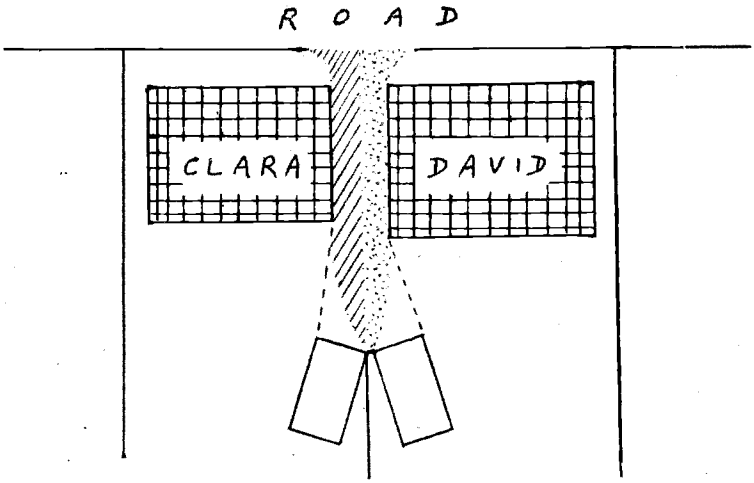
C: The Frequent Use of Easements Today

With older houses, easements for a joint driveway

are frequently met with. In our picture on page 406, the two Victorian houses of Clara and David each have a four foot path at the side. (Shown in plan view in fig. I below.)



In fig. II (below) the owners Clara and David have made an eight foot driveway giving both of them access to rear garages. They have done it by removing the dividing wall and granting each other easements: Clara has granted David (for the benefit of David's property) a right of way over the hatched portion of Clara's property, in return for David granting a similar right (for the benefit of Clara's property) over the stippled portion of David's property.



On many modern housing estates the services - pipes, cables, etc. - run from plot to plot. Each house is sold together with easements in respect of the services under every other plot, and subject to similar easements for all the other plots to use the services running under this plot.

D: Four Additional Notes

Before we leave the subject of the nature of easements it is necessary for us to look at four additional notes on points of detail which are of importance.

1. Additional Note on Rights of Way

A right of way may be restricted (e.g. "on foot only" or "during daylight hours only") or may be general. "A free right of way at all times and for all purposes with or without vehicles and animals" is a typical general right of way. If such wording as this is used to grant it, there is no limit on the amount the right may be used, except that it must not be used so much that other people having the right to use it are unable to do so. In *Jelbert v. Davis (1968)* a farmer had a "right of way at all times and for all purposes" over a neighbour's driveway between the main road and the farmer's field. Later the farmer obtained planning permission for the use of the field as a site for 200 caravans. The court held that the easement entitled him to use the driveway for caravans, but not so many that they swamped the other persons entitled to use it.

A right of way expressly granted (by deed, or by an informal grant recognised in Equity) is as general as the words of the grant make it. If in doubt it is construed in favour of the grantee. It is not limited to what was required at the time the grant was made. Thus a right of way to a field "for all purposes with or without vehicles and animals" would, if the field were converted into a builder's yard, be usable for all the business of the builder's yard.

A way of necessity (i.e. an implied grant, to give access to land which is completely land locked: see page 394) is limited to the necessity existing at the time the right arose. Thus a way of necessity to a field would not, if the field were converted into a builder's yard, be usable for all the business of the builder's yard.

A right of way which arises by many years' use ("prescription" - see page 401) is similarly limited.

Nevertheless a right which arises by prescription after being used for many years by horses and carts extends to include motor vehicles! *Lock v. Abercester Ltd. (1939).*

A right of way can normally only be used as access to the dominant tenement, not to other property situated beyond the dominant tenement. *Bracewell v. Appleby (1975).* Thus in our picture on pages 406-407 if Fred and Florrie Smith buy part of the land belonging to Gigi, immediately behind "Magpie Cottage", they are entitled to use the path X-Y to reach the dominant tenement "Magpie Cottage", but not to reach the additionally acquired land.

The person having the benefit of the right is normally liable for constructing and repairing it, unless there is agreement to the contrary. *Miller v. Hancock (1893).*

If the way becomes impassable there is no right to deviate, unless the obstruction was caused by the servient owner. *Selby v. Nettlefold (1873).*

The student should take care to differentiate between easements of way (which are only for the benefit of the dominant tenement) and public rights of way (which are for the general public). See page 371 as to public rights of way.

2. ADDITIONAL NOTE ON RIGHTS OF LIGHT

There is no natural right to enjoy light: if no right exists by virtue of an easement or a covenant, there is no redress within Real Property Law if one's neighbour blocks one's light completely. Nevertheless

the neighbour is subject to rules made under social legislation:- e.g. the Town and Country Planning requirements (see page 606), and the 1985 Building Regulations as to ventilation (see page 610).

If light has been enjoyed for 20 years an easement may arise by prescription (see page 415) and in the past windows have sometimes been deliberately obstructed, to prevent this. An easement of light can only exist for a window or skylight or other similar aperture, not (e.g.) for a lawn or a field.

If an easement of light exists, it has been decided by the case of *Colls v. Home and Colonial Stores Ltd. (1904)* that enough light must be left for *ordinary purposes*. There is no rule that light must be allowed at an angle of 45° or any other angle: at the most, a 45° test only provides a very slight presumption.

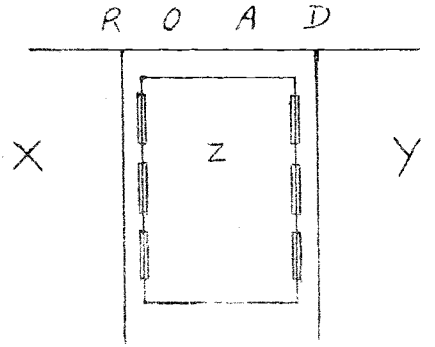
Thus if a developer builds in front of a window of a house which enjoys an easement of light, it does not matter how much light he takes away, as long as he leaves that room enough light for ordinary domestic purposes. For a shop or business premises the standard is the amount needed for "ordinary" shop or business use. The fact that the owner may have used that room for some special purpose requiring bright light, or conversely for a purpose requiring very little light, makes no difference; the standard required is that enough light must be left for ordinary purposes.

If the room has other sources of natural light such as a skylight, it may be possible to block the window altogether.

In *Allen v. Greenwood (1979)* (concerning a greenhouse in the garden of a house in Rochdale) the neighbours had erected a fence, with the result that though the plaintiffs still had enough light to enable them to work in the greenhouse, there was no longer enough direct sunlight for "tomatoes, geraniums ... violets, pansies, the red ones that are rather tender" which previously they had enjoyed for more than 20 years. The court held that the plaintiffs were entitled to this direct sunlight, though the court

deliberately left undecided the question of whether a distinction should sometimes be drawn between a right to the sun's light and a right to the sun's heat.

In *Sheffield Masonic Hall Ltd. v. Sheffield Corporation (1932)* a room was lighted by two sets of windows, one set overlooking the land marked X in the diagram below, and the other overlooking the land marked Y. The owner of X wished to build, and to leave the room on the plot Z lighted by the windows overlooking the land Y. This would have been unfair to the owner of Y, for if the owner of X built thus, the owner of Y could not build - and vice versa.



The court held that the owner of X could obstruct the windows to the extent that, if the owner of Y were to obstruct the windows on his side to the same extent, the room on plot Z would still have enough light for ordinary purposes.

More could be said on rights of light, and some of it is not to do with easements or even Real Property Law. Until 1985 there were requirements in Part K of the 1976 Building Regulations: but these only applied to new windows being constructed for habitable rooms in residential property - so did not apply to existing windows, nor to new windows in offices or workshops; and even within the home the kitchen does not for these purposes count as a habitable room! And from November 1985 Part K of the 1976 Building Regulations will cease to apply, except for some ventilation rules from Part K which are transferred into Part F of the 1985 Building Regulations. So there are plenty of situations where *Colls' case* will apply but the Building Regulations will

not. There are also advisory Planning Criteria for sunlight and daylight to prevent serious overshadowing, and British Standards on getting the light into rooms.

3. ADDITIONAL NOTE ON RIGHTS OF WATER

Various rights concerned with water may exist as easements. They include:

(1) the right to draw water from a neighbour's spring, well, or pump,

(2) the right to let one's cattle drink from a neighbour's pond,

(3) the right to discharge some substance into a neighbour's stream, polluting it,

(4) the right to discharge water (e.g. from an overflow pipe) onto a neighbour's land, and

(5) the right to permit rainwater to drop off one's roof onto one's neighbour's land - an "easement of eavesdrop".

The use of water, whether by the landowner himself or by the owner of an easement, is subject to certain restrictions, by the 1963 Water Resources Act etc., as we shall see in Chapter 46. (See page 621 .)

4. ADDITIONAL NOTE ON THE DIFFERENCE BETWEEN EASEMENTS AND CERTAIN SIMILAR RIGHTS

(A) The Contrast between Easements and Quasi-easements

We have already seen (page 358) that a quasi-easement differs from an easement because, in the case of a quasi-easement, the land subject to the right and the land with the benefit of the right are both in the same ownership and the same occupation. A quasi-easement is something which would have been an easement if the two tenements had been in different ownership or different occupation.

(B) The Contrast between Easements and Natural Rights of Support

Natural rights exist automatically, whereas an easement does not exist unless it has been acquired. Natural rights are protected by the Law of Tort.

There is a natural right to have one's land (in its natural state, without buildings) supported by one's neighbour's land. The taking away of this support would constitute the Tort of Nuisance. On the other hand there is no right to have one's buildings supported by one's neighbour's land or buildings.

Thus if Shylock digs an excavation on his property, and Fred and Florrie Smith's garden subsides as a result, they can sue him for damages for Nuisance. But if Shylock digs an excavation and "Magpie Cottage" falls or is damaged, the question arises: "Was this subsidence caused by the weight of the buildings, or would it have happened even if there had been no buildings?" If the land would have fallen in any case, there has been a breach of the natural right of support, and the Smiths can claim compensation for the damage to the land and the buildings. But if the land would not have fallen, and the weight of the buildings caused the calamity, there is no breach of the natural right; no remedy under this heading.

Cases on these points include:

Backhouse v. Bonomi (1861) (re: support of land)
Wyatt v. Harrison (1823) (re: support of buildings)
Stroyan v. Knowles (1861) (re: land with buildings).

Though there is no natural right of support for buildings, the right of support for a particular building may come into existence as an easement: such an easement may arise by virtue of the building having been so supported for a number of years (this is "Prescription" see page 401) or may be created as an easement by deed or otherwise.

Thus in the House of Lords case of *Dalton v. Angus (1881)* (known as *Angus v. Dalton* in the lower courts) we have a leading case – which contains a great many

important observations on easements generally - where this occurred. In this case the plaintiff and the defendant owned adjoining houses. The plaintiff turned his into a factory. Twenty seven years later, the defendant pulled his house down and excavated his land to a depth of several feet - whereupon the factory collapsed. The House of Lords held that there was no natural right of support for the building, but that an easement of support had arisen by prescription under the doctrine (which we shall see on page 405) of "lost modern grant".

Besides the natural right of support, there are other natural rights which can exist. There is for instance a natural right to use water flowing in a definite channel across one's land: the right is limited by various restrictions and this subject receives attention in Chapter 46. (See page 621 .) There are also the rights against the careless or deliberately malicious acts of neighbours or others which are governed by the Law of Tort, and a number of specific torts are mentioned in Chapter 47.

(C) The Contrast between Easements and Public Rights

Easements only benefit a particular piece of land, the dominant tenement. Thus Fred and Florrie as owners of the dominant tenement "Magpie Cottage" can use the path X-Y in the picture on page 406 together with their family and friends. But contrast this with a public right, which is for the public at large: such as a public footpath, or the local High Street, or the M4 motorway.

The only common type of public right is a public right of way, although other types, such as a public right of navigation on a river, can exist.

A "highway" (the land over which a public right of way runs) may be of any nature, ranging from a grassy field path to a main road or motorway.

A public right of way may be created:-

(1) by statute,

(2) by dedication and acceptance — the landowner dedicating the way to the public (dedication sometimes formal, but usually inferred from the way's uninterrupted use without permission for so long that the landowner must have known that the public was using it) - and the public accepting the way, by using it. (This is how the majority of roads originated.)

(3) by the 1980 Highways Act, under which a right is deemed (assumed) to have been dedicated if it has actually been enjoyed by the public as of right and without interruption for at least twenty years, unless the landowner shows that there was no intention to create a right.

Absence of intention to dedicate can be shown in various ways, such as by closing the way for one day each year, or erecting a notice intimating that the way is not dedicated to the public.

Once a highway, always a highway. Obstruction or disuse (even for many years) does not put it out of existence. It can only be stopped up or diverted by the making of an order by the appropriate authority.

The 1980 Highways Act, which is the main Statute dealing with highways, is outside the scope of this book. This Statute (it has 345 sections plus 25 Schedules - a total of 432 pages!) deals with the creation and maintenance of highways, the requirements for dual carriageways, roundabouts (but not traffic lights and other road signs which are under the 1984 Road Traffic Regulation Act) - the 1980 Act deals also with cycle tracks, cattle-grids, grass verges, bridges, tunnels ... ss.116-119 deal with stopping-up and diversion of highways ... ss.139-140 control builders' skips ... ss.203-237 deal with the making up of private streets ... the Act refers to Building Lines (lines in front of which building is generally not permitted) ... there are rules about obstruction of the highway ... excavations in the highway ... etc.

Local Authorities keep Footpath Maps showing public footpaths in their area.

(D) The Contrast between Easements and Licences

Licences are unlike easements in that they need no dominant tenement, they are much more informal and varied than easements, and they cannot be legal interests in the land. There are also various other differences. Licences are dealt with on pages 423-432.

(E) The Contrast between Easements and Restrictive Covenants

Restrictive covenants are wider in scope and more flexible than easements, so can bring about results which easements cannot give. For instance, by obtaining a covenant that neighbouring land shall not be built on, an owner can secure for his property an amount of light far exceeding that available under either *Coll's* Case (page 367) or the Building Regulations, and can also prevent the obstruction of a view.

There are other differences between easements and covenants, one of the most important being that an easement can be acquired by prescription and a covenant cannot. Covenants are dealt with in Chapter 34.

(F) The Contrast between Easements and Customary Rights of Fluctuating Bodies

These customary rights include such rights as:-

(a) a right for the parishioners of a certain parish to use a certain path to go to Church,

(b) a right for the fishermen at Walmer to dry their nets on a piece of land: *Mercer v. Denne (1905)*

(c) a right for the inhabitants of a parish to erect a maypole on certain land and to dance around it.

These rights differ from easements in that there need be no dominant tenement: the rights extend to all

persons in the class mentioned, whether they own land or not - and yet they are not public rights for they do not extend to the public at large.

These customary rights are really a local variation, dating from time immemorial, of the common law. A custom which goes back as far as anyone remembers may be assumed to go back to time immemorial (i.e. the year 1189!) unless there is proof that it *must* have commenced after that date. (The reason for the date 1189 is given on page 404.)

As well as being *ancient*, the right needs to be *certain* (i.e. for a certain definable group of persons) and *reasonable*.

SUMMARY

In this chapter we have seen:-

1. An easement is the right to do something on someone else's land (or the right to stop someone doing something on his own land - as on page 363).
2. Easements are of many types but have four essentials:
   - (A) dominant and servient tenement,
   - (B) the right must benefit the dominant tenement,
   - (C) the dominant and servient tenement must be owned and/or occupied by different persons,
   - (D) the right must be capable of forming the subject-matter of a grant - which involves
     - (i) a capable grantor,
     - (ii) a capable grantee,
     - (iii) the right must be sufficiently definite, and
     - (iv) the right must be within the general nature of easements: this includes rights of
       - (a) way
       - (b) services (drains etc.)
       - (c) light
       - (d) air
       - (e) support
       - (f) water

       and (g) miscellaneous.

3. Examples of easements today - joint driveways and residential services.

4. Additional notes on:-
   1) rights of way,
   2) rights of water,
   3) rights of light,
   4) the differences between easements and certain other rights, namely,
      A) quasi-easements,
      B) natural rights of support,
      C) public rights,
      D) licences,
      E) restrictive covenants,
   and F) customary rights of fluctuating bodies.

TEST QUESTIONS on Chapter 27:-

1. Explain the meaning of the following:-
   a) An easement must accommodate a dominant tenement,
   b) The benefit of the easement runs with the dominant tenement,
   c) The burden of easements runs with the servient tenement.

2. a) What are easements?
   b) Give half-a-dozen examples of typical easements.
   c) How does a negative easement differ from a positive one?

3. How do easements differ from (a) licences, (b) restrictive covenants, (c) public rights, (d) profits à prendre, (e) natural rights, (f) rentcharges, (g) quasi-easements, (h) personal (e.g. contractual) rights?

4. In the pictures on pages 107 and 406, "Magpie Cottage" has a legal easement whereas Clara's and David's properties have Equitable easements, over the path X-Y on the servient tenement "Tiny Nook". How do legal easements differ from Equitable ones?

CHAPTER 28
THE NATURE OF PROFITS À PRENDRE

OUTLINE OF CHAPTER:-

A: Introduction
B: Four legal classes of profits:-
  1. profit appurtenant
  2. profit appendant
  3. profit pur cause de vicinage
  4. profit in gross
C: Six "natural" classes of profit:-
  1. pasture
  2. piscary etc.
  3. turbary
  4. in the soil
  5. estovers etc.
  6. pannage
D: Additional notes:-
  1. on the difference between profits and
    (A) quasi-profits
    (B) public rights
    (C) rights of fluctuating bodies
  2. on Commons

A: INTRODUCTION TO PROFITS

A profit à prendre (usually referred to simply as a profit) is the right to take something from someone else's land. Like an easement, it can be either legal or Equitable, depending on how it is made.

The thing taken must be either
  (1) part of the soil itself
    (e.g. sand, gravel, peat)
  or *(2) produce of the soil*
    (e.g. firewood, straw, grass)
  or *(3) wild animals on the property*
    (e.g. hares, pheasants, fish - the hunting, shooting and fishing rights).

A wild animal, while alive, is a *res nullius* (i.e. a thing belonging to no-one - it cannot be owned) but

when dead, it belongs to the landowner, or to the profit owner if a profit of taking that species of animal has been granted.

A right to take water is not a profit, except possibly (indeed, doubtfully) in certain special cases. We have seen on page 369 that rights to take water are able to exist as easements.

A profit can be enjoyed by one person - this is a "several" (which means separate) profit - or by a person in common with others - this is a "common" profit.

B: Four Legal Classes of Profits

Profits may be classified as to their legal nature

1. profit appurtenant,
2. profit appendant,
3. profit *pur cause de vicinage*,
4. profit in gross.

Alternatively profits can be classified as to the nature of what is taken

1. pasture,
2. piscary (fish) etc.,
3. turbary (turf),
4. profit in the soil (gravel etc.) and
5. estovers,
6. pannage.

We will look briefly at them all.

1. Profit Appurtenant

Of the four legal classes of profit, this is the one which is most like an easement. It is created by one landowner for another landowner.

The four essentials of easements apply: therefore
(a) there must be a dominant and a servient tenement,
(b) the profit must benefit the dominant tenement
(so if - for instance - it is a fishing right, one may fish for the needs of the dominant tenement - but not for sale to the whole town)

(c) the dominant and servient tenements must be owned and/or occupied by different people, and
(d) the right must be within the general nature of profits - i.e. limited to taking the soil, its produce or its wild animals.

The methods of creation of profits appurtenant are the same as for easements - see Chapter 29.

A profit appurtenant may be either "several" or "in common".

2. PROFIT APPENDANT

A profit appendant is attached to the land by operation of law, in contrast to profits appurtenant which (we saw) are attached by the persons concerned.

Probably the profit appendant can only exist today as a profit in common of pasture - but the profit appendant was the original form of profit: the more important profit appurtenant developed later.

In Anglo-Saxon times the waste land outside the village may well have belonged to the villagers as a community, so the man who put his beasts there was individually using what belonged to all of them collectively. But sooner or later, and probably it was before 1066, an overlord appeared, and though the villagers still used the waste land in the same way, the notion grew that it was not their land but the lord's. The Normans' application of the doctrine of tenure to every acre from Land's End to the Scottish border completed this transition: the twelfth-century freeholders in the village (Cedric and Donald in our example on page 33) were exercising these rights over the feudal lord's waste land.

Profits appendant came into being as a by-product of subinfeudation. If arable land was subinfeudated, the right for the person receiving the land to pasture horses, oxen, cows and sheep on the lord's waste was automatic by operation of law - for a man could not plough arable land without beasts to pull the plough, therefore he had to pasture those beasts somewhere while his arable land was producing corn, and the village fallow field under the three-field system of agriculture was not sufficient for all the men's animals. (Contrast these automatic

profits appendant with profits appurtenant, which have to be deliberately acquired.)

The right to profit appendant only extends to horses and oxen (which in former times were the beasts to plough the arable land) and cows and sheep (to manure it); contrast this with profits appurtenant which can be for any sort of animal.

It has not been possible to create any further profits appendant since *quia emptores* (1290) abolished subinfeudation (see page 35) but quite a number still exist. Their existence is registered with the local authority - see below.

The mediaeval waste land, being subject to this "common" (i.e. this profit in common) of pasture, became known as "the common".

As years passed, the acreage of the common decreased: by the thirteenth century the lord was able to take parts of it for himself, as long as he left enough for the villagers' pasturage of their beasts. (This was "Approvement" - see page 421 below.) Then the Black Death (1349) reduced the population to such an extent that there were far fewer people interested in keeping the old common rights alive - and then in Tudor times when the growth of the wool trade made pasture land more valuable than arable, inclosures took place on a large scale. The eighteenth and early nineteenth centuries, too, saw inclosures, until public anxiety grew at the disappearance of open spaces, and the 1852 Inclosure Act (see page 421) restricted further inclosures. Only scattered pieces of common land are left today.

Profits appendant and appurtenant (and those pur cause de vicinage, described below) were limited to the number of beasts which could be levant et couchant on the land - that is to say, the number it could support through the winter.

So, in our example on page 33, Cedric and later Donald received the rights of common together with the 30 acres, prior to 1290. No further profits appendant were created after 1290 but those existing continued. In due course part of the 30 acres passed to Gerry, who built fifty houses, including "Magpie Cottage".

"Magpie Cottage" has the benefit of those rights if

they still exist. They may have been forgotten after the Black Death, there may be no common left because it has all been inclosed, but *if* the rights still existed at the end of 1969, let us hope the owner of "Magpie Cottage" at that time registered them with the local authority under the 1965 Commons Registration Act:-

Under this Act, all persons having rights of common had to register them with their local authority before a deadline which was in 1970. Any which were not registered were no longer enforceable. This requirement applied to all profits held in common, not only to profits appendant. Thus (for example) it includes fishing rights and rights of taking peat, if held not severally but in common with other people.

The Commons Registration Act supersedes the doctrine of levancy and couchancy (explained in the small print on page 379) by limiting the registration of grazing rights to a defined number of animals.

The Act does not apply to rights held for a leasehold term.

The law concerning commons is quite complicated, and a note on commons appears at the end of this chapter.

3. PROFIT PUR CAUSE DE VICINAGE

If two commons adjoin, and animals which are legally on the one common are permitted to wander onto the other, and vice versa, the right over the adjoining common is *pur cause de vicinage*, that is:- "because of adjacency".

A profit *pur cause de vicinage* can only exist as a common of pasture, and if at any time in the past animals were driven off the common onto which they had wandered, or the commons at some time did not adjoin, or were separated by a fence, no right *pur cause de vicinage* can exist.

4. PROFIT IN GROSS

With a profit in gross there is no dominant

tenement: the right is personal. So if a person buys the shooting rights over a certain farm, it does not matter whether that person owns any land or not: he owns the shooting rights in fee simple for his own benefit, and basically can sell them or leave them to others in his will or on intestacy.

(Contrast this with shooting rights granted for the benefit of "Magpie Cottage" - profit appurtenant. In such a case as that, Fred and Florrie hold the rights as owners for the time being of the land, and if the cottage changes hands the rights will "run with the land" to the new owner of the cottage.

And contrast both of these with Licences - see page 423 - which are a more frequently used method of granting shooting or fishing rights: a Licence is purely a personal agreement and does not continue after the death of the grantor or the grantee.)

In being able to exist "in gross", profits are in contrast to easements, for we particularly noticed (page 356) that an easement cannot exist without a dominant tenement. Easements are parallel to only one of the four sorts of profit, namely the profit appurtenant. (Thus it is sometimes said that "All easements are appurtenant".)

Profits appurtenant are limited to the needs of the dominant tenement, whereas profits in gross can be unlimited.

Profits in gross are created by the same methods as easements.

- - - - -

So if cows belonging to Alan (of "Tiny Nook" in our picture) are grazing on land which is not his, it may be that (i) a profit of pasture has been granted by the owner of that land for the benefit of "Tiny Nook" (a profit appurtenant) or (ii) a profit of pasture has been granted for the benefit of Alan personally (a profit in gross) or (iii) the land on which the cows are grazing is common, and "Tiny Nook" has the benefit (duly registered with the local authority) of common rights dating from before 1290 (a profit

appendant) or (iv) the land is common and the cows have wandered onto it (pur cause de vicinage) from another common over which "Tiny Nook" has rights as in (iii).

Or there are various other explanations of the cows' presence: for instance they may be there by virtue of a Licence, or of course they may be trespassing.

- - - - -

Now that we have examined the "legal" classification of profits (appurtenant, appendant, pur cause de vicinage and in gross) we will look briefly at the "natural" classification - classification according to the nature of the rights: pasture, piscary (etc.), turbary, profit in the soil, estovers (etc.) and pannage.

C: Six "Natural" Classes of Profits

1. Profit of Pasture

Profit of pasture is the right for one's animals to take the grass or other pasturage. It is not necessarily in respect of a common: a right for the benefit of "Magpie Cottage" to keep a goat in the adjoining field would be a valid several profit appurtenant. The profit of pasture may be appurtenant, appendant, pur cause de vicinage or in gross - see the example on page 381. In various cases there are limits on the number of animals - e.g. under the Commons Registration Act (page 380). If appendant, the profit is confined to horses, oxen, cows and sheep.

A profit of pasture allowing the sheep to roam over the upland areas of the Pennines or the Welsh Mountains or Exmoor (etc.) may make all the difference between viability and non-viability for a hill farm.

2. Profits of Piscary etc.

Piscary is fishing - from Latin *pisces*, meaning a fish. This and other similar profits comprise the hunting, shooting and fishing group. They may be either appurtenant, in which case they are limited to

the needs of the dominant land, or in gross, in which case they can be unlimited. Normal cutting of timber by the servient owner is no breach of these rights even if it drives game away, but fundamental changes such as building on the whole of the land or converting it into racing stables are breaches.

In *Re Brocklehurst (1978)* a baronet died and left 3,500 acres to his sister's grandson - but six months earlier the baronet had given a 99 year Lease of shooting rights over this land to a friend. This made it impossible to build on the land: but the Lease had been granted without any undue influence on the old baronet, and was valid. (This was not done to keep the land in the family - but it has some interesting possibilities!)

3. PROFIT OF TURBARY

Profit of turbary is the right to dig turf or peat for *fuel*. It can only exist for the benefit of land on which there is a house.

4. PROFIT IN THE SOIL

Profit in the soil is a right to dig sand, gravel, stone, etc., and can be either appurtenant or in gross.

5. ESTOVERS ETC.

We saw estovers (rights of taking timber) as house-bote, plough-bote and hay-bote on page 159 where we looked at the life tenant's position. The same rights, exercisable by one person over another person's land, constitute the profit à prendre of estovers. It is also possible to have a profit of lopwood - the right to cut wood for fuel at certain times of the year. These rights may be either appurtenant or in gross.

6. PANNAGE

Pannage is a right granted to the owner of pigs to go into the grantor's wood and allow the pigs to eat

the acorns or beech-mast (i.e. the nuts of the beech tree) which fall to the ground. Quite a large number of rights of pannage exist in southern England.

In *Chilton v. Corporation of London (1878)* it was held that the right is limited to what actually falls to the ground - there is no right to pick the acorns, nor even to shake the trees for the pigs.

D: Additional Notes

1. On the Difference between Profits and certain similar rights

On page 339 we contrasted easements with other similar rights; now let us do the same with profits.

(A) The Contrast between Profits and Quasi-profits

The difference between profits and quasi-profits is the same as that between easements and quasi-easements: the dominant and servient tenements are both owned and occupied by the same person.

(B) The Contrast between Profits and Public Rights

Public rights differ from profits in that they are for the general public. The only public right of taking which is likely to be encountered is the public's right to fish in tidal waters. The public may fish in all tidal waters (sea or tidal river) except a "free fishery". A "free fishery" is a grant by the Crown to an individual, of the exclusive right to fish in a specified area of tidal water. No such grants have been made since Magna Carta (1215) but some made before that date still exist; they are valid and may be transferred from one person to another.

Examples of "free fisheries" would appear to include those at Faversham (Kent) and at Walmer (Kent) and the salmon fisheries of the Severn.

(C) The Contrast between Profits and Rights of Fluctuating Bodies

Under this heading, such situations as a long-standing custom for the inhabitants of a certain area to take oysters from an oyster-fishery are to be considered. These are customs which are not profits as they are not limited to specific individuals, yet they are not for the general public.

The law does not recognise the existence of any such rights, but if the court finds that in fact the custom has existed for a lengthy period, it will try to give it legal force. Sometimes this can be done by "incorporating" the fluctuating group of people - i.e. treating them as though (for this purpose only) they were a corporation aggregate. (For details of corporations, see page 134.)

In *Goodman v. The Mayor of Saltash (1882)* all the inhabitants of a certain area had enjoyed an oyster fishery between Candlemas (2nd. February) and Easter Eve for 200 years, jointly with the local Corporation (Mayor, Aldermen and Burgesses) which had enjoyed the fishery all the year round from time immemorial. The House of Lords refused to "incorporate" the inhabitants but decided that the Corporation was entitled to a profit à prendre subject to a trust or condition in favour of the inhabitants.

2. ON COMMONS

(Note: some parts of this section are not really relevant to a chapter on profits à prendre, but they fit here better than anywhere else, so here is where they will go.)

If land is subject to a right of persons in common to exercise a profit over it, it is a "common". In practice, most common land today is the remnant, still unenclosed, of the mediaeval waste land.

It may belong to the Lord of the Manor, or the Local Authority, or the National Trust, etc., or a

private individual - it does not belong to the public.

We must consider the rights of (1) the owner,
(2) the commoners,
(3) the public.

The owner has the right of using his land as any other owner has, as long as he does not interfere with the rights of the commoners (and the public if it is a "public access common" - see below). By s.149 of 1925 LPA nothing can be built on common land without the consent of the Secretary of State for the Environment or (in Wales) the Secretary of State for Wales.

The commoners have their rights of taking the profit à prendre, in common.

The public has NO right to roam over the common, unless such a right has been granted. There are several ways such a right may have been granted - see below - making the common a public access common. It is estimated (by the Commons, Open Spaces and Footpaths Society of 25A Bell St., Henley on Thames) that between one fifth and one quarter of all commons are public access commons.

Public access commons may be:

1. In the London area, metropolitan commons - examples are Wimbledon Common (home of the womble) and Epping Forest. They are governed by a statute named the 1967 Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act, and various other Acts.

2. Some commons are controlled by a Board of Conservators appointed under the 1876 Commons Act. (This Act also gives the inhabitants the privilege of playing games on certain parts of the commons.) Examples of such commons are Bexhill Down (Sussex) and the Clent Hills near Birmingham.

3. There are about two hundred commons regulated by District Councils under the 1899 Commons Act.

4. All urban commons (such as Horfield Common in

Bristol) come within s.193 of 1925 LPA, whereby the common is open to the public but they must not camp, light a fire, or drive a vehicle on it. Ilkley Moor in Yorkshire is also within the category of an urban common because, prior to the 1974 local government re-organisation, it formed part of Ilkley Urban District. Rural commons come within s.193 if the owner of the common executes a deed bringing the land within s.193: many have done so, because owners find these provisions useful. (One advantage of s.193 is that whereas the 1972 Road Traffic Act only forbids the driving of a vehicle on a common more than 15 yards from a road, s.193 of LPA - where it applies - forbids the driving of a vehicle on the common at all.) Much of the extensive land owned by the Crown Estates Commissioners in Snowdonia has been opened to the public by a deed drawn under s.193.

5. Some commons are governed by their own Act of Parliament - e.g. the 1861 Clifton and Durdham Down (Bristol) Act and the 1884 Malvern Hills Act. There is a series of Acts for the New Forest.

6. National Trust commons come under the 1971 National Trust Act.

7. A few commons, such as that at Itchingwood, Surrey, are managed under an Access Agreement made under the 1949 National Parks and Access to the Countryside Act.

8.By the 1906 Open Spaces Act, local authorities have power to purchase any open space and set it out for public walks and recreation. These open spaces can range from little flower gardens to areas of heathland. Surrey County Council has bought several thousand acres near Woking under this provision.

9. The 1968 Countryside Act gives powers to Local Authorities to provide car parks, toilets etc. for certain countryside commons, but the powers are subject to strict limitations and are little used.

To the majority of commons there is no public right of access. Sometimes the public may be tolerated on the land by licence (i.e. the owner does not chase

off trespassers) but in such situations the owner should take care that the public does not acquire rights (see page 372 for an example) - because, once they have been acquired, they may be difficult or more likely impossible for the landowner to stop.

Village greens are commons (or are treated by the law as commons) for many purposes.

At this point we have completed our examination of the nature of easements and the nature of profits, which has occupied us for the last two chapters, and we now embark on a fresh and very important topic, the creation of easements and profits.

SUMMARY

In this chapter we have seen:-

1. A profit is the right to take something (soil, produce or animals) from someone else's land.
2. Profits are of four types:
   1) appurtenant (granted like an easement)
   2) appendant (common rights dating from pre-1290)
   3) *pur cause de vicinage* (over neighbouring commons)

   The above three all need a dominant tenement.

   4) in gross (personal - needs no dominant tenement)
3. Profits can also be classified as:
   (1) pasture (grazing rights)
   (2) hunting shooting and piscary (fishing) rights
   (3) turbary (peat etc. for fuel)
   (4) in the soil (sand, gravel etc.)
   (5) estovers (timber - also lopwood, the taking of wood for fuel at certain seasons)
   (6) pannage (acorns and beech-nuts for the pigs).
4. Comparison of profits and
   (A) quasi-profits (one owner-occupier for both plots)
   (B) public rights of taking fish in tidal waters
   (C) rights of fluctuating bodies (e.g. for the people of the town to enjoy an oyster-fishery).

5. Commons - a complicated situation, including:
   1] London metropolitan commons
   2] commons under 1876 Commons Act (with conservators)
   3] commons under 1899 Commons Act (District Councils)
   4] urban commons under s.193 of LPA (no camping, driving or fire-lighting is allowed on these)
   5] commons with their own local Act of Parliament (e.g. Clifton Downs, Bristol)
   6] National Trust commons (1971 National Trust Act)
   7] commons with access agreements under the 1949 National Parks and Access to the Countryside Act
   8] public open spaces (1906 Open Spaces Act)
   9] Local Authority powers by 1968 Countryside Act.

   Village greens - may often be treated like commons.

TEST QUESTIONS on Chapter 28:-

1.(a) How does a profit à prendre appurtenant differ from a profit à prendre appendant?

   (b) How does a profit appurtenant differ from a profit in gross?

2.(a) Is it legal to camp on a common?
   (b) Is it legal to walk on a common?
   (c) Is it legal to play cricket on a common?
   (d) Is it legal to shoot pheasants on a common?
   (e) Is it legal to catch rabbits on a common?
   (f) Is it legal for the owner to inclose a common?
   (g) Is it legal to graze horses on a common?

   Give reasons for your answers.

3. Fred and Florrie Smith want to grant their neighbour David the right to fish in the stream which runs through the garden of "Magpie Cottage". Explain the different forms that such a fishing right could take.

4. What does the 1965 Commons Registration Act do?

Section B (Chapters 29 - 31)

Creation and Extinguishment of Easements and Profits

CHAPTER 29

THE CREATION OF EASEMENTS AND PROFITS

OUTLINE OF CHAPTER:-

A: Creation by Statute
B: Creation by express reservation
C: Creation by express grant (two types)
D: Creation by implied reservation (two types)
E: Creation by implied grant (four types)
F: Creation by presumed grant (usually known as Prescription - three types)

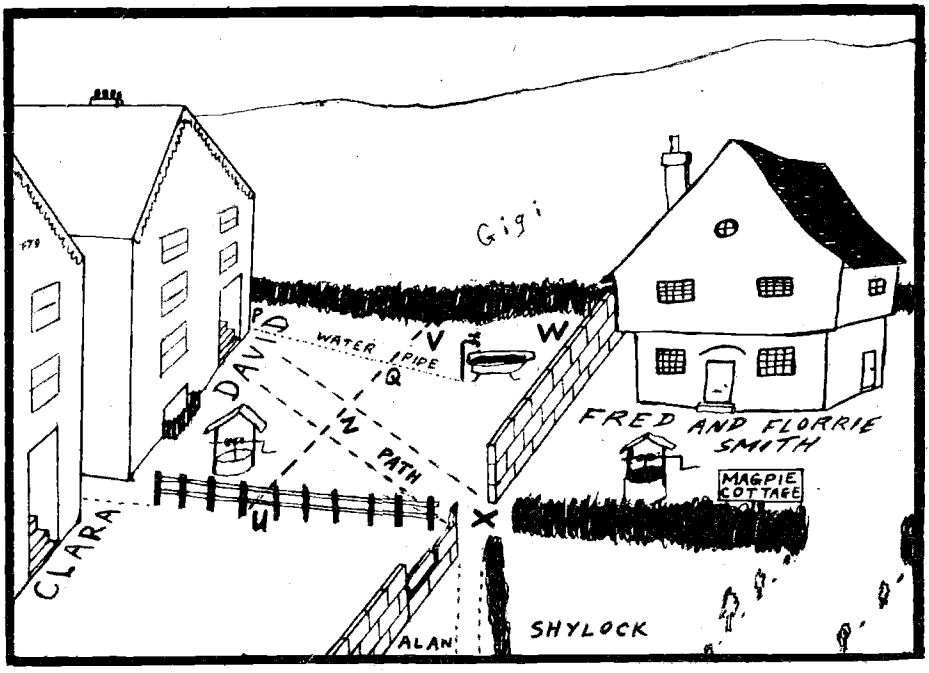
These rules apply to the creation of (i) all easements, and (ii) profits appurtenant or in gross. No creation of new profits appendant or pur cause de vicinage has been possible since 1290.

A: CREATION BY STATUTE

An Act of Parliament has sometimes been used to create an easement, such as an easement of support for the bank of a canal. For a modern example, an easement of support for the embankment of a motorway could if necessary be created in this way, but easements created thus are rare. *(Just about anything can be done by Statute!)*

B: CREATION BY EXPRESS RESERVATION

An *express* reservation is one which is actually written into the deed or document. For example David, who is the owner of the Victorian house and garden in the illustration opposite, disposes of the part of the garden marked U - V - W - X to Fred and Florrie, but reserves a right of way for his own property over the path between the points Z and X, by stating the



fact in a clause in the deed. Some such wording as "EXCEPTING AND RESERVING a right of way between the points X and Z on the plan attached to this deed..." is normally used.

C: Creation by Express Grant

Like an express reservation, an express grant is actually written into a deed or document. For example: David disposes of the land U - V - W - X to Fred and Florrie and also grants them a right of way along the path at the side of David's house to the road at the front of his house. Some such wording as "TOGETHER WITH a right of way..." is likely to be used.

In the express reservation, David sold the land but *kept back* an easement; in the express grant he sold the land and *also sold* an easement.

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There is a second form recognised by the law as an express grant. The average modern house has the

benefit of numerous easements, and it is quite possible that on a change of ownership they may not all be mentioned. Additionally it is likely that the deed will not mention full details of boundaries etc., and (possibly) may not really contain a competent description of the property at all. To prepare an accurate full description of the property would often require the expert help of a surveyor. Some provision is needed so that a less-than-perfect description still transfers ownership of the legal estate of the whole property.

S.62 of 1925 LPA contains such a provision, so that if one person disposes of (e.g. sells) property to another, even if the solicitor uses such a poor description as merely "Brownacre, at present belonging to X", the purchaser will receive all easements, rights, boundary-fences, etc. which appertain to the property, just as if the deed had expressly set them out. The law treats them as *expressly granted*.

S.62(1) of LPA states:

"A conveyance *[i.e. a deed of transfer]* of land

shall be deemed *[assumed]* to include
and shall by virtue of this Act operate to convey,

with the land,

all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever,

appertaining or reputed to appertain to
the land,
or any part thereof,

or, at the time of conveyance, demised, occupied or enjoyed with,
or reputed or known as part or parcel of
or appurtenant to
the land
or any part thereof".

If this seems verbose, s.62(2) seems more so: but the intention is to cover a wide range of possibilities.

S.62(2) states:

"A conveyance of land, having houses or other buildings thereon,

shall be deemed to include,
and shall by virtue of this Act operate to convey,

with the land, houses, or other buildings,

all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights and advantages whatsoever,

appertaining or reputed to appertain to
the land, houses, or other buildings conveyed,
or any of them,
or any part thereof,

or, at the time of conveyance, demised, occupied or enjoyed with,
or reputed or known as part or parcel of
or appurtenant to
the land, houses, or other buildings conveyed,
or any of them,
or any part thereof".

So if on the land U - V - W - X in our picture there is a water-tap supplied by a pipe which comes across David's retained property, Fred and Florrie receive the land together with an easement for the water-pipe, just as if the easement had been expressly set out in a deed.

Cases on s.62 include *Wright v. Macadam (1949)* (a case regarding a coal shed which we saw on page 360) and *Goldberg v. Edwards (1950)* which is a warning for all landlords. What happened in the latter case was that the landlord let a person into occupation before granting him a lease, and allowed that person to walk through a passage which formed part of the landlord's other property. This right to use the passage was only a revocable licence, but then the landlord granted the occupant a lease (making no mention of the passage) and

by s.62 the tenant got the right to use the passage (as something enjoyed with the property) as an easement which the landlord had no power to stop. (To avoid this it should have been expressly stated in the lease that there was to be no such easement.)

S.62 applies to all deeds for the change of ownership of land, freehold and leasehold, registered and unregistered, and also to mortgage deeds: but it does not apply to contracts.

D: Creation by Implied Reservation

The court will only rarely imply a reservation. If a person selling land wishes to reserve some easement or profit, he should do so expressly. Thus if David, selling U - V - W - X to Fred and Florrie, describes it simply as "the garden which is marked U - V - W - X on the attached plan and which at present belongs to David" he will not thereafter be able to use the pathway X - Z; for if he had wished to reserve an easement of way over X - Z he should have stated this expressly in the deed by which he sold the land.

In two cases however the law will recognise an implied reservation. One is where a property is completely landlocked and so its owner requires an *easement of necessity*. Thus if David's retained property does not abut onto any road and David cannot at present legally reach it, David is permitted a right of way, whose route the purchasers Fred and Florrie may decide upon. They may agree to X - Z or some other route, but having chosen it the purchasers are not allowed to change it.

Corporation of London v. Riggs (1880) and *Nickerson v. Barraclough (1981)* are cases concerning ways of necessity.

An easement of necessity is not usually available for matters other than access. The reasoning is that if a person's land lacks light, or drainage, etc., he can still use it for *something*; whereas if it lacks any means of access he cannot use it at all. But in *Wong v. Beaumont (1965)* the Court of Appeal (Lords

Denning, Pearson and Salmon) upheld an easement of necessity for a ventilation-duct for a Chinese restaurant in Exeter, on the grounds that without the duct the restaurateur could not use the premises *for the purpose for which they had been leased to him* at all. (*Wong v. Beaumont* was a case of implied grant, not implied reservation, but the point is just as relevant to reservations as it is to grants.)

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The other form of implied reservation recognised by the court is: *easements intended by both parties.* For examples see *Wong v. Beaumont* (above) and *Pwllbach Colliery Co. Ltd. v. Woodman (1915).*

Here is a typical example:- If X owns a pair of semi-detached houses and sells one of them to Y, it is implied that both parties intend the two houses, built as a pair, to continue to told each other up. Y cannot take the support away: if he demolishes his house he must take steps to see that X's house is still supported. In other words, when X sells the semi to Y, X impliedly reserves a right of support for the house he has retained.

Compare this with *Tollemache & Cobbold Breweries Ltd. v. Reynolds and another (1983)* and contrast it with *Phipps v. Pears (1964)* - the two cases on protection from weather which we saw on page 359.

Rights of support and protection are important in multi-storey blocks of flats. Y (in lower flat) cannot normally tell X (upstairs) "I am going to demolish my flat!" - nor can X tell Y, "I am going to demolish the upstairs, leaving your ceiling open to the rain!" - for there will normally be implied rights of support and protection, even if their deeds do not contain (and they usually *will* contain) express rights.

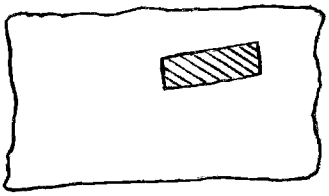
E: Creation by Implied Grant

The first two of the four methods for implied grant are the same as we have seen above for implied

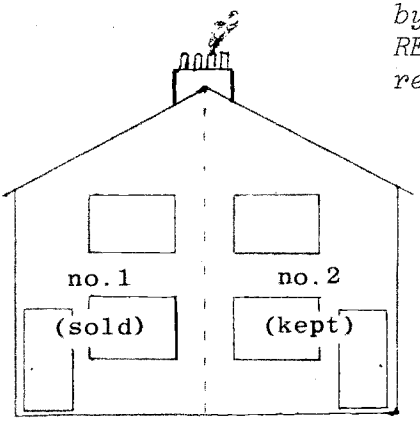
reservations, namely (i) easements of necessity and (ii) easements intended by both parties.

Thus if X sells Y an island of land - completely landlocked by other land - this is a grant of the land together with (by implication) a right of way to give access thereto; and when in the second example X with his pair of semis sold one to Y, it is implied that Y received the house together with an easement that the house retained by X would continue to support it - X is not entitled to take the support away.

If X sells Y the shaded plot, Y is entitled to a way of necessity by IMPLIED GRANT to reach his plot.



If X sells Y the entire field, except the shaded plot which X retains for himself, X is entitled to a way of necessity by IMPLIED RESERVATION to reach his plot.



X, owner of no.1 and no.2, sells no.1 to Y,

together with the implied grant of an easement
that no.2 will continue to support no.1
(so no.2 cannot be pulled down without no.1 being supported)

and impliedly reserving an easement
that no.1 will continue to support no.2
(so no.1 cannot be pulled down without no.2 being supported).

(iii) The third mode of creation by implied grant is a grant of *ancillary easements*, i.e. easements made for the enjoyment of some express right. Thus if Fred and Florrie grant their neighbour Shylock an express easement to draw water from their well, there is implied, as ancillary to this, a right of way across the garden of "Magpie Cottage" to give access to the well.

(iv) The fourth way of creation by implied grant is under the rule in the case of *Wheeldon v. Burrows (1879). (Note: this case only applies to easements, not profits.)* The *Wheeldon v. Burrows* doctrine applies if a landowner sells part of his land and keeps the rest, or if he sells part of his land to one person and the rest to another. Let us again use as our example the picture on page 391, where David has sold part of his land (i.e. the piece of garden U - V - W - X) to Fred and Florrie, and has kept the rest.

The rule in *Wheeldon v. Burrows* is:-

With the grant *(sale, gift, etc.)* of the part of the land, there pass (as easements) all quasi-easements which

(i) were continuous and apparent, or
(ii) were necessary to the reasonable enjoyment of the land granted, and (in either case)
(iii) had been - and were at the time of the grant - used by the grantor for the benefit of the land granted.

Our picture on page 391 will help to make this clear. David agrees to sell U - V - W - X to Fred and Florrie but in their contract (their agreement) they have omitted to make any mention of easements. There is a water-tap on U - V - W - X fed by a pipe coming from David's house, and whenever David has wanted pure water on U - V - W - X he has used this; but from time to time David has instead walked across to the well on the part of the garden he is retaining, and has fetched untreated water from it for use on U - V - W - X.

So the right to use the water-pipe and the right to use the well are both quasi-easements - they are rights like easements over the retained property for

the benefit of U - V - W - X, though they cannot be true easements as David is both the owner and the occupier of both properties.

The question we must consider is:- when U - V - W - X is sold to Fred and Florrie with no mention of any easements, will they receive either or both of these rights as an implied grant?

Wheeldon v. Burrows supplies us with our answer: where a vendor sells part and retains part (as here) quasi-easements which satisfy the conditions set out on page 397 pass as easements to the purchaser by implied grant.

Considering first the length of water-pipe (P-Q) under the retained land:- is this continuous and is it apparent? It is continuous, for it is there all the time, even though the tap is not in use all the time. It is also apparent: although buried, it is there to be seen by anyone with a mind to look for it. The first condition is satisfied.

It is necessary for the reasonable enjoyment of the property (for to cut off any property's piped water would be a serious loss for the property) and so the second condition is also satisfied.

We saw above that the vendor used the pipe for the benefit of the land being sold up to the time of the sale to Fred and Florrie, so the third condition is satisfied.

Therefore under the *Wheeldon v. Burrows* rule, the right to use the water-pipe exists henceforth as an easement by implied grant for the benefit of the land sold to Fred and Florrie.

Now let us consider the use of David's well. (And don't say, "Fred and Florrie don't need it: they've got a well of their own" - this has nothing whatever to do with whether they are entitled to draw water from David's well or not.) - But the using of David's well fails the first test: it is not "continuous and apparent".

Certainly the *right* for David to use the well was

continuous, but, unlike the water-pipe, there was no indication there continuously of the right - unless David used it so often that he wore a visible track on the ground. But assuming there is no visible track, there is no continuous sign of the existence of any right.

And it is not apparent: if Fred and Florrie inspected the property on Thursday and it happened that David was not using the well on that Thursday, there was nothing indicating the right to be seen by Fred and Florrie just then, however hard they looked. So, not being "continuous and apparent", was it necessary to the reasonable enjoyment of the land - this being condition (ii) on page 397? And in the circumstances of this example, the answer may well be, "No". And so it may well be that no easement to use David's well will arise under *Wheeldon v. Burrows*.

Now, having completed our examination of the rule in *Wheeldon v. Burrows* , we must take a close look at a pitfall which occasionally causes some trouble. We shall see in Chapter 36 ("Conveyancing") that the normal procedure when a vendor sells a property to a purchaser falls into two main parts. The first part leads to the signing of the contract, by which the vendor promises to sell and the purchaser promises to buy at the agreed price. Then later (it is often about a month later) a deed will be executed by which the actual transfer of the legal estate from vendor to purchaser takes place. The difficulty stems from the legal rule that s.62 of LPA (which we saw on page 393) applies to the deed, but s.62 does not apply to contracts so the rule in *Wheeldon v. Burrows* will apply instead.

Can we see the result this produces on our above example. The contract has omitted to mention any easements but by the rule in *Wheeldon v. Burrows* the right to use the pipe passes as an easement while the right to use the well (being neither continuous and apparent nor necessary) does not. About a month later the deed is executed, and if the deed describes the property in the same terms - word for word - as the contract (which is quite common) there is again no

mention of any easements. S.62 is the rule applicable to deeds - and s.62 says the purchaser receives as an express grant (as if expressly granted) "all ... rights and advantages ... appertaining ... to the land ..." - and both the right to use the water-pipe and the right to use the well come within this definition.

So by the contract (plus the *Wheeldon v. Burrows* doctrine) Fred and Florrie are entitled to the one right, and by the deed (because it uses identical wording but is subject to a different rule of law: s.62) Fred and Florrie have been granted the two rights.

They can only keep the one, for the deed is only meant to give them what they are entitled to under the contract; therefore David is entitled to rectification of the deed so that only the one right, the right to use the water-pipe, passes. Rectification will generally involve the expenditure of time and energy in drawing up a further deed which somebody (e.g. the solicitor who let this situation arise) must pay for.

In *Sovmots Investments Ltd. v. Secretary of State for the Environment (1979)* the House of Lords quashed a compulsory purchase order on 36 maisonettes in the large London building known as Centre Point. The reason for this decision was that certain rights, which were not included in the compulsory purchase order, did not arise under *Wheeldon v. Burrows* (because they did not fulfil condition (iii) on page 397) and also did not pass under s.62 - and without these rights the maisonettes could not be used for housing purposes.

F: Creation by Presumed Grant (Prescription)

There is more to be said on Prescription than on all the other five methods of creating easements and profits put together. Therefore it is best to give it a chapter of its own. Please see Chapter 30.

For summary and test questions on Chapter 29, please see page 417.

CHAPTER 30

PRESCRIPTION

OUTLINE OF CHAPTER:-

A: What is Prescription?
B: Requirements of prescriptive rights
1. nec vi, nec clam, nec precario
2. not against a leaseholder
3. "continuous"
C: Length of prescription period
1. at common law
2. by "lost modern grant"
3. under the 1832 Prescription Act
(A) the Act and how it works
(B) the 19 years and 1 day rule
(C) how to count years
(D) rights of light
D: Final note on Prescription

A: WHAT IS PRESCRIPTION?

Prescription is the creation of an easement or a profit à prendre by a presumed grant. There are three types of prescription (namely prescription (i) at common law, (ii) by "lost modern grant" and (iii) under the 1832 Prescription Act) but all three are based on the same principle, namely:- If enjoyment of a right without hindrance for many years is shown, the court will uphold the right by *presuming* that it had a lawful origin.

For an example, we shall use that footpath X-Y through the garden of "Tiny Nook" - see page 406. We first saw this illustration on pages 74 and 107 where we saw Fred and Florrie with a right of way by deed (a legal easement) and Clara and David with rights of way by informal documents (Equitable easements). The Smiths and Clara and David all have express grants. But Shylock has used the path X-Y for more than twenty years without any consent whatever. The court will, in certain circumstances which we must now look at, uphold this as a legal right by presuming that there was once

an actual grant of it, even though no evidence of any such grant can be produced.

Once a right by prescription has arisen, it is a legal easement or profit, holding good against the whole world for ever; and if it runs over registered land it counts as an overriding interest, good without being shown at the Land Registry. So, before acknowledging such a right, the law looks to see whether the right claimed really has been used without objection for a lengthy period.

B: Requirements of Prescriptive Rights

For a legal right by prescription to come into existence, three conditions must be fulfilled:-

1. it must be *nec vi, nec clam, nec precario*,
2. it must not be against a leaseholder,
3. it must be "continuous".

1. NEC VI, NEC CLAM, NEC PRECARIO

The easement or profit claimed must have been used as though the person using it had a right. Throughout the whole period of use, this must have been done *nec vi, nec clam nec precario* - i.e. neither by force, nor secretly, nor by consent.

Thus if I join my drain into my neighbour's sewer and (a) I use it with his permission (i.e. *precario*) or (b) I insist on using it despite his protests (i.e. *vi*) or (c) I made the connection at dead of night and am using it without his knowledge (i.e. *clam* - it actually happened in *Liverpool Corporation v. Coghill (1918)*) this will never provide grounds for an easement by prescription.

2. A RIGHT BY PRESCRIPTION DOES NOT ARISE AGAINST A LEASEHOLDER

Rights by prescription can only be acquired in fee simple and against a fee simple occupier: they cannot (generally) arise for a term of years (though a

leaseholder can acquire a right by prescription on behalf of the freeholder) - and cannot arise against anyone other than a freeholder.

Thus in our example of Shylock acquiring a right over the path X-Y on "Tiny Nook", a tenant of Shylock's might acquire the right on Shylock's behalf; but if "Tiny Nook" (the servient tenement) were leased to a tenant no right could be acquired, for the fee simple owner (having no right to be on the land while it is tenanted) is not in a position to stop Shylock.

Before prescription can arise, there must be a situation where:-
(a) the servient freeholder knows what is being done,
(b) he could put a stop to it (or take court action) and
(c) he does not do so.

Thus a claim may be by a fee simple owner or his agent (including his tenant) but may only be against a fee simple owner-occupier.

3. THERE MUST HAVE BEEN "CONTINUOUS" USE

The right claimed must have been "continuously" used: this does not mean it must have been used every day; to show it was used as and when required is sufficient, so long as the gaps between the occasions on which it was used are not excessive.

In *Davis v. Whitby (1974)* it was held that where a path had been used for many years, the re-routing of part of the path (by agreement) fifteen years previously did not prevent a right by prescription from arising. (But if there had been closure of the whole of the old path and replacement of it by a new path, the result might well have been different.) And if a way becomes blocked, there is no right to deviate without the landowner's consent unless it was the landowner himself that blocked it - *Selby v. Nettlefold (1873)*.

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If it is shown that the road, pathway, drain or other subject of the claim has been used for a number of years *nec vi nec clam nec precario*, and against a

fee simple occupier, and "continuously", the next question is:- HOW LONG a period must be proved for a legal right by prescription to arise?

C: Length of Prescription Period

Prescription may be any one of three types:-

1. Prescription at common law,
2. Prescription by "Lost Modern Grant", and
3. Prescription under the 1832 Prescription Act.

The length of the period which must be shown is different for each type.

1. PRESCRIPTION AT COMMON LAW

Common law required proof that the right claimed had been enjoyed (i.e. used) since time immemorial.

In the eleventh and twelfth centuries the common law from time to time fixed a "limit of legal memory" - e.g. "the beginning of the reign of Henry I" or "the last voyage of Henry II to Normandy" - and actions for recovery of land could not be brought if the claimant was dispossessed before the date fixed. In its day this prevented the bringing of stale claims - but the last date so fixed was the first year of the reign of Richard I, i.e. 1189. Today there are quite different rules for limiting the recovery of land - see Chapter 43 - but 1189 has remained the relevant date for proof of custom and for prescription. To sum it up:-

"Time immemorial" means the year 1189.

If enjoyment is shown for over 20 years, with no explanation of how it began, the court will assume it dates back to 1189. Similarly if enjoyment is shown for *under* 20 years but supporting circumstances are shown which raise a presumption of enjoyment ever since 1189, the court will assume it dates back to that time.

Evidence that it cannot, or does not, date back to 1189 defeats the claim. (Thus it cannot give a right of light to a window, unless the building was erected before 1189.) Evidence that, at any time since 1189, the dominant and servient tenements have both been in the occupation and ownership of a single owner also defeats the claim.

Thus in our picture, if Shylock and his predecessors have used the path X-Y for over 20 years there is a presumption that enjoyment of the path goes back to 1189 - but if some elderly inhabitant of the neighbourhood gives evidence that she remembers that the path X-Y did not exist (and no-one ever walked across there) prior to 1910, a claim to a legal right of way by prescription under this heading fails.

Similarly, if it were shown that (say) 500 years ago there was a deep pond on the land where the path now runs, Shylock's claim under this heading would fail, even if the path had been used for 450 years.

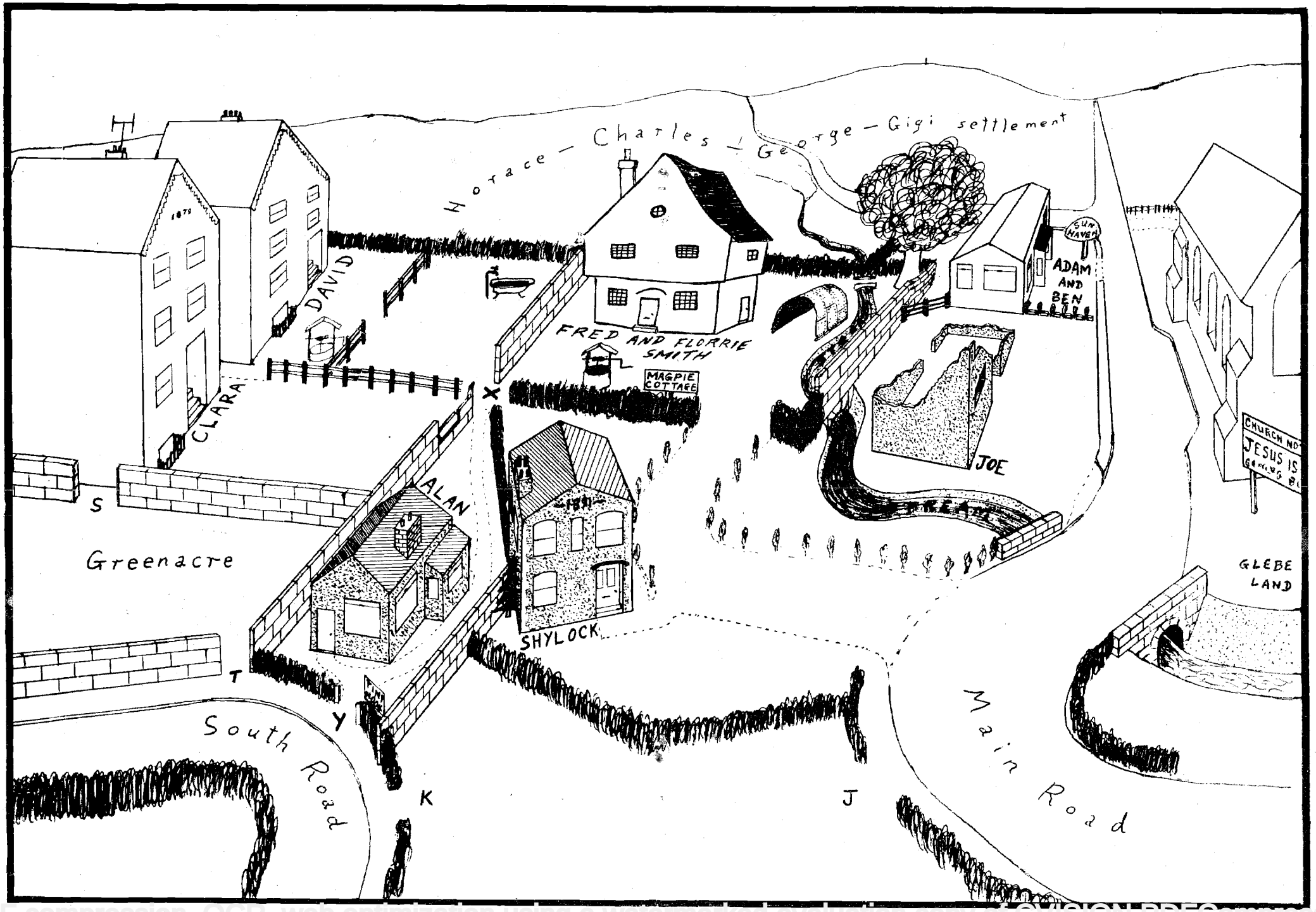
In view of these shortcomings of common law prescription, something further was needed, and therefore there developed the doctrine of:-

2. PRESCRIPTION BY "LOST MODERN GRANT"

The "revolting fiction" (as Mr. Justice Lush called it) of Lost Modern Grant applies if (a) there has been enjoyment for 20 years, and (b) common law prescription fails because the enjoyment is shown to have started later than 1189. In such cases the court will presume that a legal grant was made by deed in more modern times (a "modern grant") and that unfortunately(?) the deed has been lost.

Perhaps this idea originated in a case where this had in fact happened. At any rate, in its original form it was only a suggestion. ("The court may if it so wishes presume that there was a deed which has been lost.") As the doctrine developed it became stronger. ("The court is recommended to presume...") Then it became mandatory. ("The court shall presume it even if neither the Judge nor the parties have the slightest belief that there ever was such a deed.")

In *Tehidy Minerals Ltd. v. Norman and others (1971)* - a case concerning a profit à prendre of pasture; the facts are outlined on page 410 below - the Appeal Court confirmed that "the law will adopt a legal fiction that such a grant was made, in spite of any direct evidence that no such grant was in fact made". So even if there



is evidence that there was no deed of grant, the doctrine still applies and the court must assume that there was a deed of grant and it has been lost.

On the other hand, if throughout the whole period of the enjoyment there has never been anyone capable of making a grant, a claim under this heading would fail.

Let us consider two defects in the "lost modern grant" doctrine:-

(a) For this doctrine - and also for prescription at common law - there is no set period of required enjoyment. A period of round about twenty years (depending on the circumstances of the individual case) is normally sufficient, but the period has never been made definite.

(b) More serious, in the days when it was normal to have a jury for such cases, the difficulties of getting a jury to understand and accept the fiction ... let us picture the scene in an imaginary case:-

Judge: "Gentlemen of the jury, have you come to a decision?"

Foreman of Jury: "Yes milord, and we find that there can be no right of way in this instance because we are all agreed there was never any deed granting one."

Judge: "I agree there may have been no deed, but you should assume that there was one."

Foreman (nervously): "But we have considered the evidence most carefully milord, and we are all sure that there was no deed."

Judge: "I know that; but treat it as though there was one!"

Foreman (knees knocking): "But there wasn't!"

Judge: "I don't care: go and say there was!"

Foreman: "But..." *(knees knock harder and he sits down; press reporter in court scribbles furiously...)*

To reduce the difficulties of prescription the 1832 Prescription Act was passed, but the Act is unduly complicated because of its poor drafting, and common law prescription and/or "lost modern grant" can apply to certain cases which the Act does not cover. All three forms are therefore current today. In the *Tehidy Minerals* case (pages 405 above and 410 below) the Appeal Court remarked: "The co-existence of three separate methods of prescribing is anomalous and undesirable, for it results in much unnecessary complication and confusion. We hope that it may be possible for the Legislature to effect a long-overdue simplification in this branch of the law". The matter was looked into by the Law Commission, but nothing was done about it, and so at present the position remains that the three different methods are available. Claims are usually brought under all three headings in the hope that if one of them fails another will succeed.

3. PRESCRIPTION BY 1832 PRESCRIPTION ACT

An advantage of the 1832 Act is that it specifies definite periods. For the Act to apply it is necessary to show, for easements, 20 years enjoyment; and for profits 30 years. The claim fails if it is shown that the enjoyment was by permission (i.e. it was *precario*) whether the permission was oral or written.

If there can be shown for an easement 40 years enjoyment, or for a profit 60 years, a right by prescription arises under this Act even if the enjoyment began originally by oral permission - but it fails if it was enjoyed by written permission.

After written permission, no legal easement or profit can arise, however long it is used - but the permission may constitute an Equitable right by informal express grant - which the dominant owner should register - see page 106.

So the periods required by the 1832 Act may be summed up as:-

	EASEMENTS	*PROFITS*	
if no consent	**20**	**30**	*(if any consent given, the claim fails)*
if oral consent	**40**	**60**	*(if written consent given, the claim fails)*
if written consent	**no legal right**	**no legal right**	

Unity of *possession* at any time during the period is fatal under the Act. This is not so with common law prescription, though a claim to "time immemorial" would be defeated by proof of unity of possession *and ownership*.

S.4 of the 1832 Act provides that for prescription to arise under the Act the claimant must show user for the 20, 30, 40 or 60 year period *next before* (i.e. immediately before) the bringing of the claim; and that if any interruption of the enjoyment is acquiesced in for one year, the rights under the 1832 Act are lost. But this does not apply to common law prescription nor to "lost modern grant".

In *Davies v. du Paver (1953)* the blockage (a fence) had existed for 14 months but had not been acquiesced in - on the contrary, "the parties were breathing fury on each side of a newly-erected fence", as the Court of Appeal said - and so the right under the 1832 Act had not been lost.

In *Tehidy Minerals Ltd. v. Norman and others (1971)* the facts were as follows:-

from 1920 to 1941: **certain farmers (the defendants or their predecessors) grazed their cattle on certain land;**

in 1941 **the grazing ceased as the land was requisitioned by the Ministry of Agriculture and Fisheries;**

in 1954 **a licence for grazing was granted to a**

commoners' association of which the defendants were members; *(the land was de-requisitioned)*

in 1966 **after the purported termination of the licence, a fence was erected by a potential purchaser of the land, with the consent of the landowners (the plaintiffs) - and the defendants promptly demolished the fence;**

an action was then brought against the defendants for trespass, and an injunction was sought preventing them from continuing to graze their cattle on the land;

the defendants put forward the defence that they had a prescriptive right by the 1832 Act, or alternatively by common law, or alternatively by "lost modern grant".

(The court normally applies the three methods in this order: the Statute first, then common law, and finally, if both other methods fail, the fiction.)

As to prescription under the 1832 Act, the Appeal Court held that, while the prevention of user from 1941 to 1954 might well not count as an "interruption" (since neither the dominant nor the servient owners had any choice in the matter) the Act nevertheless required the showing, for a profit à prendre, of 30 years user *next before* the claim. As there was no such user the claim under the Act failed.

But the 1832 Act did not do away with common law prescription and "lost modern grant". In the case we are examining common law prescription fails as the evidence was that user clearly did not go back to 1189; but so far as "lost modern grant" is concerned, even though the claim under the 1832 Act fails, the court will presume there was a deed, which was lost, *where on the evidence the court would have done so before the Act.*

"Lost modern grant" requires, for a profit à prendre, 20 years user (not 30) and this need not be

"next before" the claim. In the *Tehidy Minerals* case, such a period could be shown (from 1920 to 1940) and so the defendants won their case: the court assumed a grant had been made in 1920 and had been lost. (Actually the court assumed that five grants for five separate farms had been made in 1920 and that all five of them had been lost!)

Note two further points as to the 1832 Act:-

(1) Under the Act the easement or profit does not exist automatically at the end of the statutory period: what exists is the right to go to court and obtain a decision that a legal easement or profit exists. And he has one year to do so:-

(2) The Act does not recognise interruptions as existing until they have been acquiesced in for a year; the person whose enjoyment is interrupted needs to issue a writ within the year or protest at fairly frequent intervals (for a protest counts as non-acquiescence for a short period of time - see *Davies v. du Paver*, above) - if he acquiesces for a year his rights under the Act are lost.

The rule that an interruption of enjoyment is not recognised until it has been acquiesced in for a year can have an odd result if an obstruction is created shortly before the prescriptive period has elapsed. Take for example the case of someone who has used a path for 19 years and 1 day:-

(B) The 19 Years and 1 Day Rule

1st. April 1965 X begins to use Y's path.

2nd. April 1984 Y blocks it. *(X has not yet enjoyed the path for 20 years; he must be patient.)*

1st. April 1985 It is 20 years since X began to use the path; the right for X to make a claim arises on this day.

2nd. April 1985 The path has been blocked a full year; if X has not made a claim he loses all rights which the 1832 Act gave him.

Thus there is a single day, 1st. April 1985, on which X can issue his writ. Before that date he has no right. After that date, his right under the 1832 Act is lost - though in some cases he might still succeed in a claim based on "lost modern grant".

In *Flight v. Thomas (1841)* in which the plaintiff's light was blocked after 19 years and 330 days, the plaintiff won the case on the basis of this rule.

(C) How to count Years

If the servient owner was for a time an infant or a lunatic, or a tenant for life, or if the property was let to a tenant, there are further provisions:-

(a) In calculating the 20 year or 30 year period, discount any time that the owner of the servient tenement was *an infant, a lunatic or a tenant for life.*

Thus if Shylock has walked over the path X-Y since 1955, but for the eleven years from 1958 to 1969 the owner of the servient tenement "Tiny Nook" was of unsound mind, 20 years user is completed not in 1975 but in 1986. (1955-58 = 3yrs., 1969-86 = 17: total 20.) Until then, Shylock can be stopped.

(b) In calculating the 40 year period *(note that this provision does not apply to the 60 year period)* if the claim is in respect of any right of "way or other convenient watercourse or use of water" ... oh dear. Something has gone wrong with the wording of the Act, for a way is not a watercourse - or if it is, it is not convenient! *(Possibly it was meant to be, "way or other easement or watercourse"?)* - Never mind; we cannot tell if this provision applies to all easements except light, or only to rights of way and water, but we must take the statute as it is. Here is the provision:-

In calculating the 40 year period (regarding any right of way or other convenient watercourse or use of water) discount any time that the owner of the servient tenement was a *tenant for life*, or the servient tenement was held on *a lease for a term exceeding three*

years provided that the claim is resisted by the reversioner (and this does not include a remainderman!) within three years of the end of the term.

Thus if Shylock has walked over the path X-Y since 1945, the fact that the owner of the servient tenement was of unsound mind from 1958 to 1969 makes no difference *(lunacy affects the 20 year period but not the 40)* - but the fact that the servient tenement "Tiny Nook" was let to a tenant on a four years lease from 1980 to 1984 affects the situation, for 40 years user would not be completed until 1989, instead of 1985, *(so Shylock's claim will fail)* as long as Alan in "Tiny Nook" resists Shylock's user of the path by 1987 *(i.e. within three years after the end of the lease).*

Just one further thought on this ill-worded, unnecessarily-complicated and (very probably) self-contradictory 1832 Prescription Act, before we proceed further. Clara (in the house at far left of picture on page 406) has enjoyed a path S-T across the plot "Greenacre" from her house to South Road, since 1930. Last week the landowner Edward stopped her, and so she is claiming an easement under the 1832 Act. "I shall claim a 40 year period," she says, "and then there is no risk of Edward saying I had oral permission before I started". What has not occurred to her is that the plot was let to Tom from 1932 until last year: on a 40 year claim this must be deducted, while on a 20 year claim it need not be. So, if she claims to have been using for 40 years, all she can prove is: 3 years. But if she claims 20 years, she is likely to succeed - provided that no oral permission can be proved. So, even though she has used it since 1930, it is better to claim (in this case) 20 years than 40. *(The position on the 20 year claim would have been different if the servient tenement had already been leased when her enjoyment of the path began, for then Edward would not have been freeholder in occupation: see heading 2 on page 402.)*

[Edward later sold "Greenacre" in fee simple to Alan, the owner of "Tiny Nook". This is why Alan appears as owner of both "Tiny Nook" and "Greenacre" in Chapter 34.]

(D) Rights of Light

There is a special provision under the 1832 Prescription Act for rights of light. There is only one period for them - 20 years - and it is only necessary to show actual enjoyment. Even 20 years of wrongful enjoyment is sufficient: there is no need for it to have been *nec vi nec clam nec precario* - except that if written permission was given the claim fails.

In the aftermath of the second world war, many instances could be seen where windows had been opened up in the 1941 "blitz" by the bombing of the premises which overshadowed them, and (as the post-war building restrictions and shortages of materials would prevent the blitzed buildings from being rebuilt within 20 years) such windows would obtain an easement of light by 20 years enjoyment, in 1961.

To prevent this the 1959 Rights of Light Act was passed. This contained two main provisions. One was a proviso (now more or less obsolete) whereby the prescription period was extended from 20 years to 27 in respect of certain cases arising out of war damage.

The second and more important provision created the power to "erect a notional barrier" to prevent an easement arising. By this provision, instead of blocking the light by erecting a hoarding (which requires planning permission and is sometimes structurally difficult) a notice can be served on the person who is to be prevented from acquiring a right.

In short, the Act provides a new way of preventing easements of light from arising: a way of blocking the *right*, without physically blocking the *light* - don't erect a billboard, serve a notice!

The notice (which must be supported by a certificate from the Lands Tribunal and is registrable as a land charge) counts as an obstruction of the light for a year, known to and acquiesced in by all concerned. The person affected may take any legal action he could have taken if his window had been physically obstructed; and for this purpose he can treat his right as having

begun a year earlier than it actually did, if it would otherwise be subject to the "19 years and 1 day" problem which we saw above.

An easement of light, unlike profits and other easements, cannot be acquired against the Crown.

D: Final Note on Prescription

Easements by prescription are legal rights and are not registrable at the Land Charges Registry. Even in respect of registered land (on which they can be protected by entry in the Land Registry) they count as "overriding interests" (see page 115) and so they are binding even if not on the Register.

In the nature of things this is the only workable way. We must remember that we are not dealing with legally-informed persons when we deal with prescription. Our example is in this respect typical: we are dealing with Shylock, the local butcher, who walks over the land of Alan who is a dentist. Neither of them has ever heard of the Land Registry or the Land Charges Registry. They have no idea that 20 years is of any importance; all they have is an innate vague sense of justice: "I've done it for donkey's years: doesn't that give me the right to?" The idea of any positive action such as registration, or drawing up a document, or even seeing a solicitor to find out if anything is needed, would just never enter their heads.

SUMMARY of Chapters 29 and 30

In these two chapters we have seen the six ways of creating easements and profits à prendre.

In Chapter 29 we saw:-

1. creation by Statute
2. creation by express reservation
3. creation by express grant
   (including s.62 of 1925 LPA)

4. creation by implied reservation
   (of necessity,
   or mutually intended)
5. creation by implied grant
   (of necessity,
   or mutually intended,
   or ancillary,
   or under Wheeldon v. Burrows)

and in Chapter 30 we saw:-

6. creation by presumed grant (i.e. Prescription)
   (nec vi nec clam nec precario,
   against a freeholder,
   and "continuous")

length of prescriptive period

(1) at common law: time immemorial: 1189 - but user for about twenty years raises a presumption that it goes back to 1189 unless there is proof that it does not

(2) "lost modern grant": show about twenty years user and the Court will assume there was originally an express grant by a deed which has been lost - as in Tehidy Minerals Ltd. v. Norman and others

(3) 1832 Prescription Act: requires twenty years user (forty if by oral permission) for easements; and thirty years user (sixty if by oral permission) for profits

Blockages of less than a year do not count under the 1832 Act

"nineteen years and one day" rule

Easements of light under 1832 Act require twenty years only

Notice to prevent prescriptive easement of light from arising can be served under 1959 Rights of Light Act

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TEST QUESTIONS on Chapters 29 and 30:-

1. Describe with examples the difference between grants and reservations of easements.

2. Compare and contrast the three types of Prescription and consider how they could be improved.

3. The following ten persons use a track across X's freehold field. Advise each of them (with reasons) whether he has a right to do so:-

   A has written permission granted by a deed of easement dated 1950;

   B has written permission granted in consideration of £1 by a letter dated 1917;

   C has a letter saying, "You can use the track until further notice, free of charge", dated 1918;

   D has written permission by a signed contract in consideration of £5, dated 1970;

   E was originally granted oral permission and has been using the track for $37\frac{1}{2}$ years;

   F has no permission at all and has been using the track for $19\frac{1}{2}$ years;

   G is a poacher who has used the track secretly since 1945;

   H (the former owner of X's field) has used the track ever since he sold the field to X (keeping the adjoining field for himself) five years ago;

   I is able to prove that the track has been used by him and his ancestors since Henry VIII's reign, except that it was not used from 1977 to 1979;

   J used the track from 1917 onwards, and was given a court declaration that he had a prescriptive right in 1939, but has not used it since 1943.

4(a) X owns a house and an adjoining orchard in fee simple. X sells the orchard to Y but forgets that the house-drains run under the orchard. Y blocks the drains. Advise X (with reasons) of his rights.

(b) X owns a house and an adjoining orchard in fee simple. X sells the house to Y but forgets that the house-drains run under the orchard. Advise Y whether he can use the drains.

5. Can I stop my neighbour from building a shed which reduces (a) my light (b) my view and (c) the wind to my clothes-drying area?

CHAPTER 31

EXTINGUISHMENT OF EASEMENTS AND PROFITS

OUTLINE OF CHAPTER:-

Easements and profits may become disused, out-of-repair, or overgrown, but they do not thus cease to exist. On the other hand they *can* come to an end by

A: express release
B: implied release
C: unity of ownership and occupation
D: statute
  1. through Inclosure
  2. through Approvement
  3. through lack of Registration.

A: EXPRESS RELEASE

At law a deed is required for express release, but Equity will recognise an informal express release if the circumstances are such that it would be inequitable for the dominant owner to claim that the right still existed - e.g. if the dominant owner has informally released an easement of light, and the servient owner, relying on this release, has built in a manner which blocks the light.

B: IMPLIED RELEASE

Release can be implied if some positive intention to abandon the right is shown. Thus, in our picture, if Fred and Florrie erect a fence at X so that there is no longer access between their garden and the right of way X-Y, this might be sufficient to show an implied release of the right - but mere non-user and letting stinging-nettles and brambles block the access (even for many years) would not destroy the right.

C: UNITY OF OWNERSHIP AND OCCUPATION

We have seen (page 357) that if the dominant and servient tenements have (a)the same owner but different

occupiers, or (b) the same occupier but different owners, an easement or profit can exist; but if they have (c) the same owner and the same occupier, an easement or profit cannot exist. Therefore, if the dominant and servient tenements come into the same ownership and occupation, any easements and profits of the one over the other are thereby extinguished.

If the owner of the two properties subsequently sells the one which had been the servient tenement, the rights do not automatically come back into existence: if the vendor wants to reserve these rights for the benefit of his retained "dominant tenement" it is up to him to make express reservations of them. If he does not do so, no rights arise except easements of necessity and "mutually intended" easements, as we saw on pages 394-396.

If the owner retains the "servient tenement" and sells the "dominant tenement", the rights again do not automatically come back into existence: but by implied grant the purchaser will receive rights of the types we saw on pages 395-397, namely rights (i) of necessity, (ii) "mutually intended", (iii) ancillary, and (iv) under *Wheeldon v. Burrows*. In particular, note that the purchaser will receive all continuous and apparent, or necessary, easements which satisfy the requirements of *Wheeldon v. Burrows*. As he receives these as new easements, not as resurrections of the old ones, they will not necessarily be in an identical form to the old ones. (Reminder: *Wheeldon v. Burrows* is only applicable to easements, not profits.)

D: Statute

There are three possibilities for us to note under "extinguishment of easements and profits by Statute", namely:-

1. through Inclosure
2. through Approvement
3. through lack of Registration.

Let us look at each of these in turn.

1. THROUGH INCLOSURE

By the many Inclosure Acts after the mid-eighteenth century vast areas were inclosed, changing the face of England from a land of large fields and "manorial waste" (the waste land between one village's fields and the next) to the small-field countryside which we know (though in some places it is disappearing due to modern farming methods) today. As the land was inclosed the rights of common came to an end by virtue of the Inclosure Acts.

Owing to the disappearance of open spaces, the 1852 Inclosure Act prevented further inclosures from being made without the consent of Parliament. Inclosure is still possible today: it involves an application to the Secretary of State for the Environment (or in Wales the Secretary of State for Wales) followed by a local public enquiry.

2. THROUGH APPROVEMENT

Approvement (i.e. the Lord of the Manor taking a part of the manorial waste for his separate enjoyment) can be applied only to *part* of the manorial waste, and takes away only commons (appendant and appurtenant) of pasture, whereas inclosure is applicable to the whole of a manor's waste and takes away all common rights. Approvement is an ancient right: the Statute of Westminster II (1285) confirmed it but obliged the lord to leave enough land for the commoners' needs.

Today anyone seeking to "approve" (i.e. take) common land other than under the strict procedure for inclosure must advertise his intention in the press; a local enquiry and eventual consent from the Secretary of State for the Environment (or Wales) is also needed.

3. THROUGH LACK OF REGISTRATION

By the 1965 Commons Registration Act, all rights of common (except those held for leasehold terms) had to be registered with the appropriate local authority

by 31st. March, 1970, as we saw on page 380. Since that date, no unregistered rights of common have been exercisable.

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And this ends our examination, spread over the last five chapters, of the nature of easements and profits, the six ways of creating them, and the four ways of extinguishing them.

SUMMARY

In this chapter we have seen the termination of easements and profits à prendre

1. by express release
2. by implied release
3. by the dominant and servient tenements both coming into the ownership and occupation of one person
4. by Statute, either (1) by Inclosure, or
   (2) by Approvement, or
   (3) because of failure to register a profit à prendre in common by March 1970 under the 1965 Commons Registration Act.

TEST QUESTION on Chapter 31:-

(a) Compare and contrast Approvement and Inclosure;

(b) Compare and contrast express and implied release;

(c) What types of profit à prendre are brought to an end
   (i) by not having been registered under the 1965 Commons Registration Act, and
   (ii) by unity of ownership and possession of the dominant and servient tenements?

Section C (Chapters 32 - 33)

Licences, Wayleaves and similar Rights

CHAPTER 32

LICENCES

OUTLINE OF CHAPTER:-

A: Definition and Introduction
B: Four types of Licence:-
1. bare licence
2. licence coupled with a grant
3. contractual licence
4. licence by estoppel
C: a final comment

A: DEFINITION AND INTRODUCTION

A licence is a permission to do some act which would otherwise be a trespass: thus the small boy who knocks on my door and says, "Please Mister can I go in your garden to get our football back?" is really saying "Please will you give me a licence to enter upon your realty in circumstances which otherwise would constitute a trespass, in order to recover an item of personalty".

As we study licences, one of the facts which becomes most clear is the fact that the law on licences is at present not clear. Until a few years ago it appeared that, with rare exceptions, licences were purely personal - they formed no part of Real Property Law. Now it is appearing more and more that this may not be so.

A licence does not confer any legal estate or interest, and it is by no means certain that it confers even so much as an Equitable interest - yet leading writers on Real Property Law believe that in licences we may well be seeing the gradual birth of a new type of right *in alieno solo*.

There is no limit to the types of activity for which a licence may be granted. Examples of licences include:

(a) a grant of permission for the boy (above) to recover his football,

(b) a grant of permission for some person to walk across another's land until further notice *(right which looks remarkably like an easement except that it is revocable)*

(c) an agreement for an advertisement to be placed on a wall (as can be seen on various buildings around Piccadilly Circus in London) in return for a payment of £... per year,

(d) living in lodgings, and

(e) a temporary arrangement for someone to occupy a house *(a right looking very much like a lease except that it is revocable at any time: an example of how such a right can occur appears on page 536).*

In the above examples, (a) and (b) are not in return for any consideration; they are "bare" licences and can be revoked at any time. Example (c) is a contract in consideration of £... per year (a "contractual licence"), (d) is also contractual, and (e) might be either bare or contractual.

The law appears to recognise four types of licence, namely:-

1. a bare licence,
2. a licence coupled with a grant,
3. a contractual licence, and
4. a licence by estoppel.

B: Four Types of Licence

1. Bare Licence

The bare licence, not in return for any consideration, can be revoked at any time, though on revocation the licensor must give the licensee reasonable time to leave the property. The licensee cannot assign his right to anyone else, and if the property changes hands he cannot enforce his licence against the new owner. Being purely personal between the licensor and the licensee, the bare licence in no way affects the land and is therefore no part of Real Property Law.

2. LICENCE COUPLED WITH A GRANT

As long ago as 1673 (in *Thomas v. Sorrell*) it was held that "a licence to hunt in a man's park and carry away the deer killed to his own use; to cut down a tree in a man's ground and to carry it away, the next day after, to his own use, are licences as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and the tree cut they are grants" *(i.e. profits à prendre)*.

In other words, although the right to hunt in this case is only granted as a licence, the right to *take* the deer is a profit à prendre which, like an easement, can be assigned, and can be enforced against the new owner if the land changes hands - and the licence to hunt goes hand in hand with the profit à prendre. Thus a licence which is coupled with a grant of an easement or profit may affect the land - may be a sort of right *in alieno solo*.

The grant of the profit in the above example, not being made by deed, is only Equitable; but nevertheless, if it satisfies the requirements as to Equitable rights - namely, there is writing, the grant is in return for some value, and there is (for a pre-1926 right) notice or (for a post-1925 right) registration: see pages 76 and 106 - the profit is enforceable against the landowner, whether he owned the land at the time the grant of the profit was made, or bought the land later.

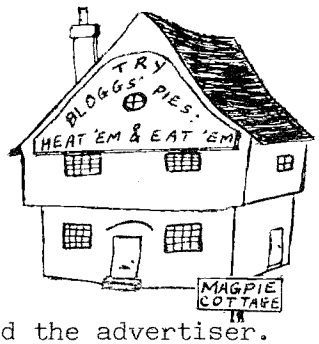
This can make the licence irrevocable, for Equity could grant an injunction to prevent the licensor or any of his successors from revoking the licence, if the revocation of the licence would prevent the full enjoyment of the profit. Similarly the licence is assignable, for a profit à prendre can be assigned, and the licence goes with the profit.

3. CONTRACTUAL LICENCE

At common law there appears to have been a right to revoke any licence as to land which was not coupled with a grant, even if to do so amounted to a breach of

contract. Damages for breach of contract, but no rights concerning the land, could be obtained. Thus a theatre-goer forcibly ejected before the end of the performance would in Victorian times have had only a contractual right, to sue for the price of his ticket.

The position now however appears to be that the rights of the parties to a contractual licence must be decided upon the proper construction of the contract. Thus a theatre-goer today is a licensee with a right to occupy his seat until the performance is over: during the performance the licence is irrevocable (provided he does not misbehave) and if ejected before the end he could claim substantial damages, for assault - which is what happened in *Hurst v. Picture Theatres Ltd. (1915).*



Similarly the length of time that the advertisement for Bloggs' meat pies could remain on the wall of "Magpie Cottage" - assuming that the advertisement does not contravene planning regulations (see Chapter 45) - would depend on the proper meaning of the contract between Fred and Florrie Smith and the advertiser.

Whether a contractual licence is good against a third party (e.g. against a purchaser of "Magpie Cottage") is not clear. The present view seems to be that it can hold good - possibly on the principle of estoppel as in *E. R. Ives Investment Ltd. v. High (1967 - see page 108).* Lord Denning has supported the view that contractual licences can hold good against successors in *Errington v. Errington & Woods (1952), Binions v. Evans (1972), D. H. N. Food Distributors v. Tower Hamlets (1976)* and other cases.

4. LICENCE BY ESTOPPEL

Estoppel is a rule of evidence whereby certain statements, once they have been made, cannot subsequently be denied in court. For example a

man who lets a vacant house and receives rent as "landlord", by saying he is the fee simple owner when in fact he is not, cannot subsequently escape from his responsibilities as landlord (e.g. responsibilities for repairs) by denying that he is the owner. The court will not permit such a denial to be given in evidence.

By the same rule, or an extension of it, the court will not allow a licensor inequitably to say that a licence has been revoked, if the licensor has let the licensee spend money in reliance on having the licence. We saw an example of this in the judgments of Lord Danckwerts and Lord Winn in *E. R. Ives Investment Ltd. v. High (1967). (The student is advised to have another look at these judgments at this point - see page 109.)*

It is necessary to distinguish between *promissory* estoppel and *proprietary* estoppel. Both of these are matters of Equity, but let us look at estoppel at common law first.

ESTOPPEL AT COMMON LAW:-

Estoppel arises at common law because of conduct - i.e. because of something the plaintiff in the case has done, or because of some representation (i.e. encouragement) he has given.

For example, if the plaintiff has pretended to be the landlord (as in the example on the top line of this page) the plaintiff will be estopped at common law from saying he is not the landlord.

But common law does not recognise estoppel arising out of a promise.

ESTOPPEL IN EQUITY (I)

Estoppel arises in Equity because the plaintiff made a promise: once the defendant has done some action in reliance on that promise, the plaintiff cannot thereafter give evidence that the promise was not to be relied on. This form of Equitable estoppel is the form known as PROMISSORY ESTOPPEL. It was not really generally recognised until 1947, when Mr. Justice Denning (as he then was) propounded it as a doctrine in the case of *Central London Property Trust Ltd. v.*

High Trees House Ltd. (1947) - usually known as the *High Trees case*.

The facts of the *High Trees case* were as follows. In 1937 the plaintiff granted the defendant a lease (by deed, signed sealed and delivered) of a new block of flats in London, at a rent of £2,500 per year for the whole block. The intention was that the defendant would sublet the flats to individuals and would collect normal rents from them; and after paying a rent of £2,500 per year to the plaintiff, the defendant would still make a profit.

Due to the evacuation of many people from London because of the war, a number of the flats became empty: and so in 1940 the defendant found that after paying £2,500 per year to the plaintiff, the defendant was making a loss.

Plaintiff and defendant therefore entered into an agreement in 1940, in which the plaintiff promised that the £2,500 per year would be reduced to £1,250 per year. This agreement was in writing, but was not sealed as a deed, and was not a binding contract because the defendant gave no consideration for it.

The rent of £1,250 per year was paid from 1941 to 1945. In September 1945 the war was over, all the flats were occupied, the defendant was still paying rent of £1,250 per year, the plaintiff company had gone out of business - and the Receiver for the plaintiff company claimed that the defendant ought to pay arrears of rent back to 1941 amounting to £7,916 on the grounds that the agreement of 1940 was invalid as it had no seal and no consideration.

To establish the legal position, the Receiver brought a friendly action in 1947 against the defendant, claiming £625 for the two quarters ending 29th. Sept. and 25th. Dec., 1945. (At £1,250 per year, £625 had been paid for the two quarters. At £2,500 per year, £1,250 would have been due. The £625 claimed was the difference between these two figures.)

The court held that (i) a contract - even if not under seal - can vary a sealed deed (such as a Lease) -

but had not done so here because the agreement had no consideration; but (ii) as the promise to accept a lower rent had been acted upon (the defendant having committed himself to acceptance of lower rents on sub-lettings, in reliance on only having to pay out £1,250 per year) the plaintiff was estopped from asking for the full £2,500 per year rent for the period from 1941 to 1945. After that the plaintiff could demand the full rent, because the promise to accept the lower rent was originally only made for the period that the flats were not fully let, and from 1945 onwards they were fully let.

Thus *the essence of PROMISSORY ESTOPPEL* is that if the defendant has relied on something which the plaintiff has *promised* (as in the *High Trees* case) the plaintiff is not allowed to give evidence that what he promised cannot be relied upon.

(Similarly *the essence of COMMON LAW ESTOPPEL* is that if the defendant has relied on something which the plaintiff has *done* or *pretended* (as in the example at the top of page 427) the plaintiff is not allowed to give evidence that what he did or pretended cannot be relied upon.)

ESTOPPEL IN EQUITY (II)

There is an "Equitable doctrine of encouragement and acquiescence" known as PROPRIETARY ESTOPPEL, which applies to interests in *land*. We saw it spoken of on page 110 in *E. R. Ives Investment Ltd. v. High (1967)* (nothing to do with *High Trees* of course - they are two totally different cases twenty years apart, though Lord Denning was in both of them).

The essence of PROPRIETARY ESTOPPEL is that if one party (plaintiff or defendant) has relied on something to do with *land*, in which the other party has *acquiesced* (i.e. has shown that he doesn't mind, as in *E. R. Ives Investment Ltd. v. High* where the neighbour had said he did not mind Mr. High crossing his land) and the party relying on it has spent money or has otherwise acted to his detriment in reliance on the acquiescence, the party who acquiesced (or, in *E. R. Ives Investment Ltd. v. High*, his successor) is not allowed to give evidence that what he acquiesced in cannot be relied upon.

Proprietary estoppel was explained by Lord Kingsdown in *Ramsden v. Dyson (1866)* in which the alleged interest in the land was a lease. Proprietary estoppel has also been raised in *E. R. Ives Investment Ltd. v. High (1967)* and *Crabb v. Arun District Council (1976)* - two cases in which the alleged right in land was a right of way. Proprietary estoppel has also been applied, particularly by Lord Denning, to try and achieve justice with regard to matrimonial homes (etc.) in various matrimonial and family cases, such as *Inwards v. Baker (1965)*, and *Greasley v. Cooke (1980)* - a case which we mentioned on page 309.

Can we sum all this up by saying:-

common law estoppel arises because of some conduct - e.g. something which was done, or some representation or misrepresentation which was made;

promissory estoppel arises because of some promise which was made: even though the promise was not for consideration and is not a binding contract;

proprietary estoppel arises because of some acquiescence which was made concerning land: even though it is not a binding contract.

There is a saying that "Estoppel can be used as a shield but not as a sword", meaning that estoppel can be used as a defence to a Court action, but cannot be used as a method of attack. It can be a defence to a claim, but cannot be used for *making* a claim.

But *proprietary* estoppel can be both a shield and a sword: it can be a basis for bringing a case, just as it can be a defence to a case.

The law on estoppel is growing and at present we do not know which way it will grow. In 1983 the author came across a matter in which proprietary estoppel was raised as a sword in a dispute over car parking rights. The situation was that prior to 1974 a County Borough Council had allowed a group of its employees to have free use of a certain Council car park. In the local government re-organisation of 1974, the employees were transferred to the County Council and the car park passed to the District Council. The group of employees continued to use the car park. In 1975 these employees

moved from their city-centre building to other premises several miles away, but another group of County Council employees was given the opportunity to move to the city-centre building. By arrangement between the two Councils, the County Council told this group of employees that they could have free use of the said car park - and in reliance on this the employees moved from a neighbourhood where parking was easy, to the city-centre building near which there were no parking facilities (except expensive ones) other than the said car park. In 1983 the County Council told its employees that their licence to use the car park was revoked.

The matter was settled without going to court, which in a way was a disappointment because it would have been interesting to see whether the court would have regarded proprietary estoppel as being wide enough to cover such an interest in land as a parking-licence granted over land which the grantor did not even own.

- - -

- But what all this comes to from the students' point of view is that they may come across situations where someone is using something merely by a revocable licence or by an unenforceable promise - but by estoppel the person wanting to stop it may not be able to <u>say</u> that it is revocable or unenforceable, and so in effect it becomes irrevocable and enforceable, just as Mr. High's right of way did.

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So to sum up this chapter:- we have seen four types of licence: 1. bare licence,
2. licence coupled with a grant,
3. contractual licence, and
4. licence by estoppel,

and to some extent we can say of numbers 2, 3 and 4 that (a) they are irrevocable, (b) their benefit can be assigned (i.e. transferred) to third parties, and (c) their burden can "run with the land" so as to bind third parties, such as purchasers of the land over which they are exercised. This has been the recent growth (so far) of these rights, of which the

traditional view was that generally they were only personal, and were neither irrevocable, nor assignable, nor capable of running with the land.

SUMMARY

In this chapter we have seen:-

1. bare licence, to do something which would otherwise be a trespass. Revocable and purely personal.
2. licence coupled with a grant - can be irrevocable.
3. contractual licence - can be irrevocable.
4. licence by estoppel - can be irrevocable.

   common law estoppel - on conduct,
   promissory estoppel - on a promise,
   proprietary estoppel - on acquiescence.

TEST QUESTIONS on Chapter 32:-

1. "Fifty thousand people who pay to see a football match do not obtain fifty thousand interests in the football ground!" (Latham CJ in *Cowell v. Rosehill Racecourse Co. Ltd. (1937)*). How far is this true? Advise Scouse, a well-behaved supporter who has been evicted from the ground at half-time, of his rights.

2. Rat and Mole owned two cottages on the river bank. Access to them was by a long lane, but in 1940 Toad gave Rat and Mole oral permission to use his river bridge as a short cut, and both of them frequently used it from then (and contributed to the repair of the bridge in 1943, 1961 and 1977) until the bridge was swept away in a flood in 1982.
   Rat sold his cottage to Badger in 1983.
   The bridge has just been rebuilt, but Toad now says that Badger and Mole have no right to use it.
   Advise Badger and Mole, with reasons.

3. (a) What type of estoppel was applied in the case of *E. R. Ives Investment Ltd. v. High*?
   (b) What type of estoppel was applied in the *High Trees* case?
   (c) Explain the differences between the two types.

CHAPTER 33

WAYLEAVES AND RIGHTS OF STATUTORY UNDERTAKERS

OUTLINE OF CHAPTER:-

A: rights of the Gas Board
B: rights of the Electricity Board
C: wayleaves
D: telephone services
E: rights of the Water Authority (as to water)
F: rights of the Water Authority (as to sewers)
G: pipelines
H: compulsory purchase

A: GAS

Example. The Gas Board wants to dig up a Victorian gas main which runs through the front garden of "Magpie Cottage", and replace it with a modern one. Fred and Florrie (who do not want their garden rendered into chaos by the digging of a deep trench) say there is nothing wrong with the old main and they will not allow the Gas Board to enter their land. Can the Gas Board come in anyway *without* Fred and Florrie's consent? YES by giving seven days notice (or with no notice if it is an emergency). The 1972 Gas Act says so.

On the other hand there appears to be no right for the Gas Board to enter to lay a main where there has never been a main before, unless the Board obtains the consent of both the owner and the occupier (i.e. both the landlord and the tenant if the property is let to a tenant).

Schedule 4 of the 1972 Gas Act gives the Gas Board the power to break up streets to lay pipes etc., but not to lay pipes through or against any building or in any private land without the consent of the owners and occupiers, except in two cases. The two cases are:- (i) it can dig up a private road, and (ii) it can enter private property on giving seven days notice (or without notice in an emergency) to replace or repair a pipe.

The 1954 Rights of Entry (Gas and Electricity Boards) Act may apply. There is no right of *forcible* entry, but if the occupier will not let the Gas Board in, the Board can enter by obtaining a Warrant for entry from a Magistrate.

B: ELECTRICITY

Example. The Electricity Board wants to run an underground power-cable across one of Gigi's fields - to which she objects - and also wants to run a new line of overhead cables on pylons across Gigi's land - to which Gigi does not object but the Planning Authority does, saying the pylons will be an eyesore. What are the Electricity Board's rights?

Let us consider that new line of overhead cables and pylons across the landscape first. S.21 of the 1919 Electricity (Supply) Act provides that where the consent of the Secretary of State has been obtained for placing an electricity line above ground, the consent of the Local Authority is not required. But before giving his consent, the Secretary of State must give the Local Authority (and the local planning authority if it is different from the Local Authority) an opportunity of stating its views on the matter. (But he does not have to agree with them.)

And what about that underground cable which Gigi does not want laid beneath her field? - The 1899 Electric Lighting (Clauses) Act gives the Electricity Board certain powers - the same powers as we saw for the Gas Board, above - for entering land with the owner's and occupier's consent, and also imposes certain restrictions on where above-ground lines can be placed. But there is an additional power, in s.22 of the 1919 Electricity (Supply) Act, whereby a line may be placed below ground across any land (except land covered by buildings or used as a garden or pleasure-ground) as long as notice of the intention to do so is given to the owner and occupier of the land ... and if they do not give their consent within 21 days, the line cannot be placed there without the consent of the Secretary of State. But with his consent it can be

done - so the Electricity Board has wider rights than the Gas Board in this respect.

These s.22 rights are sometimes called "wayleaves" but "wayleave" is a word of various meanings: see below.

Note that all these rights of statutory undertakers to put pipes, cables etc. through someone's land are statutory rights, not easements. No deed of easement need be drawn up for them.

The 1947 Electricity Act gives the Electricity Board the right to dig up streets in certain circumstances, and the 1957 Electricity Act makes further provisions affecting the placing of electricity lines and the conditions on which the Secretary of State will give his consent.

C: WAYLEAVES

In connection with mines, a "general right of wayleave" is like a right of way without a specified route. It authorises the construction and use of such a way (e.g. a waggon-way) as is necessary. If the direction is specified, there must be no material deviation; but if unspecified, the way may be constructed in the most convenient direction, which need not be the shortest possible route.

Sometimes a rent is payable in respect of bringing minerals along the way. This rent, which amounts to a royalty on the minerals mined, is known as a "wayleave rent" or a "wayleave".

Wayleaves in connection with mining are likely to be for the benefit of private firms, i.e. the mining companies: but wayleaves are also conferred under statutory authority - e.g. by the 1919 Electricity (Supply) Act which we saw above.

Another example of wayleaves conferred by statutory authority is wayleaves for the erection of telegraph poles on private land - see next heading - and in respect of this too a rent (which in some cases is 5p per year) may be payable.

D: Telephone Services

The 1863 Telegraph Act is the main source of powers for placing and maintaining telegraph and telephone equipment above or below ground. (A telegraph sends Morse Code whereas a telephone talks - but for legal purposes the telephone is a type of telegraph.) The 1863 Act gives a right of placing and maintaining telegraph and telephone equipment, together with such telegraph poles as are necessary, along or across streets or across land; and includes a power to dig up the street. Overhead wires must be clear of the roof of any house by at least six feet, and must be raised within 14 days if the building is to be heightened; and no wires (except underground) shall be put within thirty feet of any house without the occupier's consent. If consent is refused, this dispute is known as a "difference" which can be settled by the County Court (with appeal to the High Court) under the 1878 Telegraph Act - subject to certain restrictions imposed by the 1916 Telegraph (Construction) Act.

E: Water

Water and sewage services are more dependent on gravity than gas, electricity and telephone services are, and the 1973 Water Act reflects this.

The Water Authority is responsible for the water mains, and also the reservoirs which supply them, and the rivers and streams which supply the reservoirs. For this reason the Water Authority covers a different area from the Local (County and District) Authorities: the Water Authority's area is based on the watershed so that it includes the whole river-system from its sources to the sea - because it would be silly if one Authority could build a reservoir and then a different Authority further up-river could cut off all the water.

The Water Authority is also responsible for sewers - but this is a separate system, and where I live the Bristol Water Authority maintains the water supply but the Wessex Water Authority maintains the sewers.

(Until 1973 the rivers and streams came under a River Authority, and the sewers were the responsibility of the Local Authority.)

Schedule 3 of the 1945 Water Act (as amended) says that the Water Authority may lay a water main (a) in a street (it has powers to dig up streets) and (b) on any other land *with the consent of* the owner, the occupier, the Highway Authority if the main will be within 220 feet of any highway, and possibly other bodies (e.g. the Gas and Electricity Boards in certain cases) - such consent not to be unreasonably withheld. The Water Authority may also inspect, repair, alter, renew or remove any main.

The supply pipe to the house from the stopcock belongs to the householder, but the communication pipe to the stopcock from the mains belongs to the Water Authority. So does the stopcock itself. If there is no stopcock, the pipe from the mains to where the front boundary of the property meets the street, belongs to the Water Authority.

(Regarding gas and electricity, the meter and the pipe or wire taking gas or electricity into it normally belong to the Board: the pipes and wires etc. beyond the meter normally belong to the householder.)

As to water for London, there are more than a dozen special statutes, mostly under the name of Metropolitan Water Board Acts (1927 onwards).

The 1963 Water Resources Act (as amended by the 1973 Water Act etc.) is important, but we will leave our investigation of this until page 621. Fishing and "riparian" water rights are also on page 622.

F: Sewers

The 1936 Public Health Act (as amended by the 1973 Water Act, the 1974 Control of Pollution Act, etc.) is the important statute here.

By s.15 the 1936 Act enables the Water Authority to construct a public sewer (a) in under or over any

street ... and (b) in on or over any other land after giving reasonable notice to every owner or occupier of that land. (No consent is needed, and no easement need be granted; but in certain circumstances compensation is payable for damage suffered.)

By s.19 of the 1936 Act, if a person (e.g. a builder) proposes to construct a drain or sewer, the Water Authority may require it to be constructed in such a way that it fits into and becomes part of the general sewerage system.

The 1974 Control of Pollution Act puts restrictions on the erection of buildings over sewers and drains.

The law on the difference between a public sewer, a private sewer, a private drain, etc., is in a very confused state, but here is an outline of it:-

To be a *public sewer*, a pipe should drain two or more buildings - *Travis v. Uttley (1894)*.

Any such pipe for more than one building, laid before 1st. October 1937 (and not for private profit) became vested in the Local Authority under the 1975 Public Health Act, and is now vested in the Water Authority under s.20 of the 1936 Public Health Act as amended by the 1973 Water Act. (The pipe may be under the road or under private land.)

"Combined drains" constructed before 1st. October 1937 come within the same category, so they too are public sewers. (There appears to be no legal definition of "combined drains", but they serve more than one property and they may lead to the main sewer, or a cesspit, or into the sea, etc.)

A so-called "single private drain" serving two or more properties comes within the same category, unless both properties which it serves are within the same building or curtilage. ("Within the curtilage" means within the boundaries: an example would be a bungalow for the chauffeur, built in the garden of a large house.)

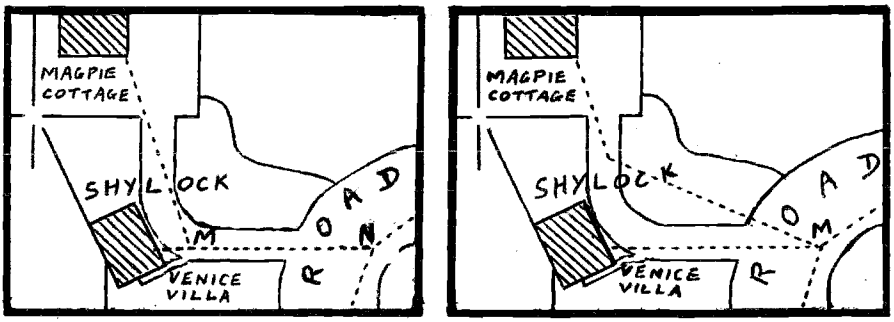
Generally speaking, all sewers constructed at any

time by the Local Authority or Water Authority, or acquired by them (e.g. from the developer) after construction, come within the same category.

So all of these various types are *public sewers*.

A sewer which is not a public sewer is a private sewer (or a private drain - there seems to be no legal difference). If the pipe only serves one property it is not a public sewer - and if it gets blocked the householder must make his own arrangements for getting it unblocked, as it is not the Water Authority's responsibility. (This is so, whether the pipe is under his own property or under someone else's property, or under the road.)

Thus in both diagrams below, the sewers or drains from both "Magpie Cottage" and "Venice Villa" (Shylock's property) are private until they reach the point "M".



And in both cases "Magpie Cottage" would need an easement, because its private drain goes under Shylock's land.

But it may be found with regard to drains built since 1937 that two or more buildings are drained in combination by a private sewer which has never been taken over by the Water Authority - so in diagram 1 above the drain may be a private one down to point "N".

The 1976 Building Regulations referred to three types of drains and/or private sewers, namely (a) those for soil water (from toilets, bed-pan washers etc.) (b) those for waste water (from baths, kitchen sinks etc.) and (c) those for rain water.

The 1985 Building Regulations, which will replace the 1976 ones from 11th. November 1985 onwards, are shorter and less detailed than the 1976 ones. The 1985 Regulations divide drains into only two types, namely (a) those for foul water (from toilets, baths etc.) and (b) those for rain water.

The 1985 Regulations require only that the drains must be "adequate": but to show what will be acceptable to Local Authorities and their Building Inspectors as "adequate", there is a set of "approved documents" (approved by the Secretary of State for the Environment) published by Her Majesty's Stationery Office to give practical guidance on the Regulations' requirements.

G: PIPELINES

Anyone building a pipeline is subject to the 1962 Pipelines Act. (What is a pipeline? It is defined in the 1962 Act as a pipe for conveying anything *other than* air, water, water-vapour, or steam, and not a sewer. And the Act is not applicable to Gas and Electricity Boards and the Atomic Energy Authority. But the Act would apply - for example - to an oil-pipeline running from a fuel depot to an airfield - though it would not apply to an oil-pipe used for purely domestic purposes such as a pipe from an oil tank serving the heating systems of two houses, as this is exempt from the Act.)

By the 1962 Act a "cross-country pipeline" (i.e. a pipeline more than ten miles long) must not be constructed without a "pipe-line construction authorisation" granted by the Secretary of State for Trade and Industry. For a pipeline not exceeding ten miles, the Secretary of State's authorisation is not required but he must be given at least sixteen weeks' notice of the intention to build any pipeline to which the Act applies.

A map of the pipeline must be deposited with the Local Authority.

There are also powers to break up streets to lay or maintain a pipeline, and powers (at the Secretary of

State's discretion) for compulsory purchase of land, or compulsory purchase of rights over land, for pipeline construction.

H: Compulsory Purchase

If a person has gas mains, electricity cables, sewers etc. laid across his land, this does not normally deprive him of his land. But if a person has a railway line, or a motorway, or an extension to an airport runway or to a Polytechnic, built across his land, he loses that part of his land completely. The appropriate procedure in these cases, if a price for buying the land cannot be fixed by agreement, is Compulsory Purchase. Local Authorities, Central Government and certain other bodies have power to acquire land by this means.

Compulsory purchase is a complex subject, outside the scope of this book, and the student is referred to the standard textbooks on it for details: but it can be summarised as A.C.A.C., standing for authorisation, choice, acquisition, compensation. Let us spend just two pages on it.

Authorisation:

Authorisation to carry out compulsory purchase is given to central and local government and other authorities (Gas and Electricity Boards, the Post Office, etc.) by numerous authorising Acts, including 1936 Public Health Act, 1944 Education Act, 1965 New Towns Act, 1969 Post Office Act, 1971 Town and Country Planning Act, 1957 and 1980 Housing Acts, etc.

No-one likes having their land taken from them compulsorily, even though compensation is available: but it is a social necessity. For instance, we can hardly leave a gap in a motorway just because some landowner refuses to give up the necessary bit of land, without any valid reason. Of course, if he *has* a valid reason (e.g. that a different route should be chosen for the motorway) that is a different matter - this leads us on to our second point, *choice*.

Choice:

Choice depends on what land is needed, but to widen a road you have the choice of acquiring the adjoining land along one side - or the other (or possibly both) and for a new motorway there may be a choice of several routes, all of them being supported by some people and opposed by others.

There is a standard procedure for dealing with this, laid down in the 1981 Acquisition of Land Act. Under this Act, the body wishing to acquire the land makes a provisional CPO (Compulsory Purchase Order) which will not be effective unless and until it is approved by the appropriate Minister (usually though not always the Secretary of State for the Environment). If there are any objections to the CPO, the Act requires that there must be a Public Inquiry conducted by an Inspector on behalf of the Minister.

Acquisition:

When the CPO has been made, and has been confirmed by the Minister, the next step is to carry out the order - i.e. to make the purchase. The procedure for this is under another statute, the 1965 Compulsory Purchase Act. The procedure involves serving the owner of the property with a "notice to treat" (which takes the place of the contract which would be used if he were selling the land by agreement instead of by compulsion) and then a deed is drawn up.

There is an alternative procedure which was introduced by the 1968 Town and Country Planning Act but is now contained in the 1981 Compulsory Purchase (Vesting Declarations) Act: this uses a "general vesting declaration" which telescopes the two steps of "notice to treat" and "deed" into a single step.

And so there remains only the question of compensation.

Compensation:

This is dealt with under the 1961 Land Compensation Act (as amended). As it is concerned with money rather than land, I shall not discuss it further.

SUMMARY

In this chapter we have seen:-

rights of the Gas Board,
Electricity Board,
and Water Authority;

an outline of the law regarding sewers and drains,
and regarding pipelines;

an outline of the law of Compulsory Purchase.

TEST QUESTIONS on Chapter 33:-

1. The building firm which is developing the field adjoining your land wants to lay a drain across your land.

   The Gas Board wants to lay a gas main across your land.

   The Water Authority wants to lay a main sewer across your land.

   You do not particularly want any of these bodies laying pipes across your land. Can you refuse to let them do so? Give reasons for your answer.

2(a) What is compulsory purchase and how does it differ from purchase by agreement?

(b) The building firm mentioned in the question above wants to buy your land for development. Can you refuse to sell?

(c) The County Council wants to buy a strip of your land in order to widen the main road. Can you refuse to sell?

3. Mollie, a spinster who lives in a bungalow in a cul-de-sac, finds that her drains are blocked. Advise her whose responsibility it is to get them unblocked.

TEST QUESTIONS on Chapter 34:-

(Read pages 445-478 before attempting these questions.)

1. Explain what is meant by
   (a) privity of estate
   (b) privity of contract
   (c) the benefit of covenants runs with the land.

2. Vernon sells part of his land in fee simple to Polly subject to covenants (i) not to cause any nuisance or annoyance, (ii) not to use any part of the land for the parking of motor vehicles, and (iii) not to allow the fence dividing the sold land from the retained land to fall into disrepair.

   Polly re-sells the land: it has six owners in the next eight years. Then it comes into the hands of Joe, in fee simple, and Joe makes a habit of leaving three cars and a caravan on the land. He also keeps pigs there. Last week the fence blew down, and when Vernon asked Joe to attend to it, Joe replied, "You can do it and pay for it yourself!"

   Advise Vernon, who wishes to see that the covenants are enforced.

   How (if at all) would your answer differ if Vernon recently died and his daughter Violet sold his land to Fred Smith, so you are asked to advise Fred.

3. Shylock has leased his house to a group of students subject to a covenant to keep the front garden free from weeds. Will the students be in breach of this covenant if they
   (a) weed the garden twice a term,
   or (b) lay a lawn but never mow it,
   or (c) use the garden as parking-ground for their cars,
   or (d) plant the whole front garden with cabbages,
   or (e) concrete the whole front garden?

4. What is meant by Land Obligations? How will they differ from covenants?

5. What problem arises with freehold flats, and how can it be avoided today?

Section D (Chapters 34 - 35)

Covenants (and Land Obligations)

CHAPTER 34

COVENANTS

OUTLINE OF CHAPTER:-

A: Definition of a covenant
B: Preliminary note
C: Covenants - the background

I: THE RUNNING OF THE BURDEN OF COVENANTS

D: Covenants touching and concerning the land
E: The usefulness of covenants
F: Positive and restrictive covenants
G: Enforceability of covenants
1. on leaseholds
2. on freeholds

II: THE RUNNING OF THE BENEFIT (ON FREEHOLDS)

H: The running of the benefit at law
I: The running of the benefit in Equity
J: Building schemes
K: Other schemes similar to building schemes

III: THE REST OF THE CHAPTER

L: Covenants and Planning
M: Land Obligations: the Law Commission's Proposals

A: DEFINITION

A covenant is an agreement under seal - i.e. an agreement or promise contained in a deed.

B: PRELIMINARY NOTE

This chapter is of particular importance to Valuers. When a solicitor sees that an area of land, on which run-down Victorian mansions are being demolished, is subject to a covenant not to build more than three houses per acre, he may consider the enforceability (or otherwise) of the covenant as an interesting legal point. A valuer, on seeing the same

covenant, may turn pale and be heard to gasp, "But my client wants to build sixteen to the acre: if this covenant is enforceable it will lower my valuation of the land by more than £100,000!"

C: COVENANTS: THE BACKGROUND

When I first studied covenants I was baffled. Then someone pointed out to me that the history of covenants developed in Contract Law before it found its way into Land Law: and I discovered that as long as I remembered this, the rules on covenants had a certain logic to them. We must particularly bear in mind one major difference between Contract Law and Land Law:-

In the Law of Contract, one party (i.e. one person who has entered into a contract) can if necessary sue the other party for breach of contract; but there is a general rule that *anyone who is not a party to the contract cannot sue for breach of that contract.* A case on this point is *Tweddle v. Atkinson (1861)* in which the father and the father-in-law of William Tweddle agreed with each other that they would each pay William Tweddle a certain sum of money. Father-in-law did not pay. The court held that William could not sue for the money, because, not being a party to the contract, he had not given any consideration in return for the promise which had been made.

In Land Law we have a different situation, as we have already seen in the chapters on easements. Let us contrast two examples, (1) being Contract Law and (2) being Land Law:-

Example (1): Fred and Florrie Smith agree with Alan (the owner of the bungalow "Tiny Nook" in the picture on page 406) that they will polish his car for him every Friday, in return for a small payment. This is a contract, enforceable only between the individuals (the Smiths and Alan).

Example (2): Fred and Florrie Smith are granted a legal right of way across Alan's property. This legal easement is enforceable by any owner of "Magpie Cottage" against any owner of "Tiny Nook".

Covenants sit rather uncomfortably part-way between these two examples. Their rules are based partly on the Law of Contract and partly on Land Law.

So understanding this chapter is a little bit like playing socby (part-soccer, part-rugby!) - you always need to apply the right set of rules to the particular circumstance. But by now the student is so used to having two sets of rules (law and Equity) in his mind for nearly every chapter of this book, that having to hold two sets of rules (Land Law and Contract Law) in his head for this chapter is not a terrible problem.

The remedy for breach of contract is damages; but where Land Law applies we must remember that covenants have only come into Land Law through Equity, and so the relevant remedy is the injunction - and Equitable provisions as to registration and B.F.P. without notice are applicable.

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Before we go further, let me introduce an example (which we shall see again later in this chapter) to make a few preliminary points. Alan, who owns "Tiny Nook" and the adjoining plot known as "Greenacre" (see picture on page 406) sells "Greenacre" to Boris, who covenants - i.e. promises in a deed - not to keep pigs on "Greenacre".

Boris, the person with the *burden* of the covenant - the person who has covenanted not to keep pigs - is the covenantor.

Alan, the person with the *benefit* of the covenant - the person with the benefit of knowing that his new neighbour will not keep pigs - is the covenantee.

Later, Alan sells "Tiny Nook" to Barney, and Boris sells "Greenacre" to Cyril.

There are two very separate questions here:-

(1) Does the *benefit* pass on from Alan to Barney?

(2) Does the *burden* pass on from Boris to Cyril?

The answer in any particular case may well be "Yes" to both questions, or "No" to both, or "Yes" to one and "No" to the other.

The passing (or, as it is usually called, the "running") of the *burden* is dealt with in Part I of this chapter; the running of the *benefit* is in Part II.

Part I: THE RUNNING OF THE BURDEN OF COVENANTS

D: Covenants Touching and Concerning the Land

A covenant may be purely a personal thing, or it may "touch and concern" the land. For example, a covenant (an agreement made by deed) by Fred and Florrie Smith to clean Alan's car for him every Friday is personal between the Smiths and Alan; but a covenant that no caravans shall be kept on the property known as "Magpie Cottage" touches and concerns the land: it affects the property as well as the persons.

Since this book is dealing with land, we need not look further at the personal covenant, except to say that it exists only between the person making the promise (the covenantor) and the person receiving the promise (the covenantee) - thus in the above example the benefit of the covenant to clean Alan's car is for Alan alone and he is unlikely to want to transfer it to anyone else; and the burden (the liability) is upon the Smiths alone and if they sell "Magpie Cottage" the burden remains on them; it does not pass to the purchaser - or in other words it does not "run with the land" to the purchaser.

Typical covenants often found touching and concerning residential premises include:-

(a) not to use the premises for any trade or business,

(b) not to keep pigs, chickens or pigeons,

(c) not to let the boundary fences fall into disrepair,

(d) to keep the garden free from sheds, huts, building materials, scrap metal and caravans,

(e) to keep the garden free from weeds,

(f) to refrain from hanging out washing in the front garden,

(g) not to let the fire insurance on the property lapse,

(h) not to carry on the trade of ... on the premises.

What we see in (h) above should not be confused with a contract in restraint of trade. An example will make this clear. Suppose a butcher owns six shops - he runs one himself and employs Managers to run the other five. He sells a piece of land adjoining one of his shops, with planning permission for the erection of a shop - but he imposes a covenant that the new shop must never sell meat. This is an example of (h) above. But all the five Managers have a clause in their contracts of employment stating that they must not set up in opposition to their employer within 5 miles of any of his shops within 5 years after leaving his employment. These are contracts in restraint of trade.

E: The Usefulness of Covenants

Covenants were used a lot in Victorian times - and are used a lot by builders today. A typical developer building an estate of 50 freehold houses is anxious lest anyone buying one of the first houses might lower the tone of the whole residential neighbourhood by (for example) keeping chickens or collecting scrap metal in the front garden - thus reducing the saleability of all the other houses. So the builder is likely to impose most of the covenants on the above list, and several others, in the deed by which he sells the fee simple of each plot to its purchaser.

But the longest lists of covenants are generally found in Deeds of Lease.

This is quite separate from Town Planning conditions. Covenants can sometimes protect matters over which the planners have no powers - see page 473.

F: Positive and Restrictive Covenants

Covenants are either to do something (positive covenants) or to refrain from doing something (restrictive covenants - or sometimes they are called negative covenants, particularly if they are on leasehold property).

The use of the word "not" in a covenant does not necessarily make it restrictive: the test is, "If X

(the person subject to the covenant) does nothing at all, will he infringe the covenant?" If he can perform the covenant by sitting in his armchair doing nothing, the covenant is restrictive. If, to perform the covenant, he must get up from his armchair and do something positive, it is a positive covenant.

Thus in the examples on page 448, covenants (a) and (b) are restrictive: they are not broken if X simply remains in his armchair. Covenant (c) is different: if X does nothing for long enough the fences will eventually deteriorate and he must do something positive to counteract this. So (c) is a positive covenant.

(d) is restrictive because if X does nothing no sheds, huts etc. will appear; (e) is positive because weeds will appear unless X takes positive action to keep them down.

Test yourself as you read: what are (f), (g) and (h)?

(f) is _____
(g) is _____
(h) is _____

(answers at foot of page 452)

G: ENFORCEABILITY OF COVENANTS

1. ENFORCEABILITY OF COVENANTS ON LEASEHOLDS

First we need to understand the meaning of two technical terms, "Privity of contract" and "privity of estate".

Privity of contract is the relationship which exists between the parties to a contract. Thus (for example) on a contract for sale of a house - or a horse - there is privity of contract between the vendor and the purchaser; there is privity of contract between employer and employee on a contract of employment, and so on.

Privity of estate is the relationship which exists between a landlord and a tenant.

The following basic rules (i) - (iii) should be learnt:-

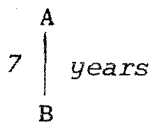
(i) If there is privity of contract between the person subject to the covenant and the person wishing to enforce it, the covenant can be enforced. *(This is ordinary Contract Law.)*

(ii) If there is no privity of contract, but there is privity of estate between the parties, the covenant can be enforced IF it touches and concerns the land. *(This is an extension of Contract Law - it is to do with leasehold, which is based on contract.)*

(iii) If there is neither privity of contract nor privity of estate between the parties, the covenant cannot be directly enforced at law, though it sometimes can in Equity. *(And if it can, this is Land Law and not Contract Law.)*

Let's have some examples to show how this works:-

A leases his house to B for seven years. *(Note: for a fuller explanation of leases, sub-leases and assignments of leases, see Chapter 40.)*

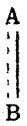


A is landlord and B is tenant: this relationship is what we call privity of estate.

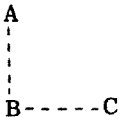
There is also a contractual relationship between A and B; A offered to let the property and B then accepted (or B offered to take a lease of it and A accepted) - this relationship is privity of contract.

Thus between A and B above, there is both privity of estate and privity of contract.

In the following diagrams privity of estate will be represented by a solid line and privity of contract by a broken line.

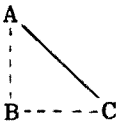


B wishes to leave the property after six months and assigns the residue, i.e. the remaining 6½ years of the lease, to C.

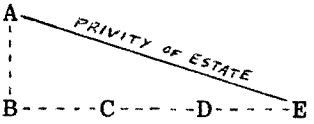


C has made no contract with A; C has agreed the transaction with B. So there have been contracts (i.e. there is privity of contract) between A and B, and six months later between B and C - but none between A and C.

On the other hand the landlord-tenant relationship now exists between A and his new tenant C. So the situation is:-



If C assigns the lease to D, who later assigns it to E, the situation is:-



We observe that however many changes of tenant have taken place, the landlord can always sue his present tenant for breach of covenant, as long as the covenant touches and concerns the land; because there is always privity of estate between the landlord and his tenant.

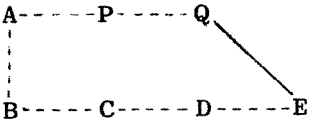
It is interesting to note that if E has become bankrupt or has disappeared, A can still sue his *original* tenant B on the basis of privity of contract. (That is ordinary Contract Law: A had a contract with B.)

Answer to the question on page 450:-
(f) restrictive (g) positive (h) restrictive.

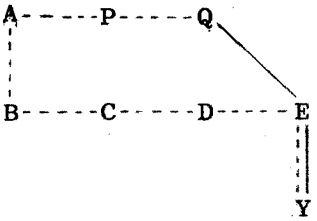
B can then sue C (if he can find him) on B and C's contract; C can sue D, and D then has a right to sue the vanished or bankrupt E - so D who assigned the property to the unsatisfactory E can find himself paying for E's wrongs. But it is hard on B that if he cannot trace C, and E is worthless, B will find himself paying for the wrongs of E - whom he has never even met. (Tenants sometimes do not realise this danger.)

There is a right for B to sue E direct (without finding C) under the law of quasi-contract, on the grounds that B has paid E's debt for him. (Note that this right in quasi-contract does not exist for freeholds, because on freeholds there is no privity of estate and therefore *it is not E's debt*.)

Even if there have been changes of landlord (e.g. A sells the fee simple, which includes the right to receive the rent, to P, who subsequently transfers it to Q) there is still privity of estate between the present landlord and the present tenant: Q can sue E and *vice versa*.



But suppose that, instead of assigning, E sublets the property. In other words, E sub-grants it for a shorter period than what he owns - e.g., in our example, E (who still has 2 years of the original 7 years to run) sub-lets to Y for 6 months, with reversion to Y's landlord E (himself) at the end of the 6 months. On the sub-letting, there is privity neither of estate nor of contract between the head landlord (Q) and the sub-tenant (Y).



Q could sue E (privity of estate) and E could sue Y

(privity of estate and privity of contract) but Q cannot sue Y direct: except that on *restrictive* covenants he might under the rule in *Tulk v. Moxhay* (see page 459) if Y had notice of the covenant. A case where this rule was applied is *Mander v. Falcke (1891)* in which an action (for breach of a covenant not to cause annoyance or inconvenience to the landlord's adjoining property) was brought against the sub-tenant's father: and Father had no estate or interest at all, legal or Equitable, in the premises, but he *was* running an oyster-bar there which was a "front" for a brothel on the premises, so an injunction was granted against him to restrain him from breaking the covenant.

Because there is no privity of estate or contract between Q and Y, Q will be likely to insist on joining as a party in the E-Y contract, to give Q a privity-of-contract relationship with Y.

Another possibility is that A may have inserted a proviso for forfeiture in the original A-B lease, stating that if a covenant is broken (whether by B or by an assignee or sub-lessee or anyone else) the landlord can take the property back. If there were such a proviso, it would apply whether or not Y had notice that what he was doing was in breach of covenant.

2. ENFORCEABILITY OF COVENANTS ON FREEHOLDS

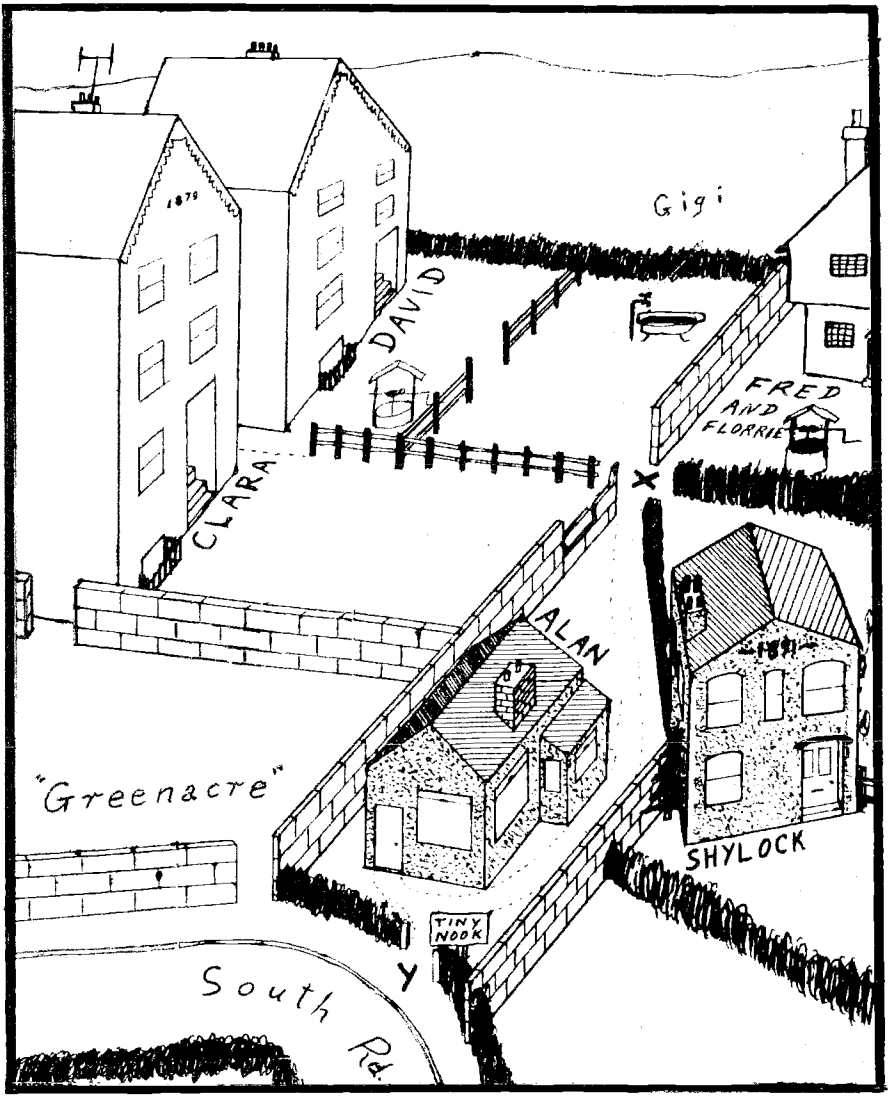
So far our examples have dealt with leaseholds. We must now turn to freeholds, where the position is much less satisfactory.

Suppose A has sold his property to B in fee simple instead of leasing it to him.

A-----B

There is still privity of contract, for A offered to sell, and B accepted (or B offered to buy, and A accepted) but there is no intention to create any landlord-and-tenant relationship so there can be no privity of estate. We will now examine the difficulties which arise.

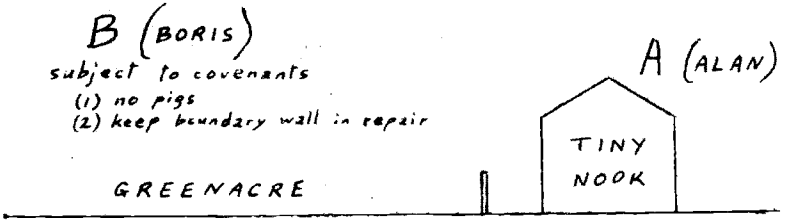
For our illustration which will run through the rest of this section we shall use the following



example. A (Alan) owns "Tiny Nook" and the adjoining vacant plot (the one marked "Greenacre" in the diagram - above) both in fee simple. He sells the vacant plot to B (Boris) subject to covenants (for the benefit of the retained land "Tiny Nook") that (i) no pigs shall be kept on the land sold and (ii) the upkeep of the wall between the two properties shall be the responsibility of the owner for the time being of "Greenacre".

So both of these covenants touch and concern "Greenacre", which might therefore be called the "servient tenement".

There need not necessarily be a dominant tenement *(contrast easements, where it is essential)* because the covenants could have been imposed for the benefit of Alan personally, but in fact in our example they have been imposed for the benefit of the property "Tiny Nook". The knowledge that there will not be pigs next door and that the dividing wall will always be kept in good repair *(will it? - we shall see!)* makes "Tiny Nook" a more desirable property - one can say that the benefit of the covenants touches and concerns "Tiny Nook"; it is the "dominant tenement".



There is privity of contract between Alan and Boris: if Boris keeps pigs or lets the wall become dilapidated Alan can sue him.

"Tiny Nook" has the benefit of the covenants.

"Greenacre" has the burden of the covenants.

- - - - -

Now take note of three general rules about covenants touching and concerning the land, with regard to freehold land:-

(1) *The benefit of covenants runs with the land,*

(2) *The burden of covenants does not run with the land at law,*

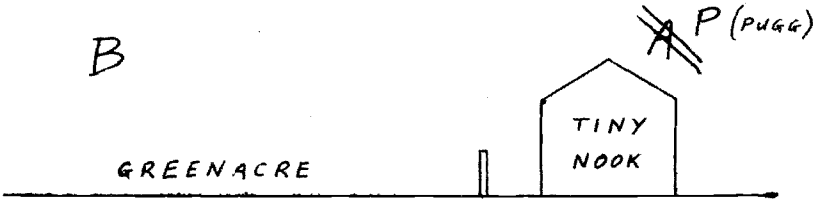
(3) *The burden of restrictive covenants runs with the land in Equity.*

Let us look at these, one at a time.

The benefit of covenants runs with the land.

If Alan sells "Tiny Nook" to Barney Pugg, with the benefit of the covenants, the law will regard the purchaser Pugg as being in exactly the same position as Alan - or, at least, it *can* do so, if the conditions on page 465 are fulfilled. (This is logical under Contract Law: the benefit of a contract can be assigned, i.e. transferred, if desired, from one person to another.)

In other words, in this situation the law will treat Pugg as if he had a contract - as Alan had - with Boris: if Boris keeps pigs or lets the wall fall into disrepair Pugg can sue Boris on the basis of privity of contract.



(Note: it is not true to say that the benefit of all covenants runs with the land, but what conditions have to be fulfilled for them to run is too complicated a subject to deal with here, and it is therefore looked at in Part II of this chapter. Let us for the time being take the rule to be that generally the benefit of covenants touching and concerning the land runs with the land.)

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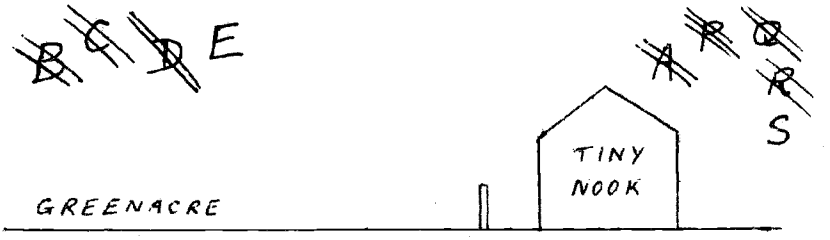
The burden of covenants does not run with the land at common law.

Boris sells "Greenacre" to Cyril subject to the covenants. *The liability for the covenants remains on Boris.* (This too is logical by contract law, for if a person has entered into a contract, he has no right to shrug off the liabilities of that contract onto someone else.)

If C breaks covenants, P cannot (at law) sue C. P can sue B; B can sue C.

Thus, so far as common law is concerned, if Cyril introduces pigs, the owner of "Tiny Nook" will sue Boris: Boris in turn can sue Cyril *(privity of contract - there was a contract by which Boris agreed to sell "Greenacre" to Cyril)* as Cyril has covenanted with Boris that Cyril will indemnify Boris against all such claims. (If Cyril has not entered into this "covenant for indemnity" Boris remains liable and has no remedy against anyone else.)

This could give rise to serious difficulties. Suppose the fee simple of "Greenacre" has passed from Boris to Cyril and then through Diane to the present owner Ethel. Meanwhile the fee simple of "Tiny Nook" has passed from Alan to Pugg and then through Quirk and Russell to Singh.



Ethel introduces a herd of pigs.

We have seen that the benefit of the covenants runs with the land, so Singh can "stand in Alan's shoes" and sue just as Alan could have sued.

But who can he sue? The burden of the covenants does not run with the land, so he can only sue Boris (if he can find him); then Boris can sue Cyril, Cyril sue Diane, Diane sue Ethel.

This is the type of situation which arose in the famous case of *Tulk v. Moxhay (1848)*. The facts of this case were:- houses overlooking Leicester Square in London were sold in fee simple with the benefit of a covenant that the Square would be kept and maintained in an open state, uncovered with any buildings. (In other words it was a restrictive covenant not to build.) Tulk was purchaser of one of these houses. The Square, subject to the covenant, passed through the hands of various owners until it was bought in fee simple by one Moxhay who said he was going to build on it. Moxhay admitted that he was aware of the covenant (because he could not deny that he knew it was in the old deeds, even though it was not in fact mentioned in the deed by which he bought the Square) but he claimed that neither Tulk nor anyone else would be able to trace the intermediate owners to set up a chain of privity of contract, so no-one would be able to sue Moxhay.

The case was brought before the Chancery Court, which held - as a court of conscience - that it was not right that a person should be able to make a profit by buying land subject to a covenant, and then proceeding to ignore that covenant. Equity therefore granted an injunction ordering Moxhay not to break the covenant.

In effect, Tulk had thus acted against Moxhay direct, without going through the intermediate owners. This is the basis of our third rule:

The burden of restrictive covenants runs with the land in Equity.

Thus Moxhay found himself in the same position with regard to the covenant as the original covenantor. Similarly in our example of Ethel and Singh (the picture on page 458) if Ethel keeps pigs Singh can bring an action against Ethel direct - provided of course that Singh himself has been Equitable in his

dealings, for "he who seeks Equity must do Equity".

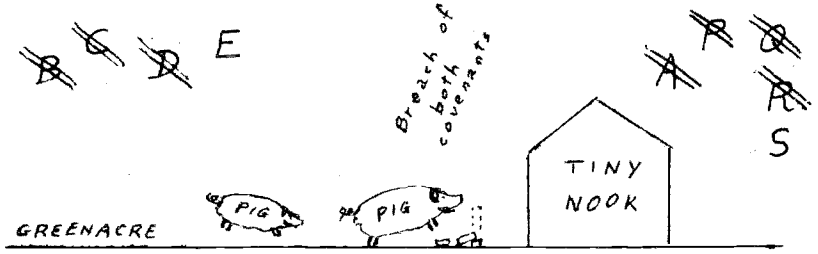
The rule in *Tulk v. Moxhay* only applies if three conditions are fulfilled:-

(1) The covenant must be negative in nature, i.e. it must be a restrictive covenant, not a positive covenant,

(2) The covenantee must, at the date of the covenant, own land which will benefit from the covenant, - in other words, although a dominant tenement is not necessary for covenants generally, a genuine dominant tenement is essential if *Tulk v. Moxhay* is to apply,

(3) The burden of the covenant must have attached to the covenantor's land, - this really means that there must be a genuine servient tenement: the situation must be one where the burden of the covenant is not merely personal.

Let us see how this affects our example.



In this diagram we can see a breach of the (restrictive) covenant against pigs, and a breach of the (positive) covenant to keep the fence in repair. Has Singh any remedy?

First, can Singh sue *anyone*? - Yes. The benefit of the covenants has run to him, so he has the same power to sue as Alan had.

Secondly, can Singh sue *Ethel*? - Yes and No:-

On the restrictive covenant the burden which was originally on Boris has run to Ethel in Equity, so Ethel is liable, provided that she knew (or should have known) of the covenant before she bought the land: and so Singh can in Equity take action against Ethel on the basis of *Tulk v. Moxhay*.

But if Ethel was a bona fide purchaser of the land without notice of the covenant, Singh cannot take action against her, for Equity will never act against a B.F.P. without notice.

In *Re Nisbet and Potts' Contract (1906)* the facts were as follows:-

In 1867, B purchased land in fee simple from A, and covenanted not to build within 30ft. of the road. (This covenant by B benefitted other property which A had retained.)

In 1872, B sold to C, who similarly covenanted not to build within 30ft. of the road.

About 1878, D wrongfully took the land, but as he remained there more than twelve years without hindrance he obtained a "squatter's title" (see page 580).

In 1890, D had died, but his son sold the land to E, who (quite legally) accepted the squatter's title and therefore did not demand to see the pre-1878 deeds. So he did not discover the existence of the covenant.

Later, E sold to Nisbet.

In 1903, Nisbet contracted to sell the land to Potts, who discovered the existence of the covenant before completing his purchase of the land. He pointed out that if he were buying from a B.F.P. without notice, the covenant would not be binding on him (as in *Wilkes v. Spooner* - page 77) but otherwise it would.

The court held that, although neither E nor Nisbet had known of the covenant, they had constructive notice because they had not insisted on looking at the old deeds. So the covenant still applied.

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All *restrictive* covenants created since 1925 (except those between landlord and tenant) must be *registered* in the Land Charges Registry *(if the servient tenement is unregistered land)* or must be protected by an entry on the Register at the Land Registry *(if the servient land is registered)*. Failure to register results in the covenant being unenforceable against anyone who acquires the servient tenement for money or money's worth.

Thus in our example if the covenant not to keep pigs was not registered, it would be enforceable against Boris, the original covenantor; but it would not be enforceable against Cyril (or any of his successors in title) if Cyril acquired the property for money (i.e. a purchase) or money's worth (e.g. an exchange of fields) - though it *would* remain enforceable if the property were *given* to Cyril.

Even if the restrictive covenant is registered, it is not *necessarily* enforceable. Registration only protects the covenant to the extent that the covenant is *valid*. Thus if there is neither privity of contract nor privity of estate and the plaintiff has done something which prevents him from being entitled to Equity, the covenant even if registered will be unenforceable.

The *benefit* of the covenant cannot be registered: so in our example Alan registers the burden against Boris' name at the Land Charges Registry (or enters it on the Register against "Greenacre" at the Land Registry if "Greenacre" is registered land) but there is no register in which he can register himself or "Tiny Nook" as having the benefit.

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On the positive covenant in our example - the covenant as to repair of the fence - Equity does not assist Singh. It was pointed out in *Austerberry v. The Corporation of Oldham (1885)* that *Tulk v. Moxhay* cannot be extended to positive covenants. Singh is therefore left with his legal right of suing Boris if he can find him. Boris can sue Cyril, Cyril sue Diane, Diane sue

Ethel. In other words there are such difficulties that it is fairly unlikely that Singh will obtain any satisfactory remedy for the breach of the positive covenant.

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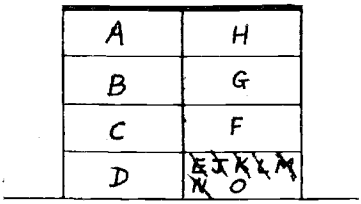
This difficulty on enforceability of positive covenants explains why freehold flats are so unpopular. Let us imagine a block of eight flats originally occupied by A, B, C, D, E, F, G, and H. Each of them owns the fee simple of his own flat and has entered into a (positive) covenant to keep his flat in good repair. E's flat subsequently passes through the hands of J, K, L, M, and N before coming into the hands of the present owner O in fee simple. O's flat is in a state of disrepair which is distasteful and alarming to all the other owners, and they want to take action against him.



As the covenant to repair is positive, *Tulk v. Moxhay* does not apply. They can only sue E. Then J, K, L, M, and N in turn, and finally O, will be joined in the action - there is privity of contract. The likelihood is that this will prove impracticable.

If the land is registered, the Land Registry will (as a concession) show the burden of the positive covenants on the Register - i.e. in our example it will show the burden of the covenant to repair the fence, on the Title Certificate of "Greenacre". But this concession does not extend to positive covenants imposed before the First Registration of the land. The evidence for these is the old pre-registration deeds! This is a strong reason for keeping the deeds after the land has been registered.

There is a rather useful rule laid down in the case of *Halsall v. Brizell (1957)* and discussed in detail in the case *Tito v. Waddell No.2 (1977)* stating that anyone who claims the benefits contained in a deed must submit to the burdens imposed by that deed.

A person cannot have the benefits without the burdens. Thus if O in our example above had been in the top-floor flat, O might have found himself deprived of the easements by which water and electricity come up to the top floor from ground level. But O in our example happens to have a ground-floor flat, so deprivation of benefits may not greatly inconvenience him.

If O cannot be sued for breach of covenant, it may or may not be possible - depending on just what he has or has not done - to sue him for the tort of Nuisance. But this only results in the plaintiffs receiving damages: it does not get the repairs done.

Because of the difficulty of enforcing positive repairing covenants on freehold property, it is far from easy to obtain a mortgage on a freehold flat where there are several flats in a block. Many Building Societies will not give them at all.

If the block of flats is leasehold - all the occupiers holding, for example, on 99 year leases from a landlord X, the position regarding covenants is comparatively simple. X can sue O on the basis of privity of estate, and the lease is likely to contain a proviso for forfeiture on breach of covenant. This "proviso for forfeiture" gives X the power to evict O if O will not put the breach of covenant right.

A useful device, often used today, is to grant leaseholds to the tenants and to grant the freehold to a limited company specially formed for the purpose. All the tenants hold a share in the company, subject to a covenant that if a tenant sells his leasehold flat he will also sell his share in the company to the purchaser. Thus, in our example above, the freeholder company would consist of eight equal shares which were originally allocated to A, B, C, D, E, F, G, and H. E's share is now held by O - who is likely to be outvoted at any shareholders' meeting.

Another device sometimes used is to grant freehold flats subject to a nominal rentcharge. Look again at the example of this on pages 349-350. As the positive covenants are made (in theory) *in support of the*

rentcharge, they are enforceable against the freeholder as if he had privity of estate with the rentcharge-owner. These "estate rentcharges" are not affected by the 1977 Rentcharges Act and can therefore still be created today.

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Part II: RUNNING OF THE BENEFIT (ON FREEHOLDS)

Note that for the rest of this chapter we are only dealing with the running of the benefit with regard to freeholds - because on leaseholds the benefit passes anyway by privity of estate and so the points set out below do not apply.

And remember that the history of covenants is rooted in the Law of Contract, and by the Law of Contract the benefit of a contract can be assigned or passed on to another person. This is the basic principle behind much of what we shall see below.

H: The Running of the Benefit at Law

The benefit of a covenant runs with the freehold land at common law if it is shown that it fulfils three conditions:-

(1) The covenant must touch and concern - must be for the benefit of - the covenantee's *land*: i.e. it must have been made for the benefit of some land (dominant tenement) which the covenantee owned at the time of the making of the covenant,

(2) The benefit must have been intended to run with a legal estate in that land, *(if no such intention is shown, the covenant is only personal: Contract Law says so.)*

(So, taking our original example, the covenant on page 455 not to keep pigs on "Greenacre": if this was for the benefit of Alan personally it would not run with the property; and even if it was made for the benefit of the property - dominant tenement - only an owner of a legal estate therein can sue: an Equitable owner cannot.)

(3) *(only applicable to covenants created before 1926)* The assignee must have that legal estate to which the benefit of the covenant was attached. *(In other words, if the covenant was attached to the fee simple, only the present fee simple owner can sue. But if the covenant is post-1925 this rule does not apply: and so the owner of ANY legal estate in the land - e.g. a tenant under a Lease - can sue.)*

If the above three conditions are fulfilled, the benefit runs - there is no need to show any express assignment of it to the purchaser.

The leading modern case on the running of the benefit at law is *Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board (1949).*

Alternatively the benefit of a covenant may be transferred by an express assignment in writing. Written notice of such a transfer has to be given to the covenantor.

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The privity of contract in our example is between Boris in "Greenacre" and Alan in "Tiny Nook". But by s.56 of LPA, other persons can be included: for example if the covenant had been expressed to be for the benefit of Alan *and the owners for the time being of "Magpie Cottage"*, then Fred and Florrie Smith (as the owners of "Magpie Cottage" at the time the covenant was made) could sue Boris as if they too had privity of contract. *White v. Bijou Mansions Ltd. (1937)* is a case on this point. Fred and Florrie are treated as if they had actually been parties to the deed.

But a person who subsequently buys "Magpie Cottage" from the Smiths would not be in the same position as Alan, but would be in the same position as Barney Pugg (who purchased "Tiny Nook" - see page 457) - in other words he could sue if the conditions (1)-(3) above were fulfilled, or if the benefit had been expressly assigned to him and Boris had been given written notice thereof.

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I: The Running of the Benefit in Equity

The benefit of a covenant runs with the freehold land in Equity if it is shown that two conditions are both fulfilled:-

(1) The covenant must touch and concern the covenantee's land: this is the same as condition (1) at common law, above, and

(2) The plaintiff must be entitled to the benefit of the covenant: see next paragraph.

The plaintiff can show he is entitled to the benefit of the covenant in any one of four ways:- he can show

either (a) the benefit of the covenant has been attached to land, and the plaintiff owns some interest in that land; *(This is Land Law.)*

or (b) the covenant, though not attached to the land in question, was made for the benefit of the land; and the plaintiff owns some interest in that land; and the benefit of the covenant has been assigned to him; *(This is not Land Law, because Land Law is inapplicable if the covenant has not been annexed to the land: but Contract Law applies and says that the benefit of a covenant can be assigned.)*

Note:- In (a) the benefit runs with the land automatically; in (b) it runs if it is assigned - e.g. if it is expressly transferred from Vendor to Purchaser in the purchase-deed. But it seems under (b) that once it has been expressly assigned once on the sale of the land, it will go on passing to future owners automatically without further express assignments. And furthermore on (b) see the case of Federated Homes Ltd. v. Mill Lodge Properties Ltd. (1980) on page 469 below.

or (c) there is a building scheme *(see below)*,

or (d) other scheme similar to a building scheme.

Regarding (a) above, the covenant is normally attached to the land if the deed imposing it states

that it is for the benefit of the land, or if it states that the covenant is made with the covenantee in his capacity as owner of the land. Usually some such formula as the following is used:-

> *"For the benefit and protection of the property known as "Tiny Nook"* retained by the Vendor (hereinafter called "the retained property") or any part or parts** thereof and so as to bind so far as may be the property known as "Greenacre" hereby conveyed into whosesoever hands the same may come**** the Purchaser hereby covenants with the Vendor and with the owners of the other plots on the Hill View Estate**** that neither the Purchaser nor those deriving title under him will at any time hereafter keep a pig or pigs on the property hereby conveyed or on any part or parts thereof *but so that neither the Purchaser nor those deriving title under him shall be liable for a breach of this covenant occurring on or in respect of the property hereby conveyed or any part or parts thereof after he or they shall have parted with all interest therein*****."*

Note:-

* *These words are to annex (i.e. attach) the benefit of the covenant to the land and not just to Alan.*

** *These words are inserted because of the cases of re Ballard's Conveyance (1937) and Marquess of Zetland v. Driver (1939) - see page 469.*

*** *These words are to annex the burden of the covenant to the land and not just to Boris (but even so the burden of the covenant can only run with the land in Equity - see Tulk v. Moxhay (1848) on page 459.*

**** *These words are inserted for s.56 of LPA - see page 466.*

***** *The last six lines of this formula serve to protect the purchaser against the possibility of his being liable - by privity of contract - for some future owner's breaches of the covenant.*

The benefit of the covenant is *not* attached to the land if the area of the land is greater than can reasonably be benefitted. So in *re Ballard's Conveyance* when restrictive covenants were stated to be for the benefit of the "owners for the time being of the Childwickbury Estate" (which was about 1,700 acres) it was held that the benefit could not run with the estate as the land was too extensive for the covenant to be able to benefit the whole of it.

A covenant for the benefit of the whole *or any part* of the Estate (as in the formula above) would have attached to the land, as shown in *Marquess of Zetland v. Driver (1939)*.

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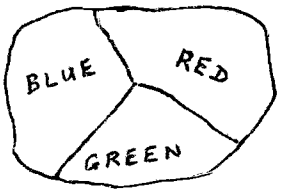
With regard to the points (a) and (b) on page 467, we must note that in the 1980 case of *Federated Homes Ltd. v. Mill Lodge Properties Ltd.* something rather odd happened in the Appeal Court, as a result of which it *may* be that point (a) applies automatically, and therefore point (b) *does not exist*. Briefly, the facts of *Federated Homes Ltd. v. Mill Lodge Properties Ltd. (1980)* were as follows:-



The Vendor owned all three pieces of freehold land shown in the accompanying diagram.

He sold the "Blue" land to the defendant, who gave an assignable restrictive covenant (for the benefit of the "Red" and "Green" lands) not to build more than 300 houses on the "Blue" land.

The Vendor then sold the "Red" and "Green" lands (and expressly assigned the benefit of the covenant) to B.

B sold the "Green" land (and expressly assigned the benefit of the covenant) to the plaintiff.

The "Red" land was sold (and the benefit of the covenant was expressly assigned) to United Dominions Trust.

United Dominions Trust sold the "Red" land to the

plaintiff but did not expressly assign the benefit of the covenant.

Thus the plaintiff had both the "Red" and the "Green" pieces of land, but on the "Green" the benefit of the covenant had been assigned to him, while on the "Red" it had not.

The plaintiff wished to stop the defendant from building more than 300 houses on the "Blue" land. (The defendant wanted to build 332, and this would reduce by 32 the number for which the plaintiff could obtain planning permision, because the Planning Authority had decreed that development on the three pieces of land was not to exceed 1,250 houses in total.)

The High Court decided the case in the plaintiff's favour, on the grounds that there was express assignment of the benefit for the "Green" land and implied assignment of the benefit for the "Red". The defendant appealed against this decision.

The Appeal Court, without expressing any view on the "implied assignment" point, held that the plaintiff must win because by s.78 of LPA the benefit of covenants is *automatically* annexed to land, and to every part thereof, irrespective of whether or not the deed says so. And so no assignment is necessary, and the requirement (b) on page 467 is abolished for all post-1925 restrictive covenants.

This is not how s.78 had previously been understood, and many criticisms and grave doubts have been expressed as to whether the Appeal Court took a right course in interpreting s.78 to mean this.
But if this is the present position (and it is, until the case is overruled or is changed by Parliament) then it seems that point (b) simply does not exist, so far as post-1925 covenants are concerned. It has been suggested by one textbook-writer that the Appeal Court did not realise that this was the effect of what it was doing!

Personally I would still use an express assignment - because if one day a case on this point goes to the House of Lords, the decision might be reversed!

J: Building Schemes

On many housing estates covenants are imposed on each plot for the benefit of all the other plots. But this intention does not always succeed in practice. Take for example an estate of 100 new houses, of which 96 have already been sold. You are buying the 97th., subject to the covenants which have been imposed throughout the estate.

By making the benefit of the covenants attach to "the whole or any part" of the land at that moment retained by the developer, the developer causes you to be bound by the covenants for the benefit of the three plots still unsold - the developer will have power to bring an action against you if you choose to ignore the covenants, and so will the purchasers of those remaining three plots, though if they happen to be at the far end of the estate the court might hold that they could not receive any benefit in this instance. But the other 96 owners have no power to maintain an action against you if you choose to ignore the covenants, unless the covenants were stated (in your purchase-deed) to be made with them also - by s.56 of LPA: see page 466.

If this was not done, the purchaser of the last plot can be sued by no-one but the developer - and if the developer happens to have been a company which has subsequently gone out of existence, the covenants may well be unenforceable.

(Similarly in our example of freehold flats on page 463: if the flat which E bought happened to be the last one, and no words to bring in s.56 were inserted, then no-one but the builder could sue - which makes the situation in that example even worse than we thought!)

It is possible to avoid such situations as this by careful use of the formula on page 468; but sometimes such situations may be more conveniently avoided by having a Building Scheme. This is a scheme whereby covenants on each plot on the estate are enforceable by the owners of all other plots.

For a Building Scheme to exist, the following five

conditions laid down in the case of *Elliston v. Reacher (1908)* have to be satisfied:-

a) common vendor: the plaintiff and the defendant must both have derived title from the same vendor. (This does not require them both to have *bought* from the same vendor, but requires them to show title going back, maybe through several previous owners if the houses have been built for some years, to one original vendor. Normally he is the builder.)

b) estate laid out in lots: before the sale of the plaintiff's and the defendant's plots, the common vendor must have laid out or intended to lay out the estate in lots subject to restrictions which were intended to be imposed on all of them and which were consistent only with some general scheme of development.

c) restrictions intended for the benefit of all lots: the common vendor must have intended the restrictions to be for the benefit of all the lots *(i.e. plots - or possibly groups or parts of plots)* sold - not merely for his own personal benefit.

d) plaintiff's and defendant's plots were purchased on the understanding that this was so: the plaintiff's and defendant's plots must both have been bought originally from the common vendor on the footing that the restrictions were for the benefit of the other plots.

e) clearly defined area: the area to which the scheme extends must be clearly defined.

The fundamental intention of the Building Scheme is that each original purchaser should know, when he buys from the common vendor, that the covenants entered into by him are to be enforceable by the owners of all the other lots.

The proving of the above five points is sometimes not easy, but where a Building Scheme can be proved it is in effect a sort of local law for the estate.

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K: Other Schemes similar to Building Schemes

The principle outlined above is not limited to building estates - it can be applied to an estate already fully built which is disposed of in sections, and also in certain circumstances has been applied to a block of residential leasehold flats: a Letting Scheme.

Part III - THE REST OF THIS CHAPTER

L: Covenants and Planning

The Town Planning legislation of the twentieth century (by which, with certain exceptions, no development may be carried out without the written permission of the local planning authority) has not in any way replaced the law concerning covenants. Landowners must observe restrictions imposed by covenants and also those imposed by the planning requirements (see page 609) and the requirements of the Building Regulations (see page 610).

Covenants can sometimes help in situations where Town Planning legislation has no power. For example:-

X owns two freehold shops, side by side. They were already in use as shops on 1st. July 1948 (the date that the 1947 Town and Country Planning Act brought Planning in its present form into being) - and today X runs one of them as a butcher's, and employs a manager (Y) to run the other one as a grocer's.

The manager leaves, and X sells the grocery shop to Z in fee simple as a going concern.

A few months later, Z decides there is more profit in meat than in groceries, and converts his shop into a butcher's - which is quite likely to put X out of business.

Z does not need planning permission for this. There are eighteen Planning "Use Classes" laid down in the Town and Country Planning (Use Classes) Order 1972 *(statutory instrument 1972 no. 1,385, amended by s.i.*

1983 no. 1,614) but as all shops (except fish-and-chip shops and a few others) come within Use Class I, changing this shop from a grocer's to a butcher's is not a change in the use and does not require any Planning Permission.

If the shops had been built since 1948 the position might be different because the Planning Permission for building them might be subject to conditions - but these can only be enforced by the Planning Authority, so X could do little about it if the Authority chose to take no action against Z.

X should have guarded himself against such risks. He should have sold the property to Z in fee simple subject to a restrictive covenant not to use the premises for the sale of meat. (But this wording is so general that it prevents the grocer from selling pork pies, so the covenant needs to be more specific, saying "fresh meat" or "uncooked meat" or "meat except in pies and puddings" etc. X's and Z's respective solicitors will negotiate a form of words agreeable to both sides.)

Restrictive covenants are sometimes overridden by statute if a Local Authority has acquired the land for planning purposes, or if the land has been compulsorily purchased. In such cases there is compensation for persons losing the benefit of the covenants.

M: Land Obligations - the Law Commission's Proposals

In 1984 the Law Commission produced a Report on Covenants (331 pages) proposing the creation of a system of "Land Obligations" to be used instead of covenants. The idea is not new: there have previously been the Wilberforce Committee on Positive Covenants (1963) the Law Commission's Report on Restrictive Covenants (1967) the Law Commission's Working Paper on Rights Appurtenant to Land (1971) and some suggestions by the Benson Commission on Legal Services (1979) along somewhat similar lines.

The 1984 Report recommends that the systems of

both positive and restrictive covenants should be replaced by a system of Land Obligations whose benefits and burdens would run with the land very much like the benefits and burdens of easements do at present.

Land Obligations could be either legal (made by deed either in fee simple or for a term of years) or Equitable (all other cases) - but whether legal or Equitable they would require to be registered as Class C Land Charges at the Land Charges Registry, or (in the case of registered land) noted on the servient title at the Land Registry.

Their benefit should run with the dominant land automatically - just like the present law on easements.

Their burden should run with the servient land automatically - like easements - but it would be unfair if a person with a one year's lease found himself therefore subject to a positive obligation to repair a ten-foot-high Victorian boundary wall about half a mile in length (for example) and so the proposal is:-

the burden of *restrictive* Land Obligations should run with the land to bind any owner and any occupier;

the burden of *positive* Land Obligations should run with the land to bind any owner and any occupier with a lease *exceeding 21 years*.

There would be certain provisions for variation and extinguishment of Land Obligations to allow for changing circumstances (demolition and re-development, for instance).

Legislation to bring these proposals into effect on 1st. January 1986 was hoped for but it is doubtful whether this date can now be achieved.

Once such legislation comes into effect, it will no longer be possible to create any further new covenants, *but these proposals will not affect covenants already in existence at the date of the passing of the Act*: all the existing covenants will remain as they are under the present law with all its present ramifications as to privity of contract or privity of estate, *Tulk v. Moxhay* and so forth. This

is an inconvenience but it makes sense: if a purchaser bought a freehold property at some time in the past, at a price determined by a Valuer who took into account the fact that an onerous positive covenant to repair a high Victorian boundary-wall was unenforceable, it would not be right to make a change which saddled the purchaser with liability for hundreds of pounds in repair bills for which he had not budgeted. So the old unenforceable covenants should remain unenforceable.

One exception to this might be a provision to solve the present "freehold flats" problems by enacting that if a majority of freeholders in the block of flats entered into an agreement about the covenants, the Court could make an order that the consent of those owners who refused to join in the scheme was not needed.

Obligations will be divided into two types (with slightly differing rules) namely "neighbour" obligations (between neighbours) and "development" obligations (covering a new housing estate or similar development). The Perpetuity Rule will not apply to Land Obligations.

SUMMARY

In this chapter we have seen:-

a covenant is an agreement made in a deed

personal covenants, and covenants touching and concerning the land

positive and restrictive covenants

privity of contract: the relationship between two parties to a contract

privity of estate: the relationship of landlord and tenant

two questions arise:

(i) can the person wishing to take action do so? (Has the benefit run to him?)

(ii) can he take his action *against the person who is breaking the covenant?* (Has the burden run to that person?)

the benefit of covenants touching and concerning the land runs with the land

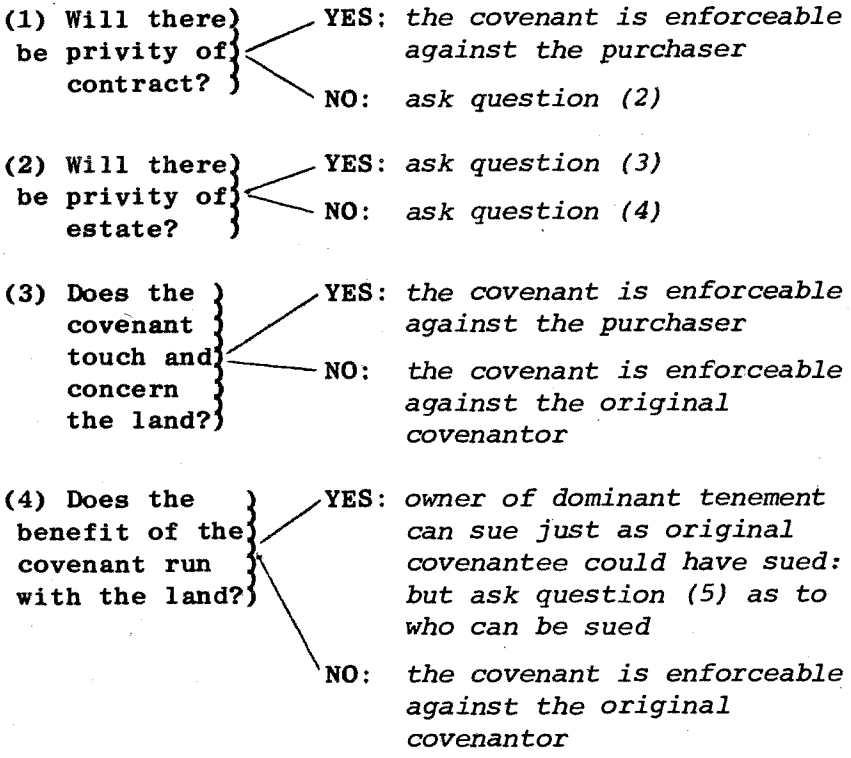
the burden of covenants touching and concerning the land does not run with the land, at common law

the burden of *restrictive* covenants touching and concerning the land can run with the land, in Equity: *Tulk v. Moxhay (1848)*

a covenant created before 1926 is not enforceable against a "B.F.P. without notice"

a covenant created since 1925 is not enforceable against any purchaser for money or money's worth if it is not registered

when considering whether or not a particular covenant is enforceable, we should ask certain questions:-



(5) Is the covenant restrictive in nature?

- **YES:** *ask question (6)*
- **NO:** *the covenant is enforceable against the original covenantor, but he may set up a chain of privity of contract leading to the present purchaser*

(6) Was the restrictive covenant created before 1926?

- **YES:** *if the purchaser is a bona fide purchaser without notice, the covenant is not enforceable against him; but if he is not a B.F.P., then ask question (8)*
- **NO:** *ask question (7)*

(7) Was the restrictive covenant registered?

- **YES:** *ask question (8)*
- **NO:** *the covenant is not enforceable against a purchaser for money or money's worth. [But if the property is acquired by someone not in this category, then ask question (8).]*

(8) Has the plaintiff himself behaved Equitably in all respects?

- **YES;** *ask question (9)*
- **NO;** *answer as in "(5) NO", above*

(9) have all the conditions laid down in *Tulk* v. *Moxhay* been fulfilled?

- **YES:** *the covenant is enforceable against the purchaser*
- **NO:** *answer as in "(5) NO", above*

For QUESTIONS, see page 444.

CHAPTER 35

REMOVAL OF RESTRICTIVE COVENANTS

OUTLINE OF CHAPTER:-

A: Enforceability
B: Court's Refusal to enforce
C: Declarations
D: The Lands Tribunal
E: The County Court
F: Unity of Ownership

ENFORCEABILITY

As we have seen in the previous chapter, the apparent existence of covenants does not necessarily mean that any covenants are enforceable. For instance (i) there may be no-one who can bring an action, either because the covenant was a personal one or because of one of the other reasons we have seen, or (ii) even if there is someone who can sue, there may be no-one who for practical purposes can be sued - maybe (a) the covenant is a pre-1926 restrictive covenant and the servient land has come into the hands of a B.F.P. without notice or (b) the covenant is a post-1925 restrictive one which has not been registered or protected at the appropriate Registry, or (c) the covenant is a positive one, not a restrictive one, over freehold land and it is impracticable to trace the persons in the chain of privity of contract.

COURT'S REFUSAL TO ENFORCE

Even when an examination of the situation in accordance with the rules in the previous chapter leads to the conclusion that a covenant is enforceable, the court may refuse to enforce it if (i) breaches have been tolerated for so long that a normal person would think that the covenant was no longer applicable, or if (ii) the character of the neighbourhood has so changed that the action must have been brought in bad faith with some ulterior motive.

DECLARATIONS

An application can be made to the court for a declaration as to whether the freehold is affected by any restriction, and (if so) what is its nature, extent and enforceability.

This provision is particularly useful to a developer who is buying land on which covenants were imposed many years (sometimes more than a hundred years) ago. A typical example would be a covenant "not to build more than two houses per acre" dating from the 1860s or even earlier, on a piece of land in an area which was - then - a neighbourhood of fine residences for those well-to-do Victorian gentlemen who could afford to employ servants and a number of gardeners. Today some of these once-fine houses are in a sorry run-down state, and if they are of no architectural interest and/or are structurally unsound, they may well be ripe for demolition so that the land can be redeveloped. The town having expanded, these large houses are in an inner urban area where the limiting of development to two houses per acre would benefit no-one and would be a waste of very valuable (and expensive) land.

Note that the court has no power to remove or vary the covenants.

There are however two ways in which covenants may be removed or varied, one being through the Lands Tribunal, and the other (applicable only to covenants against the conversion of houses into flats) through the County Court:-

LANDS TRIBUNAL

The Lands Tribunal is able to discharge or modify a covenant in four situations, namely:-

(a) if it is obsolete because of a change of character of the neighbourhood, and thus impedes the reasonable use of the land, without benefitting anyone, or

(b) if it impedes some reasonable use of the land, and gives no practical benefits of substantial value or

advantage to the persons entitled to benefit (or it is contrary to the public interest) and money will be adequate compensation, or

(c) if the persons entitled to the benefit agree, expressly or impliedly, to the discharge or modification, or

(d) if the discharge or modification will not injure the persons entitled to the benefit.

So in (a) there is no benefit from the covenant:
in (b) it can be compensated:
in (c) the persons entitled agree to the change: and
in (d) the persons with the benefit will not be hurt.

These powers of the Lands Tribunal apply to covenants on (a) freeholds, and (b) leaseholds over 40 years long of which at least 25 years have expired.

COUNTY COURT

The County Court is able to authorise the conversion of a house into two or more tenements (i.e. flats!) in breach of covenant if:-

(i) the neighbourhood has changed so that the house cannot readily be let as a whole (e.g. the large Victorian house for the family with servants in the example on page 480) or

(ii) planning permission has been granted for the conversion of the house into flats.

UNITY OF OWNERSHIP

And finally, if the property benefitted and the property burdened both come into the same ownership, the covenant can no longer have effect and is therefore permanently ended: *Texaco Antilles Ltd. v. Kernochan (1973)* - except perhaps if there is a Building Scheme or other similar scheme.

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for further reading:-

(on covenants) *Preston and Newsom: "Restrictive Covenants affecting Freehold Land";*
(on easements) *Gale: "The Law of Easements".*

SUMMARY

In this chapter we have seen:-

a reminder that some covenants are unenforceable (as we saw in Chapter 34)

Court declarations as to enforceability of covenants,

powers of the Lands Tribunal as to covenants,

powers of the County Court as to covenants not to convert a house into flats.

TEST QUESTIONS on Chapter 35:-

1. Margery has bought an eight-bedroomed house together with its outhouses which consist of a stable and coach-house etc. She has Planning Permission to convert the house into three flats and to make the stable and coach-house into a restaurant.

   The property is subject to a covenant in a deed dated 1877 "not to use the property except as a single private dwellinghouse in the occupation of one family and their visitors and servants only" and a covenant in a second deed (which Margery has forgotten to bring with her but she is sure it was made "in the mid-1920s", she says) "not to use the property nor any part thereof for any trade or business". There is also a covenant in the 1877 deed "to repair and maintain the western boundary wall" - this wall is now unsafe and Margery would like to replace it with a post-and-wire fence.

   Advise Margery, with reasons, whether she will be bound by any or all of these three covenants.

2. What are the main differences between extinguishment or removal of covenants and extinguishment or removal of easements?

3. In what circumstances can the Lands Tribunal extinguish a covenant?

THE END of Part 3 of this book.