EASEMENTS, PROFITS A PRENDRE, COVENANTS AND LICENCES: A REAPPRAISAL

A. INTRODUCTION

The English land law permits *A,* owner of an estate in fee simple,[1] to create in favour of *B* an easement, a profit a prendre, a positive covenant, a negative covenant or a licence. In each case, if appropriate conditions are fulfilled, *B* may acquire a proprietary interest in land and not merely a contractual right. Consequently the rights created may be enforceable by and against successors in title of the original parties, and their possible existence is relevant whenever land is transferred and title investigated. Whichever interest be created, the general purpose and result is the same — to give *B* limited control over the physical use that can be made of *A's* land; *B* acquires either the right to do something on the servient land, or the right to require *A* to do or refrain from doing something[2] The rules of law governing these five types of interest are likewise substantially similar in much of their general purpose and result, but differ considerably in detail and in mode in which they are expressed. To borrow a metaphor applied to the law of tort, these interests have grown up historically in separate compartments, and each interest has travelled in a compartment of its own.[3] The object of this article is to survey this similarity and diversity in relation to freehold land, and to consider whether any greater unity is possible or desirable.

Almost all the present law has been developed in the 19th and 20th centuries and is therefore modern by the standards of English law. In 1800 the common law contained a good deal of authority concerning easements, profits à prendre (especially) covenants and licences, but its keynote was generality and so uncertainty. Servitudes were indeed

1. This article is not concerned with the special relationship of the landlord and tenant.

2. This phrase properly includes, it is submitted a licence permitting B. to do on his own land something which would otherwise interfere with A's rights. *(c.f., Liggins* v. *Inge* (1831) 7 Bing: 682). The result is to restrict A's enjoyment. This sort of licence, irrevocable at common law, raises no problems and is really outside the scope of the present discussion.

3. Lord Simonds spoke thus of the law of tort and of that relating to animals in particular in *Read* v. *J. Lyons & Co. Ltd.* [1947] A.C. 156 at p. 182.

discussed by Bracton,[4] in terms drawn from Roman law, but Coke[5] and Blackstone[6] discuss only ways without distinguishing customary rights and rights in gross from the modern easements. Sir William Holdsworth called Gale's book, first published in 1839, the starting point of the modern law.[7] Profits a prendre, (hereafter called "profits" simply) principally in the form of rights of common, played an important part in the English agricultural system before the enclosure which culminated in the 19th century. Consequently there is ample authority in the 17th and early 18th century which, except for the omission of sporting rights, recognises the profits and comprises the rules of the modern law.[8] Nevertheless this clarity and detail seems to have given way to obscurity, for the 19th century cases show much uncertainty; the courts may be said to have undertaken all over again the task of establishing profits as an interest in land.[9]

Though the law relating to covenants between lessor and lessee (which is not considered in the present enquiry) was fairly well settled by 1800, only two rules appear to have been established concerning covenants affecting freeholds; first, that there was a difference between purely personal or collateral covenants, and covenants which might run with and so form an interest in land, and second, that the benefit of an

4. *De Legibus et Consuetudinibus Angliae* ff. 221.223. Holdsworth, *History of English Law,* Vol. VII at p. 323, says Bracton's discussion had "very little influence on the medieval common law."

5. Co. Litt. 9a, 56a, 121b; see also *Hill* v. *Grange* (1557) 1 Plow. 164 at 170. In *Peers* v. *Lucy* (1694) 4 Mod. 355 the word "easement" was held to be known to the law, rights of way and light being mentioned. Counsel had unsuccessfully argued that "easement" was "a very insignificant expression; it is neither a grammar word nor a word of art or skill."

6. Blackstone II *Commentaries* 36; see *Dovaston* v. *Payne* (1795) 2 Hy. Bl. 527; *Senhouse* v. *Christian* (1787) 1 T.R. 560.

7. *History of English Law,* Vol. VII at p. 323; Gale himself complained of the "paucity and irreconcilability" of authority.

8. See Co. Litt. 4b, 122a, 122b; Blackstone II Commentaries 33, 34. Examples of particular profits are: Pasture — *Mellor* v. *Spateman* (1669) 1 Wm. Saund. 339; fishery — *Smith* v. *Kemp* (1693) 2 Salk. 637; Turbary — *Tyrringham's Case* (1584) 4 Co. Rep. 37a; mining — *Lord Mountjoy's Case* (1583) 4 Leon 147; timber — *Dowglas* v. *Kendall* (1610) Cro. Jac. 256 and *Sir Francis Barrington's Case* (1611) 8 Co. Rep. 136b; sporting rights (fowling) seem to have recognised only in *Davies' Case* (1689) 3 Mod. 246.

9. See, for example, *Welcome* v. *Upton* (1840) 5 M. & W. 398; 6 M. & W. 386 (pasture); *Earl of Lonsdale* v. *Rigg* (1856) 11 Exch. 654 (pasture); *Doe & Hanley* v. *Wood* (1819) 2 B. & Ald. 724 (mining); *Musket* v. *Hill* (1839) 5 Bing. N.C. 61 14 (mining); *Wickham* v. *Hawker* (1840) 7 M. & W. 63 (sporting rights).

annexed covenant could run at law with the estate of the covenantee.[10] Whether the burden of a covenant could run was uncertain,[11] nor had any distinction been drawn between positive and negative covenants. Lastly, the uncertainty of the law of licences in 1800, can be summed up in a sentence. Mere licences were revocable, while licences coupled with a grant might be irrevocable, but no clear definition of a grant could be given.[12]

This very brief account of the common law in 1800 shows that there had been little need or scope for the development of separate rules in equity. After 1800, stimulated by problems arising from the growth of urban areas after the industrial revolution, the rules of both law and equity developed rapidly. By 1900 most of the present law of easements, profits and covenants had been established, though important additions have been made in the present century.

It is proposed to discuss certain aspects of the law in which the theme of similarity and diversity is emphasized *viz*:— formalities of creation; nature and content of the right; the requirement of a dominant tenement; and the running of the benefit and burden.

B. FORMALITIES OF CREATION

In the earlier part of the 19th century the common law courts were concerned to set bounds to the possible range of *iura in re alieno,* lest they should impose undue restrictions on the use of land. One of the methods adopted was to insist that easements and profits could only subsist as proprietary interests at law if created by deed.[13] Any informal

10. See Platt, *Law of Covenants,* 1829; Holdsworth, *History of English Law,* Vol. III, pp. 162-3; *Mayor of Congleton* v. *Pattison* (1808) 10 East. 130; *Pakenham's Case* (or the *Prior's Case)* Y.B. 42 Ed III Hil. P1 14; *Spencer's Case* (1585) 5 Co. Rep. at f. 18a; *Smiths' Leading Cases,* 13th ed., Vol. I, pp. 73-76.

11. Compare *Holmes* v. *Buckley* (1691) 1 Eq. Ref. 27 (covenant to repair a watercourse held to run) with *Brewster* v. *Kitchell* (1697) 12 Mod. 166 (covenant to pay a rentcharge held not to run). Holdsworth, *History of English Law,* Vol. III at p. 164 seems to think the burden of covenants could not run, but Platt, *Law of Covenants,* to take the opposite view.

12. See, *e.g.* Y.B. 20 E.4 fo. 4 (1480); *Hoskins* v. *Robins* (1671) 2 Wm. Saund. 324; *Thomas* v. *Sorrell* (1673) Vaughan 357. The normal example given in these and many other instances, of a licence coupled with a grant is a licence to hunt deer and a grant of the animal killed. It seems possible that in the 15th century, when most of the Year Book cases were decided, a licence to kill and take away a deer was considered to pass a proprietary interest. The Forest Laws and later the Game Laws preserved very strictly the privilege of hunting (Turner, *Select Pleas of the Forest,* Seldon Society, Vol. XIII; Manwood, *Forest Laws)* and, as noted above, sporting rights not recognised as a profit a prendre till the 19th century.

13. Co. Litt. 9a; *Hewlins* v. *Shippam* (1826) 5 B. & C. 221; *Fentiman* v. *Smith* (1803) 4 East 107; *Bridges* v. *Blanchard* (1834) 1 A. & E. 531; *Bird* v. *Great Eastern Railway* (1865) 19 C.B.N.S. 268.

arrangement created only a licence at law. Baron Parke put the point succinctly in *Holford* v. *Bailey*[14]:— "To give the plaintiff a sole and exclusive right, even for an hour, a deed was necessary, and that would be a grant" Moreover, in the leading case of *Wood* v. *Leadbitter*[15] the Court of Exchequer insisted first that all mere licences were revocable at common law and second, that although a licence coupled with a grant might be irrevocable, such grant must be made in a form suitable to the grant concerned. Licences were therefore no substitute for properly granted easements and profits. Licences at common law hereafter ceased to be a potential proprietary interest in land.[16] The form of covenants did not trouble the common law, for a covenant must by definition be made under seal.[17]

At the same time equity mitigated the strictness of the common law. Equitable easements or profits could be created by specifically enforceable agreements.[18] the form of which was governed by the Statute of Frauds, 1677, and the rules of past performance. Restrictive covenants were enforced not only if formally made, but also if the circumstances made it inequitable for the defendant to rely on lack of formality.[19] In the twentieth century licences constituting equitable interests in land may likewise be created by agreement, equitable estoppel or the operation of law.[20]

The most important difference between legal and equitable interests in land, under the general law, is that the former are rights *in rem,* good against all the world, whereas the latter are only good against everyone except the *bona fide* purchaser of a legal interest for value without notice. The 1925 legislation has, however, prescribed further formalities which if adopted destroy the substance of this distinction.

14. *Holford* v. *Bailey* (1849) 8 Q.B. 1000; 13 Q.B. 426 *per* Parke B., at pp. 446-7.

15. (1845) 13 M. & W. 838.

16. In *Bendall* v. *McWhirter* [1952] 2 Q.B. 466 at p. 479 Denning L.J. suggested that mere licences once acted upon could run with the land at law. The present writer has respectfully disagreed (1952) 16 *Conveyancer (N.S.)* at pp. 333-336.

17. And, of course, the common law did not permit the burden run — see below, Section E — so there was no problem.

18. *Frogley* v. *Earl of Lovelace* (1859) Johnson 333; *Devonshire Eglin* (1851) 14 Beav. 530; *Borman* v. *Griffith* [1930] 1 Ch. 493; *Mason* v. *Clarke* [1955] A.C. 778.

19. *Formby* v. *Barker* [1903] 2 Ch. 539.

20. See "The Deserted Wife's Licence" by F. R. Crane (1955) 19 *Conveyancer (N.S.)* 343 and "Licences to Remain on Land (other than the Wife's Licence)" by R. H. Maudsley (1956) 20 *Conveyancer (N.S.)* 281.

It will be recalled that at present England enjoys a mixed system of conveyancing. Most titles are unregistered and are investigated by reference to the chain of title deeds. Other titles — now about one-quarter of the whole — are registered under the Land Registration Act 1925, and this system is being steadily extended by compulsory and voluntary registration.

Where the title is unregistered and the interest is created after 1925, the Land Charges Act, 1925 permits the registration, in a register of encumbrances, of *(inter alia)* a restrictive covenant and an equitable easement or profit ;[21] whether licences are so registrable is still undecided. Registration constitutes notice to all persons for all purposes connected with the land,[22] thereby destroying the plea of purchaser for value without notice.

The Land Registration Act, 1925, operates in a somewhat different way. Only the title to a legal estate can be registered.[23] A purchaser of a registered estate takes subject *only* to *(i)* overriding interests, which do not appear on the register, and *(ii)* interests protected on the register.[24] The list of overriding interests is set out in the Act.[25] It includes legal easements and profits and a variety of other interests, including the interest of any person in occupation or possession; equitable interests are included if they fall within the definition.[26] Other interests, including positive and restrictive covenants and licences, can be protected by entry on the register of title to the servient land.[27] Some interests may be protected either as overriding interests or on the register.[27a] Moreover, an express grant of an easement or profit is a "disposition" which must be completed by registration to pass a legal interest.[28] As a result of these rules and the practice of the Registry, the register of title to servient land can and should disclose the burden of all legal easements

21. S.10. In this section, as throughout the 1925 legislation, notably in the enumeration of interests permitted to exist at law (Law of Property Act, 1925, s.1(2)(a)) the phrase used is "easement right or privilege" and profits a prendre are not specifically mentioned. Yet their existence after 1925 has often been acknowledged by the courts as in *Mason* v. *Clarke* [1955] A.C. 778.

22. Law of Property Act, 1925, s.198.

23. Land Registration Act, 1925, s.2.

24. *Ibid*., ss.20, 23.

25. *Ibid*., s.70.

26. See "Equitable Interests in Registered Land" by F. R. Crane (1958) 22 *Conveyancer (N.S.)* 14.

27. See Curtis and Ruoff, *Registered Conveyancing* (1958) at pp. 720-820, especially at pp. 772-3.

27a. See note 26.

28. Land Registration Act, 1925, ss.18-25.

and profits expressly granted, of positive and negative covenants and of licences other than those subsisting as overriding interests.[29] The Registry notes on the title to dominant land the benefit of express grants of easements or profits, but regards the benefit of covenants as normally too uncertain to enter.[30] More precise conveyancing could therefore lead to a change in practice. Nevertheless the important point, as regards both the Land Charges Act, 1925, and the Land Registration Act, 1925, is that observance of the prescribed formalities for express creation removes the need, so far as the plea of the purchaser for value without notice is concerned, to distinguish between legal and equitable interests in the group under discussion.

Easements and profits but not covenants or licences, may also be created by implied grant or by prescription. Rights so created cannot be registered yet bind the land, whether or not the title is registered.[31] The present law contains several anomalies.[32] Thus only easements can be created by implied grant under the rule in *Wheeldon* v. *Burrows,* yet both easements and profits can pass under the general words implied by the Law of Propercy Act, 1925, s. 62. Both interests can be created by prescription at common law or under the doctrine of lost modern grant, but the Prescription Act, 1832, makes distinctions. Profits in gross are not covered by the Act at all; as regards appurtenant rights, the periods laid down are 20 or 40 years for easements and 30 or 60 for profits; the disability sections deal with particular rights; the easement of light has its own rules. None of these differences, it is submitted, are now needful. The rule in *Wheeldon* v. *Burrows* could well be eliminated, and the present confusion in the law of prescription removed by a new Act replacing both the common law and the existing legislation.[33]

29. See Curtis and Ruoff, *Registered Conveyancing,* (1958) at pp. 414-416, 758-764. It should be noted that the Land Registration Act, 1925, does not give validity to interests not otherwise valid as easements, etc.; it merely prevents anyone claiming to take free from properly protected interests.

30. See previous note.

31. Land Registration Act, 1925, ss.20, 23, 70.

32. It does not seem necessary to give detailed reference for the propositions next advanced. See, *e.g.* Megarry and Wade, *Law of Real Property* (2nd ed.) or Cheshire, *Modern Real Property* (8th ed.). Attention may be drawn, however, to the Rights of Light Act, 1959.

33. A larger and more difficult question is whether implied grant and prescription will be needed at all in England when the present steady move to universal registration of title is complete or nearly so.

C. NATURE AND CONTENT OF THE RIGHT

The purpose of this section is to examine the differences, in the nature and content of rights, which cause them to be classified as easements, profits, covenants or licences.[34]

An easement may be defined as a "privilege without profit" annexed to and increasing the beneficial use of a parcel of land (the dominant tenement) and exercisable over another piece of land (the servient tenement) ,[35] It must not confer possession.[36] The right may be positive, permitting entry on the servient tenement for a particular purpose, as a right of way, or negative, placing a particular restriction on the use of the servient tenement, as a right of light to a window. Yet not every right within the above description can subsist as an easement. The limits were laid down in general terms in the 19th century. The leading statement is that by Lord Brougham in *Keppel* v. *Bailey:*[37]

> There are certain known incidents to property and its enjoyment . . . . . certain burthens wherewith it may be affected . . . . . But it must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal that such a latitude should be given.

As a result an undefinable particularity was required of easements. Thus (until 1955) the list of positive easements included a right of way but not anything in the nature of a *ius spatiandi,* a right to wander at large.[38] Likewise there could be an easement of light or air to a defined window or aperture,[39] but not a general right to a view — a rule better based on expediency or convenience than on the older suggestion that

34. This section is not concerned with the amplitude or volume of the right, which is either governed by the needs of the dominant tenement, or may be unlimited if the interest can exist in gross. See Section D, *infra.*

35. *C.f.* Gale on *Easements,* 13th ed. (1959) at pp. 1-6.

36. *Copeland* v. *Greenhalf* [1952] Ch. 488; *Re Ellenborough Park* [1956] Ch. 131 at pp. 176, 177.

37. *Keppel* v. *Bailey* 2 My. & K. 517 at p. 535. Two other statements often cited are: "It is not in the power of a vendor to create any rights not connected with the enjoyment or use of land and annex them to it, nor can the owner of land render it subject to a new species of burden. . . . . ," *per* Cresswell J. in *Ackroyd* v. *Smith* (1850) 10 C.B. 166 at p. 188, citing *Keppel* v. *Bailey, supra.* "A new species of incorporeal hereditment cannot be created at the will and pleasure of the owner of property. . . . . ," *per* Pollock C.B. in *Hill* v. *Tupper* (1863) 2 H. & C. 121 at p. 127.

38. *Per* dicta by Farwell J. *International Tea Stores* v. *Hobbs* [1903] 2 Ch. 165 and in *A.G.* v. *Antrobus* [1905] 2 Ch. 188, disapproved by the Court of Appeal in *Re Ellenborough Park* [1956] Ch. 131.

39. *Colls* v. *Home and Colonial Stores* [1904] A.C. 215 (light); *Bass* v. *Gregory* (1890) 25 Q.B.D. 481, (air).

the law would not recognise "things of delight".[40] Nevertheless an easement may benefit a business [41] and, besides the main categories of rights of way, water, support, and light, the courts have recognised numerous miscellaneous easements, most of which amount to rights to place something on the servient tenement.[42] The modern statement of the rule is that an easement must be "capable of being the subject matter of a grant".[43] In *Ellenborough Park,* decided in 1955, the Court of Appeal held that this phrase meant that the right must not be too wide or uncertain, nor inconsistent with the servient owner's proprietorship or possession, nor a mere right of recreation without utility or benefit.[44] This last point must be coupled with the court's earlier, and, it is submitted, very important holding that an easement must enhance the normal enjoyment of the dominant tenement, a matter to which enhancement of value is relevant but not conclusive.[45] As a result an express grant to use a garden in a square was held to constitute a valid easement existing for the benefit of adjacent houses, the court contrasting, as abnormal (and so only a licence) a right to enter a zoo or a cricket ground.[46] The Court of Appeal has also held a right to share a lavatory to be a valid easement,[47] but has excluded a right to a supply of hot water because of the active duty placed on the servient owner.[48]

40. *Aldred's Case* (1610) 9 Co. Rep. 57b said there could be no right to prospect, it being merely a thing of delight but in *Dalton* v. *Angus* (1881) 6 App. Cas. 740 at p. 824 Lord Blackburn described this reasoning as "more quaint than satisfactory" and preferred to rest the rule on a balance of convenience and on expediency.

41. *Moody* v. *Steggles* (1879) Ch. D. 261 (advertising sign) where Fry J. at p. 266 described counsel's attempt to distinguish between benefit to the land, and benefit to the business, as an argument of "too refined a nature."

42. *E.g.,* storing casks — *A.G. for Nigeria* v. *Holt* [1915] A.C. 617; storing coal — *Wright* v. *Macadam* [1949] 2 K.B. 744; telephone wire — *Finchley Electric Light Co.* v. *Finchley Council* [1903] 1 Ch. 437.

43. Cheshire, *Modern Law of Real Property,* 8th ed. at p. 450; a similar statement in the 7th edition was adopted in *Re Ellenborough Park* [1956] Ch. 131.

44. [1956] Ch. 131 at pp. 175, 176. The point about recreation was based on *Mounsey* v. *Ismay* (1865) 3 H.C. 486, but the court did not advert to the dicta in *Dalton* v. *Angus* mentioned in note 40, *supra.*

45. [1956] Ch. at p. 174.

46. *Ibid*, at p. 174. The Court followed *Duncan* v. *Louch* (1847) 6 Q.B. 904, and doubted the dicta referred to in note 38, *supra.*

47. *Miller* v. *Emcer Products Ltd.* [1956] Ch. 304, approving *Heywood* v. *Mallalieu* (1885) 25 Ch. D. 357 — easement to hang out washing in a kitchen.

48. *Regis Property Ltd.* v. *Redman* [1956] 2 Q.B. 612. It appears that only the "spurious" easement of fencing against animals can impose such a duty — see Megarry and Wade, *Law of Real Property,* 2nd ed. at p. 775; yet the *dominant* owner may be required to contribute to the upkeep of a garden, path, etc. as a condition of enjoying the easement — *Re Ellenborough Park, supra,* and presumably a servient owner could not demand such contribution without paying his share.

It is therefore submitted at the present time the range of positive easements is limited by three requirements only *viz*:— *(i)* certainty sufficient to enable the court to enforce the right *(ii)* enhancement of the normal benefit of the dominant tenement and *(iii)* absence of any active duty by the servient owner.[49] However, no similar widening of the scope of negative easements seems possible. That of support is indeed possible being acquired for particular buildings, but the House of Lords has held that rights to light and air can only be acquired for particular apertures and then only for normal needs.[50] No easement of view can be introduced, though perhaps a right to air to a directional television aerial might come within the existing rules.

A profit may be defined as a right to enter another's land and take therefrom some natural profit of the soil, or part of the soil itself, either exclusively or in common with the owner of the soil.[51] Like an easement, it does not confer possession of the land,[52] nor compel the servient owner to undertake any active duty.[53] The word "natural" sets bounds to the right by excluding cultivated crops (other than grass [54]) and manufactured goods or the proceeds of trading.[55] Fish and game[56] are

49. The learned editor of Gale on *Easements,* 13th ed. says at p. 19 : "It is difficult to imagine any right to do some positive act on servient land that would not, by the use of intelligible words, be the subject of a grant." This statement underlines the shift of importance from "grant" to the enhancement of normal enjoyment.

50. *Colls V. Home and Colonial Stores* [1904] A.C. 215. On the question of normal benefit the rules for positive and negative easements agree.

51. See Halsbury, *Laws of England,* 3rd ed., Vol. 12 at p. 620; *Sutherland* v. *Heathcote* [1892] 1 Ch. 475 at p. 484; *Race* v. *Ward* (1855) 4 E. & B. 702 at p. 709.

52. Not surprisingly, there has been difficulty in distinguishing profits from grants of the soil itself; in this field the distinction between an incorporeal and corporeal right is a fine one, *e.g., Co.* Litt. 4b, 122a; *Smith* v. *Kemp* (1693) 2 Salk. 637. *Holford* v. *Bailey* (1849) 8 Q.B. 100; 13 Q.B. 476. Moreover, the owner of a profit can sue in trespass for the disturbance of the profit — *Nicholls* v. *Ely Beet Sugar Factory Ltd.* [1936] Ch. 343.

53. But he may not use his land directly or indirectly so as to interfere with the profit, as by scaring away game by setting up racing stables *(Peech* v. *Best* [1931] 1 K.B. 1) or using the land for a gliding club *(Wenner* v. *Maris* (1935) 79 S.J. 252).

54. *Marshall* v. *Green* (1875) 1 C.P.D. 35. Profit of pasture is of course well known—*Davies* v. *Du Paver* [1953] 1 Q.B. 184. The sale of hay has been held to pass a corporeal interest—*Crosby* v. *Wadsworth,* (1805) 6 East 602. The various cases cannot be fully reconciled.

55. *Hill* v. *Tupper* (1863) 2 H. & C. 121 — right to let out boats on canal not a profit a prendre.

56. Fishery — *Fitzgerald* v. *Firbank* [1897] 2 Ch. 96; *Re Vicker's Lease* [1947] Ch. 420 and many early cases. Sporting rights—*Wickham* v. *Hawker* (1840) 7 M. & W. 63; *Peech v. Best* [1931] 1 K.B. 1.

regarded as the natural product of land, but not water, which — anomalously — may be the subject of an easement but not of a profit.[57]

A covenant can be defined only as a promise under seal (though, as noted above, the absence of seal is not necessarily fatal to enforcement in equity), Covenants are classified as positive or negative according as they require the covenantor to do or refrain from doing something. The test is one of substance, not of form, and it is useful to consider whether money has to be spent in performance. Thus the common covenant to use as a private dwelling house only is negative in substance and a covenant not to let premises fall into disrepair would be positive.[58] Either type of covenant must fulfil two conditions in relation to nature and content before the burden or benefit can run with land. First, the covenant must be sufficiently certain to be capable of interpretation and enforcement by the court,[59] — a covenant to lease land in its "natural aspect and condition" has been held too vague to pass this test.[60] Yet the limit can be considerably extended by making the existence of a breach dependent upon the opinion or decision of the covenantee.[61] Second, the covenant must be capable of "touching and concerning" the land of the covenantee. The most precise formulation of this test, applicable to both a positive and negative covenant, is that it must "either affect the land as regards mode of occupation, or it must be such as *per se* and not merely from collateral circumstances, affects the value of the land."[62] Covenants held to "touch and concern" freehold land of the covenantee include negative covenants restricting building or trading

57. *Race* v. *Ward* (1855) 4 E. & B. 702.

58. Of course, a covenant to repair is usually expressed in a positive form. Faced with such a covenant in a recent London examination paper, one candidate with misplaced ingenuity construed it as a covenant not to allow to fall into disrepair, and proceeded to apply the law of restrictive covenants. He did not however — to one examiner's regret — explain how to repair without spending money.

59. *Zetland* v. *Driver* [1939] Ch. 1; *Natural Trust for Places of Historic Interest or National Beauty* v. *Midlands Electricity Board* [1952] Ch. 380.

60. *National Trust* v. *Midlands Electricity Board, supra.* And see *Mann* v. *Stephens* [1846] 15 S. 377 at 379 — "ornamental rather than otherwise" considered too vague.

61. See cases cited in note 59, *supra.*

62. This definition was formulated in relation to leaseholds by Bayley J. in *Congleton Corporation* v. *Pattison* (1808) 10 East 130 at p. 135. It was adopted for restrictive covenants by Farwell J. at first instance in *Rogers* v. *Hosegood* [1900] 2 Ch. 388 at 395 without dissent from the Court of Appeal. The relevant passage in Farwell J.'s judgment was adopted for positive covenants by Tucker L.J. in *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500 at pp. 507-8. In *Zetland* v. *Driver* [1939] Ch. 1 another Farwell J. delivering the judgment of the Court of Appeal said the restrictive covenant must be "imposed for the benefit of or to enhance the value of, the land retained."

on the covenantor's land,[63] and positive covenants to maintain a river-bank on,[64] or supply water from, the covenantor's land.[65] But, a covenant to "procure" non-user of a seaside theatre for a time has been held not to "touch and concern," on the ground that the word "procure" implied a purely personal obligation.[65a]

A licence is simply an authority entitling the licensee to enter on the licensor's land without being a trespasser or, more rarely, an authority to do something on the licensee's land which would otherwise derogate from the licensor's rights.[66] Consequently the term "licence" covers a multitude of arrangements. A guest, a student in a university, a lodger,[67] a deserted wife remaining in the matrimonial home,[68] an occupier under a family arrangement,[69] the proprietor of "front rights" of a theatre[70] or even the person running the theatre[71] — all may or must be licensees. Licenses are the ultimate residuary group of rights over land not otherwise classified. Until 1945 or thereabouts a licence could not confer possession — exclusive possession necessarily connoted a tenancy of some sort. Now, however, this one definable characteristic has gone; the possessory licence is well established, and the difference between a lease and a licence depends on the purpose and circumstance of creation and not on the content of the right.[72] Consequently there seem to be only two bounds to licences. First, any interest otherwise classifiable should not be called a licence; second, a licence must, like other rights, have sufficient certainty for interpretation.

63. *E.g., Zetland* v. *Driver, supra.*

64. *Smith* v. *River Douglas Catchment Board, supra.*

65. *Shayler* v. *Woolf* [1946] Ch. 320.

65a. *Re Royal Victoria Pavilion, Ramsgate,* [1961] 3 W.L.R. 491.

66. *Winter Gardens Theatre (London) Ltd.* v. *Millenium Productions Ltd.* [1948] A.C. 173 at p. 188, *per* Viscount Simon. *Liggins* v. *Inge* (1831) 7 Bing. 682, and All (1952) 16 *Conveyancer (N.S.)* at pp. 328-9.

67. *Smith* v. *Overseers of Cambridge* (1860) 3 E. & E. 383; *Helman* v. *Horsham Assessment Committee* [1949] 2 K.B. 335.

68. *Jess B. Woodcock* v. *Hobbs* [1955] 1 W.L.R. 152; *Westminster Bank Ltd.* v. *Lee* [1956] Ch. 7.

69. *Cobb* v. *Lane* [1952] 1 All E.R. 1199.

70. *Clore* v. *Theatrical Properties Ltd.* [1936] 3 All E.R. 483.

71. *Winter Gardens Theatre (London) Ltd.* v. *Millenium Productions Ltd.* [1948] A.C. 173.

72. *Errington* v. *Errington* [1952] 1 K.B. 290; *Faccini* v. *Bryson* [1952] 1 T.L.R. 1386.

Some distinctions in nature and content therefore remain. Despite the decision in *Re Ellenborough Park*[73] the present range of positive easements and profits is still restricted and does not cover all types of entry on another's land. Negative easements are much more limited in scope than restrictive covenants, but, so far as the present discussion is concerned, is not this merely to say that the part is less than the whole?

The question which arises therefore is whether the differences in nature and content require or justify the separate existence in law of easements, profits, covenants and licences, or whether all these interests could not be subsumed under one description and any differences in law related to points of principle. Distinctions might be drawn between rights to enter on the servient tenement and rights merely restricting its use, and (though the categories may overlap) between rights which do and do not put the servient owner to expense. The existing law indicates that probably the only real problem under this head would be whether a right putting the servient owner to expense should constitute an interest in land. Subject, of course, to the requirement of certainty, it is submitted that all other rights could be *permitted* so to exist; whether they actually did constitute an interest in land would depend on factors other than that of nature and content.

D. THE REQUIREMENT OF A DOMINANT TENEMENT

The requirement of a dominant tenement has been the most successful device used by the courts to prohibit novel and fancy interests at law,[74] and to "clip the wings" of restrictive covenants in equity.[75] Where the requirement is imposed a right, to be more than merely contractual, must be annexed to a dominant tenement; that is it must be capable of benefiting, *(supra,* section c) be intended to benefit, actually benefit and itself be measured by, the needs of a reasonably ascertainable parcel of land.[76] It is convenient to consider the various interests *seriatim.*

(i) Easements. Until the second half of the 19th century the easement in gross, unattached to any dominant tenement, was regarded as a possible interest in land. The point seems to have been conceded *sub silentio* in 1787[77] and again in 1845 in *Wood* v. *Leadbitter,* for the

73. [1956] Ch. 131, discussed above.

74. *Supra,* Section C.

75. The phrase comes from Challis, *Real Property,* first published in 1885 — (see now 3rd ed. (1911) at p. 185).

76. Normally and certainly for the purpose of this article the dominant tenement may be equated with a parcel of land. Easements, however, have been held to be capable of being appurtenant to another incorporeal interest *(Hanbury* v. *Jenkins* [1901] 2 Ch. 422, and to the conglomeration of interests owned by a water company *(Re Salvin's Indenture* [1938] 2 All E.R. 498).

77. *Senhouse* v. *Christian* (1787) 1 T.R. 560.

whole tenor of the judgment in the case is explicable only on the premise that the plaintiff could have had a grant — an interest in land — if his ticket for the Doncaster racecourse had been given under seal.[78] In 1850 the rule that the amplitude of an appurtenant easement must be measured by the needs of the dominant tenement was laid down by the Court of Common Pleas in *Ackroyd* v. *Smith*[79] and eighteen years later the decision in *Rangely* v. *Midland Railway* [80] made a dominant tenement essential to the existence of an easement. The conditions of annexation are readily fulfilled. No difficulty has been experienced in identifying the dominant tenement.[81] Such identification though normally easy where an easement is granted in a conveyance of the dominant land, might have been more troublesome on a reservation or grant apart from land. Inclusion of an adequate description of both dominant and servient tenements seems to be normal conveyancing practice.[82] As mentioned above the Chief Land Registrar is able to enter a note of the benefit of easements on the register of titles kept under the Land Registration Act, 1925. Likewise intention to benefit and actual benefit seem to be shown by the mere creation of a right enhancing the "normal enjoyment" of the dominant tenement.[83] Lastly, an easement must be annexed once and for all at the time of grant; there is no question of annexation by subsequent assignment (see *infra* as to covenants).

(ii) Profits. Everything that has been said of appurtenant easements appears to be applicable to profits appurtenant to land.[84] It would seem

78. (1845) 13 M. & W. 838 at p. 843, *per* Alderson B. "This is a right affecting land at least as obviously and extensively as a right of way over the land — it is a right of way and something more; and — independently of authority, it would appear perfectly clear to us that no such right can be created otherwise than by deed. The plaintiff, however, in this case argues that he is not driven to claim the right in question strictly as grantee. . . . ." And see (1915) 31 *L.Q.R.* at p. 217.

79. (1850) 10 C.B. 186. A grant of an appurtenant way "for all purposes" was held void as being too wide for the needs of the dominant tenement.

80. (1868) L.R. 3 Ch. App. 306. Even now, however, the possibility of a way in gross is canvassed in Gale on *Easements,* 13th ed. at p. 38, citing the views of Sweet in Challis, *Real Property,* 3rd ed. at p. 55, and in (1908) 25 *L.Q.R.* 259. It is nevertheless submitted, with respect, that the easement in gross is like the character in a once popular song — "dead but won't lie down."

81. *Per* Gale on *Easements,* 13th ed. at p. 8.

82. See Key and Elphinstone, *Precedents in Conveyancing,* 15th ed. at pp. 645, 850 (1953); Prideaux's *Precedents in Conveyancing,* 24th ed. (1948) at p. 703.

83. *Re Ellenborough Park* [1956] Ch. 131 at p. 173, *et seq.*

84. Profits may in fact be annexed to land by appurtenancy, appendancy or per cause de vicinage — Cheshire, *Modern Real Property,* 8th ed. at p. 422. The latter two forms must be of ancient origin and what is said of appurtenant profits applies to them also. As to measurement of the profit, see *Douglas* v. *Kendal* (1610) Cro. Jac. 256; *Bailey* v. *Stephens* (1862) 12 C.B.N.S. 91 failure of a prescriptive claim to take all the wood from one Bloody Field as appurtenant to a house. Compare *Ackroyd* v. *Smith* (1850) 10 C.B. 164, *supra.*

that a share in the natural produce of land is automatically regarded as beneficial to a dominant tenement. A profit may also, however, exist in gross, as an interest in land exercisable over the servient land but unattached to any other land.[85] Such profits have survived both the restrictive decisions of the courts and the 1925 legislation.[86]

(iii) Covenants. The benefit of a covenant, whether positive or negative, must be annexed to a dominant tenement if the covenant is to be enforced by *or against* any person other than the original contracting parties. This rule has applied to positive covenants since the fourteenth century[87] and has recently been reviewed and reiterated by the Court of Appeal.[88] It did not, however, apply to restrictive covenants in the years immediately following *Tulk* v. *Moxhay*.[89] The process of extension seems to have begun in 1880 with dicta by Jessel, M.R., in *London and South Western Railway Co.* v. *Gomm*[90] and to be completed in 1914 by the Court of Appeal in *L.C.C.* v. *Allen.*[91] Thereafter the courts are concerned only to fix the details of the rule. First, the dominant tenement must be identifiable. The Court of Appeal has said at law that the maxim to be applied is *certum est quod reddi potest,*[92] and in equity that the land must be "indicated in the conveyance or have been otherwise shown

85. *Sir Francis Barrington's Case* (1611) 8 Co. Rep. 136 b; *Smith* v. *Kemp* (1693) 2 Salk. 637; *Welcome* v. *Upton* (1840) 6 M. & W. 536; *Peech* v. *Best* [1931] 1 K.B. 1; *Re Vicker's Lease* [1947] Ch. 420; *Mason* v. *Clarke* [1955] A.C. 54.

86. The Law Of Property Act, 1925, s.1(2)(a) permits an "easement right or privilege" to exist at law, but s.187(1) says that where such a legal interest is created "it shall ensure for the benefit of the land to which it is intended to be annexed." Though this point has apparently not been taken in the courts, the existence of profits has frequently been recognised after 1925 (see note 21). Presumably, s.187(1) merely reiterates the rule concerning the value of an appurtenant easement or profit.

87. *The Prior's Case* (1368) cited in *Spencer's Case* (1583) 5 Co. Rep. 16a.

88. See *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500.

89. (1848) 2 Ph. 774. Assigns of the covenantor with notice were held bound, whether or not the benefit of the covenant was annexed to land — see, *e.g. Catt* v. *Tourle* (1869) Ch. App. 654.

90. (1880) 20 Ch. D. 562, where Jessel M.R. described the doctrine of restrictive covenants in equity as either an extension of *Spencer's Case,* or an analogy with negative easements.

91. [1914] 3 K.B. 462; important intermediate cases are *Rogers* v. *Hosegood* [1900] 2 Ch. 388, *Formby* v. *Barker* [1903] 2 Ch. 539 and *Re Nisbett and Potts Contract* [1906] 1 Ch. 386.

92. *Smith* v. *River Douglas Catchment Board* [1949] 2 K.B. 500 at p. 508; the description "lands belonging to the parties of the first eleven parts hereto..... situate between the Leeds and Liverpool Canal and the River Douglas and adjoining the Eller Brook" was held sufficiently certain.

with reasonable certainty"[93] or be "readily ascertainable".[94] The expressions probably mean the same thing. Extrinsic evidence is always admissible to amplify a general description of the dominant tenement given in the deed imposing the covenants,[95] to prove a building scheme,[96] and, it seems, to prove the existence of a dominant tenement even though none is mentioned in the deed creating the covenants.[97] In practice extrinsic evidence, usually under the first two heads, very often does have to be given, a fact reflected in the Chief Land Registrar's refusal to note the benefit of covenants on registered titles.[98]

Second the covenant must benefit and be intended to benefit the dominant tenement. The test of actual benefit is whether the covenant "touches and concerns", a matter already discussed *(supra* Section C) and the courts will, it seems, be readily satisfied on this point.[99] Intention to benefit is assumed without difficulty if the covenant is positive but if it is negative there are problems. Equity recognises both immediate and suspended annexation. The former may be achieved either by use of particular words imposing the covenant (the essential requirement is an express statement of intention,[100] or a reference to the covenantee as owner of land),[101] or by proof of a building scheme.[102] Indeed, if the intention is clear the benefit may be annexed to land of which the

93. *Re Union Of London & Smith's Bank Ltd. Conveyance; Miles* v. *Easter* [1933] Ch. 611 at p. 631 — no sufficient certainty in absence of evidence as to situation or area of retained lands.

94. *Zetland* v. *Driver* [1939] Ch. 1 at p. 8 —"lands.....in Redcar.....subject to the settlement" sufficiently certain.

95. See examples in Preston and Newson's *Restrictive Covenants,* 3rd ed. at p. 14.

96. See Preston and Newson *op. cit.*, at pp. 35, 36; *Reid* v. *Bickerstaff* [1909] 2 Ch. 305; *Lawrence* v. *South County Freeholds Ltd.* [1939] Ch. 656.

97. *Newton Abbot Co-operative Society* v. *Williamson & Treadgold* [1952] Ch. 286; *Marten* v. *Flight Refuelling Ltd.* [1961] 2 W.L.R. 101.

98. Compare the practice in relation to easements.

99. See *Smith & Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500 at p. 506, (positive covenant); *Marten* v. *Flight Refuelling Ltd.* [1961] 2 W.L.R. 1018 at pp. 1029-1030, where Wilberforce J., said the court would be reluctant to substitute its own opinion for that of the parties. The contrary approach in *Re Ballard's Conveyance* [1937] Ch. 473 has been criticised and distinguished — see *Zetland* v. *Driver* [1939] Ch. 1; *Marten* v. *Flight Refuelling Ltd., supra,* and Preston and Newson's *Restrictive Covenants* at pp. 24, 25.

100. Preston and Newson, *Restrictive Covenants,* 3rd ed. at p. 65, *et seq.*

101. *Rogers* v. *Hosegood* [1900] 2 Ch. 388; *Re Union of London & Smith's Bank Conveyance,* [1933] Ch. 611.

102. For the requirements of a building scheme see *Elliston* v. *Reucher* [1908] 2 Ch. 374 at p. 384, *per* Parker J. Definition of the area included is essential, *supra,* note 95.

vendor disposed before taking the covenant.[103] Suspended annexation occurs where the covenant does not refer to a dominant tenement, and permits the covenantee to annex subsequently by assignment of the benefit of the covenant on the transfer of land owned at the date of the covenant.[104] All this complication, it is submitted, derives from insufficiently precise drafting, though one can hardly blame those draftsmen who did their work before the rules were laid down. Today, it is both practicable and desirable to define the land to be benefitted by the covenant, and normally to achieve immediate annexation.[105] In that event the benefit of covenants could and should, it is submitted, properly be noted on registered titles.

(iv) Licences. Many licences, notably the deserted wife's licence and most possessory licences are personal to the licensee,[106] in which case there is no room for the doctrine of attachment to a dominant tenement. Another group consists of licences to do something permanent on the servient land, such as putting part of a building thereon,[107] and in such cases the licensee will probably own adjoining land. However the point has not been treated as legally significant. Consequently the requirement of a dominant tenement does not apply to licences.

E. RUNNING OF THE BURDEN AND BENEFIT

This section can be said to contain the heart of the matter, for the fundamental characteristics of proprietary interests, as opposed to those merely contractual, is that they are enforceable by and against successors in title to the original parties. It will be assumed that the rules already discussed concerning formalities, content and annexation have been observed; in this connexion it may be emphasised again that the burden of easements, appurtenant profits and restrictive covenants will not run unless the benefit is properly annexed to a dominant tenement.

(*i*) *Burden.* Easements and profits are legal interests, so that the burden runs *in rem* at law, irrespective of notice, against anyone in

103. Under either a building scheme or the Law of Property Act, 1925, s.56.

104. *Renals* v. *Cowlishaw* [1879] 2 Ch. D. 125; *Re Union of London and Smith's Bank Conveyance* [1933] Ch. 611.

105. Preston and Newson, *Restrictive Covenants,* 3rd ed. at pp. 65-75 suggest various formulae.

106. *Westminster Bank Ltd.* v. *Lee* [1956] Ch. 7 (deserted wife); *Cobb* v. *Cobb* [1952] 1 All E.R. 1199 (family arrangement); *Marcroft Wagons Ltd.* v. *Smith* [1951] 2 K.B. 496 (generosity to licensee). Cases such as the last-named turn on the applicability or otherwise of legislation protecting tenants and are probably in a special category.

107. *E.g. Hopgood* v. *Brown* [1955] 1 W.L.R. 213.

possession or occupation of the servient tenement.[108] Restrictive covenants are equitable interests; therefore, if created before 1925, they are enforceable against the servient tenement in the hands of anyone except the *bona fide* purchaser for value of a legal estate without actual or constructive notice;[109] if created after 1925 and registered under the Land Charges Act, 1925, or the Land Registration Act, 1925, they are equivalent to rights *in rem* yet no one can plead absence of notice, *(supra,* section B). This point of similarity is enhanced for registered land, because a note of easements and profits expressly created will appear on the register of title to the servient land. Other differences between legal and equitable interests do, however, remain. Equitable defences are wider than those available at law,[110] and restrictive covenants unlike legal easements and profits cease to be enforceable when they no longer benefit the dominant land.[111]

The burden of positive covenants was held to run with land by the Court of Appeal in *Austerberry* v. *Corporation of Oldham,* thereby settling earlier doubts.[112] However, in 1957 a gloss was added by the decision at first instance in *Halsall* v. *Brizell.*[113] There vendors of a building estate had covenanted to hold all roads, sewers etc., on trust for various purchasers in return for covenants to contribute to upkeep. Upjohn, J., though expressly recognising the rule in *Austerberry* v. *Corporation of Oldham,* nevertheless held an assignee of a purchaser bound on the principle that "a man cannot take benefit under a deed without subscribing to the obligations thereunder". Presumably the decision applies only to cases on continuing mutual obligation.[114] In that context there is much to be said for permitting the burden of some positive covenants to run — for example, as between the owners of different flats or offices in one building.[115] Nevertheless, the "touch and concern" test might permit the

108. *Leech* v. *Schweder* (1874) L.R. 9 Ch. App. 463.

109. *Re Nisbet and Potts Contract* [1906] 1 Ch. 386 — restrictive covenant enforceable against person in adverse possession.

110. *Marten* v. *Flight Refuelling Ltd.* [1961] 2 W.L.R, 1018 at pp. 1041-2 — he who seeks equity must do equity — need to disclose existence of restrictive covenants.

111. See *Chatsworth Estates* v. *Fewell* [1931] 1 Ch. 224; Law of Property Act, 1925, s.84. See generally *The Discharge and Modification of Restrictive Covenants* by G. H. Newson Q.C. (reprinted as a book from Vol. 7 of the *Planning and Compensation Reports).*

112. (1885) 29 Ch. D. 750. As late as *Cooke* v. *Chilian* (1876) 3 Ch. D. 694 it was thought that the burden of a failure covenant could run.

113. [1957] Ch. 169.

114. See note by present writer in (1957) 21 *Conveyancer (N.S.)* at pp. 160-162.

115. Developers of large blocks of flats or offices in England now usually make use of long leases rather than "flying freeholds" because of the difficulties over covenants.

imposition of unduly heavy burdens — it would be better if the easement test of enhancement of normal enjoyment could be substituted in this instance.

The burden of some licences may run in equity; if and when it does, the basis is either simple notice or equitable estoppel.[116] The deserted wife's licence is indeed established as a mere equity, with the consequence that the holder of either an equitable or a legal interest can plead purchaser for value without notice, and here, exceptionally, possession by a wife does not constitute notice.[117] Other licences are in very much the same position as restrictive covenants immediately after *Tulk* v. *Moxhay,*[118] and their effect on land law and conveyancing similarly disturbs legal opinion. The device of the dominant tenement does not seem an appropriate instrument of control. Perhaps only possessory licences, whereof a purchaser can acquire notice without difficulty, will in the end establish themselves as proprietary interests.[119]

If licences are excluded from consideration as still embryonic, a single proposition can be submitted concerning the burden of the interests under discussion:— the burden runs with the servient tenement excepting where it imposes an actual duty on the servient owner, and probably even then if there are mutual obligations.

(ii) Benefit. The benefit of easements and appurtenant profits passes to anyone who acquires a legal interest or, it seems, merely possession of the dominant tenement.[120] The benefit of positive covenants passes to anyone acquiring a legal interest in the dominant tenement,[121] and of restrictive covenants to anyone so acquiring a legal or equitable interest.[122] The benefit of a profit in gross may be freely assigned without any annexation to land; this exception to the general tenor of the law seems to depend first on the early origin of profits in gross and second on the continued desire of the urban Englishman, in the nineteenth

116. See "Licences to Remain on Land (other than the Wife's Licence)" by R. H. Maudsley (1956) 20 *Conveyancer (N.S.)* 281.

117. *Westminster Bank Ltd.* v. *Lee* [1956] Ch. 7; see "The Deserted Wife's Licence" by F. R. Crane (1955) 19 *Conveyancer (N.S.)* 343.

118. (1848) 2 Ph. 774.

119. This solution is favoured by Maudsley in the article cited in note 117.

120. *Leech* v. *Schweder* (1874) L.R. 9 Ch. App. 463.

121. *The Prior's Case* (1368) decided that the benefit passed to a person acquiring the *same* estate as the covenantee. The Court of Appeal in *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500 held that s.78 of the Law of Property Act, 1925, passed the benefit also to a lessee.

122. See Megarry and Wade, *The Law of Real Property,* 2nd ed. at pp. 733, 741.

and twentieth centuries, to fish and shoot on land which he does not own. Profits in gross meet a social need and are no impediment to simplified conveyancing.

No general rule can be laid down for licences. The benefit of executed licences to do something permanent on another's land, as to place part of a building there would seem to pass with the dominant tenement.[123] The benefit of a contract creating a commercial licence, such as one for "front rights" in a theatre, would probably be assignable.[124] Other licences, such as that of the deserted wife, are clearly personal and unassignable. It would seem that all possessory licences are in this group, because a personal relationship is required to produce a possessory licence instead of a lease.[125] If the burden of only possessory licences runs with the land, then the non-assignability of their benefit provides a means of limitation and control.

To sum up therefore, as regards benefit, licences and profits in gross are exceptional. Apart from them, we have a general rule that the benefit runs with the dominant tenement, subject to a hardly justifiable distinction between legal and equitable interests.

F. CONCLUSIONS

The differences between easements, profits, positive covenants, negative covenants and licences are sufficiently demonstrated by the length of this article, and by the much more extensive treatment contained in any textbook. Clearly licences at present stand on their own, and profits in gross are an exceptional group. Subject to these points, however, it is submitted that the differences are concerned primarily with history, formalities and terminology; so far as the substantive law is concerned, the similarities are more important than the differences. To adopt the analogy cited at the start of this article,[126] licences are still in a separate compartment, but the walls between the other compartments have been largely demolished, though the occupants are inclined to behave as if they were still there. If licences and profits in gross are ignored, a general principle can be suggested for rights expressly granted, *viz*:— that all third party rights to control the use of another's land, either by entry on the servient tenement or merely by restricting the owner's use thereof, can subsist as proprietary interests in land, of which the burden will run with the servient tenement provided the benefit is annexed to and runs with a dominant tenement. Three qualifications

123. *Hopgood* v. *Brown* [1955] 1 W.L.R. 213.

124. *Clore* v. *Theatrical Properties Ltd.* [1936] 3 All E.R. 483.

125. *Cobb* v. *Lane* [1952] 1 All E.R. 1199.

126. See note *3, supra.*

must be added; first, no such third party right can confer possession; second, no active burden can be imposed on the servient owner unless, perhaps, under a scheme of mutual obligations; third, rights involving entry must enhance the natural enjoyment of the dominant tenement, whereas rights simply restricting user need only affect the value or mode of occupation of that tenement. It must be acknowledged that the licence may become a separate proprietary interest breaking all the above rules !

Many of the differences may be minimised or eliminated by appropriate drafting of documents. Further, the differences are least and the similarities are greatest in conveyancing under the Land Registration Act, 1925, which is destined to become dominant and almost certainly universal in England. It is to be hoped that in the future the similarities will be emphasised not only by decisions in the courts but also by the practice of conveyancers, and of the Chief Land Registrar. Lastly, there is clearly much to be gained from comparative study to see how the problems are tackled by other systems of registration of title.[127] Registered conveyancing in England is at present conditioned by co-existence with the unregistered system, but the exemplars for the future may be found overseas.

F. R. CRANE.*

127. One such valuable study has been made in recent years — *An Englishman Looks at the Torrens System* by T.,B. Ruoff, Solicitor, one of the Senior Registrars in H.M. Land Registry. (1958).

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