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FIRST PROGRAMME: ITEM IX: TRANSFER OF LAND

APPURTENANT RIGHTS

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PART I - INTRODUCTION

1. Item IX of our First Programme requires us to examine the system of conveying land with a view to its modernisation and simplification. We soon found that many of the existing difficulties in the system merely reflected the state of the substantive law. Nowhere is this more true than in the field of appurtenant rights, and, as will be seen, the law here is complicated. Different categories of rights have different historical origins and have been allowed to develop separately, leading to confusion in principle and uncertainty in practice. The development of the law took place, moreover, at a time when rights of private ownership were held sacrosanct to a degree not now regarded as consistent with the interests of the community as a whole, and in some respects the law needs to be made more flexible so that it can take account of social changes.

2. We accordingly embarked on a wide-ranging study of the relevant law, and this Paper is the product of that study. We are very grateful to the members of the Consultative Group[1] who assisted us in the early stages and to Mr R.R.A. Walker (formerly the senior Conveyancing Counsel of the High Court) who has agreed to give us the benefit of his experience in land law matters and has discussed the final draft of the Paper with us. We must, however, add that the responsibility for the suggestions made and provisional conclusions arrived at is ours alone.

3. The scope of the Paper must be defined. By "appurtenant rights" we mean all those rights which are (or ought to be) enforceable by the owner for the time being of one piece of land[2] against the owner of other land, enabling the former either to do something on the other land; or to require the other person

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1. The members of the Group are named in the Appendix.

2. As explained in para. 7, to speak of the ownership of land itself is convenient, although not strictly accurate.

to do or refrain from doing something on his own land; or to pay or contribute to the cost of works which would benefit his land. The Paper is therefore about matters such as rights of support, rights of way, rights to light ("ancient lights"), and covenants relating to land, and it makes suggestions as to how rights of that sort might be treated in the future. In addition to owners, occupiers of land may be involved. The rights may be given by the common law or by statute; or they may be created by individuals with the intention that they should be attached to the land. The expression covers covenants between landlord and tenant relating to other property of the landlord but not covenants relating exclusively to the premises which are the subject matter of the lease or tenancy. It does not include rights under purely personal agreements which are of concern only to the contracting parties; or profits à prendre in gross; or rights which may be obtained under statutory powers by public authorities such as Electricity Boards and the Post Office. Though these other rights affect land or its user, they do not exist for the benefit of other land.

4. This seems to be the first attempt at a review of the subject of appurtenant rights as a whole, but certain parts of the field have been considered in recent years and in each case substantial changes in the law have been recommended.

(a) A Committee under the chairmanship of Lord Wilberforce considered the position of positive covenants affecting land. In their Report (1965 Cmnd. 2719) they recommended that certain positive covenants should run with the land so as to be enforceable by and against the owners for the time being; and they dealt in particular with buildings in divided ownership.

(b) The Law Reform Committee in their 14th Report (1966 Cmnd. 3100) considered the acquisition of easements and profits by prescription. Their members were divided on the question

whether prescription should be retained, but were unanimous that if it were retained the law should be drastically revised.

(c) The Council of The Law Society have drawn attention to problems relating to party structures and have suggested that the relevant provisions of the London Building Acts (which deal with building on or near boundaries) should apply to the rest of the country; and we know that the Royal Institution of Chartered Surveyors would welcome such an extension. The Council have also suggested that certain standard rights could be incorporated into conveyances by short reference to a statutory code setting out those rights.

(d) We published a Report in 1967 (Law Com. No.11) recommending various changes in the law relating to restrictive covenants.

5. One of the disadvantages of dealing piecemeal with a subject such as the present is that overlapping problems, even if appreciated, may not ever get dealt with. That method of proceeding, moreover, tends to preserve between categories of rights distinctions which are part of legal history but which no longer have any rational justification. As will be seen, the existing classification of rights seems to be faulty, if only because the categories are not in a true sense mutually exclusive.

6. Having conducted our preliminary study, we have come to the conclusion that it is both practicable and desirable to give the whole subject a coherent structure. We summarise our views in the form of Propositions in the last part of this Paper, but it may be convenient to set out the essential new features at once:

(i) An extension of the category of rights and obligations which (in the absence of agreement

to the contrary) are incidental to the ownership of land. In this field we deal with rights of support for buildings; rights and obligations relating to party structures; and certain minimum rights and obligations in relation to interdependent units of occupation.

(ii) An assimilation so far as possible of all other appurtenant rights (easements, profits à prendre, restrictive covenants and positive covenants). This involves, incidentally, the implementation of the substance of the Wilberforce proposals.

(iii) The introduction of certain provisions designed to minimise uncertainty. In this field we cover the "general words" in section 62 of the Law of Property Act 1925; and prescription; and we suggest a considerable extension of the powers of the Lands Tribunal. These provisions are perhaps less fundamental than the other features just mentioned but are not necessarily less controversial.

7. The law relating to appurtenant rights forms a part of the law of real property and any reformulation of that part of the law should, pending any fundamental revision of the property legislation of 1925, be carried out in such a way that it will fit into the scheme of that legislation. We accept, for example, that ownership exists not in land itself but in estates or interests in land, and if we speak of "the owner of land" we do so merely to make the Paper more readable.

8. Any reformulation of the law is bound to raise questions about rights already created. Is the new law to apply to them at all; if so, to what extent? And if the law on prescription is changed, what is to be done about "inchoate rights" where time is running when the new law comes into force? This Paper largely leaves those questions in the air. As will be seen,

our Propositions have been so drafted that every existing appurtenant right could be fitted immediately into the new framework which we suggest. Hence, it may be that transitional provisions could be reduced to the minimum. There are, however, undoubted obstacles in the way of applying the suggested new law to some existing matters. In particular, it would be difficult to apply it to existing positive covenants since that would in some cases have the effect of imposing retrospectively new burdens on landowners.

9. Reference has already been made to our earlier Report (Law Com. No.11) on Restrictive Covenants. It must be said at once that the Propositions set out in that Report have not been carried wholesale into this Paper. Moreover, although the earlier Report had in view the assimilation of negative and positive covenants, it looked no further than that: it said nothing about bringing in easements or profits à prendre. The extension of the area of assimilation to include easements and profits is a more ambitious project, and it affects the basis on which the assimilation is to be carried out. Easements cannot be dealt with along lines hitherto regarded as appropriate to covenants; the conversion of legal easements into mere equitable interests all requiring registration for their protection would, to say the least, create problems of enormous magnitude. We are therefore suggesting that easements and covenants should be assimilated along lines hitherto regarded as appropriate to easements.

10. In this Paper appurtenant rights other than those which are (or ought to be) incidental to the ownership of land, are given the general name "Land Obligations". We appreciate that easements are primarily thought of not as obligations but as rights: they either entitle someone to do something on someone else's land (rights of way for example) or they are enjoyed by someone without any real sense of obligation normally being felt by anyone else (e.g. rights to light). Covenants, whether restrictive or positive are, it is believed, primarily thought of as placing a burden (or obligation) on land. If easements

and covenants are to be brought together the law must treat them alike either as "rights" or as "obligations" and in either event some mental reorientation is unavoidable. We have settled for "Land Obligations" because in the context of land transfer it may be more useful to be able readily to list the liabilities attaching to the land in question. That is the approach which we adopt throughout. As a matter of drafting, moreover, it has been found somewhat easier to couch everything in terms of obligations. This is true also of the rights incidental to ownership.

PART II - SUMMARY OF THE PRESENT LAW

11. It would not be practicable in a paper of this kind to explain in detail all the features of the existing law but it may be helpful to outline the various types of rights appurtenant to land which are recognised at present.

(1) Rights incidental to ownership at common law

12. These are natural rights which have been recognised from early times and exist automatically unless they have been relinquished or qualified by agreement. They are of limited scope and substantially comprise:

(a) the right to the support of land by other land,[3]

(b) the right to the uninterrupted flow of water in a natural and defined channel, subject to ordinary and reasonable use by owners of other land through which it passes.[4]

(2) Rights provided by statute

13. We refer here to rights arising under legislation limited in its application to certain built-up areas. The principal

3. Though usually expressed as a "right", this is perhaps more accurately stated as a duty not to withdraw support, since natural landslips, for example, do not found causes of action.

4. The enjoyment of this right has however been greatly affected by the Water Resources Acts 1963 and 1968.

example of such local legislation is the London Building Acts (Amendment) Act 1939, Part VI of which contains provisions relating to:

(a) party walls and projecting footings and foundations; and

(b) the regulation of excavation on the land of one owner which is likely to cause damage to a building on the adjoining land.

(3) Rights capable of creation by the owners of land

14. The following different types of appurtenant right are included within this category: easements[5] (including the "easement" of fencing), profits appurtenant, restrictive and positive covenants, and what can be termed "estoppel interests".

(a) Easements

15. Easements are rights possessed by the owner of one piece of land (the "dominant" land) whereby the owner of other ("servient") land is obliged either to suffer something to be done on his land, or to refrain from doing something on his own land, for the benefit of the dominant land. The necessary characteristics of an easement are:

(i) there must be both dominant and servient lands;

(ii) the easement must be connected with the normal enjoyment of the dominant land;

(iii) the dominant and servient lands must be in different ownership;

(iv) a right over land can be an easement only if it can form the subject matter of a grant: that is to say it must be a right known to the law[6] and it must be clearly defined. Further-

5. Listed in paras. 16 and 17 below.

6. It has been held that neither a right to a view nor a right to shelter from the weather is a right known to the law: Phipps v. Pears, para. 17 below.

more, a right may fail to qualify as an easement if it is so extensive as to amount in practice to possession of the servient land.

16. Rights which can subsist as easements may be divided into two categories: positive easements (which give the owner of the dominant land a right to do something on the servient land) and negative easements (which give the dominant owner a right to stop the servient owner doing something on the servient land). The positive easements which have hitherto been recognised by the courts may be roughly classified[7] as:

(i) rights of way,

(ii) rights of access to land,

(iii) rights to the passage of services (including piped supplies of water, piped sewage disposal, the laying of telephone wires etc.),

(iv) rights connected with water (e.g. to discharge water onto a neighbour's land or to take water from a spring or pump),

(v) miscellaneous rights to make use of neighbouring land (e.g. by using a private garden for recreation, by attaching something to a building or by putting something on the land).

So far as positive easements are concerned, it was held in Re Ellenborough Park[8] that the list is not closed and it seems that any positive right which is neither too vague to be granted nor so extensive as to amount to possession of the grantor's land could qualify as an easement.

17. Negative easements comprise:

(i) a right to light for a building,

(ii) a right to receive air by a defined channel,

(iii) a right to the support of buildings by land

7. For a fuller list, see Gale on Easements, 13th ed. pp. 31-32.
8. [1956] Ch. 131.

or other buildings,

(iv) a right to an uninterrupted flow of water in an artificial stream.

Such rights can in effect also be obtained by the imposition of appropriate restrictive covenants on the servient land and it seems unlikely that any further negative easements would now be recognised: indeed in Phipps v. Pears[9] the Court of Appeal confirmed that rights such as shelter or shade from trees or buildings, or to a prospect or view, are not known to the law as easements. Benefits of that kind must be obtained by the imposition of restrictive covenants.

18. A true easement, whether positive or negative in character, requires no more than sufferance on the part of the owner of the servient land. There is, however, one right which is enforceable as though it were an easement but which calls for positive action on the servient owner's part. This is the relatively rare "easement" of fencing, which entitles the dominant owner to require the servient owner to maintain a fence on the servient land.[10] The effect of this right is to protect the dominant owner from the risk of liability for cattle trespass.[11] Its existence is not easily established for although farmers maintain the fences and hedges on their land, that fact is, ordinarily, sufficiently explained by their wish to keep their own animals in: it is not referable to the acceptance of an obligation to keep their neighbour's animals out.[12]

19. Easements are capable of subsisting as legal interests in land if granted for an interest equivalent to an estate in fee simple absolute in possession (i.e. a freehold estate) or a term of years absolute. If created for any other length of time (e.g. for life) they take effect as equitable interests.

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9. [1965] 1 Q.B. 76.

10. The obligation to fence commonly found in the context of housing development is based not on the existence of this "easement" but on express covenant.

11. As in Crow v. Wood [1970] 3 W.L.R. 516.

12. See Jones v. Price [1965] 2 Q.B. 618. The "easement" of fencing is a thinly disguised positive covenant which has escaped the unfavourable treatment hitherto accorded by the law to such covenants.

20. Easements can be created by express grant (which requires a deed if the easement is to subsist as a legal interest in the land) and by prescription (whereby the right is acquired as a result of long use). They may also come into being under the "general words" in section 62 of the Law of Property Act 1925; as easements of necessity; or under the doctrines of implied grant,[13] non-derogation from grant and, in certain circumstances, implied reservation.

(b) Profits Appurtenant

21. Profits à prendre are rights to go onto another's land and take something off that land. The subject-matter may be part of the land (e.g. sand or peat), living things such as fish or game, or things growing naturally on the land, such as ferns or acorns. They also include rights of pasture. Unlike easements, these rights may be enjoyed in gross (that is to say, they need not be enjoyed by someone in his capacity as an owner of land), but it is only with those profits which are attached to dominant land that this Paper is concerned. Broadly speaking they have the same characteristics as easements in that they are normally legal interests which pass automatically with the ownership of the dominant land and the methods of acquisition are in principle the same. A profit cannot exhaust the produce of the servient land so as to amount to a right of possession of the land itself; and its extent is further limited by the rule that the dominant owner is not entitled to take advantage of a profit further than the normal enjoyment of his land requires.

(c) Restrictive Covenants

22. Restrictive covenants are agreements between neighbouring landowners whereby specific restrictions on the use which may be made of the land of one of them are imposed for the benefit of the land of the other party to the agreement. For example, a householder may sell part of his garden to his neighbour subject to a covenant that it shall not be built on.

13. See Wheeldon v. Burrows (1879) 12 Ch. D. 31.

23. The benefit of a restrictive covenant may be assigned; and it can "run with the land" of the covenantee without express assignment provided that the covenant "touches or concerns" that land - i.e. affects its enjoyment or value[14] - and provided that the benefit of it has been clearly attached to defined land of the covenantee. The burden cannot be assigned but, although it does not run with the covenantor's land at law,[15] it can be enforced against a successor in title of the covenantor in equity.[16] In addition, where a "building scheme" can be shown to have been established in accordance with the rule in Elliston v. Reacher[17] - i.e. where plots have been laid out for sale by a common vendor subject to a scheme of development imposing mutual restrictions - the restrictions can be enforced by the purchasers of the plots (and their successors in title) against each other.

24. Covenants of this kind, originally purely contractual in nature, have thus achieved the status of equitable interests in land, being enforceable in equity by the current owner of a specific piece of benefited land against the owner for the time being of the burdened land. They have, however, also retained their contractual character in that the original covenantor remains liable on his covenant even after parting with all interest in the land.[18]

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14. If a covenant benefits a trade or business carried on by the covenantee, it is sometimes a difficult question of fact to decide whether the covenant benefits the land on or from which the trade or business is carried on. Similar problems may arise in relation to easements: compare Moody v. Steggles (1879) 12 Ch. D. 261 with Hill v. Tupper (1863) 2 H. & C. 121.

15. Austerberry v. Corporation of Oldham (1885) 29 Ch. D. 750.

16. Established in 1848 by the decision in Tulk v. Moxhay (1848) 2 Ph. 774.

17. [1908] 2 Ch. 374. There seems to be a trend towards a wide application of the rule: see Re Dolphin's Conveyance [1970] Ch. 654; Eagling v. Gardner [1970] 2 All E.R. 838; Brunner v. Greenslade [1970] 3 W.L.R. 891.

18. In Law Com. No.11 (Report on Restrictive Covenants) we recommended that this should no longer be so (proposition 4).

25. Covenants can only be created expressly. If properly imposed they can last for ever, but they may be released by agreement and in certain circumstances the Lands Tribunal has power to discharge or modify covenants as to user or building.[19]

(d) Positive Covenants

26. The positive covenants with which this Paper is concerned are those in agreements between neighbouring landowners whereby specific positive obligations are imposed on the land of one of them for the benefit of the land belonging to the other (or for their joint benefit). Such covenants are usually entered into on the occasion of a division of land, one party undertaking, for example, to maintain, or to pay for the maintenance of, a dividing wall or fence.

27. The benefit of a positive covenant can be made to run with the covenantee's land but the corresponding burden does not run with the covenantor's land. The covenant cannot be directly enforced against the covenantor's successor either at law or in equity, for equity will not compel a person who has not contracted to do so to spend money or carry out work. Although positive covenants (e.g. to erect and maintain a fence)[20] are often included with restrictive covenants in a single list of stipulations, they are not enforceable against anyone other than the original covenantor or his personal representatives,[21] who remain liable under the covenant even after they have parted with their interest in the land. The dominant owner may, for a time, be able to ensure that a positive covenant is in fact observed by the covenantor's successor by threatening proceedings against the covenantor, who is almost certain to have required his immediate successor to covenant with him to perform the

19. Law of Property Act 1925, s.84 as amended by the Law of Property Act 1969, s.28.

20. Not to be confused with an "easement" of fencing.

21. But see Halsall v. Brizell [1957] Ch. 169 where the court enforced a positive covenant to contribute to the cost of maintaining roads and sewers by applying the principle that a person who takes the benefit of a deed must also undertake the obligations imposed by the same deed.

original covenant and to indemnify him against liability thereunder (and so on down the line of successive owners). But a chain of such indemnity covenants is effective only while the original covenantor is both traceable and worth powder and shot. Because of the difficulties which this unsatisfactory situation can create, both in the context of covenants between adjoining landowners in the traditional sense and, perhaps more particularly, in the context of buildings erected or converted for use as freehold flats, the Wilberforce Committee[22] recommended that:

(i) The benefit and burden of certain positive covenants created in future in the required form should run with the dominant and servient lands respectively.

(ii) These covenants (called in that Committee's report "covenants in rem") should be defined as covenants either to execute works on the covenantor's land for the benefit of other land or to pay or contribute towards the cost of works to be executed on other land and intended to benefit the covenantor's land (and possibly other land as well).

(iii) The Lands Tribunal should have power to modify or discharge a positive covenant in rem, with particular reference to the cost of the work or the amount of the payment as compared with the benefit likely to result from its performance.

(iv) Certain minimum obligations should be applied compulsorily to all buildings divided in the future into horizontal units of ownership.

28. The Committee considered that such positive covenants should not be binding on a purchaser of the burdened land who had no notice of them. For this purpose, it was suggested that

22. See (1965) Cmnd. 2719, para. 53 for a summary of their recommendations.

in the case of registered land entry in the register of title should constitute notice but for unregistered land the pre-1926 doctrine of notice should apply.

(e) Estoppel Interests[23]

29. What is meant by an estoppel interest is, perhaps, best illustrated by the facts in E.R. Ives Investment Ltd. v. High[24] which were as follows:

> In 1949 the sites of three adjoining houses which had been destroyed by bombing, Nos. 73, 75 and 77, were sold. Mr High, a builder, bought No. 77 and built a house for his own occupation. A Mr Westgate bought Nos. 73 and 75 and began to build a block of flats. It was discovered that the foundations of one wall of the flats extended by about a foot into Mr High's land and he objected. After discussion it was agreed that the wall should remain (but should have no windows overlooking No. 77) and in exchange, Mr High should be given a right of way across the yard behind the flats to a side street. In 1959 (by which time Mr Westgate had sold the flats to Mr and Mrs Wright) Mr High built a garage so placed that the only access to it was via the yard behind the flats. The Wrights knew of this and raised no objection. The original agreement was evidenced by letters but there was no formal contract. Mr High used the right of way regularly from 1949 onwards.
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> In 1962 the Wrights sold the flats by auction and offered them subject to the right of way enjoyed by the owner of No. 77. The "right" had not been registered as an equitable easement under the Land Charges Act 1925.

30. The Court of Appeal held that an equitable estoppel arose in favour of Mr High which entitled him to keep his right of way. Lord Denning M.R. thought that the right was not an equitable easement (which would have been void against a purchaser for want of registration) but was based first, on the mutual benefit and burden comprised in the agreement between Mr High and Mr Westgate in 1949, and secondly, on the acquiescence of the Wrights in the siting of the garage and the use of the access over their yard. Both Danckwerts and WinnL.JJ. held that,

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23. The term "estoppel interests" is borrowed from an article by Professor F.R. Crane in (1967) 31 Conv. (N.S.) 332.

24. [1967] 2 Q.B. 379.

whether or not the right should be regarded as an equitable easement, the requirement of registration had no application to equitable rights such as this based upon estoppel. The decision that the estoppel binds a purchaser who has notice of the facts requires the inclusion of estoppel interests among the appurtenant rights which must be considered in this context.[25]

PART III - THE NEED FOR REFORM

31. The present law on appurtenant rights is open to criticism as being, in some respects, illogical, uncertain, incomplete and inflexible.

32. The illogicality of the law is the result of its historical development. Rights and obligations attaching to land are not classified by reference to their nature but principally by reference to the manner of their creation. Easements and profits are matters of grant (express, implied or fictitious) and have always bound the land; covenants, on the other hand, are essentially matters of contract binding only on the parties. The intervention of equity has blurred that distinction by enabling some restrictive covenants to bind the land: thereby creating a marked contrast (which had not previously existed) between restrictive and positive covenants. In the result there is now, for example, substantial overlapping in subject-matter between negative easements and restrictive covenants, but the rules are different and the effects are not quite the same. The law would be simplified if appurtenant rights were reclassified by reference to their nature. This would eliminate some unnecessary distinctions, and would, for example, enable a proper place for the "easement" of fencing to be provided.[26]

33. Covenants, owing to their very nature, do not normally pose questions as to their existence but it is sometimes by no

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25. cf. also the earlier decision in Ward v. Kirkland [1967] Ch. 194.

26. See para. 44, Class III.

means clear whether they are enforceable by or against successors to the original parties. It may, for example, be uncertain whether the benefit of a restrictive covenant has been sufficiently "annexed" to the plaintiff's land. Enforceability is not, in practice, a common difficulty with easements; but in their case their very existence may be in doubt. Easements are not always expressly created and (especially where units of land have been divided) both the law and the facts may provide room for argument as to whether easements[27] have arisen under the "general words" in section 62 of the Law of Property Act 1925 or by implication. Additional uncertainty is created by the state of the law on prescription. Questions may also arise as to the extent of an easement, for grants are not infrequently made in terms unlimited as to extent without thought of the possibility that the character and use of the dominant land may change, increasing the potential burden on the servient land.[28]

34. There can be no doubt that the present law is incomplete in that it does not recognise and make satisfactory provision for many rights and obligations appropriate to freehold land in modern conditions. More and more people are living in flats and maisonettes and consequently share facilities with others; but so long as positive covenants outside leases remain unenforceable against anyone other than the original covenantor, permanent arrangements cannot conveniently be made for the provision of common services, or for the maintenance of parts of the building in which all the occupants are interested. This has inhibited the creation of freehold interests in flats. The density of modern building, moreover, has shown up the defects in the general law relating to party structures, and adds weight to the criticism relating to the absence from the general law of any right to the support of buildings by neighbouring land. Nor is there any general right to shelter or to privacy, and this too may deserve consideration.

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27. And, less commonly, profits.

28. See White v. Grand Hotel Eastbourne [1913] 1 Ch. 113.

35. A degree of flexibility was introduced into the law in 1925[29] when the body now replaced by the Lands Tribunal was given power in certain circumstances to discharge, or modify, restrictive covenants. The circumstances have recently been widened by the Law of Property Act 1969, but there has been no enlargement of the subject-matter of the power. The Tribunal cannot, for example, discharge an obsolete right of way (even on terms) or substitute a more convenient right of way for one that has become inconvenient.[30] Nor is there any power to impose obligations (save as the terms on which other restrictions are relaxed). It is, therefore, still true to say that the use and development of land may be restricted by the existence of rights which are no longer reasonably required (at least in their present form); and such use and development may also be affected by the inability of the owner of the land in question to obtain necessary rights from his neighbour by agreement. In the interests of flexibility there would seem to be a case for giving the Lands Tribunal further powers, extending their jurisdiction to the imposition and substitution of rights and obligations in certain circumstances.

PART IV - SUGGESTIONS FOR REFORM

36. The aims of reform in this branch of the law are thought to be:

(i) to introduce as much certainty, clarity and uniformity as is possible without producing excessive rigidity; and

(ii) to ensure that the law does not impede the development of land in accordance with the needs of the community, while retaining

29. Law of Property Act 1925, s.84. The county court now has a similar but more limited jurisdiction under the Housing Act 1957, s.165.

30. As recommended by the Law Reform Committee (1966) Cmnd. 3100 para. 97.

adequate safeguards for the rights of the individual owner of land.

37. The fact that each of those aims has to be stated with a qualification indicates that there is likely to be some controversy as to the extent to which they can be achieved, and even, perhaps, as to the zeal with which they should be pursued. English land law has in the past been adapted to deal with factual situations - for example by recognising squatters' rights and by accepting the doctrine of prescription. Certainty might be bought at too high a price if legal rights were no longer able to arise from factual situations of long standing. A fundamental disinclination to override the rights of the individual must also be borne in mind, although there is probably a growing recognition that, subject to adequate safeguards, private rights may sometimes have to give way to the public interest.

A. GENERAL VIEW

38. The basis for any reform is thought to be a rationalisation of the various categories of appurtenant right. To achieve a greater amount of certainty and clarity it is suggested that the present categories should be replaced by two types of interest appurtenant to land; first, statutory incidents of ownership; secondly, Land Obligations.

(1) Statutory incidents of Ownership

39. An enactment setting out the basic obligations incidental to land ownership would have obvious advantages: and it is thought that such an enactment might cover a wider field than the present common law rights to the support of land by land and to the natural flow of water. For example, it seems to be desirable, and should be possible, to assure to the owner of a building certain basic rights in respect of the support of that building. It would be particularly helpful if the statute defined the content of these rights with some precision to avoid disputes as to their extent.

40. Bearing in mind the variety of circumstances which can exist, it is suggested that it would be a mistake to attempt to include by statute too much within the category of incidents of ownership. A clear distinction should be drawn between those obligations which should be "inherent in ownership" and those which should be capable of imposition by the persons owning the land. If the former were extended beyond the matters which are of general application it might become necessary to make provision for their modification or discharge and the advantages of clarity and certainty would be lost. Accordingly, it is suggested that the scope and content of statutory incidents of ownership of general application should be limited, apart from those recognised under the present law, to matters relating to party structures and the support and, possibly, shelter of buildings. Each of these is linked to a consideration of Part VI of the London Building Acts (Amendment) Act 1939. In addition, it would be possible to provide further minimum obligations applying to buildings divided into units of multiple occupation (as the Wilberforce Committee and the Law Reform Committee recommended)[31] and, perhaps, in other situations where two or more buildings are dependent upon each other for certain facilities.

(2) Land Obligations

41. We believe that it is now generally accepted that the distinction that has grown up between positive and restrictive covenants should be eliminated and that as the Wilberforce Committee recommended, the burden of certain covenants to execute works or to pay or contribute to the cost of works should be capable of running with the land of the covenantor. Once it was established that both the benefit and the burden of an obligation were attached to land, the obligation would be enforced by the owner of the "dominant" land for the time being against the owner of the "servient" land for the time being, and the fact that the obligation happened to have its origin

31. See (1965) Cmnd. 2719, para. 47, and (1966) Cmnd. 3100 para. 93.

in contract would cease to be relevant. The continuance of the contractual relationship between the owners of the lands when the obligation was created after they have parted with all interest in the lands, would seem to be unnecessary. So far as restrictive covenants are concerned, the contractual element has played no really significant part since the middle of the nineteenth century, and if positive covenants were placed on the same footing, the continued liability of the original covenantor as an aid to enforceability would no longer be required.

42. Although covenants (as covenants) create legal relationships between the parties, the law did not regard them as a means of creating legal interests in land. As interests in land, restrictive covenants are creatures of equity and they are all treated as equitable interests, notwithstanding that they may in fact benefit and burden the land in exactly the same way as legal easements. History apart, and accepting that restrictive covenants do create interests in land, there would seem to be no logical reason for excluding such of them as would, if they were easements, be legal interests, from the category of interests capable of subsisting at law; and since positive covenants have no such equitable history, it is suggested that the statute making them a means of creating interests in land should provide that the appropriate interests should also be capable of subsisting at law.

43. Much of the present distinction between, on the one hand, easements and profits and on the other, covenants would be eliminated if covenants (restrictive or positive) were recognised as creating interests in land in the full sense, and if the contractual relationship between the original parties were severed by either of them parting with his land. Bearing in mind the element of overlapping that has already been noted, it is suggested that easements, profits and covenants could be placed under a general title of "Land Obligations" sub-divided into five classes according to their nature.

44. The five classes may be shortly stated as follows:

Class I Obligations restrictive of the user or development of land A for the benefit of land B.

This class incorporates negative easements and restrictive covenants.

Class II Obligations on the owner of land A to execute or maintain works on his land for the benefit of land B.

Class III Obligations on the owner of land A to execute or maintain works on land B or to pay for such works, for the benefit of land A (or for land including land A).

Classes II and III cover the positive covenants which the Wilberforce Committee recommended should become enforceable as interests in land. Class II also covers the "easement" of fencing.

Class IV Obligations on the owner of land A to allow the owner of land B to make use of land A, such user conducing to the enjoyment of land B, or enhancing its value.

This Class covers positive easements.

Class V Obligations on the owner of land A to allow the owner of land B to take from land A such part of it or its natural produce as is appropriate to the enjoyment of land B.

This Class covers profits appurtenant.

B. STATUTORY OBLIGATIONS ATTACHING TO LAND - CONTENT OF THE LAW

45. In our discussion of these matters, we proceed on the general assumption that any changes in the law would not affect situations already in existence. A great deal of thought will be required at a later stage in devising appropriate transitional provisions and, in particular, in determining the extent to which any changes might be retrospective in their effect.

(1) GENERAL STATUTORY OBLIGATIONS ATTACHING TO LAND

46. Early in this Paper,[32] when summarising the existing law, we referred to the London Building Acts (Amendment) Act 1939 which already in effect attaches certain statutory obligations to land in London. These obligations relate to party structures and to building (and excavation) on or near the boundary: in short, they are connected with the question of support. As will be seen, our suggestions for general statutory obligations lie in the same area and are tied up with the extension of the London Act (subject to modification) to the country generally. Before discussing the different aspects of support, it will be convenient to introduce the reader to the procedures under that Act and we do this by dealing first with the particular topic of party structures.

(a) Party structures

47. By a party structure is meant a wall (or other structure) which in fact divides separate properties, whether erected astride the actual boundary or wholly on one side of it. Under the present general law the adjoining owner in the latter case has no rights (or duties) in relation to the wall and must prove the existence of an easement of support or obligation to maintain in the ordinary way. The position is the same where the wall straddles the boundary and it is known exactly where the boundary line runs or there is other evidence indicating that the two parts of the wall, vertically divided, have remained in separate ownership. Usually, however, no such

32. Para. 13.

evidence is available and in that case it was presumed (before 1926) that the strip of land on which the wall was built (and the wall itself) was owned by the adjoining owners as tenants in common, so that each of them had rights over the whole wall with which the other could not interfere. This, in effect, gave each a right of support. Under the Law of Property Act 1925 a subsisting tenancy in common at law was converted into an equitable interest under an implied trust for sale. This was clearly inappropriate to party structures and by section 38 of that Act vertical severance was substituted for the tenancy in common but the previous rights of the owners were preserved. In the result, the present position in regard to party structures erected on the boundary usually is that the two halves are in separate ownership but that there are automatic mutual rights of support in some cases only.

48. The general law, with its emphasis on the separate rights of adjacent owners, gives rise to difficulties over the erection of structures which will be party structures and over the repair and use of the structures thereafter. These difficulties have to a large extent been eliminated in the London area by local legislation, now represented by the London Building Acts (Amendment) Act 1939; and Bristol has had resort to local legislation for the same reasons. This raises the question whether the relevant parts of Part VI of the London Act should be extended to the whole country. Although these provisions are said to work well in practice, it is not so easy to analyse the nature of the legal rights which they create or to fit them into the general law. However, some broad propositions can be stated:

> Section 45 provides (first) a right, which would not otherwise exist, for one owner to put footings under his neighbour's land on payment of compensation, thus enabling him to build up to the boundary of his property: (secondly) a procedure for ascertaining whether the neighbour will consent to a wall being built astride the line of junction and if he will, for apportioning the cost of building it.

> Section 46 gives each owner a prima facie right, where a party structure exists, to carry out such works in respect of that structure as may be necessary either for the repair of that structure or for the development of his own land; but he must give notice to his neighbour before doing any work and the neighbour has a counter-right to withhold his consent to the work or to object to the proposed manner or extent of it. In that event, a procedure for settling differences by a surveyor's award is provided.

49. It is implicit in this legislation that when a party wall exists, each owner is under an obligation not to demolish or interfere with any part of it except under the statutory procedure. To that extent it may be said that each owner acquires a statutory right of support for his building without having to prove that he has acquired an easement in one of the normal ways. On the other hand even if two buildings have stood together for long enough to establish an easement of support by prescription, that support may apparently be removed to any extent authorized by the surveyor's award - see Selby v. Whitbread & Co.[33] in which McCardie J., after finding that the plaintiffs had an easement of support, said:

> "The two sets of rights, namely, the rights at common law and the rights under [the London Building Act 1894] are quite inconsistent with one another. The plaintiffs' common law rights are subject to the defendants' statutory rights. A new set of respective obligations has been introduced. The common law was seen to be insufficient for the adjustment of modern complex conditions. Hence I think that the Act of 1894 is not an addition to but in substitution for the common law with respect to matters which fall within the Act. It is a governing and exhaustive code, and the common law is by implication repealed."

It seems to be accepted that that view is not inconsistent with section 54 of the 1939 Act (which replaces section 101 of the 1894 Act) which says that nothing in Part VI "shall authorise

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33. [1917] 1 K.B. 736 at 752.

any interference with any easement of light or other easement in or relating to a party wall", so that section 54 is not regarded as a factor which limits the scope of an award under the Act. Indeed it is difficult to see how the procedure would work otherwise.

50. Although these provisions have developed from the practical needs of a densely built-up area, there seems to be no reason why they should not be extended generally. In 1962 the Royal Institution of Chartered Surveyors submitted a memorandum to the Lord Chancellor in which they expressed the view that the absence of any such general legislation gave rise to definite practical disadvantages outside London. If a landowner wishes to develop on or near the boundary it is usually necessary for agreement to be reached with the adjoining owner, and even if negotiations are successful they may take a long time. If agreement cannot be reached, valuable space may be wasted and unnecessary outside walls may have to be built. It is also exceedingly difficult to carry out major repairs on one side only of a thin party wall. The Royal Institution's observations were supported by the Royal Institute of British Architects. They also accord with the view of the Council of The Law Society that "much difficulty and uncertainty which arises in practice would disappear if [the London] provisions were extended to the whole country". Moreover, we have been told that the London procedure is frequently adopted elsewhere by agreement. No corresponding disadvantages have so far been brought to our notice, but certain detailed improvements in the London provisions have been suggested. Subject to any such improvements and amendments which are found to be necessary, there seems to be a strong case for extending the London provisions throughout the country. Similar situations exist in any built-up areas although occasions to apply the Act may be fewer in country districts.

51. In discussing party structures, we have spoken exclusively in terms of vertical structures such as walls. It is a matter for consideration whether the concept should not also include

horizontal structures such as the floor and ceiling dividing flats, although the occasions for resorting to a London Building Acts type of procedure in such cases would doubtless be less frequent.[34]

(b) Support

(i) Generally

52. A right of support is a negative right: the corresponding duty is a duty not to withdraw support rather than one positively to provide it. As we have already mentioned, the only right of support existing under the present law as a natural incident of ownership is that of land by land - using "land" in its natural, rather than its legal, sense, so that it does not here include buildings. Any other right of support, for example of buildings by buildings or by land, has to be specifically acquired either by express grant or by prescription.

(ii) Support of buildings by buildings

53. The need for the support of a building by a building arises when two buildings or units are to some extent dependent upon each other. This is inevitably the case where a building is divided into separate horizontal units but otherwise the situation normally occurs only where buildings have been erected in such a way that they are bound together. However, there is also the possibility that two buildings initially independent will become dependent in the course of time through one building leaning on another, although this should be less likely to occur in the future having regard to the use of modern building methods. In the first two cases there would seem to be no reason why the support of a building by a building should not become a general statutory incident of ownership. In addition, if, as has been suggested above, section 46 of the London Building Acts (Amendment) Act 1939 were extended to the rest of the country, it would regulate the right of support by imposing an obligation not to interfere with a party structure

34. The definition of "party structure" in s.4 of the London Building Acts (Amendment) Act 1939 does in fact include floor partitions in some circumstances.

without following the procedure contained in that section. Cases where buildings later become interdependent, so that mutual support was not originally envisaged, are more difficult. Whether or not a building should have a right of support in such circumstances would depend, we think, on the particular facts of the case and we therefore consider that the right should not be automatic. This does not preclude the possibility of the right being acquired by agreement (or under an order made by the Lands Tribunal in exercise of its extended jurisdiction which we suggest and discuss later in this Paper under Land Obligations).

(iii) Support of buildings by land

54. Although, at common law, land has an inherent right of support by neighbouring land, so that an owner cannot with impunity carry out excavations on his property which will cause his neighbour's land to subside, no such right is in general enjoyed by buildings as such. A right of support must be obtained by agreement or as an easement acquired by grant or (more usually) by prescription. What amounts to a right of support of buildings by land does, however, exist in London, for by section 50 of the London Building Acts (Amendment) Act 1939, a landowner proposing to excavate near an existing building is obliged to give notice of his intention and he may (and, if so required by his neighbour, must) take steps to support the building during the operation.

55. That there should be a general right to such support is not a new thought. In 1881 Lord Penzance's speech in Dalton v. Angus[35] contained the following passage:

> "If this matter were res integra, I think it would not be inconsistent with legal principles to hold, that where an owner of land has used his land for an ordinary and reasonable purpose, such as placing a house upon it, the owner of the adjacent soil could not be allowed so to deal with his own soil by excavation as to bring his neighbour's house to the ground. It would be, I think, no unreasonable application of the principle 'sic utere tuo ut

35. 6 App. Cas. 740 at 804.

> alienum non laedas' to hold, that the owner of the adjacent soil, if desirous of excavating it, should take reasonable precautions by way of shoring, or otherwise, to prevent the excavation from disastrously affecting his neighbour. A burden would no doubt be thus cast on one man by the act of another done without his consent. But the advantages of such a rule would be reciprocal, and regard being had to the practicability of shoring up during excavation, the restriction thus placed on excavation would not seriously impair the rights of ownership."

The next few paragraphs of that speech pointed out that the matter was not res integra and that, in the absence of express agreement, the adjoining owner could excavate his own land so as to allow his neighbour's house to fall in ruin to the ground at any time within twenty years after it was built.[36]

56. The Law Reform Committee approached this question in a rather different way.[37] After drawing attention to the adjoining owner's right of excavation, they favoured a system whereby a person who proposed to build should be able to acquire a right of support before he started. Under the procedure which they recommended, the builder would serve on his neighbour a notice of his intention to build. If the neighbour took no action the builder would be free to build and would immediately acquire a right of support for his building: but if the neighbour served a counter-notice in reply to the notice of intention the matter would be referred to the Lands Tribunal. The Tribunal could either award the right of support, on payment of compensation if it thought fit, or declare that the building would damage the neighbour's property to an extent which could not be compensated adequately. If the builder proceeded to build in the face of the latter declaration, or if he built without invoking this

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36. The adjoining owner would not incur liability unless possibly (and the law on this point appears to be very uncertain) there is negligence or unless the excavation is such that, had there been no building on the neighbour's land, that land in its natural state would have suffered damage from it. For a recent case see Ray v. Fairway Motors (Barnstaple) Ltd. (1968) 112 S.J. 925.

37. See (1966) Cmnd. 3100, paras. 86-89.

procedure at all, he would acquire no right of support. Nor would he obtain one by prescription, for the Committee considered that prescription should not apply to a right of support.

57. There are thus two fundamentally different approaches to the question of support. The "automatic right" approach of Lord Penzance treats building as a normal use of land which should be undertaken without any necessary reference to one's neighbour and without fear that he may destroy the building by excavation. In the interest of simplicity, and bearing in mind the reciprocal aspect, it is said to be reasonable to put the burden of shoring up on the neighbour when he comes to build. But the majority of the Law Reform Committee adopted, in relation to the main issue which was under discussion, the basic principle that a person who wants an easement should ask for it; and the Committee's proposals on support are consistent with that view. The matter should, they thought, be determined in advance by negotiation or by proceedings in the Lands Tribunal.

58. A disadvantage of the Law Reform Committee's proposal is that it could lead to disputes by creating an issue between neighbouring owners of land which might never have arisen. An adjoining owner, although he has no intention of building in the foreseeable future, might feel bound to serve a counter-notice rather than give up his rights, and he would often be advised to do so if he took professional advice. By serving a counter-notice he could delay a development whether he had good reason for objecting to it or not; and he might do this simply in order to obtain an offer of compensation, regardless of whether, on the facts, any compensation was really called for. The basis upon which compensation is to be assessed (bearing in mind the variety of different uses to which the adjoining land might be put) could also give rise to difficulties.

59. It is appreciated that the "automatic right" approach gives an advantage to the owner who builds first. Nevertheless, it seems preferable to put the burden of support on the second builder when he comes to excavate rather than to encourage disputes in anticipation of a situation which may never become

an issue between the two owners. It must be remembered that this approach has operated for many years under the London Buildings Acts. We are not aware of any hardship caused by its operation. Moreover in modern conditions it is thought to be reasonable to regard building as a normal use of land which can be undertaken freely provided that it conforms with planning control and does not infringe a neighbour's existing rights.

60. For these reasons our provisional conclusion is that a right to support of a building by land should exist as a statutory right. It has been suggested that this right might be more acceptable to those who favour the contrary view if the expense of safeguarding the first builder's support were not placed wholly on the second builder but were apportioned between them. Again, however, it is thought that the apparent logic of the proposal is outweighed by its inconvenience in practice. The first builder or any purchaser from him would be left uncertain as to the extent of any future liability, and this would, for example, make it difficult for him to calculate the rent which he should reserve on any letting. Only in the case of a substantial development would the cost be very heavy, and, since it must fall somewhere, the balance of convenience suggests that in such a case it should be borne by the second builder. Views are, however, invited upon whether the second builder who has been placed under an obligation to support a neighbour's building should be entitled to claim compensation and if so upon what basis the compensation should be assessed.

61. A further question which arises is whether it is sufficient to provide this statutory right and leave the resulting problems to be dealt with under the general law, or whether a procedure for regulating the exercise of the right and settling disputes should also be provided, as in the London Building Acts. To point the contrast, suppose that A proposes to excavate his land in a way which may endanger the stability of a building on B's adjoining land if proper precautions are not taken. B would normally have no right to complain until

the work had been done and he had suffered damage (unless, exceptionally, the probability of damage to his building was so great that he could bring a "quia timet" action to restrain the execution of the work at an earlier stage). If, on the other hand, a procedure were introduced on the lines of section 50 of the 1939 London Building Act, A would serve a notice on B before he started to excavate, with plans showing the extent of the intended work; if B took no action within a specified time A could proceed with the work, but if B served a counter-notice objecting to the work and the parties could not reach agreement the dispute would have to be determined by a surveyor's award, subject to appeal to the court. An award would be binding on A as to the way in which the work was to be done, if permitted at all; but he would still be liable to B for any damage which resulted from the operation.

62. Although the law does not normally intervene to control the way in which a landowner can exercise his rights of ownership it is thought that such a procedure would be justified in these circumstances to ensure that the stability of an existing building is not put in unnecessary danger. Experience of the operation of section 50 of the London Act suggests that a similar procedure would work well in practice provided that a satisfactory formula could be devised to indicate when the procedure is to apply. A further advantage of adopting this procedure is that in most cases it would ensure that the development of land would not be discouraged by a neighbouring owner's right to the support of his building. The neighbouring owner would not be able to refuse to sanction any interference with the support of his building but would be bound (without prejudice to his rights if any damage is actually caused) by the surveyor's award which would specify the precautions the developer must take to safeguard the support of the building whilst the excavations are in progress.

(iv) Support of land by land

63. The next question is whether that procedure, if introduced at all, should extend also to excavations which may affect the

support of land itself, even if there are no buildings on it. The right of support for land has existed up to now without any backing of that kind but we see no reason for excluding the procedure in such a case; and if it had been available, a case such as Morris v. Redland Bricks Ltd.[38] (where the excavations of a clay pit caused adjoining land used as a market garden to slip) might never have arisen.

64. It must of course be remembered that the right of support of land by land is not restricted to support by adjacent land but in principle extends also to support by subjacent land. This is of prime importance in mining areas, where the surface and the underlying minerals are often in different ownership. A landowner effecting such a severance can negative the right of support by reserving not only the right to the minerals but also the right to let down the surface. The existence of a procedure of general application for regulating operations likely to affect support might eliminate the need for legislation in particular instances.

(v) Support of land and buildings by water

65. Although it is established that the land providing support need not be entirely stable,[39] it seems that there is at common law no right to support by water alone. We say "seems" because during the last hundred years or so there have, we think, been only two reported cases in which the decision depended on the point, and there is very little evidence of the earlier law. In both those cases, the successful defendants had carried out on their own lands drainage operations which had the effect of draining also other lands in the vicinity. This caused the neighbouring lands to settle, with consequent damage to buildings. The first of the two cases (Popplewell v. Hodgkinson)[40] was

38. [1967] 1 W.L.R. 967, (reversed as to whether a mandatory injunction should be granted [1970] A.C. 652).

39. Trinidad Asphalt Co. v. Ambard [1899] A.C. 594 (asphalt); Jordeson v. Sutton Southcoates and Drypool Gas Co. [1899] 2 Ch. 217 (quicksand).

40. (1869) L.R. 4 Exch. 248.

discussed at length in a later case in the Court of Appeal,[41] and two members of that court indicated (though it was not necessary to their decision) that they did not regard the decision in the Popplewell case as having finally settled the law as to support by water. That case has, however, recently been followed by Plowman J. in Langbrook Properties Ltd. v. Surrey County Council.[42]

66. The question of support by water has sometimes been linked with (and perhaps bedevilled by) another question, that of ownership of water. It is quite settled that proprietary rights do not attach to water percolating underground in undefined channels[43] so that a landowner cannot complain of the loss or interception of such water brought about by his neighbour's activities. But, as we have already seen, rights of support are not dependent on ownership of everything under the surface; and it seems to us that the right of a landowner to take water from beneath his neighbour's land is not absolutely irreconcilable with the existence of a right of support by that water.[44] A right of support by water would in practice operate as a limitation on the extent to which the right to take water may safely be exercised, but the law is accustomed to balancing conflicting interests in that way.

67. Such evidence as there is of the law before Popplewell v. Hodgkinson suggests that the court did entertain claims to rights of support by water. At the end of the eighteenth century, a defendant was held liable for subsidence caused by his draining old coalmine workings with a view to further mining.[45] It may also be noted that in 1854 the Court of Session

41. Jordeson v. Sutton etc. Gas Co. fn. 39 above.

42. [1970] 1 W.L.R. 161.

43. Acton v. Blundell (1843) 12 M. & W. 324; Chasemore v. Richards (1859) 7 H.L.C. 349; and cf. Bradford Corporation v. Pickles [1895] A.C. 587.

44. See Humphries v. Brogden (1850) 12 Q.B. 739 at 753: "But the right to running water and the right to have land supported are so totally distinct and depend upon such different principles ..." Also Meux Brewery Co. v. City of London Electric Lighting Co. [1895] 1 Ch. 287 at 301.

45. Lonsdale v. Littledale 2 H. Bl. 267 (reported only on another point to which the appeal was apparently limited).

decided a case with very similar facts in the plaintiff's favour,[46] and if the courts in Scotland would now follow that decision it would seem that the law there may now differ from that in England on this subject.

68. The court which decided Popplewell v. Hodgkinson did not, in fact, deny the possibility of the existence of a right of support by water in all circumstances, for it recognised that a defendant could be made liable if his actions amounted to a derogation from grant; and it has since been pointed out[47] that it follows that a right of support by water is capable of being acquired by prescription. This, however, puts such a right on an altogether lower plane than the right of support by land which, being a natural incident of ownership, requires no period of long use and is effective against any neighbour.

69. Our present view is that the refusal to recognise support by water as a natural incident of ownership is anomalous; and, it may be added, considerable difficulty may be experienced in borderline cases in attempting to draw a distinction between "water" and "silt" which, in the present context, appears to have no scientific basis. In the summary of our conclusions contained in Part V of this Paper (Proposition 1) we accordingly deal with support in such a way as to include support by water. We feel that if damage is proved to have been caused by the withdrawal of support, the cost of repairing the damage should fall on the person who has caused it. We appreciate that since such damage may occur at a distance from the operations causing it[48] the risk of withdrawing support by water may not be easily measured (or even foreseen); but in many cases, the damage will have arisen in consequence of the defendant's profit-making activities and we think he should accept the potential

46. Bald v. Alloa Colliery Co. (1854) 16 Dunl. (Ct. of Sess.) 870.

47. By Rigby L.J. in Jordeson v. Sutton etc. Gas Co. fn. 39 above.

48. For example, pumping water from quarries, thus lowering the water table in the surrounding area.

liability as a normal (and perhaps insurable) commercial risk.

(c) Shelter

70. The desirability of providing a general right for a building to have shelter from the elements is more doubtful. A building can be sheltered either when it is attached to another building or when it is in close proximity to the other. Where the buildings are bound together, the connecting wall will be a party structure and shelter can be one of the matters to be considered under the procedure in section 46 of the 1939 London Building Act. In other cases it is thought that a right to shelter should be obtained by express agreement. The result would be that a person who wishes to erect a building beside an adjoining owner's building but not bonded into it would either have to obtain an express right to shelter or erect it as an entirely independent structure with its own weatherproofing. We suggest that it would not be right to enable a person by unilateral action (and without reference to any regulatory procedure) to impose an obligation on his neighbour to afford him shelter.

(d) Privacy

71. We are of the clear opinion that if a landowner wishes his land to have the benefit of a right not to be overlooked he should take steps to obtain it expressly, by getting his neighbour to accept a restrictive obligation. It would be hopelessly unrealistic to suggest that an absolute right to privacy should be an incident of ownership of land, and we do not think that it would be practicable to provide by legislation for a qualified right of that kind. By whom would it be decided whether one man may be permitted to infringe another's "right to privacy", and, if so to what extent? This is plainly not a matter appropriate to be dealt with by the London Building Acts procedure.

(e) Contracting out

72. In the next section of this Paper we consider certain obligations which, in the circumstances, might be regarded as

essential; and for that reason, as will be seen, we suggest that it should not be possible to contract out of them. The same considerations do not, we feel, apply to the matters with which we have been dealing in this section. Although we would regard an obligation (for example) not to withdraw support from other land as one which should normally attach to land, there may be cases in which it would not be unreasonable to negative the existence of the obligation. We understand that conveyances of land reserving mineral rights often reserve also the right to let down the surface. We accordingly suggest that it should be possible to contract out of the general statutory obligations.

(2) ADDITIONAL STATUTORY OBLIGATIONS RELATING TO INTER-DEPENDENT UNITS OR BUILDINGS

73. The next question to be considered is whether additional statutory incidents of ownership should apply automatically in the case of inter-dependent buildings. The two main questions here relate to the definition of "inter-dependent" and to the subject-matter of the obligations. So far as the latter question is concerned, we wish to emphasize at once that what we have in mind are minimum obligations: that is to say, those which we would expect to see in any well-drawn conveyance of the sort of property to which we here refer. We are not thinking of any exhaustive regime regulating such properties.

74. The Wilberforce Committee considered[49] that neither the erection of a new building in horizontally divided units nor the horizontal division of an existing building should be permitted without the imposition of certain minimum obligations. The Law Reform Committee recommended[50] that the same principle should apply to buildings divided vertically, subject to any written agreement to the contrary. We have considered whether there is a case for extending this principle to include other situations where two or more buildings are dependent upon each

49. (1965) Cmnd. 2719, paras. 46 and 47.
50. (1966) Cmnd. 3100, para. 93.

other for certain facilities as may, for example, be found on a housing estate. The principal development companies have their own standard forms of conveyance or transfer which, in addition to standard schedules of restrictive stipulations, normally contain grants of essential easements such as rights of way over the roads on the estate and for the passage of services. To provide by legislation that such minimum easements and obligations relating to them should exist automatically in the cases of divided buildings and of "building schemes" (as that expression is now understood) would thus represent no more than an extended application of the present practice.

75. We think it is worth considering whether such legislation could go further and apply at least to some situations where buildings are in fact dependent on neighbouring land for certain facilities but where the present conditions relating to "building schemes" are not satisfied. We have in mind the case, for example, where something new is installed, long after the houses in question have been built, for the common benefit of several houses (which may, indeed, never have formed part of one estate). Insofar as the actual installation of the new facility involves more than one landowner it will be necessary for agreement to be reached expressly; but it might well be convenient to have the subsequent rights and obligations of the parties regulated by statute. In the summary of our conclusions contained in Part V (Proposition 3) we have accordingly dealt with this question of minimum obligations in connection with separate buildings on this broader basis. We have been concerned to see that by doing so we have not opened up opportunities for developers to impose obligations on neighbouring land unilaterally, by building in such a way that the new houses will be dependent on that land; but it seems clear that in such a case the necessary dependency could not be set up without some earlier act of trespass on the developer's part. Neighbouring landowners could prevent their becoming subject to any statutory obligations against their will by resorting to the court for an injunction at an early stage.

76. The Wilberforce Committee's recommendations were limited to single buildings and the minimum rights and obligations

proposed by them included support, shelter, free passage of water, gas, electricity and other usual services, and a right of access to other parts of the building to carry out repairs. If the suggestions made in paragraphs 53-69 above are accepted, i.e. that there should be a general right of support, there is no need to make additional provision for such a right here. For the reasons given in paragraph 70 it is suggested that the minimum obligations should not include an obligation to provide shelter, save possibly in connection with the maintenance of roofs, which we discuss below. It is, however, suggested that the obligations as to services and access should be provided, together with a duty not to obstruct common means of access to or through the premises.

77. It is also for consideration whether as between all the owners of the units of occupation these obligations should be equal or whether, in certain circumstances, distinctions ought to be made. In relation to services, for example, it might be right to impose on all units the obligation to permit the passage of the services, but to impose only on those who benefit from the services the obligation to maintain them. The obligation to maintain the parts of a building used in common such as stairs, lifts and passages might be similarly limited. Our summarised provisional conclusions on these matters (Proposition 2) assume that a distinction of this sort should be drawn.

78. Special problems arise if there is default in complying with any of the suggested obligations which involve the carrying out of work or payment of money. It would be essential to provide an effective means whereby the owners of the other affected units could ensure that the work was done or the money paid. The same problems occur in relation to positive land obligations and are discussed below in connection with them.[51]

79. It is not easy to see why contracting out of these obligations should be allowed, if the result of such a contract

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51. See Notes to Proposition 13.

were substantially to reduce them or to exclude them altogether. The justification for imposing minimum obligations is that they are essential to the use and enjoyment of "multi-unit" structures or inter-dependent buildings. It is accordingly suggested that the minimum obligations should always apply, but that the parties should be free to make arrangements of a more comprehensive character if they wish.

80. We have also considered the question of repairs to the structure of buildings in multiple occupation, and whether there should be among the minimum obligations any positive obligations to keep, for example, the roof and foundations in good condition. If the views which we have already expressed on the question of support are accepted, the owner of the ground floor (or basement) will not be free to interfere with the foundations in any way which might endanger the support of the building as a whole, but to impose a positive obligation on him to maintain the foundations would be to go much further. To impose on the owner of the top floor a positive obligation to maintain the roof does more than extend any general statutory obligation since we are inclined to the view that it would not be appropriate to provide a general obligation to afford shelter to other land.

81. Of all the questions which concern the freehold owners of a divided building, that of the maintenance of the structure is without doubt one of the most important. It is also one of the most complicated, and while it is clear that some arrangements ought always to be made, we feel that a flexible approach is required and that it is preferable, therefore, that such arrangements should be tailor-made by agreement rather than that positive obligations should be laid down by statute. Some structural repairs - to the roof or foundations for example - would bear heavily on the owners of particular parts of a building if (as would be natural) the primary obligation were imposed on the owners of the units which included the parts of the structure which required repair. If, therefore, statute imposed on the owner of the top floor a primary duty to keep

the roof in good condition, it would probably be necessary for it to provide also for some contribution towards the cost to be made by the other owners. But this would depend, we think, on whether the burden of the obligation had been reflected in the price paid by the owner of the top floor for his unit. It would therefore be inappropriate to lay down a hard and fast rule. We also think that the existence of a statutory obligation to repair would be liable to give rise to difficulties as the building approached, or passed, the end of its useful life. It could oblige the majority of the owners of the building to keep it standing for the benefit of one or two who took a different view of the building's usefulness. Questions of this sort can perhaps be solved by vesting the whole building in a company; or by having, as some other countries do, a form of "condominium" ownership with its own special incidents. In either case, the owner of a unit is something more than a tenant but less than an absolute owner of the freehold. Consideration of that matter is clearly beyond the scope of this Paper.

(3) CONCLUSIONS

82. To sum up the foregoing discussion, it is suggested that legislation should provide, in addition to the natural rights existing at common law, the following obligations as general statutory incidents of the ownership of land:

(1) A general obligation relating to the support of buildings by other land (including water) and buildings,

(2) Specific obligations in respect of party structures.

The legislation should provide procedures for regulating works and settling disputes in relation to party structures and operations which may adversely affect an adjoining owner's rights of support.

83. The legislation should, it is suggested, also provide certain further minimum obligations applying to divided buildings and to land and buildings in certain other circumstances where buildings are dependent on other land for certain facilities.

C. LAND OBLIGATIONS - SPECIAL TOPICS

84. The assimilation of easements and covenants into a single category of interest in land calls for the re-examination of the differences between them. Some of these differences and other matters require fuller discussion than can conveniently be placed in the Notes to the Propositions, and they are accordingly treated as separate topics now.

(a) The Nature of Land Obligations

85. As already explained, insofar as covenants create interests in land at all, they take effect as equitable interests only; easements (and profits) on the other hand may be either legal or equitable, depending on whether or not they satisfy the conditions laid down in section 1(2) of the Law of Property Act 1925. We suggest that all the obligations which we call Land Obligations should, in this respect, be like easements, so that those corresponding to restrictive and positive covenants will be capable of being legal in their nature. That will have consequences on their registrability under the Land Charges Act 1925. All restrictive covenants affecting unregistered land have for their protection now to be registered under that Act; such of the corresponding Land Obligations as were created as legal interests affecting unregistered land would not be so registrable. Legal obligations would, however, have to be created by deed, and should come to the notice of a purchaser of servient unregistered land on examination of the title. If the servient land were registered land, the imposition of a legal Land Obligation would result in a note on the servient owner's title.[52]

86. It may be suggested that it would be a simplification if Land Obligations were either all legal or all equitable, but both rules would have unacceptable consequences if they were treated consistently with the principles of the Law of Property and Land Charges Acts 1925. If they could only be legal, an obligation intended to endure for a term other than a fixed term of years,

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52. Land Registration Act 1925 ss. 19(2) and 22(2).

or an obligation created informally, would not take effect as a Land Obligation; but there can be no doubt that the court would enforce many such obligations and so create a separate category of interests in land. We wish to avoid developments of that sort. If, on the other hand, all Land Obligations were equitable, those affecting unregistered land would require for their protection to be registered at the Land Charges Registry. Even if that register were constructed on a satisfactory basis, we think that it would be unreasonable to require the registration of every expressly created Obligation corresponding to a legal easement, and difficult problems would arise over Obligations arising by implication or by prescription.

(b) Section 62 Law of Property Act 1925; Implied Grant, etc.

87. Easements and profits, unlike covenants, can at present arise otherwise than by express agreement under the "general words" implied in conveyances by section 62 of the Law of Property Act 1925. That section has two quite separate functions. First, it eliminates the need to enumerate in a conveyance all the existing easements and profits benefiting the land conveyed; save to the extent that such rights are expressly excluded, they are deemed to have been conveyed. Secondly, (and this is the function which is relevant for discussion here) the section creates easements because it operates to convey also "advantages" previously enjoyed by the land conveyed even if those advantages had not previously been easements. This usually occurs on the occasion of the sale by a landowner of part of his land. The part sold may have enjoyed the use of an access road across the part retained, but this cannot constitute an easement in favour of the part sold while both parts were in the same ownership. By virtue of section 62 the advantage (or quasi-easement) may become an easement on the conveyance of the part. This second function of the section is plainly slanted in favour of purchasers and found a place in the Conveyancing Act 1881 because express provisions to the same effect were then often inserted in conveyances. In recent years, however, the practice has been

to exclude or modify the operation of that part of the section, thus reducing the risk to the vendor of having the use or development of his retained land restricted by the creation of rights over it in favour of the purchaser. This practice is reflected in both The Law Society's and The National Conditions of Sale.

88. A further distinction between easements (and profits) and covenants is that the former may also arise by implied grant (or, exceptionally, reservation); or as easements of necessity; or under the doctrine of non-derogation from grant.

89. If the contract has not covered all the rights of the parties, intractable problems can arise when part only of a person's land was conveyed to another. Some of the unsatisfactory features of the present law are, in brief:-

(i) The effect of the general words in section 62 may be to cause to pass to the purchaser rights to which he is not entitled under the contract and may lead to a subsequent claim to rectification of the conveyance.

(ii) It is still uncertain on the authorities whether the general words of section 62 apply to cases where the land has been owned and occupied as one unit before the division occurs.[53]

(iii) Section 62 applies to privileges or advantages in fact enjoyed,[54] although the grantor may have intended them to last for a limited time only: thus if a lessor allows his tenant to exercise some right over his retained land and then sells the demised part to the tenant,[55]

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53. See Long v. Gowlett [1923] 2 Ch. 177; Broomfield v. Williams [1897] 1 Ch. 602; and dicta in Ward v. Kirkland [1967] Ch. 194.

54. Provided that they are sufficiently certain; s.62 only covers matters capable of being the subject-matter of a grant: see Green v. Ashco Horticulturalist Ltd. [1966] 1 W.L.R. 889.

55. Or grants a new lease: "conveyance" in s. 62 includes leases, assents and mortgages where appropriate.

the conveyance may enlarge into a permanent easement something which was granted as a temporary facility.[56]

(iv) Section 62 does not operate in favour of the vendor: for any right not expressly reserved to him in the conveyance he must rely on the limited doctrine of implied reservation. If the vendor has sold part of his land without expressly reserving any right of access to the part retained, the reservation of a right of way over the part sold will be implied if there is no other means of access; but, apart from such easements of necessity, it is difficult for a vendor to prove that there was a common intention to create an easement in his favour.[57]

(v) The doctrine of implied grant, as expounded in Wheeldon v. Burrows,[58] covers quasi-easements which are "continuous and apparent", "necessary to the reasonable enjoyment" of the property sold and "used at the time of the grant by the owner for the benefit of the part granted"; but it is not entirely certain what is meant by "continuous" in this context, or whether a quasi-easement has to be both "continuous and apparent" and "necessary to the reasonable enjoyment" of the land sold.

(vi) The doctrine of non-derogation from grant is closely linked with section 62 and the doctrine of implied grant, and, indeed, provides much of the basis for them. It is of potentially wider application than implied grant since it may for

56. See for example Wright v. Macadam [1949] 2 K.B. 744.
57. See Re Webb's Lease [1951] 1 Ch. 808.
58. (1879) 12 Ch. D. 31.

example place a vendor under an obligation too uncertain to be the subject-matter of a grant; but it is difficult in practice to forecast in what cases the court will supplement the doctrine of implied grant by reference to the principle of non-derogation.

(vii) It is doubtful to what extent profits à prendre are covered by these doctrines; the "continuous and apparent" aspect of implied grant may, for example, exclude all profits from that doctrine.

90. The proposals made earlier in this Paper relating to statutory obligations would, where they applied, remove some of the uncertainties by providing rights of support and rights in relation to access and common services. However, problems can arise in other types of case for which no minimum obligations can be prescribed. It might be possible further to reduce the likelihood of those problems arising by encouraging the parties to direct their minds to all the matters for which express provision should be made in the contract, conveyance or lease. Forms of contract (possibly containing questions in "boxes" to be answered affirmatively or negatively in respect of the various types of right) might be of some value; but at best they would only provide a partial remedy. Some of the necessary or appropriate rights could still be overlooked.

91. A drastic solution would be to provide that a conveyance should not operate to pass any rights which were not expressly granted or reserved, and to give a court or tribunal jurisdiction to award any that were reasonably required: but this is not thought to be justifiable. Parties to contracts are entitled to expect that the law will give their contracts business efficacy without the expense (and strain) of proceedings. Moreover, it could lead to real injustice in the case of tenancies, which are often entered into informally, and without the benefit of legal advice. The aim of reform should be to devise a statutory formula of simple application which will:

(a) confer on each party the appropriate rights which he should reasonably expect to have in respect of the other party's land, but

(b) contain no element of a trap for the unwary by conferring more than the parties contemplated.

92. We have considered the possible bases for such a formula and have come to the provisional conclusion that neither a test founded solely on "necessity" nor on "actual enjoyment" would be satisfactory. We suggest that the formula should cover both:

(a) facilities of a nature recognisable as Land Obligations of Class IV or Class V which are actually enjoyed and which in all the circumstances it is reasonable to contemplate as continuing, and

(b) rights of the same nature which, even if not already enjoyed, must be taken to have been contemplated as being available after the completion of the transaction.

Views are invited upon this formula and particularly on whether the element of intention in (a) should be entirely objective, or whether one should seek to ascertain what the parties mutually contemplated at the time of the sale (or tenancy). It would, of course, be possible, in the interests of greater certainty, to eliminate the element of intention from (a) altogether; but that would have the effect (which we think undesirable) of enabling cases like Wright v. Macadam[59] to recur.

93. If there is a contract, it is suggested that the formula should operate as though the rights and obligations which it would create had been agreed, thus enabling either party to require the relevant rights to be included in the conveyance, transfer or lease. The formula should operate in favour of the vendor (or lessor) as well as the purchaser (or lessee) although in practice it would perhaps not be easy for the former to establish his case. Moreover, it is suggested that it should

59. See para. 89(iii) above.

apply to situations where land was previously in common ownership and common occupation provided that the facility had been specifically connected with the enjoyment of the part of the land for which its continuance is claimed, and was not merely enjoyed by the previous owner by virtue of his ownership of the whole land.

94. The burden of proving the acquisition of the benefit of an Obligation under the formula should, we think, always be on the party claiming it. That rule, coupled with the inclusion in the formula of an element of intention, would clearly make it less easy to obtain the benefit of a Land Obligation under the formula than it now is to obtain the benefit of an easement under section 62. We hope that this will render the formula more acceptable to vendors so that they would not feel impelled to exclude its operation by express "contracting out". As to "contracting out", we do not think that it would be right to prohibit it altogether by statute, but it might perhaps be provided that it should only be possible to exclude the creation of specified Obligations. We doubt, however, whether this suggestion would be practicable; it would be difficult to define the excludable obligations with sufficient precision and questions would arise as to how specific an exclusion had to be.

95. A statutory formula on those lines should replace the doctrines of implied grant and reservation, easements of necessity and the "creating" part of section 62 of the Law of Property Act 1925. That part of section 62 which operates to convey existing easements (together with the provisions relating to the physical description and extent of the property) would be retained for Land Obligations. Whether the formula should also replace the doctrine of non-derogation from grant in the context of Land Obligations depends on whether Land Obligations of Class I (i.e. those corresponding to negative easements and restrictive covenants) would be capable of arising under the formula. If so, it would seem that it would no longer be necessary to invoke the doctrine of non-derogation from grant in relation to matters capable of subsisting as Land Obligations.

The doctrine would, however, continue to operate outside this area to restrain interference with a facility which could not be created as a Land Obligation,[60] if such interference clearly would be a derogation from the grant. We think, however, that the better view is that restrictive Obligations (including rights to light) should be created by express agreement only as is now the case with restrictive covenants. On this view the formula would operate to create Land Obligations of Classes IV and V (i.e. those corresponding to positive easements and profits à prendre) only. It is, however, recognised that the enjoyment of land may demand the existence of certain restrictive obligations on adjacent land and we think that the doctrine of non-derogation from grant should be capable of operating where on a division of land, the parties have failed expressly to impose the necessary restrictive obligations on the vendor's adjacent land. This would be an important function of the doctrine since, as will be seen, we have come to the conclusion that even if some form of prescription is to be retained it should no longer apply to negative easements.

(c) Prescription

96. Easements (and profits), unlike rights under covenants, can also be acquired by long user; and as with implied easements questions may well arise as to the existence, nature and extent of the rights acquired. Adoption of the Law Reform Committee's (majority) proposal to abolish prescription as a means of acquiring easements and profits would certainly simplify the law. The indications are, however, that (as on the Law Reform Committee itself) opinions are sharply divided on whether prescription should be retained or not.

97. One of the principal arguments against prescription (the abolitionists on the Law Reform Committee placed it first) is the moral one that he who wishes to acquire a right over someone

60. Because, for example, it is of too indefinite a nature to have been the subject matter of a grant: see Browne v. Flower [1911] 1 Ch. 219, 226; Corbett v. Jonas [1892] 3 Ch. 137 (light for special purposes); and Harmer v. Jumbil (Nigeria) Tin Areas, Ltd. [1921] 1 Ch. 200 (air not through a defined channel).

else's land should adopt the straightforward course of asking (and, if necessary, paying) for it. Prescription is seen as

> "a process which either involves an intention to get something for nothing or, where there is no intention to acquire any right, as purely accidental. Moreover, the user which eventually develops into a full-blown legal right enjoyable not only by the dominant owner himself but also by his successors in title for ever, may well have originated in the servient owner's neighbourly wish to give a facility to some particular individual or, (perhaps even more commonly) to give a facility on the understanding, unfortunately unexpressed in words or at least unprovable, that it may be withdrawn if a major change of circumstances ever comes about."[61]

98. On the other hand, the very existence of the doctrine of prescription at common law (i.e. enjoyment from time immemorial) coupled with its development ("lost modern grant" and the Prescription Act 1832) shows that there has in the past been a demand for some means whereby situations of long standing, to which no objection has been made, can be legally confirmed. As a well-known Chancery judge said almost 100 years ago:[62]

> "Where there has been a long enjoyment of property in a particular manner it is the habit, and, in my view, the duty, of the Court so far as it lawfully can, to clothe the fact with right."

There is no reason to believe that that demand no longer exists. That is not to say that the present law is wholly satisfactory, or that prescription need apply as widely as it now does; but it recognises that, if prescription as we know it now is eventually abolished, some alternative means of confirming situations of long standing will have to be evolved.

99. Proposition 15(2) in the last part of this Paper contains a provision enabling the Lands Tribunal to impose Land Obligations

61. (1966) Cmnd. 3100, para. 32.

62. Fry J. in Moody v. Steggles (1879) 12 Ch. D. 261 at 265.

where the facilities in question are already being enjoyed, and this is capable of providing, among other advantages, an alternative to prescription.[63] The report of the Law Reform Committee made no reference to such an alternative and it may prove an acceptable and practicable compromise between the two extreme views. As at present advised we are inclined to agree in principle with the majority, but only on the basis that some alternative to prescription can be found. In the meantime it will be assumed that prescription will continue, at least for a time, alongside a Lands Tribunal procedure, and it is therefore necessary to discuss the reform of prescription.

100. Apart from cases where a grant has been genuinely lost or where the parties mistakenly believe that there had been an actual grant, the main justification for prescription lies in the servient owner's long acquiescence in the enjoyment of the facility. Even the minority of the Law Reform Committee, who favoured the retention of prescription in principle, recommended its abolition in relation to support, recognising that it is difficult for a landowner to prevent time from running in favour of his neighbour without unreasonable expense, labour or damage to his own property. As we see it, the same reasoning applies also to all negative easements: the failure of a potentially servient owner to take positive steps to prevent a right to light, for example, from accruing against his land is hardly "acquiescence". We accordingly suggest that such rights (comprehended within the Land Obligations of Class I) should not be capable of being acquired by prescription, though they may be suitable for consideration by the Lands Tribunal under our Proposition 15(2). Apart from support, much the commonest of the matters affected by that suggestion is the right to light. At one time, before the general introduction of efficient means of artificial lighting, that right was of very considerable importance to every landowner, but its significance has undoubtedly waned during the last century. Reasonable rights to natural light are in fact often assured by planning control;

63. This provision is discussed below at para. 120.

on the other hand the Rights of Light Act 1959 is designed to facilitate the prevention of rights to light being acquired by prescription. We do not think that, today, social needs outweigh the case for abolishing the prescription of rights to light.

101. If prescription were to be retained in respect of Land Obligations corresponding to positive easements and profits,[64] the modernised form of prescription recommended by the Law Reform Committee would depart from the present law in certain respects. Briefly, the main rules would be:-

(i) the prescriptive period would be any consecutive period of 12 years, not limited to the 12 years immediately before any proceedings are brought;

(ii) only rights now capable of subsisting as easements and profits could be acquired by prescription, but there would be no presumption of a grant;

(iii) the right must have been enjoyed with the knowledge of the servient owner or in such circumstances that he ought reasonably to have known of it;

(iv) enjoyment must have been of such a kind and frequency as apart from consent or agreement, would only be justified by the existence of an easement or profit;

(v) actual or notional interruption for 12 months would stop the time from running: notional interruption would be effected by registration of a notice in the local land charges register;

(vi) where a dominant owner, having acquired an easement or profit by prescription, made no

64. The Law Reform Committee recommended the abolition of prescription in relation to profits. We are inclined to the same view so far as profits in gross are concerned; but if the principle of prescription is to be retained for easements, we are not at present satisfied that sufficient cause has been shown for the abolition of the prescription of profits appurtenant.

use of it for a continuous period of twelve years, he would thereupon cease to be entitled to the easement.

102. A right to acquire the benefit of a Land Obligation by prescription in accordance with these rules might, we think, give rise to difficulties where the Obligation related to drainage. It is hard enough for a landowner to know whether drains on his land are being used by his neighbour: it is still harder for him to discover the extent of such use. Without knowledge of such extent, a landowner does not know whether he ought to interrupt his neighbour's enjoyment of the facility; and at the end of the prescriptive period he does not know the extent of the right which his neighbour has then acquired. These points might be met by providing that, in order to acquire the benefit of a Land Obligation by prescription, the nature and extent of the user must have been such that it could reasonably have been known to the servient owner.

103. An aspect of the present law which has been criticised (but which is not specifically mentioned in the Law Reform Committee's Report) is the position of the "dominant owner" while the prescriptive period is running. Unlike a squatter - in adverse possession of land, who has valid rights against all but the true owner of the land, a would-be dominant owner has no rights against a third party who interrupts his enjoyment of the easement which is in the course of being acquired. It has been suggested that he should be in the same position as a person in adverse possession of land, and we have adopted this suggestion in Proposition 14.

104. A further point of principle which must be discussed concerns the position where the owner of a limited interest, (e.g. a tenant under a lease) is in possession of either the dominant or the servient land. No problem arises under the present law because prescription only operates against and in favour of the freehold. The Law Reform Committee recommended, however, that if prescription were to be retained:

(i) a prescriptive right should be capable of being acquired against the owner of a limited interest in the servient land so as to subsist as long as that servient owner's interest subsists;

(ii) where the servient owner is a tenant for life or has the powers of a tenant for life, a right should be capable of being acquired to the full extent that he could grant one under the Settled Land Act 1925;

(iii) where the person in occupation of the servient land is a beneficiary under a trust for sale, his occupation should be regarded as that of the trustees;

(iv) the owner of a limited interest in the dominant tenant should continue, as at present, to be capable of obtaining a prescriptive right which would enure for the benefit of the freehold.

105. If prescription is founded on acquiescence, its extension on the lines of the first of these recommendations would appear to be justified, although the duration of the interest acquired would, from the dominant owner's point of view, be entirely fortuitous. The Law Reform Committee suggested that user adverse to successive owners of a single leasehold interest (or persons deriving title from them) should be cumulative for the purposes of ascertaining whether the period had run; but that, despite continuous user, time should start to run afresh each time the tenancy against which it started came to an end. Views are invited on these aspects of prescription, and on whether, in the converse case, rights acquired by a tenant of the dominant land should necessarily enure for the benefit of the freeholder of that land.

(d) Interpretation of Express obligations

106. The extent, both qualitative and quantitative, of an easement or profit arising by prescription is governed by the

actual use throughout the prescriptive period; and that of an easement which has arisen by implication (or under section 62 of the Law of Property Act 1925), by the situation as it existed at the date of the conveyance of the land to the dominant owner. Where an easement or profit has been granted in express terms, however, the grant is construed according to the words used and its extent is limited by other considerations only in special circumstances.

107. Grantors, in their own interest, should, therefore, be careful to see that the grant is not loosely worded; but it is not always easy to foresee the use to which the dominant land might be put in the future and it may be somewhat difficult to express in words a quantitative limit to the exercise of the right. Whatever the reason, it is not uncommon to find easements (particularly rights of way) granted in terms which do not specify the amount of the use which is permitted.

108. The situations that can arise when grants are made in general terms may be illustrated by three cases which have been before the Court of Appeal during the present century.

White v. Grand Hotel, Eastbourne Ltd.[65] A right of way along a lane on the plaintiff's land had been granted to give a neighbouring private house access to the main road. The private house later became an annexe to the defendant's hotel, and its stables became the hotel garage. This, naturally, greatly increased the exercise of the right of way. The plaintiff failed in his action to restrict it.

Todrick v. Western National Omnibus Co.[66] In order to obtain access to its land, the defendant company had a right of way through a narrow gateway and along an existing lane on the plaintiff's land, and a right to extend the lane on the plaintiff's land to the common boundary. The existing lane had a retaining wall and the line of its extension followed a sharp

65. [1913] 1 Ch. 113.
66. [1934] Ch. 190 and 561.

downward slope. The company built a bus garage on its land; and in making up the extension to the lane, built a concrete ramp to help to get buses up and down the slope. The plaintiff complained about this ramp, and the use of the lane for buses, and succeeded. It was held that the ramp interfered excessively with the plaintiff's enjoyment of his own land; and that, having regard to the narrowness of the gateway and the possible weakness of the retaining wall, the lane was not and never had been suitable for buses. The grant therefore did not include a right of way for buses.

Jelbert v. Davis and another.[67] The plaintiff took a conveyance of agricultural land in Cornwall together with a right of way along a lane to the main road, "in common with all other persons having the like right". Five years later he obtained planning permission to use part of the land as a camping site for 200 caravans or tents. The defendants (who were also entitled to use the lane) objected and erected notices discouraging campers. In proceedings, the plaintiff failed to establish a right to have so many people using the lane. The grant was held to be limited by the words in quotation marks, and full use of the land by the campers would interfere with the defendants' rights over it. The easement, as claimed, was excessive.

109. It appears from these cases that if the words of grant allow, the extent of an expressly created easement is not affected by a change from private to business use, or from one business use (say, agricultural) to another, even if this means that the right will be more frequently exercised. In construing the grant, however, reference may be made to the physical limitations of the land, and they may cut down the nature of the permitted user. Jelbert v. Davis is, we think, really a case of straightforward construction of the words of the grant and would not be of special interest were it not for Lord Denning M.R.'s approach to the question. In the context of

67. [1968] 1 W.L.R. 589.

the facts in Todrick v. Western National Omnibus Co., Farwell J. had said:[68]

> "... a grant of this kind must be construed as a grant for all purposes within the reasonable contemplation of the parties at the time of the grant"

and Lord Denning, adopting that, said:[69]

> "... the true proposition is that no one of those entitled to the right of way must use it to an extent which is beyond anything which was contemplated at the time of the grant."

Whereas Farwell J. had looked to the surrounding facts as aids in determining the qualitative extent of the right of way, Lord Denning appears to have applied an intention-test to the quantitative extent of the right. In Jelbert v. Davis, nobody suggested that the right of way did not extend to the campers' cars and caravans: the only dispute was about numbers.

110. Lord Denning might, it seems, have come to the same conclusion in Jelbert v. Davis even if the words "in common with all other persons having the like right" had not actually been in the grant. It is, however, by no means certain that the other members of the Court would have taken the same view and it is, therefore, not clear whether the extension of Farwell J.'s dictum into the quantitative area has become an established limitation on the principle derived from White v. Grand Hotel, Eastbourne Ltd.

111. In our view, it is reasonable that some such limitation should exist. It may, however, be difficult to ascertain positively what the parties to the grant of an easement had in contemplation by way of its quantitative extent (they probably did not direct their minds to that question), and we do not think that the words of the grant should always be cut down to cover only the initial level of use. The dominant owner should be entitled to increase the level of use within the grant, if

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68. [1934] 1 Ch. 190 at 206-7.

69. [1968] 1 W.L.R. 589 at 595.

that increase does not seriously increase the injurious effect on the servient owner's enjoyment of his land. But if the servient owner can show that an increased use of the easement interferes with that enjoyment to a marked degree, we think that it is reasonable to assume that that level of interference was not within the parties' contemplation at the date of the grant. We suggest, therefore, that that should be the test.

(e) Imposition of Land Obligations by deed poll

112. An easement cannot exist unless the dominant and servient lands are in different ownerships and this makes it impossible for a developer to impose a comprehensive scheme of Obligations before the plots are disposed of. We think that a change in the law here might be advantageous, and in our Proposition 7 we suggest that in the appropriate circumstances Land Obligations should be capable of being imposed on plots by a deed to which no person other than the common landowner is a party. While all the land affected by such a deed is still under the developing landowner's control, the Obligations contained in the deed will be of no practical significance and need not therefore have a status higher than quasi - Obligations; but as soon as a plot is disposed of, such of the Obligations as are relevant to that plot will automatically have full force and effect both as regards that plot and the others. The execution of a single Land Obligations deed would afford the clearest possible evidence of the existence of a building scheme and we think it would considerably simplify the conveyance on the sale of each of the plots in a new estate.

(f) Jurisdiction of the Lands Tribunal in relation to Land Obligations

113. Under this head we wish to discuss what powers the Lands Tribunal might have to impose, confirm, vary or discharge Land Obligations of all classes.

114. The Tribunal already has a limited jurisdiction in this area. By section 84 of the Law of Property Act 1925, the Authority which it has replaced was empowered to discharge or

modify restrictive covenants if it was satisfied:

(i) that in all the circumstances, the restriction ought to be deemed obsolete; or

(ii) that the restriction impeded the reasonable user of the servient land without securing practical benefits to other persons; or

(iii) that the persons currently interested in the dominant land agreed to the discharge or modification; or

(iv) that the discharge or modification would not injure the persons interested in the dominant land.

The Law of Property Act 1969 clarified (and somewhat widened) the second head; and confirmed that the power to modify a restriction included the power to make a relaxation of a restriction conditional on acceptance of other new restrictions. Apart from that provision, the Tribunal has no power to impose obligations, and it has never had any jurisdiction over easements or positive covenants.

115. We are inclined to the view that the time may have come for the jurisdiction of the Lands Tribunal to be substantially widened in this field. In the preface to the current edition of Preston and Newsom's Restrictive Covenants, the learned editor (Mr Newsom) writes that there is:

> "... a serious social question to be solved. In an increasingly crowded island, how far can privately imposed restrictions be allowed to stand permanently in the way of private development which the planning authorities think desirable? Public development presents no problem, since the burdened land is taken compulsorily and the aggrieved parties are left to their remedy in compensation; and if private development is unduly hampered, the tendency will be to encourage development under public authority. It would surely be a pity if too severe a refusal to modify restrictive covenants and too rigid an enforcement of them in their unmodified state led to a sweeping increase in the use of statutory powers."

Although those words were directed to the problems created by

restrictive covenants, they are, as the Law Reform Committee recognised,[70] equally applicable to easements. An easement is just as capable of becoming obsolete as a restrictive covenant, and its existence may well be an impediment to the proper use and development of the servient land. Again, although Mr Newsom was directly concerned only with the discharge or modification of obligations, the "serious social question" to which he refers may demand an answer involving their imposition.

116. Let it be supposed that in a particular case it would be in the public interest that a housing estate should be built on a particular site, and, further, that such development would require the acquisition of drainage rights over neighbouring land. It is always to be hoped that the developer will obtain those rights from his neighbour by agreement; but what if he cannot? The probable consequence will be that the developer's land will not be put to optimum use, unless the development is carried out by some body having compulsory powers.

117. We do not imagine that cases of this sort arise with any great frequency but we think that if a proper balance is to be maintained between public and private development it may be desirable to create a procedure under which essential facilities over other land may be obtained by private persons in proper cases. It will be appreciated that the acquisition of such rights may be important on any change of the use of land and not only on development in the ordinary sense. We provide for this in Proposition 15(1).

118. The concept is not entirely new. In 1923, the need to ensure an adequate supply of minerals led to the introduction of legislation (now contained in the Mines (Working Facilities and Support) Act 1966) under which the court may confer on any person the right to search for and work certain minerals, together with ancillary rights over private land of a quite extensive kind. An Order under that Act can be made only if a grant of rights is expedient "in the national interest", but

70. (1966) Cmnd. 3100, para. 97.

the burden on the land affected is likely to be much heavier than that which would be incurred by the servient land if the procedure summarised in Proposition 15(1) were adopted. Nevertheless, we think that the procedure should include stringent safeguards against its misuse by persons wishing to develop their land and we suggest four conditions, all of which would have to be satisfied, namely:

(i) the proposed use or development must be in the public interest;

(ii) the imposition of the obligations must be necessary if the development is to be economically practicable;

(iii) it must be possible for the servient landowner to be adequately compensated in money; and

(iv) the refusal of the servient landowner to agree to impose the obligations must be unreasonable (or, nobody must be available capable of entering into such an agreement).

119. We do not think that it would be necessary or desirable to define "the public interest"[71] but the burden of proof throughout should be on the party seeking the rights. The suggestion that that party should first have to apply to the Tribunal for leave to institute proceedings has certain attractions; but it is not always satisfactory to have such an application made to the same body as will (if a prima facie case is made out) subsequently adjudicate on the issue when both parties are before it. A better additional safeguard, we think, would be a rule that the whole of the costs of the proceedings from an early stage should normally be borne by the applicant in any event. That would discourage the making of applications lightly; and it would reduce the risk of servient landowners being forced into "agreements" under threat of proceedings.

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71. cf. Cartwright v. Post Office [1969] 2 Q.B. 62, in which it was held that it was in the public interest that personal contact between members of the community should be maintained by telephone.

120. It seems to us that there are circumstances in which it might be desirable for the Lands Tribunal to have jurisdiction to impose Obligations rather more freely than under the procedure outlined above. We do not think that the same safeguards are necessary if the applicant is already in fact enjoying the facilities which he is asking the Tribunal to impose as Obligations on his neighbour's land. The fact that that enjoyment is being acquiesced in suggests that the facility is not unacceptably burdensome to the servient land and that its conversion into an Obligation (on terms) would not, therefore, be unreasonable. We cover this situation in our Proposition 15(2). We suggest that an extension of the Tribunal's jurisdiction along those lines could have two useful results. First, it could be used as a means of confirming the existence of Land Obligations arising by implication on a division of land under the formula contained in Proposition 9.[72] Secondly, it might in due course be found to be an adequate substitute for prescription.

121. Even if the jurisdiction of the Lands Tribunal is not extended to allow the imposition of Obligations as suggested in the previous four paragraphs, we think that, in consequence of the assimilation of easements and covenants, the Tribunal's present jurisdiction to discharge or modify should be widened to cover all Land Obligations and this is done in Proposition 16. That Proposition goes further than that, because it envisages applications to the Tribunal by the dominant owner. At present, only servient owners are entitled to make applications under section 84, but it has now been made clear that the Tribunal's powers include a power to vary, up or down. The form of the variation may well be suggested to the Tribunal by the owner of the dominant land and we see little reason why he should not be able to institute the proceedings himself with the same end result. The sort of variation which might be applied for is a change in the line of a right of way. Although the power to vary at the behest of the dominant owner might tend more often

72. Discussed at paras. 91-95 above.

to increase burdens on servient lands, whenever that occurred compensation would be payable. We think, however, that the jurisdiction should not (except in a limited class of cases) extend to increasing the burden of a positive obligation, even with compensation.

(g) The Nature of Liability for Breach

122. Liability for interference with interests in land at common law lies in tort: the dominant owner of an easement has a right of action in nuisance and a profit à prendre gives a sufficient degree of possession to support an action for trespass. These actions lie against any person interfering with the right. A breach of covenant on tne other hand can only give rise to an action against the covenantor or (in certain circumstances in equity) a successor in title to, and other occupiers of, the servient land.

123. It is thought that there is no need for such distinctions to survive the merger of these different forms of right into Land Obligations. It would not seem appropriate to extend the right of action in tort against third parties to all cases of interference with rights now existing only as a matter of covenant between the landowners. If easements, profits and covenants are to be assimilated, it would appear therefore that the present position of easement and profits should be modified. We are inclined to think that a third party (for instance, an independent contractor brought in to do some work on the servient land) should not be liable for interfering with the benefit of a Land Obligation of which he had no knowledge. Proposition 13 is accordingly drawn on the basis that liability for interference with any negative Land Obligation attaches to such a third party only if he knowingly interferes with the dominant owner's right.

D. STANDARD DOCUMENTS, CLAUSES AND DEFINITIONS

124. As we have already indicated, some of the problems affecting this branch of the law arise from the fact that easements can come into existence otherwise than by express creation, with

the result that they are wholly undocumented. Every encouragement should be given to the practice of including in contracts and conveyances every Land Obligation of which there is not already documentary evidence.

125. The suggestions which have already been made for increasing the number of statutory rights inherent in land ownership should help in this connection. It has, however, been suggested that standard forms of contract and conveyance might also be provided, and it is true that some development companies have adopted standard forms of their own which ensure that essential items are not overlooked.

126. A reference to the possibility of having such forms in general use was made in paragraph 90 above. The question is whether any such forms could be successfully devised, and if so, whether they would be at all suitable to be clothed with statutory authority (for example, by statutory instrument).

127. It is envisaged that such forms would include a large number of paragraphs covering all the rights which might be required, many of which would be struck out as irrelevant in any given case. Certainly there would have to be different basic forms for fundamentally different types of property - dwelling houses, shops, factories, agricultural land, and so on - and the larger the number of basic forms the smaller (one would hope) would be the element of irrelevance. The usefulness of such forms would, however, be limited. It would be unduly restrictive to make their employment compulsory; and, although they would serve to draw contracting parties' attention to matters which might otherwise be overlooked, they would not always help the parties to define the rights required. Very often, the problem attaching to section 62 (and implied) rights relates not so much to their existence as to the definition of their extent.

128. We think that sets of forms could be devised, but we do not think that their use could be made mandatory and if their use were voluntary we feel that they would have little chance

of continued acceptance if they were not kept very up-to-date, and it is therefore important that that should not be a cumbersome process.

129. There is however one model standard clause which we would like to see provided by statute. It is of the essence of a Land Obligation that the benefit should be "annexed" to particular land; this is a matter of intention, but the evidence of such an intention has in the past often been somewhat uncertain. The adoption of a standard formula would make the intention clear, and we include one in Proposition 7.

130. In order to shorten conveyancing documents, statutory definitions could be provided for short phrases which would thus becomes terms of art. A precedent for this technique can be found in the way in which the use in conveyances of certain keywords such as "as beneficial owner" automatically introduces certain statutory covenants by virtue of section 76 of the Law of Property Act 1925. Similarly the South Australian Real Property Act 1886 provided that the words "together with a free and unrestricted right of way" should import:

> "together with full and free right and liberty to and for the proprietor or proprietors for the time being taking or deriving title under or through this instrument, so long as he or they shall remain such proprietors, and to and for his and their tenants servants, agents, workmen and visitors, to pass and repass for all purposes and either with or without horses, or other animals, carts or other carriages."

To the extent that Land Obligations could be reduced to standard forms, we think that the adoption of statutory shorthand could be useful. At the same time, we suspect that the value of the technique in this field may be somewhat limited. No useful purpose would be served by providing formulae representing clauses which are not matters of common form: they would not be generally adopted by practitioners. It must also be borne in mind that the landowner might prefer to have the obligations attaching to his land spelt out in full in his documents of title. The attempt by the Leases Act 1845 to introduce certain

lengthy covenants into leases by means of keywords has been a complete failure and it may be either that leasehold covenants are not a suitable subject-matter for this treatment or that the particular covenants provided were unacceptable for some reason. It is plain that any proposal to apply the technique requires most careful consideration before its adoption.

PART V - SUMMARY OF PROPOSALS

We now summarise the changes in the law which we put forward for consideration. We do this in the form of Propositions, to which we append Notes. Since it is essential that the changes should be seen in their context, the Propositions are in fact more than a summary of changes and contain a good deal of unaltered law as well as amendments to the existing law and completely new matter. Over most of the field, we have attempted to make the Propositions comprehensive so far as their content is concerned; but despite their form we have not attempted to draft them as though they were clauses for a Bill. The Notes draw attention to what is new, and where the subject-matter of a Proposition is dealt with at greater length in Part IV of the Paper, reference is made to the appropriate paragraphs in that Part.

A. STATUTORY OBLIGATIONS ATTACHING TO LAND

Proposition 1

General Obligations

For the benefit of all interests in other land which may be adversely affected by any breach, there shall (subject to express agreement to the contrary), be attached to all land the following obligations:-

(i) to allow the natural flow of water in a defined channel subject to the reasonable exercise of the rights of the owner of the land through which the channel passes;

(ii) not to do anything which will withdraw support from any other land or from any building, structure, or erection which has been placed on it;

(iii) in addition and without prejudice to (ii), not to excavate in circumstances which give rise to a potential danger of withdrawing support from the land or buildings of an adjoining owner without following a statutory procedure;

(iv) except in accordance with statutory provisions

(a) not to erect any structure which would become a party structure or would cause an existing structure to become a party structure,

Notes to Proposition 1

The matters dealt with in this Proposition are discussed more fully in paragraphs 45-69 and 72.

(i) This preserves unchanged the existing right to flowing water inherent in the ownership of land.

(ii) Insofar as this covers the support of land in its natural state by other land, it preserves the existing law. It is, however, in large measure new in that it extends that natural right or support to buildings, whether that support is provided by other buildings or by land, (see paragraphs 53-62); and it also gives for the first time a right of support both to land and to buildings by water in the underlying land (see paragraphs 65-69). (Support of buildings by buildings in the special circumstances described in paragraph 53 is intended to be excluded).

(iii) The statutory procedure referred to here would be based on that already provided for the London area by section 50 of the London Building Acts (Amendment) Act 1939, and it will back up the right of support dealt with in (ii). The procedure under section 50 of the London Act is summarised and discussed in paragraphs 61 and 62.

(iv) This in substance extends to the whole country the provisions of sections 45 (in part) and 46 of the London Act (togetner with their procedures) relating to party structures (see further, paragraphs 48 and 49). The definitions of "party wall" and so on in that Act may call for revision but broadly speaking, we envisage the paragraph as applying to any wall which is built on both sides of a boundary or which, although erected

(b) not to demolish, lower, raise, underpin, thicken, cut into or alter any party structure;

(v) subject to statutory provisions as to compensation and the procedure to be followed, to allow an owner who desires to build close up to the line of junction to place under the land any projecting footings or foundations which are required for that purpose.

wholly on one side of a boundary, in fact separates buildings in different ownership; and any corresponding horizontal structure. The substantive obligations in relation to party structures are set out in sub-paragraph (b); sub-paragraph (a) prevents one owner imposing such obligations on his neighbour unilaterally.

(v) This in substance extends to the whole country the remainder of section 45 of the London Act. It differs from (iv) in that here the structure is by definition not a party structure. It is suggested that the obligation to allow a neighbour to place foundations under the land should be limited (as under the London Act at present) to foundations not of a "special" character.

Save to the extent that it may be afforded by a party structure, we do not provide any general obligation to afford shelter; nor do we create any obligation protecting the privacy of other land. (See paragraphs 70 and 71).

Proposition 2

Minimum Obligations attaching to parts of buildings in multiple occupation

Where after the appointed day:-

(i) an existing building is divided into a larger number of units of occupation than it previously contained; or

(ii) a building is erected in a form designed for occupation as more than one unit;

then:-

(1) there shall be an obligation attaching to each such unit for the benefit of such of the other units as may be affected by any breach:-

(a) not to obstruct common means of access or free passage of piped water, gas, electricity, drainage and other services;

(b) if repair, renewal or other remedial work is required, to allow anybody who has the benefit of the foregoing obligation to enter on the premises on reasonable notice to carry out such work as may be necessary to or on pipes and installations relating to the services and the means of access (subject to the work being carried out in a workmanlike manner and with reasonable expedition and any damage to the premises being made good).

Notes to Proposition 2

The matters dealt with in this Proposition are more fully discussed at paragraphs 73-81.

In addition to the general obligations set out in Proposition 1 (which in the present context are principally concerned with giving mutual rights of support), we suggest that certain other minimum obligations should be attached, for example, to each of the flats in a block of flats. This Proposition is, however, not limited in its application to buildings which are wholly, or even partly, in residential occupation.

Paragraph (1) imposes on all the units the negative (or passive) obligations (a) not to obstruct the common means of access or the passage of services, and (b) to allow the owner of another unit to enter the premises for the purpose, for example, of clearing drains or renewing wiring. Paragraph (2) goes further and imposes positive obligations to maintain, or to contribute towards the maintenance of the means of access or common services; but these obligations are not necessarily imposed on all the units. No such obligation in relation to access or to a particular service is imposed on a unit which does not benefit from the access or service. Normally, therefore, the ground-floor unit will not be burdened with the maintenance of the stairway or lift. Contribution towards the expense of maintenance on the basis of the respective rateable values of the units may not always be appropriate, and we accordingly leave this open to variation by agreement.

For the reasons given in paragraphs 80 and 81 we have not included in this Proposition any obligations relating to structural repairs. On the other hand, since we regard the obligations which we have included as minimum obligations, we do not think that they should be capable of exclusion by contracting-out. To provide by statute that these obligations attach automatically to the units in a building in multiple ownership would be to create new law: it will however be

(2) In addition, if any such unit derives some benefit from any common service or means of access, there shall be an obligation attaching to that unit for the benefit of such other units as may be affected by any breach:-

(c) to maintain in good repair the pipes and other installations relating to the common services which are on the premises;

(d) to maintain in good repair the common means of access through the premises;

(e) to pay a contribution, which in the absence of agreement to the contrary will be assessed proportionately according to the rateable value of the units affected, to the cost of maintenance incurred pursuant to the obligations in (c) and (d) above.

(Notes, Continued)

appreciated that any well-drawn conveyance of such a unit would in fact impose them expressly.

Proposition 3

Minimum obligations attaching to land in developed areas

Where after the appointed day:-

(i) any land is or has been divided into separate parcels; and

(ii) two or more such parcels (whether created by the same division of land or not) are so situated that a building on any of them is when it is erected, or later lawfully becomes, to some extent dependant for its beneficial use on another or others of the parcels for access or the free passage of services,

then: (a) there shall attach to each parcel upon which a building on another parcel is so dependant (whether the first-mentioned parcel is itself built on or not) for the benefit of the second-mentioned parcel, the obligations set out in paragraph (1) of Proposition 2; and

(b) if any parcel derives some benefit from any common service or means of access, there shall attach to that parcel for the benefit of any other parcel as may be affected by any breach the obligations set out in paragraph (2) of Proposition 2.

Notes to Proposition 3

Proposition 2 imposes certain minimum obligations on each of the units comprised in a building in multiple ownership. This Proposition imposes the same obligations, in certain given circumstances, on quite separate parcels of land. The matter is more fully discussed in paragraphs 74 and 75.

The important question is, in what circumstances should those obligations exist? The Proposition has nothing to do with the provision of any means of access or with the installation of any services: it proceeds on the footing that these things lawfully exist in fact, having been provided either by the common developer or by the later owners of the separate parcels by agreement among themselves. Given the existence of the common means of access or common services, we think that the minimum obligations should attach to the parcels without reference to the history of the title to the parcels, or to any question of the intention of any party at some earlier date.

It will be noted that the obligations may be imposed not only on such of the parcels as have been built on, but also on those remaining undeveloped. When land is divided up for building purposes, some of it may be left undeveloped (e.g. for amenity purposes); and the drainage system for all the houses may pass through such a parcel.

The Proposition creates new law not only by making certain obligations attach automatically but also by making them enforceable in circumstances in which the conditions for the existence of a "building scheme" are not satisfied.

Proposition 4

Enforcement

The obligations in Propositions 1, 2 and 3 shall be enforceable in the same manner and to the same extent as if they had been expressly imposed on the freehold interest as land obligations.

Notes to Proposition 4

We think that the statutory obligations contained in the three previous Propositions should be enforceable in the same way and to the same extent as the analogous Land Obligations dealt with in the Propositions which follow. The Proposition directly concerned with enforcement and remedies is 13, but it is necessary to refer also to Proposition 6 in which Land Obligations are classified under five heads.

The Obligations under Proposition 1, paragraphs (i), (ii), (iii) and (iv), and those under Proposition 2, paragraph 1(a) (and by reference Proposition 3) are all analogous to restrictive covenants and are therefore, for the purpose of Proposition 13, treated as though they were Land Obligations of Class I.

Similarly, the obligations in paragraph (2) of Proposition 2 (and, by reference, Proposition 3), being analogous to positive covenants, are treated as though they were Land Obligations of Class II or Class III; and the remaining obligations (Proposition 1, paragraph (v) and Proposition 2, paragraph (1)(b)) being analogous to the obligations of servient land subject to easements, are treated as though they were Land Obligations of Class IV. (None of the statutory obligations is analogous to a profit à prendre, Class V).

In applying Proposition 13 to the statutory obligations, every piece of land is both "dominant land" and "servient land"; and every person must be presumed to know of the existence of the statutory obligations affecting land.

B. LAND OBLIGATIONS

Proposition 5

Definition

A "Land Obligation" means any obligation which, in accordance with the following Propositions, binds an interest or interests in one piece of land (the "servient" land) for the benefit of an interest or interests in other land (the "dominant" land).

Land Obligations shall be capable of subsisting as legal interests in land if imposed in perpetuity or for a term of years absolute whether taking effect immediately or in the future.

Notes to Proposition 5

1. At present, the law recognises a number of different kinds of obligation which may burden land and applies different rules to them. One of the principal purposes of this Paper is to suggest that some of those obligations should be assimilated. We give the assimilated obligations the name "Land Obligations".

2. The existing obligations affected by our proposals are (i) all those recognised as easements, (ii) most of those recognised as profits à prendre and (iii) many of those arising under covenants, both restrictive and positive. The characteristics which we propose that Land Obligations should have are substantially those now possessed by easements, which exist only if created for the benefit of other land. Profits à prendre and covenants which have not been created or entered into for the benefit of other land are not, therefore, within the concept of Land Obligations. Covenants between landlord and tenant are thus generally excluded.

3. "Land" includes any stratum of land and buildings on the land, so that mutual Land Obligations may be imposed, for example, on all the units in a block of flats.

Proposition 6

Classes of Land Obligations

Any obligation which falls within the following classes may be imposed or may arise as a Land Obligation:-

Class I Obligations which restrict the use of, or the execution of work on, the servient land for the advantage of the dominant land and which do not fall within any of the following classes.

Class II Obligations to execute or maintain any works on the servient land for the advantage of the dominant land.

Class III Obligations to execute or maintain any works on the dominant land, or to pay or contribute to the cost of works to be carried out on the dominant land, for the advantage of the servient land or for specified land including the servient land.

Class IV Obligations to allow the owner of an interest in the dominant land to do or to place something on or under, or to make use of any amenity or facility over, the servient land which conduces to the normal enjoyment of the dominant land or enhances or maintains its value.

Class V Obligations to allow the owner of an interest in the dominant land, so far as conducive to the enjoyment of that land, to enter on the servient land and take any part of that land or its natural produce or wild animals on that land.

Notes to Proposition 6

1. We classify Land Obligations according to their subject-matter.

Class I — covers obligations of the type now affecting land subject to negative easements (e.g. rights to light) or restrictive covenants; by reason of Proposition 1, however, most negative easements of support will be treated as statutory incidents of ownership and not as Land Obligations.

Classes II and III — contain what are now positive covenants to carry out or pay for work on land, the work in question to be carried out on, respectively, the servient and the dominant land. Bringing these covenants into the scheme represents a substantial change in the law, and implements the recommendation made by the Wilberforce Committee in 1965 (see paragraph 27). Class II also provides a proper place for the existing but irregular "easement" of fencing (see paragraph 18).

Class IV — covers obligations of the types now affecting land subject to positive easements (e.g. rights of way).

Class V — covers obligations of the types now affecting land subject to profits à prendre existing for the benefit of other land.

2. An agreement between neighbours may give rise to two distinct Land Obligations, the land of each of them being "dominant" in respect of one of the Obligations and "servient" in respect of the other. For example, the owners of lands A and B may agree that land A should have the benefit of a right of way along a road over land B, land A being simultaneously burdened with a liability to maintain the road in good repair (or to pay for or contribute towards its maintenance). The right of way is a

(Notes, Continued)

Class IV Obligation, in respect of which A is dominant and B servient; the maintenance Obligation is Class III, and in respect of that Obligation B is dominant and A servient.

Proposition 7

Express Imposition

(i) Method of Imposition

(1) A Land Obligation, if expressly imposed, requires an instrument which identifies the dominant and servient land and shows an intention to impose a Land Obligation. The legislation should contain a specimen form of words on the following lines:-

> "The land hereby conveyed [or land shown hatched blue on the attached plan] shall henceforth be subject to the Land Obligation set out in the Schedule hereto for the benefit of the land shown hatched red on the said plan."

(2) A Land Obligation will normally be imposed in a transaction inter partes and the instrument must be executed by both parties.

(3) Exceptionally, where an owner of land intends to dispose of his land in a number of plots subject to Land Obligations, he may, by instrument to which no other person is a party, impose Land Obligations on his own land or on any part or parts of that land. Such instrument shall by reference to a plan specify the plots and the Obligations to be imposed on them respectively.

(ii) Extent and Duration

A Land Obligation may be imposed by any person entitled to a legal estate in the land or to an equitable interest therein other than under a settlement; and it may be imposed so as

Notes to Proposition 7

Para. (i)

(1) A Land Obligation would create an interest in land and, as such, if expressly imposed must be imposed in writing (section 53(1)(a) Law of Property Act 1925). Moreover, by section 52 of that Act, if it is to subsist as a legal interest, the writing must be either a deed or an Order of the Court or other competent authority (which would, in the present context, include the Lands Tribunal).

Deeds imposing obligations on land do not always set out as explicitly as they might the (dominant) land to which the benefit is intended to be attached. This can give rise at a later date to doubts as to whether the owner of particular land is entitled to enforce the obligations in question. To reduce that risk, we suggest that any legislation giving effect to our proposals should provide a standard form for adoption by the parties.

(2) Although easements normally arise as the result of agreements between parties, they are, as a matter of form granted (or reserved) as unilateral acts and it may therefore be necessary for one party only to execute the operative document. In practice, however, it is often necessary for both parties to execute a conveyance (for example), because while the vendor is doing the conveying, and perhaps granting or reserving easements, the purchaser is entering into covenants. Our impression is that purchasers commonly expect to be required to execute conveyances to them, and are surprised if, in the circumstances, it is not necessary for them to do so. Viewing such transfers as matters of agreement rather than of grant, we think that it would be preferable if they were always executed by both parties. Consistently with that, we suggest that any instrument by which a Land Obligation is imposed should be executed by both parties. This would also help to remove the distinction sometimes drawn between grants and reservations.

to last for the duration of his interest or for any shorter period.

(iii) Interpretation of Express Obligations

The nature and extent of an Obligation will be ascertained by applying the ordinary rules of construction to the words in the instrument; but, unless a contrary intention appears in the instrument, Obligations of Classes IV and V will not be construed so as to permit use of a substantially different kind from, or to an extent which would interfere to a substantially greater degree with the enjoyment of the servient land than can be taken as contemplated when the Obligation was imposed.

(Notes, Continued)

(3) This proposal is made to enable a developer to draw up a comprehensive Land Obligation scheme before parting with any of the plots. It would change the present law and it is more fully discussed at paragraph 112.

Para. (ii)

It is self-evident that a lessee having a term of, say, 21 years cannot effectually impose an Obligation on the demised land for a longer term or in perpetuity. It is for consideration whether it would be right to extend section 162 of the Law of Property Act 1925 so that no Land Obligation would be liable to be invalidated by the rule against perpetuities, but we think that the Perpetuities and Accumulations Act 1964 may have modified that rule sufficiently. It is now possible to grant an easement to take effect at an unspecified future date, provided that it does in fact take effect within the period allowed by the rule (compare Dunn v. Blackdown Properties Ltd. [1961] Ch. 433).

Para. (iii)

This part of the Proposition is discussed at paragraphs 106-111. As will there be seen, it is not altogether clear whether the suggested limited construction of the extent of Obligations of Classes IV and V would represent a change in the law; but we think that if the words used in the instrument imposing the Obligation do not make the quantum of the Obligation clear, it may be limited by reference to what the Court finds to have been in the contemplation of the parties.

Proposition 8

Express Variation or Discharge

Any person owning an interest in the dominant land may vary or discharge a Land Obligation but no such variation or discharge shall affect any other interests in the dominant land or prevent the owner of a concurrent interest in the land from enforcing the Obligation.

Notes to Proposition 8

Variations should, where appropriate, be registered (see Proposition 11 below).

Proposition 9

Land Obligations Implied on a Division of Land

Where a person disposes of part of his land, the relevant interest in each of the parts into which the land is divided (including any part retained by him) shall become subject, unless there is express provision to the contrary, to any Land Obligations of Classes IV or V which are appropriate to ensure that the owner of the relevant interest in any other part will have:-

(a) any facilities which were previously available to the occupier of that part of the land and which in all the circumstances it is reasonable to contemplate as continuing; and

(b) any new facilities which are either necessary to the proper enjoyment of that part at the time of the transaction or which in all the circumstances it is reasonable to contemplate as having been intended by the parties to be imposed upon completion of the transaction.

Notes to Proposition 9

1. At present, easements (and, theoretically, profits) may be created by operation of law under section 62 of the Law of Property Act 1925; and they can also arise by implication. This somewhat confusing part of our subject is discussed at paragraphs 87-95.

2. Strictly speaking, it should not be necessary for the law to make provision for easements to arise in those ways, because they could have been specifically created or reserved in the conveyance to the purchaser of part of the vendor's land. It would, however, be unrealistic to expect that all the desired Land Obligations will always be imposed expressly, and it is therefore necessary to provide for some Obligations to arise by implication in certain circumstances. We suggest that this Proposition, which is intended in substance to replace the present law, incorporates several distinct improvements:-

(i) The Obligations may arise in favour of either the vendor's or the purchaser's land; no distinction is drawn, as at present, between grant and reservation.

(ii) The reasonable contemplation of the parties is the criterion; it would not be necessary to show that the facility was previously attached specifically to one part of the land.

(iii) Unlike section 62 of the Law of Property Act 1925, the Proposition will operate (unless excluded) to imply terms into the contract. If an Obligation is implied in the contract, it cannot be excluded in the subsequent conveyance. Equally, if not implied therein, the purchaser is not entitled to have it included in the conveyance, where its inclusion will nevertheless be implied under section 62. At present, if the conveyance is silent as to the matters covered by section 62, the purchaser's claim to the benefit

(Notes, Continued)

of easements under that section to which he was not entitled by virtue of the contract may be met by a claim by the vendor to have the conveyance rectified to exclude them.

3. In conformity with the present law, nothing will be implied as a Land Obligation under this Proposition which is too uncertain or indefinite to have been imposed expressly. It is, moreover, evident that the Obligations which would arise under this Proposition would be likely, in due course, to arise by prescription; and since, as will be seen, we do not think that Obligations of Class I (negative easements) should be capable of arising by prescription, we have limited this Proposition to Obligations of Classes IV and V (positive easements and profits).

4. The Proposition would apply not only on sales of land, but also on leases and other assurances of property (see section 205(1)(ii) of the Law of Property Act 1925).

Proposition 10

Acquisition of Land Obligations by Long Use

(1) Conditions for acquisition

Where the benefit of an obligation which is capable of subsisting as a Land Obligation of Class IV or V (Proposition 6 above) has in fact been enjoyed over other land for a continuous period of twelve years and the nature and extent of the enjoyment:-

(a) were actually known to the person or persons in occupation of the servient land or were such that they should reasonably have been known to such person or persons, and

(b) were not at any time during the twelve year period enjoyed by force or by the consent or agreement of the person or persons in occupation of the servient land,

a Land Obligation will burden the interest of such person or persons in the servient land (e.g. where throughout the period that land was occupied by a person with a limited interest, so as to burden that interest) for the benefit of all interests in the dominant land.

(ii) Duration of the Obligation

A Land Obligation acquired in this way will be capable of lasting so long as the burdened interest in the servient land continues; but it will be subject to termination or variation in the same ways as an Obligation created expressly. In addition, a prescriptive Obligation of which the persons interested in the

Notes to Proposition 10

General We discuss prescription at paragraphs 96-105. While we recognise the force of the views expressed by the majority of the members of the Law Reform Committee (who reported in 1966 in favour of abolishing prescription altogether), we think that there is a practical need to give effect to situations of long standing, and therefore consider that some form of prescription must remain until some alternative has been found and proved satisfactory. As to that, see Proposition 15(2) below. In the meantime, we suggest that the law of prescription should be reformed along the lines which commended themselves to the Law Reform Committee as a whole.

Para. (i)

1. The Committee accepted that the justification for prescription lay in the servient owner's acquiescence in his neighbour's enjoyment of the facility in question. But they did not think there was even this justification if steps needed effectively to interrupt that enjoyment would be burdensome to the servient owner and they therefore recommended that a right of support should not be capable of being acquired merely by long enjoyment. By parity of reasoning we would suggest the exclusion of all negative easements (including the right to light), and allow prescription only for Obligations of Classes IV and V.

2. Although a tenant may now grant an easement for the term of his lease (or for a lesser period), such an easement cannot be acquired against his land by prescription. The Committee recommended, and we agree, that this should be changed. The benefit of a Land Obligation acquired by prescription, should, however, continue to attach to all interests in the dominant land.

Para. (ii)

1. It may be necessary to provide that an Obligation acquired for a term against a tenant's interest in the servient

dominant land take no advantage at all for a continuous period of twelve years will be extinguished.

(iii) Extent

The nature and extent of a Land Obligation acquired by long use will be determined by the character and extent of the enjoyment whereby the benefit of the obligation was acquired.

(Notes, Continued)

land is not lost prematurely by, for example, the surrender of that tenancy.

2. The extinguishment of prescriptive Obligations by non-user follows a recommendation of the Law Reform Committee.

Para. (iii)

This restates the present law. Where an Obligation of a particular extent has already been acquired (by prescription or otherwise) its extent may be increased by twelve-year enjoyment of increased use.

Proposition 11

Registration of the Burden of a Land Obligation

(1) Where the title to the servient land is registered:-

(i) The express imposition of a Land Obligation will constitute a disposition of the registered land and, as such, will require to be completed by registration and notice of it made on the register of the burdened title.

(ii) A Land Obligation which arises under Proposition 9 or 10 above (Obligations implied on a division of land or acquired as a result of long use) will take effect as an overriding interest and accordingly any disposition of the servient land will take effect subject to it notwithstanding the absence of any reference to it on the register. Any person claiming to have the benefit of such a Land Obligation may apply to the Registrar for the Obligation to be noted on the register of the servient title. If after considering all the available evidence the Registrar is satisfied that a valid Land Obligation has come into being, he must note the Obligation.

(2) Where the title to the servient land is not registered:-

(i) A Land Obligation of Class II or III (Obligations to execute or maintain any works

Notes to Proposition 11

General It is proposed that the registration of Land Obligations should (with one major exception in connection with positive obligations of Classes II and III) follow the general pattern of the present law relating to easements. (Class I Obligations corresponding to restrictive covenants would, if not picked up on first registration, have to be overriding interests in the same way as are unrecorded easements. We appreciate that this provision accordingly increases the number of matters in respect of which compensation would not be payable if there were an accidental omission on first registration of the title to the servient land).

Para. (1)(i) On first registration of the title to the servient land, all Obligations appearing on the title or registered in the Land Charges register will be noted on the register; thereafter, all expressly created Obligations must be noted on the register and will not be overriding interests.

Para. (1)(ii) Obligations which are not expressly created are not susceptible of registration on their "creation", and they must, therefore, be overriding interests. There may be some advantage to the dominant land in having the overriding obligation noted on the title to the servient land and a procedure for attaining that desirable object is accordingly suggested.

Para. (2)(i) 1. Where the land is unregistered, the general rule is that equitable interests require for their protection to be registered (in the Land Charges register) but that no legal interest is so registrable. To the latter there is an existing exception: puisne mortgages (legal charges not accompanied by a deposit of title deeds) must, though legal, be registered as land charges. As will be seen (Proposition 13), the enforcement of a Class II or Class III Obligation may result in the imposition of a monetary charge on the servient land and it is therefore considered that all Obligations of these Classes should be registered.

or to pay or to contribute to the cost of works) will be registrable in the register of Land Charges and accordingly will (subject to paragraph (3) below) be void against a purchaser for value of any interest in the servient land unless it has been so registered before the completion of the purchase.

(ii) A Land Obligation of any other class:-

(a) if subsisting as a legal interest, shall not be registrable in the register of Land Charges and shall be binding even upon purchasers for value of the servient land whether or not they have actual notice;

(b) if subsisting as an equitable interest, shall be registrable in the register of Land Charges and accordingly will (subject to paragraph (3) below) be void against a purchaser for value of any interest in the servient land unless it has been so registered before the completion of the purchase.

(3) Notwithstanding the general rule that a registrable Land Obligation is void against a purchaser for value completing before registration of the Obligation, where:-

(a) the Obligation is imposed in a conveyance or lease;

and

(Notes, Continued)

2. We accept that registration under the Land Charges Act 1925 is not very satisfactory, since registration under that Act is against the name of the estate owner and not against the affected land. Nevertheless, in relation to Obligations of Classes II and III which may result in a charge on the land having priority from the time of creation, it seems logical to treat them in the same way as puisne mortgages (and as registrable land charges). We feel that that would be preferable to reverting, so far as those Obligations only are concerned, to the pre-1926 rules about notice, as the Wilberforce Committee recommended in relation to positive covenants. This is a matter on which we would particularly welcome readers' views. In this connection we would add that a compromise has been suggested to us, namely that the old notice rules should apply to a positive Obligation imposed in a conveyance or lease, and that only those imposed in any other document should be required to be registered at the Land Charges Registry. Having regard to the difficulties inherent in the Land Charges system, we think that there is much to be said for this suggestion and, if it were adopted, the rule suggested in paragraph (3) of this Proposition would not be required.

Para. (2)(ii)(a) Most legal Obligations would be imposed on the occasion of a conveyance, and so would be on the title; and they should therefore normally come to the notice of a purchaser. Again, however, there may be some advantage to the dominant land to have the existence of the Obligation recorded on the deeds constituting the title to the servient land and it is for consideration whether the dominant owner should have a right to have either a duplicate conveyance, or a memorandum of the Obligation endorsed on such deeds (a right similar to that given by section 200 of the Law of Property Act 1925).

Para. (2)(ii)(b) This provision is not intended to apply to an "estoppel interest" (that is to say, an obligation which the court would enforce on purely equitable grounds) unless and until the obligation has been declared to exist by an Order of the court. As soon as an Order has been made, however, the

(b) the Obligation is registered in the register of Land Charges within fourteen days of completion

a mortgagee or other purchaser for value of any interest in the servient land taking such interest from the transferee or lessee under the conveyance or lease shall take subject to the Land Obligation.

(Notes, Continued)

obligation should become a Land Obligation exactly as if it had been expressly created by agreement between the parties and, if declared to be equitable in its nature, it should be registered.

Para. (3) This is entirely new. It is designed to eliminate a practical difficulty which now arises in relation to restrictive covenants (in particular) imposed on a transfer of land where there is a simultaneous mortgage or immediate sub-sale. Since there is in such a case no time in which to register the covenant before the mortgage or sub-sale takes effect, it is necessary (if the covenant is not to be void against the mortgagee or sub-purchaser) to lodge a priority notice at the appropriate registry before either transaction has been entered into. We think that this step is in many cases unnecessary for the protection of immediate mortgagees or sub-purchasers, because they should be aware of any covenants which are actually contained in the instrument of transfer; at the same time, as the law now stands, the consequences of omitting to lodge a priority notice could be serious. We accordingly suggest that the law would be improved if the registration provisions were relaxed in the circumstances to which this part of the Proposition applies.

Proposition 12

Registration of the benefit of a Land Obligation

(1) Where the titles to the relevant interests in both the servient and the dominant lands are registered, the Registrar will, on making an entry of a Land Obligation on the title to the servient land, also enter the benefit of the Obligation on the title or titles to the dominant land.

(2) Where the title to the relevant interest in the servient land is not registered, the Registrar will not be under a duty to enter the benefit on the title or titles to the dominant land but he may do so if he thinks fit or he may note that the benefit of a Land Obligation is claimed.

Note to Proposition 12

The validity of a Land Obligation should not depend in any way on registration of the benefit, but we think that it would be generally desirable, where the title to the dominant land is registered, to have the Obligations benefiting the land entered as part of its description. We are, however, aware that there are serious practical difficulties in this for the Land Registry; it might involve the production of complicated filed plans where the dominant land was part of a building estate subject to mutual Obligations, and problems could also arise if the servient land was unregistered and its identity was not clear.

Proposition 13

Enforcement and Remedies

(i) The Benefit

Subject to the court's discretion in (v) below, a Land Obligation will be enforceable by:-

(a) any person who currently owns an interest (either legal or equitable) in the dominant land benefited by the Obligation; or

(b) any person who is in occupation of the dominant land.

(ii) The Burden - Negative Land Obligations

Subject to Proposition 18 below, a Land Obligation of Classes I, IV or V may be enforced against:-

(a) any person who currently owns the interest in the servient land which was originally burdened with the Obligation; or

(b) any person owning an interest derived from that interest; or

(c) any person in occupation of the whole or relevant part of the servient land; or

(d) any other person who knowing of the existence of the Obligation interferes with the enjoyment of the benefit of that Obligation without lawful authority or excuse.

Notes to Proposition 13

General Persons who have parted with their interests in either the dominant or the servient land will no longer be concerned with the Land Obligations affecting the land (unless they themselves interfere with the enjoyment of the benefit of an Obligation).

Para. (i) We suggest that Obligations should be enforceable by any person interested in the matter. Even mere squatters are included, but attention is drawn to paragraph (v).

Para. (ii) This paragraph substantially reproduces the present law as to easements, to which restrictive covenants are assimilated. The liability of strangers to the land under (d) is however less strict than their present liability for interference with an easement; we think that an independent contractor, for example, working on the servient land should not be liable to the dominant owner for interfering with the benefit of an Obligation of which he was not actually aware. We would add that, for the purpose of this Proposition, a person who has obtained a title by adverse possession (and a person deriving title from him) is intended to be regarded as owning an interest derived from that of the person dispossessed.

Para. (iii) This would represent entirely new law, since a positive covenant is not now directly enforceable against the owner for the time being of the land concerned. The classes of persons against whom a positive Obligation may be enforced differ from those against whom other Obligations may be enforced in that:

1. In the nature of things, strangers to the land cannot be in breach of a positive Obligation, and
2. We do not think that dominant owners should be able to require short term tenants at rack rents, or mere licencees, to fulfil positive obligations, the burden of which might be out of all proportion to their interests in the land.

(iii) The Burden - Positive Land Obligations

A Land Obligation of Classes II or III may be enforced against:-

(a) any person who currently owns the interest in the servient land (or any part thereof) which was originally burdened with the Obligation; or

(b) any person having a tenancy derived from that interest for a term exceeding twenty one years or for a lesser term at a ground rent; or

(c) any person (other than a tenant of the servient land or part thereof or a licensee under a revocable licence) who is in occupation of the whole or any part of the servient land.

As between a tenant bound to perform such an Obligation and his landlord also bound by the same Obligation, the latter shall have primary liability to perform the Obligation unless they have agreed to the contrary, and if the tenant is called upon to perform the Obligation, he shall have the same remedies against his landlord as the person entitled to the benefit of the Obligation.

(iv) Remedies

(1) The normal remedies for breach of a Land Obligation will be:-

(a) to restrain a breach of a negative Obligation (i.e. Classes I, IV and V), an injunction, or as an alternative or in addition, damages for the breach.

(Notes, Continued)

Although we would thus exempt a particular class of tenant or occupier from direct liability, it would usually remain possible for the burden to be effectively transferred under the terms of the lease or tenancy. We think that tenants not within the exempted class should be directly liable: indeed, it would be to the person in actual occupation of the servient land that the dominant owner would naturally look. Nevertheless, we suggest that it would normally be appropriate that the burden of carrying out a positive Obligation should fall on the landlord; and, subject to the terms of any arrangement between the landlord and the tenant, the Proposition produces that result. The greater the interest of the tenant, the more likely is it that as between himself and his landlord, the burden would be placed on him.

Para. (iv)

(1)(a) These are the existing remedies for interference with easements and profits and breaches of restrictive covenants, and nothing further seems to be required.

(b) The enforcement of positive covenants gives rise to some special difficulties which may, indeed, have been among the reasons for the fact that such covenants have not hitherto run with the land. First, if the covenants are worth enforcing at all, damages for their breach may, alone, be inadequate; and the mandatory injunction is an unsuitable remedy for the enforcement of a continuing liability. In the last resort, therefore, the dominant owner must be able to carry out the work himself and convert the servient owner's liability to perform an act into a liability to pay a sum of money. For that purpose, in the case of a Class II Land Obligation, the dominant owner must be given rights of access to the servient land. The second difficulty, which the Wilberforce Committee's report did not discuss, arises on the division of the servient land into several plots in separate ownership. As in the case of rent-charges, it is essential from the dominant owner's point of view that each plot should be severally liable for the whole of the Obligation; if this were not so, the security for the

(b) To secure the performance of a positive Obligation of Class II, a person entitled to enforce the Obligation shall first give notice to the person bound to perform it (or to one or more of such persons) requiring performance of the Obligation within a specified reasonable time, and stating an intention to enter in default. If the Obligation is not duly performed, the person requiring performance may (after giving notice of the fact of default and of his intention to enter to the occupier of the part of the servient land on which the work is to be carried out and to the occupier of any other part of the servient land giving access to the relevant part) enter on the servient land and do the work himself. But if the occupier or the person bound by the Obligation serves a counter-notice disputing his right to enter, the dominant owner must obtain the leave of the court. The expense incurred by the dominant owner (and, if he is successful, his court costs) shall, when the sum has been agreed by a person bound by the Obligation, constitute a debt due to the dominant owner from such person. In the absence of agreement, the sum shall be determined by the court.

(c) To secure the performance of a positive Obligation of Class III, any expense incurred by the dominant owner in carrying out the works himself or any

performance of the Obligation would be diminished (and, indeed, could be rendered nugatory). We accordingly provide under this sub-paragraph a right of access to the dominant owner (with safeguards), in order to enable him, where necessary, to exercise the remedy of self-help; and we provide that the cost to the dominant owner of exercising that remedy shall be a debt due from the servient owner, or from any servient owner, agreeing the amount. One of several servient owners thus incurring a debt to the dominant owner will have a right of contribution (or if appropriate, indemnity) from the others, under Proposition 19 below.

(c) A Class III Land Obligation is concerned with works to be carried out on the dominant land. It will normally be an Obligation to pay for such works, and not to carry them out; but in any event the dominant owner has no access problems. This greatly simplifies the suggested enforcement machinery, but so far as any monetary liability is concerned, the provision is identical with that relating to Class II Obligations.

(d) Under paragraph (iii) above we have protected certain occupiers from direct liability; and the dominant owner may in any event wish to be able to enforce the liability against some other person interested in the servient land. It is, therefore, necessary that he should be able to find out who the persons responsible may be.

(2) A monetary liability may either be original (this would be the normal situation in the case of a Class III Obligation), or it may arise as a result of default on the part of the servient owner or owners primarily liable to carry out works. It may be quantified by agreement or by the court. If the dominant owner has to resort to the court for the recovery of the agreed sum, or for the quantification and recovery of the sum, the court has an existing power to make an Order charging the defendant's interest in the land with payment of the judgment debt. In the ordinary way, such a charge would take its priority from the date of the Order; we agree, however,

default in payment or contribution (and the cost of any proceedings in court) shall, when the sum has been agreed by a person bound by the Obligation, constitute a debt due to the dominant owner from such person. In the absence of agreement, the sum shall be determined by the court.

(d) To facilitate the discovery of the identity of the persons currently bound by the Obligation, any person entitled to enforce a Land Obligation may at any time require the occupier of the servient land (or of any part thereof) or any other person appearing to have an interest in the servient land, to state the nature of his interest therein and the name and address of the person (if any) owning the immediate superior interest in the servient land.

(2) In any proceedings instituted by the dominant owner either for the enforcement of a debt arising under sub-paragraphs (b) or (c) above or for the determination of the amount due to him, the court may make an order charging the defendants' respective interests in the servient land. The charge imposed by such an order shall have the same priority as the Land Obligation in respect of which the money liability has arisen. No lease for 21 years or less at a rack rent shall however be liable to be defeated by the exercise of the powers conferred by the charge.

(v) Powers of the court

In any proceedings for enforcement the court may refuse to

(Notes, Continued)

with the Wilberforce Committee that since a positive Land Obligation binds the land, the judgment should be regarded merely as quantifying the liability and the charge should take priority from the date of its imposition, where the defendant owned the servient land at that date; otherwise, from the date of its registration. Tenants protected from direct liability (see Notes to paragraph (iii) above) should also be protected from the consequences of charges on their landlord's interests.

Para. (v) Under this provision the court could, for example, decline to assist squatters. Moreover, as the Wilberforce Committee said: "Changing circumstances or unforeseen events may not only, as in the case of negative covenants, render the obligation obsolete or unnecessary, they may also make it far more onerous to perform".

make an order if it thinks that the plaintiff's interest is not materially affected by the breach or that for some other reason it would be unjust to do so. It may further, if it thinks fit, vary or discharge the Obligation on any ground on which the Lands Tribunal could do so (see Proposition 16 below) on suitable terms as to compensation, provided all the persons entitled to the benefit of the Obligation who would be effected by the alteration are before the court.

Proposition 14

Inchoate Obligations

Any person who is enjoying a facility over the servient land and who has not yet acquired (but, if the same circumstances continued, would after twelve years use acquire) a Land Obligation of Class IV or V shall have a right of action against anyone other than the owner of an interest in the servient land to which the enjoyment is adverse (or any person acting with the authority of such owner) who, knowing that he is enjoying that facility, interferes with his enjoyment of it.

Notes to Proposition 14

1. This Proposition, which contains new law, is put forward upon the assumption that prescription will be retained.

2. Since the principal moral justification for retaining prescription is the servient owner's acquiescence in the enjoyment of the facility over a number of years, the person enjoying the facility cannot have any rights against the servient land until the prescriptive period is complete. But there is no reason why strangers should be free to interfere. The absence of any protection against interruption by third parties, although not dealt with in the Law Reform Committee's Report, has been the subject of criticism and it is suggested that a prospective prescriptive owner of a Land Obligation should not, in this respect, be in a worse position than a person in the process of obtaining, by adverse possession, title to the land itself. Interference by an independent contractor engaged by the owner of the servient land would for this purpose be regarded as interruption by the servient owner himself.

3. Where more than one person is using a facility over other land, none should be able to exclude the others, but each should be able to prevent the others from excluding his enjoyment.

Proposition 15

Powers of the Lands Tribunal to impose Land Obligations

(1) Where an owner of a freehold or leasehold interest in land desires to carry out a specific development on his land or to make a specific change of the use of his land, the Lands Tribunal will be empowered to impose Land Obligations over other land on the payment of compensation where appropriate and on such conditions as it thinks fit if it is satisfied that all the following circumstances are present:-

(i) it is in the public interest that the dominant land should be developed or used in that way;

(ii) the development or change of use cannot be effective unless specific Land Obligations are imposed on the servient land;

(iii) the owner of the interest to be burdened in the servient land can be adequately compensated in money for any loss or disadvantage he may suffer from the imposition of the Land Obligations; and

(iv) in all the circumstances the refusal of the owner of the interest to be burdened in the servient land to agree to the imposition of the Obligations is unreasonable or no person can be found who is competent to enter into an agreement under which the specific Obligations could be imposed.

Notes to Proposition 15

General Both parts of this Proposition, which is more fully discussed at paragraphs 113-120, greatly extend the jurisdiction of the Lands Tribunal and go much further than section 84 of the Law of Property Act 1925 as amended in 1969.

Para. (1) This part of the Proposition is, essentially, an instrument of public policy, and represents entirely new law. As we point out in paragraph 115 we think the time may have come for the law, in the public interest, to go some way towards helping an owner of land to acquire such rights as are essential to enable him to put his land to better use. This Proposition gives effect to that view. The exercise of the Lands Tribunal's extended powers would, however, be subject to stringent conditions.

Para. (2) Although this part of the Proposition also provides for the imposition of Obligations, it is less radical, since by definition the prospective servient owner has not interrupted the present enjoyment of the facilities in question. The procedure would enable implied Obligations arising under Proposition 9 to be confirmed in case of doubt; and we suggest that it might eventually be regarded as a satisfactory substitute for prescription.

(2) Where the owner of an interest in land is actually enjoying facilities over other land the benefits of which are capable of subsisting as Land Obligations and in all the circumstances (including the length of time over which they have been enjoyed and the circumstances in which such enjoyment began) it is reasonable that the facilities should be enjoyed as Land Obligations, the Lands Tribunal will be empowered to impose Land Obligations over the other land on the payment of compensation where appropriate to the owner of the interest to be burdened and on such conditions as it thinks fit.

Proposition 16

Powers of the Lands Tribunal to vary or discharge Land Obligations

The Lands Tribunal will be able to vary or discharge a Land Obligation or to substitute a different Obligation on the payment of compensation where appropriate and on such conditions as it thinks fit if it is satisfied:-

(1) that the Obligation is obsolete (or in the case of a positive Obligation, inadequate) in its present form; or

(2) that it impedes some reasonable user of the servient land for public or private purposes provided that:-

(a) its continuance either:-

(i) does not secure to the persons entitled to the benefit any practical benefit of any substantial value or advantage; or

(ii) is contrary to the public interest, and in determining whether this is so and whether the Obligation should be varied or discharged the Lands Tribunal shall take into account the development plan for the area and any declared or ascertainable pattern for the grant or refusal of planning permissions in the area and the period at which and context in which the Obligation was imposed or arose and any other material circumstances;

Note to Proposition 16

This Proposition applies section 84 of the Law of Property Act 1925 (as amended) to all Land Obligations. The Lands Tribunal's jurisdiction would, moreover, be extended to enable applications to be made, in certain circumstances, by the dominant owner.

and that

(b) the owner of the benefited interest in the dominant land can be adequately compensated in money for any loss or disadvantage he would suffer by the variation or discharge; or

(3) that the persons entitled to the benefit have agreed either expressly or by implication by their acts or omissions, that it should be varied or discharged; or

(4) in the case of a positive Obligation to execute works or pay money, that the Obligation has become disproportionately onerous in relation to the benefit which its performance secures.

Provided that in the case of a positive Obligation to execute works or pay money, the Tribunal shall not make it more onerous, save exceptionally where there are mutual Obligations for contributions of fixed sums and those contributions have clearly become inadequate for the purpose for which they are paid.

Proposition 17

Jurisdiction of the High Court

(1) The High Court will have power on the application of any person interested to declare:-

(a) whether or not in any particular case any land or interest in land is, or would in any given event be, affected by a Land Obligation;

(b) what, upon the true construction of any instrument purporting to impose a Land Obligation, is the nature and extent of the Obligation and whether and by whom it is, or would in any given event be, enforceable.

(2) This power may be exercised not only where the imposition of a valid Land Obligation has been established in law but also where the Court is satisfied that either or any of the parties to the proceedings is estopped on equitable principles from denying the existence of an obligation which could have been imposed as a valid Land Obligation.

(3) Where the Court makes a declaration that an interest in land is effected by a Land Obligation either:-

(a) where that Obligation is not contained in any instrument or

(b) where the Court declares the nature and extent of an obligation contained in an instrument where the nature and extent are not clear from that instrument,

Notes to Proposition 17

Para. (1) This reproduces the Court's existing jurisdiction under section 84 of the Law of Property Act 1925 (as amended), substituting references to Land Obligations for those to restrictions.

Para. (2) This recognises the equitable jurisdiction which the Court already assumes in cases such as Ives v. High [1967] 2 W.L.R. 789, the facts in which are set out in paragraph 29.

Para. (3) In appropriate circumstances, a Court Order will lead to the registration of the Land Obligation.

the declaration shall specify that the obligation is a Land Obligation and of which class and whether it is a legal or equitable Obligation and shall identify the dominant and servient land. Thereafter, the provisions relating to Obligations expressly created shall apply.

Proposition 18

Negative Land Obligations - Subdivision of Servient Land

Where land which is the servient land in respect of a negative Land Obligation of Class I, IV or V is subdivided into a number of smaller units, and the Obligation is such that in the circumstances of the case it has no relevant application to one or more of such units, such unit or units shall be free of the Obligation. A breach of the Obligation may be enforced only against a person owning an interest in (or in occupation of) the unit in connection with which the breach has occurred, or against a person otherwise responsible for the breach.

Note to Proposition 18

Some Obligations are of such a nature that they affect every part of the servient land. A common example is a restriction on the number of buildings which may be erected on it. Others, however, are capable of directly affecting only part of the servient land. The purpose of this Proposition is to appropriate, so far as possible, negative Land Obligations to the relevant plots if the servient land is subdivided. For example, if a right of way in favour of Blackacre passes over Whiteacre, and Whiteacre is later subdivided, some of the plots may be free of the Obligation altogether, because the way does not pass over them; each of those over which the way passes will be subject to a separate Obligation and its owner will be liable only in respect of breaches occurring on his own plot.

Proposition 19

Positive Land Obligations - Implied terms as to contribution and cross indemnities

(1) Where land which is the servient land in respect of a positive Land Obligation of Class II or III is subdivided into a number of smaller units, each unit will remain subject to the Obligation in full; and any breach may be enforced against the owner etc. (as provided in Proposition 13(iii)) of any of the units. Where one owner etc. is compelled to perform or to pay for the performance of such an Obligation he shall (subject to any express agreement to the contrary) have a right to such contribution or indemnity from all or such of the owners of the other units as may in the circumstances be just.

(2) For the purposes of identifying such owners, the person entitled to a right to contribution or indemnity shall have powers of enquiry similar to those set out in Proposition 13(iv)(1)(d).

Note to Proposition 19

Positive Land Obligations should not automatically be appropriated to any particular part or parts of the servient land on its sub-division. In practice, the burden would no doubt often be apportioned between the plots on the occasion of the sub-division, but any such arrangement could not affect the dominant owner (unless he was party to it). If the dominant owner enforces the obligation against one of the plot owners, this Proposition enables that plot owner to obtain contributions from the others in accordance with the apportionment already made on the sub-division of the servient land, or made under the next Proposition.

Proposition 20

Positive Land Obligations - Apportionment

(1) Where the servient land has been subdivided:-

(i) the owners of burdened interests in the servient land may agree to an apportionment of a positive Obligation of Class II or III binding as between themselves but this shall be without prejudice to the rights of the persons entitled to the benefit of the Obligation;

(ii) the High Court may order an apportionment of such an Obligation on such conditions as it thinks fit upon the application of any person bound by the Obligation. Where one person bound by the Obligation has paid to the dominant landowner a sum of money which has accrued due under the Obligation and the immediate purpose of an application by such person for apportionment of the liability is to enable him to quantify the contributions due from persons interested in other parts of the land to which the Obligation attaches, all other persons bound by the Obligation shall be made parties to the proceedings. Such an order shall have the same effect for the future as an agreement under (i) above. In any other case all persons entitled to the benefit of the

Notes to Proposition 20

1. In the context of positive Land Obligations, one of several servient owners should be able to ascertain not only his own and the others' due shares of a money liability which had actually arisen (so that he can pay or collect contributions as the case may be, or discharge his own land from a charge which has arisen in consequence of default) but also his own due share, expressed as a proportion, of the potential future liability.

2. The problem is considerably reduced if, on the occasion of the sub-division of the servient land, an apportionment is made in the conveyances effecting the sub-division. It is suggested that a provision on the lines of section 190 of the Law of Property Act 1925 (equitable apportionment of rentcharges) should apply to Class II and Class III Land Obligations, making such apportionments binding as between the servient owners (though not on the dominant owner, as he is not a party to the conveyances in question), and providing the necessary remedies to a servient owner against whom the Obligation has been enforced by the dominant owner.

3. Where that opportunity of making such an apportionment had not been taken, it would be open to the several servient owners to agree to an apportionment among themselves which will have the same effect. Such agreement may not, however, be forthcoming, and a servient owner who wishes to fix the extent of his (or the others') liability would have to resort to a tribunal of some sort (or to a Minister). If the purpose of the application is merely to divide among the servient owners a money liability in respect of which the dominant owner has already been satisfied, it would not be necessary to join the dominant owner; and the resulting order would constitute an equitable apportionment which could apply not only for the purpose in hand, but also on future occasions. In all other circumstances it is suggested that the dominant owner(s) also should be joined, so that the resulting order would constitute a legal apportionment binding all parties for all time.

Obligation shall also be made parties to the proceedings. In that event the order will apportion the Obligation for all purposes.

(2) For the purpose of identifying the proper parties to proceedings under (ii) above, a prospective applicant shall have powers of enquiry similar to those set out in Proposition 13(iv)(1)(d).

(Notes, Continued)

4. The Proposition is drawn on the footing that the High Court would be the proper tribunal for the purpose. It already has a similar jurisdiction in connection with rentcharges. The procedure should not, however, be unduly complicated or expensive and it seems that there may be a case for giving the jurisdiction to the County Court (without limit) or, since the question is largely one of valuation, to the Lands Tribunal. Attention is also drawn to the fact that a somewhat similar jurisdiction in relation to rentcharges is given to the Secretary of State for the Environment and the Secretary of State for Wales by sections 10-14 of the Inclosure Act 1854 (extended by section 20 of the Landlord and Tenant Act 1927), and by section 191(7) of the Law of Property Act 1925.

Proposition 21

Termination of Land Obligations

A Land Obligation however imposed or arising will cease to be effective:-

(a) when the benefited and burdened interests in the whole of the dominant and servient land have come into the ownership of the same person in the same right unless the intention to preserve the Obligation is expressed or can be implied;

(b) when an authority possessing compulsory purchase powers acquires the servient land in such circumstances that previous Obligations are extinguished;

(c) when the Obligation has been discharged by agreement of all existing persons entitled to the benefit of the Obligation;

(d) when the benefit of the Obligation has been impliedly abandoned by all existing persons entitled thereto; and

(e) when the Obligation has been discharged by order of the Lands Tribunal or of the High Court.

Notes to Proposition 21

Para. (a) An intention to preserve the Obligation would often be implied if the dominant and servient lands remain in separate occupation, notwithstanding unity of ownership.

para. (b) Under section 64(3) of the Housing Act 1957, for example, the compensation rights supersede any right of action under Proposition 13.

para. (c) Where the servient land has been sub-divided, one of the servient owners would not be able completely to discharge his own land from positive obligations (Class II or III) unless there had been a legal apportionment of the liability. Once his liability (expressed as a proportion of the whole) has been fixed both as against the other servient owners and as against the dominant owner, he would be in a position to negotiate the discharge of the Obligation on his land, his share of any money liability arising thereafter being borne by the dominant owner. The apportionment machinery suggested in the Notes to Proposition 20 is designed to cover the situation, in order to enablesuch partial redemption to take place. Partial redemption may not, from the dominant owner's point of view, seriously affect the likelihood (or otherwise) of the performance of an Obligation to carry out works and it might simplify the collection of contributions. Having regard to the complications involved in the enforcement of positive Obligations where the land is sub-divided (Proposition 13(iv)(1)(b) and (c)) it is considered that their redemption should be facilitated.

para. (d) This is intended to cover, among other things, the extinguishment by non-user of an obligation acquired by prescription (see Proposition 10(ii)). The further question arises whether it would be possible so to define "implied abandonment" that obsolete obligations, however created, could be extinguished under this Proposition (so rendering unnecessary proceedings under Proposition 16 for their removal by the Lands Tribunal). This possibility is regarded as somewhat remote.

para. (e) This speaks for itself.

APPENDIX

The Consultative Group met under the Chairmanship of Mr Neil Lawson Q.C. (now the Hon. Mr Justice Lawson). Mr Arthur Stapleton Cotton was Vice-Chairman. The members, other than representatives of the Law Commission, were:

Mr J.A. Armstrong (now Master Armstrong)
Mr L.D. Bonsall
The Hon. G.J. Bourke F.R.I.C.S., F.L.A.S.
Mr C.P.G. Chavasse
Professor F.R. Crane
Professor J.F. Garner
Mr G.H. Newsom Q.C.
Mr E.G. Nugee T.D.
Mr C.M.R. Peecock
Mr H.H. Wagstaff F.R.I.C.S., F.I.Arb.