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## Towards a Unified System of Land Burdens?



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INTERSENTIA



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## PREFACE

On 20 May 2005 a one-day conference on land burdens was held at Maastricht University, under the auspices of the international research school Ius Commune. The term “land burdens” was chosen to give a generic description of duties, such as may arise from servitudes, burdening land, which are created by two parties and are binding upon third parties by force of law.

The aim of the conference was to compare the various approaches in civil and common law, especially the approach taken by the Restatement of the Law Third on Property (Servitudes), published by the American Law Institute in 2000. The general reporter of the Restatement, Prof. Susan French, was one of the key note speakers during this conference. Also developments in Scottish law were looked at with great interest. In Scotland, property law has gone through a period of fundamental changes. This also affected the law on land burdens. The Scottish developments were presented by Prof. Kenneth Reid, at that moment a member of the Scottish Law Commission. Other speakers provided information on German law (Prof. Manfred Wolf), Austrian law (Prof. Monika Hinteregger), Belgian and French law (Prof. Vincent Sagaert), English law (Bill Swadling) and Dutch law (dr. Lars van Vliet and Bram Akkermans). Next to these more legal positivist approaches, prof. Gideon Parchomovsky presented a paper on land burdens, written by him and dr. Abraham Bell, from a law and economics perspective.

With the financial assistance of the research school Ius Commune and the Maastricht faculty of law, the papers for the conference are now being published in this volume of the Ius Commune Europaeum series. Also, I would like to thank the Royal Netherlands Academy of Sciences and the Netherlands Organisation for Scientific Research for their financial support that made the conference possible.

For his enthusiastic and unrelenting support before and during the conference and his work as a co-editor I would like to thank mr. Bram Akkermans, junior researcher at Maastricht University. Finally, I would like to thank Yleen Simonis from the Maastricht Institute for Transnational Legal Research (METRO) for all her highly appreciated assistance before, during and after the conference as well as her editorial work.

Sjef van Erp

**TABLE OF CONTENTS**

Preface..... v

Table of Contents .....vii

**Sjef van Erp**

Servitudes: The Borderline Between Contract and (Virtual) Property ..... 1

- 1. Introduction ..... 1
- 2. Property and Cyberspace ..... 3
- 3. Servitudes and Chattels..... 5
- 4. Towards a Concept of Property Burdens and Acceptance of the *ex post* Validity Approach?..... 7

**Manfred Wolf**

Marketability contra Freedom of Parties in the Law of Land Burdens..... 11

- 1. Need for Harmonisation in Property Law ..... 11
- 2. Advantages and Disadvantages of Real Rights ..... 12
- 3. The Principle of Numerus Clausus under German Law ..... 12
- 4. The Servitudes ..... 13
  - 4.1. Land Servitude and Personal Servitude..... 14
  - 4.2. Different Purposes of Servitudes ..... 14
    - 4.2.1. Neighbourhood Servitudes..... 14
    - 4.2.2. Servitudes for Transmission Lines..... 15
    - 4.2.3. Servitudes for Extracting Land (Bodenabbaurechte) ..... 15
    - 4.2.4. Servitudes Restricting Competition..... 15

4.3.	Restrictions for Servitudes .....	17
4.3.1.	Specified Use and Use under Changed Circumstances .....	17
4.3.2.	The Principle of Prediality .....	18
4.3.3.	Obligatory Relations Connected with the Servitude.....	18
5.	The Reallast.....	19

**Monika Hinteregger**

	Servitudes - The Austrian Concept.....	21
1.	Introduction .....	21
2.	Servitudes.....	22
2.1.	Object .....	22
2.2.	General Principles .....	22
2.3.	Types.....	24
2.3.1.	Real Servitudes .....	24
2.3.2.	Personal Servitudes.....	25
2.3.3.	Irregular Servitudes .....	26
2.4.	Protection of Servitudes .....	27
2.5.	Extinction .....	27
3.	Reallast.....	27

**Vincent Sagaert**

	The fragmented system of land burdens in French and Belgian law .....	31
1.	Introduction .....	31
2.	Overview of the Limited Property Rights in Real Estate.....	32
2.1.	Servitudes.....	32
2.2.	Long Lease .....	36
2.3.	Building Rights.....	37
2.4.	Usufruct.....	39
2.5.	Other Rights with a Proprietary or Non-Proprietary Nature .....	40
2.5.1.	The Numerus Clausus Principle .....	40
2.5.2.	Real Obligations and ‘Chain Clauses’ .....	43
2.6.	Synthesis.....	45
3.	Historical Background and Current Debate on the Content of Servitudes in French and Belgian Law .....	46
4.	Do French and Belgian Law Allow the Release of Useless or Obsolete Servitudes? .....	47
4.1.	French Law.....	48
4.2.	Belgian Law.....	50
4.3.	Criticism from a Law and Economics Viewpoint .....	51



5.	Conclusion .....	51
----	------------------	----

### **Lars van Vliet**

	Acquisition of a servitude by prescription in Dutch law .....	53
1.	Introduction .....	53
2.	The 10 Year Period and the Difficult Requirement of Good Faith .....	54
3.	The 20 Year Period of Article 3:105 BW .....	55
4.	Possession of a Servitude .....	55
4.1.	Recognizability .....	55
4.2.	Visibility and Permanence .....	55
4.3.	Unequivocal Possession .....	57
4.4.	No Possession in the Case of Permission .....	58
5.	No Prescription beyond your Possession .....	58
6.	The Consequence of Permission (other than Toleration) .....	59
7.	The Consequence of Toleration .....	59
8.	Limitation without Acquisitive Prescription .....	60
9.	Compulsory Right of Way .....	60
10.	Conclusion .....	61

### **Ken Reid**

	Modernising Land Burdens: The New Law in Scotland .....	63
1.	Becoming Stuck: the Decline of Servitudes .....	63
2.	Moving forward: the Rise of Real Burdens .....	65
3.	Keeping both: a Dual System of Land Burdens .....	66
4.	The Impetus for Reform .....	67
5.	Policy Considerations .....	68
6.	Three Obligations .....	69
7.	Servitudes .....	71
8.	Affirmative Burdens .....	71
9.	Negative Burdens .....	72
10.	Techniques of Restraint .....	72

11.	The First Principle: Injury to the Enforcer’s Property .....	73
11.1.	A Benefited Property .....	74
11.2.	The Praedial Rule: Conferral of Benefit.....	75
11.3.	Interest to Enforce: Injury to the Benefited Property.....	76
12.	The Second Principle: Review by the Courts .....	77
13.	The Third Principle: a Limited Life.....	78
14.	Annex I Title Conditions (Scotland) Act 2003 .....	80
15.	Annex II Copy of a Scottish Land Certificate .....	98

**Susan French**

The American Restatement of Servitudes Law: Reforming Doctrine by Shifting From Ex ante to Ex post Controls on the Risks Posed by Servitudes.....	109
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**William Swadling**

Land Burdens – An English Perspective .....	117
1. Introduction .....	117
1.1. The Idea of a Land Burden.....	117
1.2. Sources of Law.....	119
1.3. A Numerus Clausus of Property Rights over Land .....	121
1.4. Land Burdens in English Law .....	123
1.5. Burdens Arising by Operation of Law .....	123
2. Easements.....	123
2.1. Dominant and Servient Tenement .....	124
2.2. Benefit to Dominant Tenement .....	124
2.3. Rights to Possession Vested in Different People.....	126
2.4. Content of Right Must be Certain .....	127
2.5. No Positive Obligation on Possessor of Servient Tenement.....	127
2.6. Right of Possessor of Dominant Tenement Must be Positive.....	128
3. Profits a Prendre.....	128
4. Rentcharges.....	128
5. Restrictive Covenants .....	129
6. Estate Contracts .....	131
7. Options to Purchase.....	132
8. Defects .....	132
8.1. Easements.....	132

8.2.	Restrictive Covenants .....	133
9.	Reform .....	133
10.	Conclusion .....	135

### **Gideon Parchomovsky and Abraham Bell**

	Land Burdens in the Service of Conservation .....	137
1.	Introduction .....	137
2.	The Special Challenge of Parks and Open Spaces .....	142
2.1.	Under-Provision .....	143
2.2.	Over-Exploitation.....	144
2.3.	Mismanagement.....	144
3.	The Solution of Anti-Property Easements .....	146
3.1.	Proximate Property Owners .....	147
3.2.	The De Facto Rights of Neighbors .....	148
3.3.	The Shortcomings of De Facto Rights .....	149
3.4.	Formalizing Neighbors' Anti-Property Rights.....	151
4.	Extensions .....	154
4.1.	Social Impacts of Anti-Property Regimes .....	154
4.1.1.	Distributional Effects .....	154
4.1.2.	Dynamic Effects.....	155
4.2.	Policy Alternatives .....	156
4.2.1.	Public Trust .....	156
4.2.2.	Environmental Standing .....	158
4.2.3.	Conservation Easements .....	159
4.2.4.	Summary .....	160
5.	Conclusion .....	162

### **Bram Akkermans**

	The New Dutch Civil Code: the Borderline between Property and Contract.....	163
1.	Introduction .....	163
2.	The Separation between the Law of Obligations and the Law of Property.....	165
3.	Land Burdens in Dutch Law .....	167
4.	A Pragmatic Solution: Qualitative Duties.....	172
5.	A Short Comparative Overview of Land Burdens .....	175

6. Towards a Unified System of Land Burdens? ..... 179

## SERVITUDES: THE BORDERLINE BETWEEN CONTRACT AND (VIRTUAL) PROPERTY

### 1. Introduction

Until some 10-15 years ago, property law seemed mostly unaffected by European law. Since then, this has changed considerably. The European Court of Justice has developed case law that is of direct importance for property law by invoking especially the freedom of capital.<sup>1</sup> Also directives and regulations have a growing impact on the national systems of property law. A prime example is the financial collateral directive.<sup>2</sup> More is to be expected. First of all, the Common of Frame of Reference (CFR) should be mentioned. This CFR is meant as a 'toolbox' for the revision of the existing *acquis* and the further development of European private law.<sup>3</sup> It seems that the European Parliament even would like to go further and would favour a European code of obligations or perhaps even a, in the European Parliament's words, 'full-blown European Civil Code,' given its most recent resolution of 23 March 2006 entitled: 'European contract law and the revision of the *acquis*: the way forward.'<sup>4</sup> The CFR will contain rules on assignments of claims, transfer of

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<sup>1</sup> Cf. ECJ 16<sup>th</sup> March 1999, Case C-222-97 (*Trummer and Mayer*) on the invalidity of the requirement that a mortgage securing a debt payable in the currency of another Member State must be registered in that currency and ECJ 23<sup>rd</sup> May 2000, Case C-58/99 (*European Commission v. Italy*) and ECJ 4<sup>th</sup> June 2002, Case C-503/99 (*European Commission v. Belgium*) on 'golden shares' (decisive influence of national governments on privatised companies).

<sup>2</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6<sup>th</sup> June 2002 on financial collateral arrangements, *Official Journal* L 168, 27<sup>th</sup> June 2002, p. 43-50.

<sup>3</sup> Communication from the Commission to the European Parliament and the Council, European Contract Law and the revision of the *acquis*: the way forward Brussels, 11<sup>th</sup> October 2004, COM(2004) 651 final.

<sup>4</sup> The text can be found on the web site of the European Parliament: <<http://www.europarl.europa.eu/>>.

movables, security interests (movables), personal security and trusts.<sup>5</sup> Furthermore, proposals can be expected concerning the introduction of a European type of mortgage.<sup>6</sup> This mortgage will not be dependent upon any underlying debt, taking German and Swiss law as a model. In the area of land registers, the EULIS project was aimed at connecting land registration systems at a technical level. It is now intended to continue this project.

Still, most general rules on property law (particularly land law) are national and their final interpretation still belongs to the national Supreme Courts, although even with regard to national (i.e. non-harmonised or non-unified) property law things are changing. Recently, the European Court of Human Rights has decided that English rules on prescription violate article 1 of the First Protocol to the European Convention on Human Rights.<sup>7</sup> The constitutionalisation of private law is clearly also affecting property law. As a consequence an increasing osmosis of national and European property law can be seen, resulting in growing fragmentation.<sup>8</sup> Instead of creating more transparency, accessibility and openness of markets, the outcome is the exact opposite. Land markets were already difficult to access for foreign buyers. Next to language barriers, there are legal and institutional barriers. The EULIS project may have resulted in national land registries now being interconnected at a technical level and the proposals concerning the euro-mortgage might create a uniform mortgage regime, but it is still true that in the various Member States of the European Union land law still shows considerable differences. Within the EULIS project this was recognised and the question was therefore asked, whether not only technical accessibility should be achieved, but also accessibility regarding content. Such content accessibility was to be gained by an explanation to foreign users of the various legal terms found in a national system of land registration. In order to be useful, such explanation had to be given in the language of the person consulting the land register. This meant that the explanation would have to be given by means of a translation process. As is well known, translating a legal text cannot be done without critical analysis of the relevant concepts and terms in both the source as well as the target language. This is a complicated and time-consuming process. A simple list of legal terms with their translation, if offered without any further explanation to those not familiar with that particular legal system, will not be sufficient and might even be deceptive and hence dangerous.

If land markets are to be made truly accessible to out-of-state buyers at least certain parts of land law may have to be harmonised. Land burdens – in the general

<sup>5</sup> For a recent analysis of this attempt to create a European system of property law, however written from an institutional economics viewpoint, see D. Krimphove, *Das europäische Sachenrecht*, Lohmar-Cologne, Josef Eul Verlag, 2006.

<sup>6</sup> See the *Green Paper on Mortgage Credit in the EU*, Brussels, 19<sup>th</sup> July 2005, COM(2005) 327 final.

<sup>7</sup> Case of *J.A. Pye (Oxford) Ltd v. The United Kingdom* (Application no. 44302/02), to be found at: <<http://www.echr.coe.int/echr>>. It should be noted, however, that this case has been referred to the Grand Chamber.

<sup>8</sup> Cf. C. Joerges, *Der Europäisierungsprozess als Herausforderung des Privatrechts: Plädoyer für eine neue Rechts-Disziplin*, Zentrum für Europäische Rechtspolitik an der Universität Bremen (ZERP), ZERP-Diskussionspapier 1/2006 (Bremen: ZERP, 2006).

sense of duties with effect towards third parties, such as may arise from servitudes, burdening land – seem a prime example to ask the question whether land markets can be made more accessible through legal harmonisation. Experience in the United States shows that harmonisation of land burdens may very well be possible, if a pragmatic approach is taken, focussing on the freedom of the parties and an *ex post* check by courts as to whether certain outer limits have not been transgressed.<sup>9</sup> Until now the *ex ante* approach is prevalent, under which the parties are bound by limited and fairly strict models of land burdens. Harmonising these models would not be an easy task.<sup>10</sup> Approaching harmonisation ‘the other way around’ so to speak, by starting from the freedom of the parties might create workable solutions. It also fits within developments in the area of Internet technology and law or, as it is also called, the law of cyberspace.

## 2. Property and Cyberspace

Internet law has grown in importance rapidly. In the beginning it was still unclear whether software, Uniform Resource Locators (URL’s), domain names, web sites and e-mail addresses could be given legal protection. Questions were raised with regard to the applicability of intellectual property law. It was unclear whether software could be protected through copyright or patent law. A solution was found by applying trade secret law. Users were given a license, which created a contractual relationship between software developer and software user. These contractual relationships were (and are) based on shrink wrap or click wrap ‘take it, or leave it’ contracts, which contain numerous duties for end users and which were aimed at being automatically binding upon those who acquired the software from the first licensee. The result was, what has been called by Hemnes, a relationship grounded in contract, but functioning as if it were feudal in much the same way as the old feudal system had functioned with regard to land law. The relationship was both of a personal as well as a real nature. It could be transferred, but the new tenant was bound by the original grant. Instead of the King as the Lord Paramount, the software developer/licensor now acts as such, and the licensee is now the final tenant (‘tenant paravail’).<sup>11</sup>

This raises the question whether certain rules on property law might perhaps also apply to specific relationships that exist with regard to the use of computers and computer networks, next to the protection that is nowadays given by intellectual property law. Could not it be argued that domain names, a URL, an e-mail address exist independently from the use of specific software, in such a way that they

<sup>9</sup> I refer to the chapter by Susan French in this book, who discusses this *ex post* approach taken by the Restatement of the Law Third on Property (Servitudes), published by the American Law Institute in 2000. Cf. also B.W.F. Depoorter and F. Parisi, ‘Fragmentation of property rights: A functional interpretation of the law of servitudes,’ 3 *Global Jurist Frontiers*, Article 2, 2003, to be found at: <<http://www.bepress.com/gj/>>.

<sup>10</sup> As can be deduced from reading the various contributions to this book.

<sup>11</sup> T.M.S. Hemnes, ‘Restraints on alienation, equitable servitudes, and the feudal nature of computer software licensing,’ 71 *Denver University Law Review*, 1994, p. 577.

can be seen as being a separate object? A domain name or URL remains in existence, even when the web master of a web site is not on line. Others can still access an e-mail address, when the person to whom e-mail is sent has not opened his e-mail account. Domain names, URL's and e-mail addresses are therefore not fluid, but permanent and can be protected against unwanted invasion with the help of for instance tort law remedies. In other words: domain names, URL's, web sites and e-mail addresses can exist as a distinct and separate 'object' of rights, including the right to exclude others. The latter is a fundamental aspect of a property right. Joshua Fairfield, therefore, even calls these separate objects 'virtual Property'.<sup>12</sup>

An interesting case in which the question was raised whether a computer system, computer processors and storage could qualify as a 'chattel' (in other words: 'property') and whether the sending of thousands of e-mails to employees of a company by a former employee might qualify as a 'trespass to chattels' can be found in the case of *Intel Corporation v. Hamidi*.<sup>13</sup> The facts of the case are stated by Werdegar J., who presented the majority opinion, as follows:

'Intel Corporation (Intel) maintains an electronic mail system, connected to the Internet, through which messages between employees and those outside the company can be sent and received, and permits its employees to make reasonable nonbusiness use of this system. On six occasions over almost two years, Kourosh Kenneth Hamidi, a former Intel employee, sent e-mails criticizing Intel's employment practices to numerous current employees on Intel's electronic mail system. Hamidi breached no computer security barriers in order to communicate with Intel employees. He offered to, and did, remove from his mailing list any recipient who so wished. Hamidi's communications to individual Intel employees caused neither physical damage nor functional disruption to the company's computers, nor did they at any time deprive Intel of the use of its computers. The contents of the messages, however, caused discussion among employees and managers.'

Werdegar J then proceeds to discuss whether under California law this behaviour of Hamidi can be seen as committing the tort of trespass to chattels (personal property). The final conclusion is that it is not. The reason is that no actual harm was done to Intel's computer systems. It did not seem a problem to the court that perhaps a computer system might not be seen as a chattel. In the words of Werdegar J.:

'In sum, no evidence suggested that in sending messages through Intel's Internet connections and internal computer system Hamidi used the system in any manner in which it was not intended to function or impaired the system in any way.'

<sup>12</sup> J. Fairfield, 'Virtual property,' 85 *Boston University Law Review*, p. 1047. The article can also be downloaded from the Social Science Research Network: <<http://www.ssrn.com/>>, filename SSRN\_ID869263\_code410303.pdf. See also W.W. Fisher, 'Property and contract on the Internet,' 73 *Chicago-Kent Law Review*, 1998, p. 1203; R.P. Merges, 'The end of friction? Property rights and contract in the "Newtonian" world of on-line commerce,' 12 *Berkeley Technology Law Journal*, 1997, p. 115, to be found at: <<http://btj.boalt.org/articles/12.php>> and A. Mossoff, 'What is property? Putting the pieces back together,' 45 *Arizona Law Review*, 2003, p. 371.

<sup>13</sup> *Intel Corporation v. Kourosh Kenneth Hamidi*, Supreme Court of California 30<sup>th</sup> June 2003, 30 Cal.4th 1342, 71 P.3d 296, 1 Cal.Rptr.3d 32, 148 Lab.Cas. P 59,756, 03 Cal. Daily Op. Serv. 5711, 20 IER Cases 65, 2003 Daily Journal D.A.R. 7181.



That a computer system, like a telephone system or an auction web site could be qualified as a chattel was presumed by the court and not further elaborated upon.

### 3. Servitudes and Chattels

Given, that virtual property can exist, which property rights could then be applicable? Could it be that the conditions attached to a license can be qualified as 'servitudes'?<sup>14</sup> In such a case the licensee could be given the same amount of protection as any landowner would receive who was confronted with a servitude or other type of land burden. This would presuppose, however, that for instance a domain name could be seen as 'real property.' But is virtual property indeed equal to real property or does it resemble more closely personal property, as the case of *Intel v. Hamidi* seems to suggest? For the time being, this question can remain dormant if we follow those authors who defend that servitudes not only can exist with regard to land, but also with regard to movable property. In that case the conditions attached to a license for software use, aimed at binding automatically acquirers and further users of that software, could be qualified as servitudes, irrespective of the answer to the question if virtual property can be seen as 'real' or 'personal' property. What matters is whether domain names, URL's etcetera can be considered to be 'property,' as having an existence independent from the software (programmer's code) that created these domain names and URL's.

In an article in the Harvard Law Review of 1928, entitled 'Equitable servitudes on chattels' Chafee defended the view that, along the lines of the famous English case on restrictive covenants *Tulk v. Moxhay*, also sellers of chattels and other types of personal property might be allowed to impose restrictions on the use of such property with effect *vis-à-vis* third parties.<sup>15</sup> He changed his view, however, when he saw what the impact might be in a given case.<sup>16</sup> The case that made him rethink his earlier views was *Pratte v. Balatsos*.<sup>17</sup> Pratte and Larochelle, who owned a luncheonette, had concluded an agreement concerning the use and operation of Pratte's coin-operated record player and related equipment (a juke box) in the place of business. Larochelle then assigned the lease of the building to Balatsos. Duncan J., speaking for an almost unanimous court, summarised the facts as follows:

'The terms of the contract between the plaintiff and Larochelle are not in dispute. It provided that in return for payment of forty per cent of the income from the record player, the plaintiff might install it in "a permanent and convenient part of [La-

<sup>14</sup> For a brief comparative analysis of servitudes see J. Gordley, *Foundations of private law. Property, tort, contract, unjust enrichment*, Oxford, Oxford University Press, 2006, p. 81 ff.

<sup>15</sup> Z. Chafee Jr., 'Equitable servitudes on chattels,' 41 *Harvard Law Review*, 1928, p. 945. *Tulk v. Moxhay* 2 Phillips Ch. 774. See also G.O. Robinson, 'Personal property servitudes,' 71 *University of Chicago Law Review*, 2004, p. 1449, also to be found electronically at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=477541](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=477541)>.

<sup>16</sup> Z. Jafee Jr., 'The music goes round and round: equitable servitudes and chattels,' 69 *Harvard Law Review*, 1956, p. 1250.

<sup>17</sup> Supreme Court of New Hampshire 20<sup>th</sup> April 1955, *Pratte d/b/a Joy Bar Music Company v. Balatsos d/b/a Joy Bar Luncheonette*, 99 N.H. 430, 113 A.2d 492.

rochelle's] place of business" and that "said machine shall be operated during the term of this Agreement [fourteen years and six months] and that no similar equipment nor any other kind of coin-operated machine will be installed or operated on said premises by anyone else." Thus it was intended by the parties to the agreement that the plaintiff should have exclusive rights to operate such a record player at the location in question in connection with the conduct of Laroche's business there.

Neither the bill of sale from Laroche to the defendant (Balatsos, JvE) under date of November 2, 1953, nor the contract of purchase and sale which preceded it, referred to the record player or the contract with Laroche of September 19, 1952, relating to it. The bill of sale purported to convey "an assignment of the lease [of the premises] dated April 1, 1947." No attempt was made to assign the Laroche contract to the defendant nor did the defendant expressly assume Laroche's obligations under it.'

The court held that, as a matter of law, the agreement was also binding upon Balatsos, if he had sufficient knowledge. Again in the words of Duncan, J.:

'In an article entitled "Equitable Liabilities of Strangers," the late Chief Justice Stone, then Dean Stone, (...) reached the conclusion that if the plaintiff has an equitable right which equity will enforce by compelling the covenantor to perform, thus giving the plaintiff a property right, then "equity should not deny relief merely because the result of a specific performance does not fall within one of the categories of property recognized as such by the courts of common law." 18 Col.L.R. 291, 313-314. In Pomeroy, Equity Jurisprudence, s. 1295, it is said that the doctrine that a purchaser with notice of a covenant with respect to the use of land takes subject to the covenant may be explained "by regarding the covenant as creating an equitable easement." The doctrine extends to affirmative covenants (Id., pp. 851, 852), and restrictive covenants creating equitable easements may be "specifically enforced in equity by means of an injunction, not only between the immediate parties, but also against subsequent purchasers with notice, even when the covenants are not of the kind which technically run with the land." Id., s. 1342.

The general rule received recognition in the early case of *Burbank v. Pillsbury*, 48 N.H. 475, 482, where the opinion was expressed that a stipulation in a deed providing for maintenance of a fence would be enforceable against a subsequent purchaser with notice. Relying upon the leading case of *Tulk v. Moxhay*, 2 Phillips Ch. 774 (see Clark, op. cit. supra, 170), the court said: "If [the obligation] is enforceable in equity, though not at law, the result, so far as this case is concerned, is the same. Upon the authorities we think it is enforceable in equity \* \* \* even if it be not regarded as an agreement running with the land upon which an action at law could be maintained."

The authorities support the plaintiff's claim that his rights by virtue of the contract are such as to be binding upon a purchaser with notice.'

The outcome of this case made Chafee worry about the duration of the agreement. The length of the agreement interferes with the freedom to change one's business, in this case from a popular luncheonette into a more stylish restaurant. He asked himself the question whether such policy arguments would not even stop a claim for performance between the original parties.

In spite of Chafee's own doubts as to the correctness of his earlier views, his thought that servitude law might also be applicable to personal property was not altogether rejected by other authors and still is referred to in legal literature concerning Internet technology and law. The problem he raised concerned the borderline area between contract and property. If, by using contract law, a party imposes re-

restrictions to use a product not only on his counterparty, but also on all relevant third parties, does not this in essence mean that this party has created a property relationship and for that reason should be bound by the limits set by property law? If so, should the rules of property law be applied directly or merely by analogy, making it possible to tailor the relevant rules according to the type of personal property? And, finally, should the model to be used be the traditional *ex ante* model or the *ex post* model as can be found in the American Restatement on Servitudes? These questions will be addressed in the final paragraph.

#### 4. Towards a Concept of Property Burdens and Acceptance of the *ex post* Validity Approach?

It seems that legal systems become hesitant to accept freedom of contract, the very moment a relationship is seen as not only binding upon the parties who created it, but also binding upon any relevant third party or even 'the world.' Compared to contract law things are even turned around. With regard to property relations freedom of contract no longer exists, except in as far as it is still recognised explicitly. What remains is a limited freedom of choice between pre-conceived types of relationships. Each type is governed by its own mandatory regime, which might allow some freedom for those creating the relationship. The relevant rules, however, are aimed at *ex ante* deciding if a relationship can qualify as being of a proprietary nature. Property law is seen, not as giving third party effect to a private agreement, but as the creation of a status. This also applies to land burdens, such as servitudes, although the law on servitudes, at least compared to other property rights, leaves the parties creating the land burden a considerable amount of freedom to shape their relationship. The American Restatement on Servitudes, however, takes a completely different approach. It shows a development which contract lawyers have seen happening decades ago: the disappearance of status based relations and the replacement of these relations by contractual arrangements. In the famous words of Sir Henry Maine 'the movement of the progressive societies has hitherto been a movement from Status to Contract.'<sup>18</sup>

Could it be that this development in the direction of 'contractualisation' of the law on land burdens also might affect other areas of property law? It could be asked, to give but one example, whether the acceptance under German law of security ownership is not in fact the acceptance of growing contractual freedom in prop-

<sup>18</sup> Sir H. Maine, *Ancient Law - Its connection with the early history of society and its relation to modern ideas*, edition published in London, J. Murray, 1920, p. 173/4: 'The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*.'

erty law. In the case of security ownership, the ownership is transferred from a transferor to a transferee to give the transferee a direct claim against the property transferred in case the transferor does not pay his debts. Once these are paid, the ownership can return to the transferor. In other words: the property relationship between transferor and transferee is shaped according to the contractual arrangements accompanying the transfer of ownership.

The development towards contractualisation of land burdens and, so it could perhaps be argued, property law generally might also have a, what might called, reverse impact on contract law. If contractual relations in their effect *vis-à-vis* third parties closely resemble property relations, why not also apply property law rules in such cases? By using freedom of contract the drafters of, for instance, software licenses attempt to achieve a servitude-like result. The question, which then arises, is whether the close resemblance between contractual arrangements that in effect generate a servitude regime can be treated as if a 'real' servitude had been created, even though a software license is not 'land.' Arguing from a more functional viewpoint, the first problem is whether software (or a domain name, a URL, a web site or an e-mail address) can be considered 'property' and, if so, whether it is 'real' or 'personal' property. As we have seen, this type of – what is strictly speaking nothing else but – programmer's code is considered by some authors to be equal to property in a more traditional sense. The term used here is that it concerns 'virtual property.' This still leaves the problem if servitude law could be applied, directly or indirectly (i.e. by analogy) to such virtual property. That problem is solved, if one follows the approach defended by Chafee that servitudes can also burden personal property. The 'real' and 'personal' dichotomy thus has lost its relevance.

The policy choice, which then remains is whether the parties' freedom to bind any relevant third party should be limited *ex ante* or *ex post*. If no limitations are set at all, some fear that a new form of feudalism might arise, giving an enormous market and marketing power in the hands of, for instance, software developers and allowing buyers of software to be bound to a degree that in property law would be seen as unacceptable.<sup>19</sup> Perhaps an *ex post* approach might be the most efficient. Such an approach would serve the needs of software developers as well as software buyers and users. It is a more contractual approach to problems of property law that would leave software developers sufficient freedom to protect their interests, but at the same time would allow courts to control the contracts from the viewpoint of their third party effect. No clear answers can be given yet. One thing, however, is clear: the law on servitudes is not as written in stone as some may believe.

The foregoing cannot, of course, but influence any attempts to harmonise the law on servitudes in Europe. I hope to have made clear that it is not only real and personal property law that should be involved in such a harmonisation attempt, but also Internet technology and law. We should perhaps introduce a more general concept than servitudes or even land burdens and start using the term 'property bur-

<sup>19</sup> This fear might be particularly strong in civil law jurisdiction in which, after the French Revolution, the feudal system has been abolished. Cf., as an example, P. Crocq, *Propriété et Garantie*, Paris, Librairie Générale de Droit et de Jurisprudence, 1995, no. 249.

dens' to express that burdens, created by parties, with third party effect essentially raise the same problems, irrespective of the type of property involved. The term 'property' would then encompass not only real and personal property, but also virtual property. The development of the Internet is giving rise to more and more questions on the applicability of property law policies, principles and concepts outside their traditional boundaries. Property lawyers should not ignore these problems. As the answers to these problems will have to be found in the borderline area between property law and contract law, the approach laid down in the American Restatement on Servitudes might become a highly attractive model, also with regard to this broader group of property burdens. The Restatement takes the parties' freedom as a starting point and does not choose, as is traditionally the approach in property law, an *ex ante* validity approach, but on the contrary an *ex post* validity approach to decide if what the parties agreed upon can be given third party effect. It seems to me that this is the balanced method we need in this area of the law.



## MARKETABILITY CONTRA FREEDOM OF PARTIES IN THE LAW OF LAND BURDENS

### 1. Need for Harmonisation in Property Law

The European Member States have different property laws. This sometimes causes severe problems in the internal market, not only for the trade with movable goods, but it also hinders the free transfer of real estate property rights from one Member State into another. Until today it is impossible to secure a bank loan on a piece of real estate in France or in the Netherlands with a German land charge (*Grundschuld*). On the other hand German law so far does not allow for example a French *nantissement du fonds de commerce* on a German enterprise. Such immovability of security rights which grant the power to auction land or other goods in order to get money is a severe handicap for the free circulation of capital.

At first glance it seems that land burdens like servitudes and easements which give the right to use or to prevent the use of an estate have mere regional importance and are not relevant for the basic freedoms in the internal market. But a more exact examination reveals that also servitudes and easements can have influence on the free movement of persons, services and capital as well as on the freedom of establishment.

For example, a servitude allows an entrepreneur to build a pipeline. Instead of being forced to buy the land at high costs in order to build a pipeline he can achieve the same result by simply acquiring a servitude at lower costs. The servitude allows him to use the land for the construction of the pipeline without the need to acquire ownership of the land. If an oil company for example wants to construct a cross border pipeline it is essential that every Member State which is crossed by the pipeline grants the possibility to use the land at low costs. This is possible with a servitude. If a Member State does not allow to construct a pipeline through the use of a servitude but would require to buy the land, this could be an obstacle for the oil company to build the pipeline and to invest in this Member State or even in the pipeline at all.

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The harmonisation of the law of land burdens or at least the acknowledgement of the land burdens of other Member States is not only of advantage in such a cross-border construction but a harmonised or even unified law of servitudes and easements could also encourage the establishment of enterprises in other Member States. For example, it allows the use of land at low costs may it be for the purpose of constructing buildings, for the construction of roads or for other uses. A servitude could also give the duty for a neighbour to tolerate an industrial enterprise in his neighbourhood and prevent him from filing for an injunctive relief.

Thus it could make the cross border investment in other Member States much easier and promote the establishment of enterprises throughout the internal market if there would be a unified or at least harmonised law of land burdens. The investment would be encouraged best if the land burdens were flexible enough to satisfy the needs of every investor and to survive a change of ownership in the estate.

## **2. Advantages and Disadvantages of Real Rights**

Flexibility is secured best if freedom of contract prevails. But freedom of contract which grants flexibility exists only in the law of contractual obligations. The disadvantage of the contractual obligations is that they only bind the parties of the contract and do not go with the land. Therefore in case of a change of ownership the new owner of the estate is not bound automatically by the contract concluded by the former owner. The former owner could be bound to transfer the contractual obligation to the new owner. But if the former owner is not willing to do so or if he does forget to bind the new owner or if the new owner does not give his consent to the commitment, the new owner is not bound by it and the creditor has no rights against him.

The real rights which burden the land and go with the land have the advantage that they are perpetual and bind also the new owner without his consent. But in the law of land burdens, as well as in property law in general, freedom of contract is limited under the principle of *numerus clausus*. In the law of servitudes there are additional limitations by the principle of prediality and by the principle of touch and concern. It is therefore a common concern of the investors in real estate to save as much of the freedom of contract in the field of property law without giving up the advantages of real rights. To determine the scope of freedom of contract which can be endured by the real rights without curbing their marketability is therefore an important task for the undertaking to harmonise the law of land burdens in the European Member States. To achieve this goal a comparison of the different laws of land burdens and their approaches as far as flexibility is concerned could be helpful. What is functioning in one Member State should also function in another Member State.

## **3. The Principle of Numerus Clausus under German Law**

The German law of property is, like basically all other property laws, characterised by the principle of *numerus clausus* and by a restricted freedom of contract. The



main reason for the existence of this principle is that property rights are absolute rights which do not only bind the parties to the contract but must be respected by every one else. In order to ensure that everybody can observe these absolute rights, their content must be identifiable for all persons who are affected by these rights, so that they can act according to the law. In addition, it makes the acquisition of property rights easier and therefore enhances their marketability if the buyer can rely on a definite content of those rights without having additional information costs. Of course the law must allow individual descriptions of single rights and their contents. Nevertheless the contents of property rights may not be chosen freely but only to the extent the law allows. Therefore it must be carefully looked at which agreements are allowed regarding property rights and where the law draws the borderline for such agreements.

As far as the property rights related to the use of real estate are concerned German Law knows four real property rights: the land servitude (*Grunddienstbarkeit*, §§ 1018 *et seq.* BGB), the personal servitude (*beschränkte, persönliche Dienstbarkeit*, §§ 1090 *et seq.* BGB), the usufruct (*Nießbrauch* §§ 1030 *et seq.* BGB) and a special German institute, the *Reallast* (§§ 1105 *et seq.* BGB) for which I could not find a translation but which could be literally translated as real burden. This is a burden which weighs on the land and affects the land directly. The property rights mentioned are absolute rights which are a kind of spin-offs of the all-comprising ownership. These spin-off rights must be listed in the land register. By their absolute effect against everyone and by their registration in the land register the real rights differ from the obligatory rights which bind only the parties to the contract and must not be registered.

#### 4. The Servitudes

The usufruct (*Nießbrauch*) is a spin-off right which conveys to the beneficial owner the comprehensive use which a piece of land can offer, but it grants to the owner only the right to use the land and not the right to sell it or to assign it otherwise. Contrary to the usufruct, the servitudes – to which I will draw my attention – are land burdens which grant the right to use a piece of land only in a restricted way. The beneficiary of a servitude is entitled

- to use the land in a specified manner for example by walking and/or driving across the land, by laying pipelines, power-lines, telephone-lines or other equipment, in general to do something upon the land to which the landlord could object without the servitude; I suppose that this comes close to the anglo-american requirement of touch,
- to forbid specifically defined acts exercised on the burdened land or
- to interdict specifically defined rights emanating from the ownership of the burdened land.

#### 4.1. *Land Servitude and Personal Servitude*

The difference between the land servitude (*Grunddienstbarkeit*) and the personal servitude (*beschränkte persönliche Dienstbarkeit*) exists mainly in the manner how the beneficiary is determined. In case of a land servitude the benefit is for the dominant estate and the beneficiary is the respective owner of the dominant piece of land. If the ownership changes, the new owner becomes the beneficiary. Another difference is that according to the BGB (§ 1019) a land servitude can exist only insofar as there is a benefit for the dominant land. Without such a benefit the land servitude cannot be generated and the land servitude comes to an end if the benefit does not perpetually exist anymore. This is the principle of prediality.

In case of a personal servitude the beneficiary is a specific person regardless whether he owns land and which land he owns. The person who benefits from the servitude can also be a legal entity. Similar to the land servitude, the personal servitude can exist only insofar as it serves to satisfy the needs of the beneficiary personally (§ 1091 BGB). Consequently it can not be assigned to another person (§ 1092 sec. 1 BGB) and it can exist at most for the lifetime of the beneficiary (§ 1090 sec. 2 with § 1061 BGB). There are exceptions as far as legal entities such as corporations and partnerships are concerned. If such legal entities merge with another enterprise or because of a division the servitude is required to serve the split-off part then the personal servitude follows as part of the assets of the merged or split-off enterprise. In some cases even an approval of a public authority is required.

#### 4.2. *Different Purposes of Servitudes*

Servitudes are used for many purposes. The main purposes are neighbourhood servitudes, servitudes for pipelines and power lines, servitudes for the digging of gravel and other soil ingredients, servitudes allowing the dwelling in a building on the estate and especially servitudes to secure distribution of goods and services.

##### 4.2.1. *Neighbourhood Servitudes*

Neighbourhood servitudes are mostly land servitudes (*Grunddienstbarkeiten*) because they serve the dominant estate regardless of who the owner is. Such land servitudes are used for example to provide the right of way for a piece of land which is not connected with a public street. By such a right of way the owner of the dominant estate may for example walk or drive across the servient piece of land. He may also have a servitude which allows him to lay a pipeline for water or a power-line for electricity or a TV cable. The servitude can also convey the right that the beneficiary may use a wall built on the neighbour's estate for construction purposes for example to support and uphold a building construction on the dominant estate. The owner of the dominant estate may use the servitude himself or lease it together with his estate to somebody else.

Land servitudes can serve the respective owner of the dominant estate also by reserving him the right to object to specified acts on the servient estate, for example

the beneficiary can claim not to construct buildings which block the sun, fresh air or the view on a landscape.

Insofar as the servitude grants the right that the owner of the servient estate tolerates specific acts of the beneficiary it can be used also in an environmental context, for example to allow an industrial enterprise to exhale certain emissions which the neighbours have to tolerate. A servitude can also entitle the beneficiary to have certain plants on the servient estate.

#### 4.2.2. Servitudes for Transmission Lines

Servitudes may also be used to build power-lines or pipelines not only in the neighbourhood context but also as interurban lines.<sup>1</sup> Such servitudes can be personal servitudes serving a certain enterprise or they can be land servitudes connected with a dominant estate which belongs to an enterprise. In this capacity the servitude is often used as a cross-border institution and the question becomes important if all the states traversed allow such servitudes and under what conditions they could be exercised. For the internal market it should be decided if there should be a unique European servitude or if the national servitudes should be harmonised so as to grant an equal right of interurban and cross-border powerlines. The same result could be reached if the Member States were bound to acknowledge the servitude of the state of origin where the beneficiary is seated or where the pipeline starts.

#### 4.2.3. Servitudes for Extracting Land (Bodenabbaurechte)

As already mentioned servitudes may also serve to secure a claim for extracting land.<sup>2</sup> Coal and minerals do not belong to the owner of the estate. For mining a special mining statute exists.<sup>3</sup> But gravel, turf and other non mineral soil ingredients are the property of the owner of the land. The right to dig or quarry for such soil ingredients can be granted by servitude. This servitude normally is a personal servitude and it is not for the lifetime of a person but for a limited time, 20 or 30 years, as long as the material desired is available.

#### 4.2.4. Servitudes Restricting Competition

Servitudes can also be used to influence the kind of goods and services offered on the real estate and thereby influence or even restrict competition. The Federal Civil High Court accepted for example a servitude which bound the owner of an apartment in a vacation hotel complex to offer his apartment to vacationers.<sup>4</sup> Other servi-

<sup>1</sup> Cf. Bundesgerichtshof (BGH) 12.7.2002 V ZR 441/00 = *Neue Juristische Wochenschrift-Rechtsprechungsreport (NJW-RR)*, 2002, p. 1576.

<sup>2</sup> Cf. BGH 3.5.2002 V ZR 17/01 = *Neue Juristische Wochenschrift (NJW)*, 2002, p. 3021.

<sup>3</sup> Bundesbergbaugesetz 13.8.1980 BGBl I, p. 1310.

<sup>4</sup> BGH 14.3.2003 V ZR 304/02 = *NJW-RR*, 2003, p. 733.

tudes entitle the beneficiary to forbid the practicing of a lawyer or a physician on the estate close to him. Such servitude may only be created as personal servitudes not as land servitudes because it is only for the advantage of the lawyer or the physician as person but not of advantage for the respective owner of an estate.

Servitudes for the distribution of goods and services are used especially in connection with the distribution of oil and gasoline in gasoline stations or for the benefit of breweries to distribute their beverages, especially beer, in inns or restaurants on the servient estate. Oil companies can thereby preserve the right to offer and sell their gasoline on the servient estate. Similarly breweries use the servitude to secure the right to solely deliver and sell their beverages on the servient estate. A gasoline station or a restaurant on this estate then may offer only gasoline or beverages of the beneficiary oil company or brewery. Such servitudes which grant the delivery of goods and services on the servient estate are used also in the field of cable TV as well as for long-distance heating and other utility services.<sup>5</sup> Combined with such servitudes are often so called non-competition servitudes. These servitudes aim to prevent competitors of the beneficiary to sell their products and offer their services on the servient estate.

The German Federal Civil High Court (*Bundesgerichtshof* = *BGH*) partially allowed such servitudes insofar as these servitudes give rise to real actions for the owner of the estate which emanate from the property right of the estate but not insofar as they are part of the personal freedom, especially the freedom to buy and sell and to negotiate contracts.<sup>6</sup>

This rule applies only insofar as the servitude itself is concerned. It does not affect a personal contractual obligation of the owner of the real estate not to sell certain goods or services. Such personal obligations only bind the owner who concluded the contract but not a new owner who acquires the estate from the previous owner. The contractual obligation does not follow automatically the estate. But freedom of contract allows an agreement that the previous owner binds himself to transfer his obligation together with the estate to a new owner or to a possessor. If the previous owner sells his estate or leases his land, then due to the obligation to transfer his obligation he has to bind the new owner in the sales contract or the possessor in the lease agreement not to offer or to sell other goods or services than allowed by the beneficiary of the servitude. The weakness of such contractual obligation to transfer is that it requires an agreement with the new owner or possessor. Therefore the obligation not to offer competitive products does not survive if the agreement is not made with the new owner or possessor. In this case the beneficiary of the servitude has a claim for damages against the previous owner but he can not force the new owner or possessor to comply with the obligation.

Legal advisors tried several other solutions. Instead of the right not to offer or not to sell which affects the personal freedom of contract they referred to factual actions such as not to produce, not to deliver, not to store certain goods or not to commit certain actions on the servient estate. In a later decision the Federal Civil

<sup>5</sup> BGH *NJW*, 2003, p. 733.

<sup>6</sup> Bundesgerichtshof in *Zivilsachen* (BGHZ), vol. 29, p. 244.

High Court allowed such a content of the servitude.<sup>7</sup> In this case the production and the storage of certain goods or the delivery of certain services may be forbidden. But this is only of limited avail, because it refers only to the products and services as such and not to a specific brand or to a specific provider of services. Although the servitude cannot grant the right that products of a specific producer may not be sold on the land, it is possible to forbid the production or storage in general through the servitude. From such a general prohibition exceptions for the production and storage of goods of a special provider could be allowed by an obligatory agreement between the beneficiary of the servitude and the owner or possessor of the servient estate.<sup>8</sup>

In any case such non-competition servitudes must comply with the German law against restricting competition (GWB) which basically prohibits clauses with the obligation to buy from a specific seller. If a servitude violates the relevant provisions it can be declared null and void by the German Anti Trust Agency. A similar prohibition can be found in the EC Treaty (Art. 81) if the servitudes were used to curtail the trade between Member States. Therefore such servitudes may not curtail competition essentially in the internal market.

### 4.3. *Restrictions for Servitudes*

#### 4.3.1. **Specified Use and Use under Changed Circumstances**

A principle of the law of servitudes is that the servitude only allows a limited use which must be specifically described when the servitude is created (§ 1018, § 1090 BGB). Other uses are basically not allowed. In connection with this principle two problems arise which caused much litigation and court decisions. One question is whether the use may change with the circumstances and the needs created by them. The other question is what the limits for the use of the servitude are.

Basically the initial agreement through which the servitude was created determines the scope of the servitude. Whether the exercise of the servitude changes with the circumstances depends, according to the courts, on the interpretation of the initial agreement and the purpose of the servitude. A servitude created to pass over the servient estate with horse wagons nowadays can be used to drive with motor cars because otherwise the dominant estate could not be used adequately as it was designed, i.e. to provide a driveway for vehicles commonly used at the respective time. The general principle is that the use of the servitude adapts itself to the general living conditions and insofar may change with the circumstances of the time.

Quite the reverse is true with regard to the right granted by the servitude. This right may not be enhanced or changed through an enlarged or changed use of the dominant estate. If the dominant estate was used as a one-family-villa with a big park at the time when the servitude was created but now has changed into a gar-

<sup>7</sup> BGH NJW, 1998, p. 2268.

<sup>8</sup> BGHZ 74, p. 293.

dener's land with trucks passing the drive way then such use must not be tolerated by the servient estate.<sup>9</sup>

Changes which could be foreseen at the time when the servitude was created are generally accepted by the courts. According to this rule heavier traffic over the driveway secured by the servitude would be accepted if it was foreseeable that the one-family-villa would change into a multi-family house or that a second home would be built on the servient estate.

#### 4.3.2. The Principle of Prediality

The land servitude as already mentioned can only be created and continue to exist if it benefits the dominant estate (§ 1019 BGB). For example, a land servitude intended to protect a shop keeper from a competing shop on the neighbouring estate does not serve for the benefit of the dominant estate but is only for the benefit of the present owner. Therefore it can not come into being as a land servitude. It can exist as a personal servitude but is not automatically changed into such servitude but must be created again. The rule that the servitude may exist only insofar as it serves for the benefit of the dominant estate is proven also by the provision that in case the dominant estate is divided and the servitude is for the benefit of one part of the dominant estate only, but not for the separated part, then the servitude for the separated part comes to an end (§ 1025 sent. 2). Similarly if the servient estate is divided and the split-off part is not necessary to exercise the servitude, then the split-off part of the estate is disburdened from the servitude (§ 1026 BGB). According to the Court this rule applies only if the beneficiary is restricted in the exercise of his right to a specific part of the divided estate through a binding agreement.<sup>10</sup>

#### 4.3.3. Obligatory Relations Connected with the Servitude

Although the servitude is a real burden for the servient estate and a benefit for the dominant estate without personal obligations between the owners of the estate, this is true only as a basic rule. To a certain extent the law provides for a legal relationship with obligations between the two owners. The owner of the dominant estate is obliged by law (§ 1020 BGB) to exercise his right only in the least burdensome way which protects the owner or possessor of the servient estate as much as possible. As a consequence, the law provides that the owner of the servient estate can request to change the location of the servitude, for example the location of the driveway, if this is less bothering to him and satisfies the needs of the beneficiary in a similar way (§ 1023 BGB).

If the beneficiary of the servitude is entitled to keep some kind of construction or installation on the servient estate, the owners of the estates can conclude an agreement that the owner of the servient estate has to keep the construction or in-

<sup>9</sup> BGH 14.4.2003 V ZR 323/02 = NJW-RR, 2003, p. 1235 and BGH 6.6.2003 V ZR 318/04 = NJW-RR, p. 1237.

<sup>10</sup> Cf. BGH 3.5.2002 V ZR 17/01 = NJW, 2002, p. 3021.

stallation in an ordinary condition so that the beneficiary can exercise the servitude properly (§§ 1021, 1022 BGB). The legal obligatory relationship automatically follows the servient estate as well as the dominant estate. It creates obligations for the beneficiary and for the respective owner of the servient estate.

## 5. The Reallast

The *Reallast* is a land burden which confers the right to get recurrent benefits from the real estate. In former times, benefits out of the real estate were mostly benefits from agricultural estates such as corn and vegetables, milk and meat of the animals of a farm. But benefits may also be money payments, especially annuities and pensions. Benefits to be delivered may be even services.

'Out of the real estate' is a so called real liability of the estate itself. Real liability means that it is not an obligation of the owner, but that the real estate itself will be the object of any enforcement measures. In addition the law provides that the owner of the burdened estate has a personal obligation and is personally liable that the goods or services are delivered (§ 1108 BGB). This personal liability comes with the ownership of the burdened estate and its duration is as long as the ownership. Personal liability means that the owner is not only liable with the burdened land but with all of his assets.

If the benefits are not delivered voluntarily than the beneficiary has different possibilities.

- The beneficiary may enforce his rights similar to a mortgage (*Hypothek*, §§ 1105, 1107 BGB). This means that he can file for a compulsory auction or that he can apply for a forced administration of the burdened land. Through such execution he will receive money which enables him to buy the things which were not delivered voluntarily to him.
- A second possibility for the beneficiary is to sue the person who is the owner at the time when the goods or services must be delivered to fulfil his personal obligation (§ 1108 BGB). The personal obligation which comes with the ownership also goes with the ownership, i.e. the owner is not personally liable any more if he conveys his property to a new owner. Starting with the change of ownership the new owner has to meet not only the real liability of the estate but also the personal liability for the goods and services which must be delivered during the time of his ownership. If the claim is well founded the beneficiary can enforce his rights against the owner who is liable with all his assets. The beneficiary can execute the things to be delivered or he can provide for the goods or services himself and recover the costs from the owner personally. The new owner is not personally liable if the former owner did not fulfil his personal obligations during his ownership. Insofar the beneficiary can enforce his rights only against the former owner. The real liability of the estate continues nevertheless. Therefore the burdened land will remain the object of any enforcement measures by the beneficiary, regardless of the new ownership.

- Besides the personal obligation following from the *Reallast* as a land burden there could be an additional contractual obligation. This contractual obligation does not go with the burdened estate but stays with party to the contract.

The *Reallast* nowadays is not often used under German law. But looking closer to this legal institute one could be fascinated of all the possibilities the *Reallast* offers. Beneficiary of a *Reallast* can be a specific natural or legal person (§ 1111 BGB) or the respective owner of a dominant estate (§ 1110 BGB). Contrary to the servitudes the *Reallast* is not confined to the use of the servient estate or to prevent the exercise of acts or rights connected with the ownership of the servient estate. The performance which may be object of a *Reallast* can be any good or service which can be acquired with money. Examples are the delivery of food, water or energy such as electricity or heating,<sup>11</sup> the payment of a pension,<sup>12</sup> keeping the dominant estate in a specified condition, elderly care for the seller of the estate<sup>13</sup> and many other services.

For example, the *Reallast* gives enterprises a chance to secure the delivery of goods, energy and services necessary for the production. The delivery is secured not only through the personal and contractual obligations but also through one or more burdened estates and their value. Thus German law offers a variety of land burdens which could be of advantage for everybody doing business in Germany. As far as other Member States do not offer such land burdens this could be a means of restricting free trade in the EC. Therefore a need for harmonisation exists.

The question is in which way the harmonisation should be pursued. Land burdens which affect only the burdened land through a real liability have the advantage that they do not bind the owner personally. This may result in a higher value whereas the *Reallast* creates a personal obligation for the owner which affects all his assets. The greater risk may result in a lower price for the estate and may restrict the marketability of such estate. On the other hand a buyer who has the opportunity to provide the goods or services secured by the *Reallast* has a good chance to acquire the burdened land for a good price. Thus the *Reallast* is a means to restrict the *numerus clausus* and to provide for more freedom of contract in the law of property. To introduce it into a harmonised private European law should be worth the challenge.

<sup>11</sup> Bayerisches Oberstes Landesgericht 9.12.1992 2Z BR 106/92 = *NJW-RR*, 1993, p. 530.

<sup>12</sup> BGH 25.2.1972 V ZR 27/70 = *NJW*, 1972, p. 814 and BGH 1.6.1990 V ZR 84/89 = *NJW*, 1990, p. 2380.

<sup>13</sup> BGH 13.7.1995 V ZB 43/94 = *NJW*, 1995, p. 2780.



## SERVITUDES - THE AUSTRIAN CONCEPT

### 1. Introduction

In Austria, the law of servitudes is regulated by sections 472-530 of the General Civil Code (*Allgemeines bürgerliches Gesetzbuch, ABGB*). While sections 472-529 ABGB are dedicated to *servitudes*, section 530 ABGB provides for a singular rule concerning the *Reallast*. Contrary to most other parts of the ABGB, these provisions have not been changed since 1812, the year the ABGB came into force. They, thus, still reflect the needs of the then mainly agrarian society.

Historically, the Austrian law of servitudes duly follows the concepts developed by Roman law.<sup>1</sup> This applies to the definition of the servitude by section 482 ABGB, the division into *real* and *personal servitudes* (section 473 ABGB), including the subdivision into *iura praediorum rusticorum* and *iura praediorum urbanorum* (section 474 ABGB), and even to the enumeration of specific sorts of real servitudes as provided by sections 487-502 ABGB, which comprise the traditional Roman categories of servitudes, like *iter*, *via* and *actus* (sections 492-494 ABGB), *aquae ductus* (section 497 ABGB) or *servitus stillicidii* and *servitus fluminis* (sections 489-491 ABGB) etc. The same applies to the personal servitudes of use, usufruct and the permanent dwelling right, which many Austrian lawyers are still accustomed to address by their Latin names of *usus*, *ususfructus* and *habitatio*. Section 482 ABGB defines servitudes as limited real rights to use the thing of another. The owner of the thing is obliged to tolerate an activity of the holder of the servitude or to refrain from a certain activity and, in accordance with the Latin sentence '*servitus in faciendo consistere nequit*,' cannot be obliged to an active behaviour.<sup>2</sup>

The *Reallast*, which is of Germanic and feudal origin, obliges the land owner to an active duty. It entitles the holder of the charge to demand certain services or

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<sup>1</sup> H. Klang in H. Klang and F. Gschnitzer (eds), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. 2, Wien, Verlag der Österreichischen Staatsdruckerei, 1950, p. 548.

<sup>2</sup> M. Binder, *Sachenrecht - Theorie und systematisch aufbereitete OGH-Fälle*, Wien, Verlag Österreich, 2003, p. 148.

benefits from the owner of the land. Contrary to the German Civil Code (Bürgerliches Gesetzbuch, BGB), which regulates the *Reallast* in several provisions (sections 1105-1112 BGB), the ABGB does not provide for comprehensive regulation of the *Reallast*. The ABGB itself even does not mention the term *Reallast*, which is only used by other statutes.<sup>3</sup> Section 530 ABGB only states that ‘permanent annual annuities’ are transferable and do not constitute personal servitudes. Despite this rudimentary legal basis, the *Reallast* is a commonly accepted legal instrument in Austrian law.

## 2. Servitudes

### 2.1. Object

Austrian law provides for a *unitary concept* of servitudes which applies to movable and immovable property. According to the wide definition of a thing in section 285 ABGB, the term servitude also comprises the use and the usufruct of a right.<sup>4</sup> Servitudes cannot be established with regard to an undivided share of a thing (*ideeller Miteigentumsanteil*). According to section 12 subsection 2 Land Register Law, it is, however, possible to hold a servitude on a certain part of a piece of land.

In Austria, land is subject to a multitude of regulations and restrictions by public law, e.g. zoning and building restrictions or statutory property restrictions. Some of these provisions submit private property to public use (e.g. forests, mountain areas, paths and roads, water in rivers and lakes).<sup>5</sup> These rights are often called *Legalservituten* (servitudes by law).<sup>6</sup> Legally, however, they do not constitute servitudes, but statutory property restrictions governed by public law.

### 2.2. General Principles

The servitude is defined as a limited real right to use the thing of another.<sup>7</sup> The owner of the thing is obliged to tolerate an activity of the holder of the servitude or to refrain from a certain activity (section 482 ABGB), but, in contrary to the *Reallast*, he

<sup>3</sup> E.g. section 12 Land Register Law (Allgemeines Grundbuchsgesetz 1955, BGBl 1955/39) and section 15 Law Relating to Inheritance of Farms and Forests (Anerbengesetz, BGBl 1958/106).

<sup>4</sup> Section 285 ABGB states: ‘Everything, that is different from a person and serves to the use of man, is called in the legal sense a thing.’ Austrian law, accordingly, provides for a uniform system of property law that covers tangibles and intangibles, movables and immovables, and public and private goods.

<sup>5</sup> See section 33 Forest Law (Forstgesetz 1975, BGBl 1975/440 as amended by BGBl 1987/576): right to use private forests for recreation; section 2 Aviation Law (Luftfahrtgesetz, BGBl 1957/253): right to fly over private land with aircrafts; section 8 Water Law (Wasserrechtsgesetz 1959, BGBl 1959/215 as amended by BGBl I 1997/74): right to use water in streams, rivers and lakes; section 28 Federal Road Law (Bundesstraßengesetz 1971, BGBl 1971/286 as amended by BGBl I 2002/50): right to use federal roads; with regard to other roads and paths see the road laws of the Länder.

<sup>6</sup> M. Binder, *supra* note 2, p. 161.

<sup>7</sup> M. Binder, *supra* note 2, p. 147-148.

or she is not obliged to an active behaviour.<sup>8</sup> Active behaviour, however, may be a subsidiary obligation (e.g. obligation of the owner to maintain the road which is subject to a right of way).<sup>9</sup>

The creation of the servitude needs a valid title and a modus (sections 480 and 481 ABGB). Possible titles are contract, disposition on death (testament, legacy, contract of inheritance between spouses), judicial or administrative act<sup>10</sup> or the law itself, especially by way of positive prescription. The establishment of servitudes by positive prescription is of great practical importance with respect to real servitudes. In order to obtain the servitude on the land of another the holder must prove that he or she has been exercising the right on the land for more than 30 years (sections 1460, 1468 ABGB). With respect to land owned by the state, the church or another public body, the prescription period is extended to 40 years (section 1472 ABGB). If the right is of a type that is by its nature only rarely exercised, the holder must prove that he or she has exercised the right at least three times during the prescription period (section 1471 ABGB). Good faith is a further prerequisite (section 1463 ABGB), but presumed by law (section 328 ABGB).

Necessary modus with respect to movables is transfer of possession (sections 426 *et seq.* ABGB). Servitudes on immovable property need the registration in the charges register (*C-Blatt*) of the land register.<sup>11</sup> Registration is not necessary for real servitudes acquired by way of prescription, although registration is recommended in order to hinder the unencumbered purchase of the land by a third person who acts in trust of the land register. According to consistent case law, such registration is also not necessary if the real servitude is obvious.<sup>12</sup> This opinion, however, is heavily criticised by legal scholars who see it as a clear violation of the registration principle (*Eintragungsgrundsatz*), which is a fundamental principle of the land register law.<sup>13</sup>

Servitudes must be exercised with consideration and must not be extended (section 484 ABGB).<sup>14</sup> They, except the exercise of the usufruct, are not transferable (section 485 sentence 1 ABGB) and cannot be divided (section 485 sentence 2

<sup>8</sup> H. Klang, *supra* note 1, p. 562.

<sup>9</sup> M. Binder, *supra* note 2, p. 148 and 167-168.

<sup>10</sup> Important examples are the way of necessity according to the Notwegegesetz (RGBl 1896/140 as amended by BGBl I 2003/112) and the right to transport goods over the land of another: see the Güter- und Seilwegegrundsatzgesetz (BGBl 1967/198 as amended by BGBl I 2000/39) and sections 58 *et seq.* Forest Law.

<sup>11</sup> H. Klang, *supra* note 1, p. 560-561.

<sup>12</sup> OGH 14.9.1966, 7 Ob 152/66, SZ 39/146; 14.3.1974, 2 Ob 229/73, SZ 47/29; 14.3.1996, 8 Ob 2024/96x, SZ 69/71; 27.2.2001, 1 Ob 277/00t, JBl 2001, 516.

<sup>13</sup> H. Klang, *supra* note 1, p. 562; P. Apathy, *Die publizianische Klage: das relative dingliche Recht des rechtmäßigen Besitzers*, Wien, Verlag der österreichischen Staatsdruckerei, 1981, p. 55 *et seq.*; H. Koziol and R. Welsch, *Grundriss des bürgerlichen Rechts*, vol. 1, Wien, Verlag Manz, 2006, p. 429 *et seq.*; D. Kiendl-Wendner in M. Schwimann (ed.), *ABGB - Praxiskommentar*, vol. 2, Wien, Verlag LexisNexis, 2005, § 481, No. 10.

<sup>14</sup> 'Servitus civiliter exercenda;' M. Binder, *supra* note 2, p. 149.

ABGB).<sup>15</sup> Partition of the dominant or servient tenement, however, does not affect the servitude, which continues to exist on the parts of the thing.

Nobody can hold the servitude on his or her own property. Thus the servitude extinguishes, if the owner becomes the holder of the servitude and vice versa (section 526 ABGB). Servitudes which are registered in the land register, however, need formal cancellation in the land register to be extinct. Until then they continue to exist as ‘dormant’ servitudes, which may revive if ownership of the thing and entitlement to the servitude get separated again.

### 2.3. *Types*

#### 2.3.1. Real Servitudes

Section 473 ABGB distinguishes two kinds of servitudes: real servitudes (*servitudes reales*) and personal servitudes (*servitudes personales*). Real servitudes are a charge on one piece of land (servient tenement) for the benefit of the owner of another piece of land (*dominant tenement*). This *utility principle* is a basic requirement for real servitudes.<sup>16</sup> It is, however, not handled in a strict way. Only if the servitude is totally useless, inefficient or if it cannot be exercised at all, it is extinguished.<sup>17</sup>

The ABGB provides for a multitude of different sorts of real servitudes. Section 474 ABGB distinguishes between rural servitudes (*Feldservitute*) and ‘house’ servitudes (*Hausservitute*). In the following sections the ABGB then enumerates and defines specific kinds of servitudes. ‘House’ servitudes consist, according to the general distinction, either of the positive right to use the neighbour’s house for construction purposes<sup>18</sup> or, in the negative form, as the obligation of the owner of the servient tenement not to exercise a certain right (section 475 ABGB), such as the right to raise or lower a building or to block the neighbour’s view or block out light or air (sections 476, 488 ABGB). Rural servitudes comprise of the right of way (sections 492 *et seq.* ABGB), the right of pasture (section 498 *et seq.* ABGB), the right to draw water (section 496 ABGB) and to transport water (section 497 ABGB) or various rights concerning the exploitation of forests (section 503 ABGB) etc. Real servitudes are of high practical relevance for the relationship between neighbouring estates.

<sup>15</sup> M. Binder, *supra* note 2, p. 151-152.

<sup>16</sup> K. Hofmann in P. Rummel (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. 1, Wien, Verlag Manz, 2000, § 473, No. 2.

<sup>17</sup> OGH 25.6.1996, 1 Ob 622/95, NZ 1997, 213; 4.2.1999, 4 Ob 340/98y, NZ 2000, 215; G. Iro, *Bürgerliches Recht IV – Sachenrecht*, Wien, Springer Verlag, 2002, p. 186; D. Kiendl-Wendner, *supra* note 13, § 524, No. 5.

<sup>18</sup> Section 475 ABGB names the right to put the weight of a building on the building of another, the right to put a girder or a rafter into the wall of another, the right to open a window in the neighbour’s wall, the right to build a roof or oriel over the neighbour’s airspace, the right to use the neighbour’s chimney etc.

### 2.3.2. Personal Servitudes

With personal servitudes the entitlement lies with a certain person. Personal servitudes are not transferable and, in principle, extinguish with the death of the beneficiary, but may be explicitly extended to the heirs (section 529 ABGB). The ABGB describes three types of personal servitudes: use, usufruct and habitatio.

The right of use (*usus*) entitles the holder to use the thing of another for his/her personal needs without affecting the substance of the thing (section 504 ABGB). The right of use can be established with respect to all types of things, be it immovables, movables, tangibles and intangibles. With regard to consumable things, the right of use (as well as the right of usufruct) relates to the value of the thing (section 510 ABGB). The holder then becomes the owner of the thing, and, after the extinction of the right, he or she is obliged to return a thing of the same kind, or, to reimburse the owner the estimated value. The right of use is closely connected to the needs of the holder according to the point in time when the use is established. It is, thus, not transferable and, without the consent of the owner, cannot be leased<sup>19</sup> or be the object of execution.<sup>20</sup> Although the extent of the right of use is measured according to the personal needs of the beneficiary, the assessment is not made on a strictly subjective but on a somehow generalised basis.<sup>21</sup> The duty to maintain the object of the right of use is upon the owner (section 508 ABGB), who is also entitled to use the thing as far as it is not needed by the beneficiary. Only if maintenance costs exceed the profit which the owner gains from the thing, the beneficiary must either pay the difference, or, renounce the right. Examples for the right of use are the use of a garage,<sup>22</sup> of an escalator<sup>23</sup> and the use of housing facilities,<sup>24</sup> which play an important practical role.

Usufruct (*ususfructus*) is comparable to the right of use, but of a more comprehensive nature. Like the use, it can be established with regard to all sorts of things, including movables and claims. Section 509 ABGB defines the usufruct as the right to use the thing of another in preservation of its substance without any constraints. The usufruct thus comprises all rights connected to the use of a thing, such as the right to administer the property, including the conclusion of leasing contracts,<sup>25</sup> and the entitlement to all profits derived from the thing. The usufructuary becomes the owner of the natural fruits of the thing already upon detachment from the thing, while the beneficiary of the right of use has to appropriate the fruits in order to obtain ownership. Contrary to the beneficiary of a use, the usufructuary is obliged to maintain the thing and to bear the maintenance costs, including taxes and other public charges, as far as they can be covered by the profits gained from the thing (sec-

<sup>19</sup> G. Iro, *supra* note 17, p. 182; D. Kiendl-Wendner, *supra* note 13, § 507, No. 2.

<sup>20</sup> OGH 13.7.1956, 7 Ob 301/56, JBl 1957, 267.

<sup>21</sup> OGH 25.2.1953, 1 Ob 160/53, SZ 26/49.

<sup>22</sup> OGH 2.7.1975, 8 Ob 137/75, SZ 48/78.

<sup>23</sup> OGH 3.5.1966, 4 Ob 502/66, EvBl 1966/405, p. 521.

<sup>24</sup> OGH 6.11.1980, 1 Ob 715/80, JBl 1982, 212; 22.4.1981, 3 Ob 681/80, MietSlg 33.045; 13.10.1983, 7 Ob 638/83, NZ 1984, 232; 13.1.1998, 8 Ob 55/97i, wobl 1998/205.

<sup>25</sup> D. Kiendl-Wendner, *supra* note 13, § 509, No. 7 *et seq.*

tion 513 ABGB). The usufructuary is also obliged to bear the interests costs (but not the repayment of the capital) of charges that were already in effect when the usufruct was established (section 512 ABGB). The responsibility for attrition caused by the proper use of the thing lies with the owner, and for damage to the thing the usufructuary is only liable if fault can be established.

The right of usufruct cannot be transferred from one person to another. It is, however, permissible to leave the exercise of the usufruct to another person, who is then entitled to use the thing, while the original usufructuary stays obliged to fulfil the duties deriving from the right towards the owner.<sup>26</sup>

The right of *habitatio* constitutes the real right to use a dwelling owned by another. Although it is described in section 521 ABGB as a specific type of personal servitude, it is in its nature either use or usufruct and follows the rules provided for these servitudes.<sup>27</sup>

### 2.3.3. Irregular Servitudes

It is also possible that a real servitude is created for the benefit of a certain person or that the current owner of a certain piece of land is the beneficiary of a personal servitude. These mixed types are called ‘irregular servitudes’ (section 479 ABGB).<sup>28</sup> Of great practical importance are the right of way<sup>29</sup> and the right to use the land of another for downhill skiing<sup>30</sup> acquired by way of prescription by communities and even tourism organisations, like alpine organisations,<sup>31</sup> which open private land for public use and, thus, play an important role for recreational purposes and the tourism industry.

<sup>26</sup> OGH 22.10.1991, 5 Ob 114/91, NZ 1992, 155 (*Hofmeister*); D. Kiendl-Wendner, *supra* note 13, § 509, No. 6.

<sup>27</sup> M. Binder, *supra* note 2, p. 155.

<sup>28</sup> See H. Klang, *supra* note 1, p. 557-558.

<sup>29</sup> OGH 5.10.1927, Ob II 956/27, SZ 9/163; 3.11.1981, 5 Ob 709/81, SZ 54/154; 30.10.1995, 2 Ob 570/95, JBl 1996, 511 etc.; see F. Merli, *Öffentliche Nutzungsrechte und Gemeingebrauch*, Wien, Springer Verlag, 1995, p. 352; K. Hofmann, *supra* note 16, § 479, No. 1 *et seq.*; M. Hinteregger, ‘Wandern, Klettern, Alpinbergsteigen,’ in M. Hinteregger (ed.), *Trendsportarten und Wegefreiheit*, Wien, Verlag Österreich, 2005, p. 37-68; D. Kiendl-Wendner, *supra* note 13, § 480, No. 9 *et seq.*

<sup>30</sup> OGH 19.4.1961, 1 Ob 178/61, SZ 34/59; 5.4.1972, 1 Ob 52, 53/72, SZ 45/39; 16.6.1977, 6 Ob 550/77, SZ 50/91; 16.12.1977, 2 Ob 576/77, JBl, 1 1979, 427 etc.; P. Reindl, ‘Zur Ersitzung von Schiabfahrten,’ *JBl*, 1969, p. 592 *et seq.*; R. Sprung and B. König (eds), *Das österreichische Schierecht*, Innsbruck, Universitätsverlag Wagner, 1977; R. Sprung and B. König, ‘Der Umfang der ersessenen Dienstbarkeit der Schiabfahrt – eine Judikaturanalyse,’ *Österreichische Juristenzeitung*, 1979, p. 209 *et seq.*; J. Aicher, ‘Die Dienstbarkeit der Schiabfahrt – eine Judikaturanalyse,’ *JBl*, 1979, p. 412 *et seq.*; K. Grabenwarter, ‘Schisport und Grundeigentum, Fragen der Rechtsgestattung,’ *Notariatszeitung*, 1980, p. 81 *et seq.*; H. Schwamberger, ‘Zur rechtlichen Situation bei der Inanspruchnahme von Waldgrundstücken durch Wintersportausübung,’ *Zeitschrift für Verkehrsrecht*, 1980, p. 257 *et seq.*; J. Pichler and W. Holzer, *Handbuch des österreichischen Ski-rechts*, Wien, Orac Verlag, 1987.

<sup>31</sup> M. Hinteregger, *supra* note 29, p. 52; OGH 4.5.2004, 4 Ob 96/04b, EvBl 2004/198, p. 892.

## 2.4. Protection of Servitudes

As possessor of the thing, the holder of the servitude is entitled to possessory protection against disturbance or deprivation of possession by third persons according to sections 339 *et seq.* ABGB. In order to protect the right (not only the possession), section 523 ABGB provides for a specific claim, the *actio confessoria*, which entitles the holder of the servitude to an injunction against disturbance of the right by the owner of the thing or by third persons. It covers the abatement of nuisance, restitution and, under the condition that fault and damage can be shown, compensation of damage.<sup>32</sup> Section 523 ABGB further entitles the holder of the servitude to sue the owner of the thing for a declaratory judgment in order to ascertain the existence and the extent of the right.<sup>33</sup>

## 2.5. Extinction

Reasons for the extinction of servitudes are expiration of the stipulated time (section 527 ABGB) and the occurrence of a stipulated resolutive condition (section 528 ABGB). Destruction of the servient or dominant tenement renders the servitude 'dormant' which means that the servitude cannot be exercised but may revive in case of reconstruction of the thing (section 525 ABGB). Real servitudes further extinguish, if they become totally useless, inefficient or unexercisable,<sup>34</sup> and personal servitudes end with the death of the holder, unless they are extended to the heirs (section 529 ABGB).

The right of servitude is prescribed, if the beneficiary has not been exercising the right during a period of 30 (sections 1460, 1468 ABGB) or, with regard to legal persons, 40 years (sections 1485, 1472 ABGB). If the right is of a type that is only rarely exercised, abstention from the use of the right for at least three times during the prescription period is sufficient (section 1484 ABGB). Section 1488 ABGB also provides for the *usucapio libertatis*. The servitude is extinguished if the person who is charged by the servitude hinders or impedes the exercise of the servitude and the holder does not assert the right during the period of three years. Even oral prohibition may be sufficient, if it has the effect that the holder does not exercise the right.<sup>35</sup>

## 3. Reallast

Section 530 of the ABGB provides for a further charge on land, which entitles the holder of the charge to demand certain services or benefits from the owner of the land, be it maintenance of the community bull,<sup>36</sup> or of a local monument,<sup>37</sup> or the

<sup>32</sup> According to the Roman *actio Publiciana*, it is sufficient that the claimant can show that his or her right to possess the thing is of a better quality than the defendant's right (see sections 372 *et seq.* ABGB).

<sup>33</sup> M. Binder, *supra* note 2, p. 163-164.

<sup>34</sup> See above 2.2.

<sup>35</sup> OGH 19.9.1994, 4 Ob 562/94, NZ 1995, 105.

<sup>36</sup> OGH 10.11.1869, No. 12.684, GIU 3561.

provision of water or electric energy. The right may be attached to the ownership of a certain piece of land (*Praedialreallast*) or only to a certain person (*Personalreallast*). The *Reallast* is transferable and seizable.<sup>38</sup>

In contrast to the real servitude, the obligation to perform the active duty does not constitute an accessory obligation in order to facilitate the exercise of the right, but the main obligation of the land owner. The *Reallast* mainly serves maintenance and not security purposes as is the principal function of the hypothec.<sup>39</sup> Contrary to the hypothec, the *Reallast* establishes a personal obligation of the land owner who is personally obliged to perform the duty as long as he or she is the owner of the charged land.<sup>40</sup> According to the maintenance purpose of the *Reallast*, the extent of the obligation does not depend on the revenues derived from the charged land, but is assessed according to the needs of the holder and the economic capacity of the land owner.<sup>41</sup> Usually, the *Reallast* obliges the land owner to periodic performances. It is, however, permissible to oblige the land owner to a singular activity, e.g. to pay the price for the land,<sup>42</sup> or, to construct or demolish a building.<sup>43</sup>

As a real right to immovables, the creation of a *Reallast* needs the intabulation in the land register, which must define the contents and the scope of the right as exactly as possible (sections 9, 12 Land Register Law). The creation and extinction of the *Reallast* follow the same rules as the servitude. The rules concerning the *usucapio libertatis* are, however, not applicable, and, contrary to the servitude, it is possible to charge an undivided share of a thing (*ideeller Miteigentumsanteil*) with the *Reallast*.<sup>44</sup>

Generally, the *Reallast* is of low practical importance. One exception is the *Ausgedinge*, a specific type of *Reallast* commonly used in case of the transition of farms from the older to the younger generation.<sup>45</sup> It obliges the successor to supply the retiring farmer with money payments, products or certain services. The *Ausgedinge* serves the maintenance of the retiring farmer. It is thus strictly personal and cannot be transferred to another person.

<sup>37</sup> OGH 17.4.1901, No. 4.930, GIUNF 1377.

<sup>38</sup> G. Iro, *supra* note 17, p. 188-189.

<sup>39</sup> OGH 8.4.1997, 5 Ob 81/97s, NZ 1998/404 (*Hoyer*).

<sup>40</sup> OGH 5.11.1931, 2 Ob 1047/31, NZ 1932, 150.

<sup>41</sup> D. Kiendl-Wendner, *supra* note 13, § 530, No. 7.

<sup>42</sup> LG Salzburg 23.10.1987, 33 R 211/87, NZ 1988/122 (*Hofmeister*).

<sup>43</sup> OGH 18.11.1925, Ob I 941/25, SZ 7/371.

<sup>44</sup> G. Iro, *supra* note 17, p. 189.

<sup>45</sup> OGH 3.12.1959, 5 Ob 465/59, SZ 32/158.



The holder is, however, allowed to assign claims that have already become due, and, within certain limits, the *Ausgedinge* is seizable.<sup>46</sup>

<sup>46</sup> G. Iro, *supra* note 17, p. 190; K. Hofmann, *supra* note 16, § 530, No. 5; M. Binder, *supra* note 2, p. 169; D. Kiendl-Wendner, *supra* note 13, § 530, No. 9.



## THE FRAGMENTED SYSTEM OF LAND BURDENS IN FRENCH AND BELGIAN LAW

### 1. Introduction

Broadly speaking, legal systems can have two approaches to land burdens. One approach is to have a uniform approach, providing for general requirements which apply to all land burdens, whatever may be their name or category. This is the American model, which has been adopted in the (third) Restatement of Property in 2000. The most obvious advantage of this approach is that the standards for the different types of land burdens are coherent.

Another approach is to recognize a fragmented system of land burdens, providing for different rules for each type of land burden which is legally recognized. This is the French-Belgian approach. The French and Belgian law on real burdens is characterized by fragmentation. Both French and Belgian law permit different types of limited real rights, each type attributing different powers to their holder and each type subject to different requirements.

In the original Civil Code, only one specific real burden was provided, i.e. servitudes. Through the development of case law and statutory amendments, both Belgian and French law have different degrees of powers which can be conferred to the holder of a property right on an immovable: servitudes, building rights, long leases, (immovable) usufruct, including the rights of use and habitation. There are different manners in which these limited property rights can be categorized: (1) the rights which are vested in favour of another parcel and the rights which have no connection with another parcel, (2) the rights conferring general rights to use another's land and the rights conferring a specific right to use another's lands, (3) the rights which have been awarded by the legislator in order to organize a cost-effective system of land burdens and the rights which have been awarded in order to enable parties to make land more effective for their own purposes. All these distinctions result in the same borderline between, at the one side, servitudes and, at the other side, the general real burdens such as long leases, building rights and im-

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movable usufruct. The servitudes will, for that reason be subject to a more in depth analysis in this contribution.

In this contribution, we shall first give an overview of the different existing limited property rights in real estate. We will focus in particular on the extent and borderlines of these rights, in order to determine the limits of the real burdens. In a second stage, we will deal with the possibilities to create land burdens which have not been regulated by the legislator. Furthermore, we will deal with the historical and legal-economic rationale for the borderlines which will have been detected. Finally, we will analyse whether these borderlines enable a flexible approach if, after the collapse of a certain time, the land burden has become useless or obsolete. This *a posteriori* analysis is also necessary in order to evaluate the cost-effectiveness of the French-Belgian system of land burdens.

The provisions of the French Civil Code are still the basis of Belgian property law, at least in so far as they have not been amended since then. Moreover, Belgian legal scholars and case law have been subject to the major influence of French law on this point. Therefore, we will give an analysis which encompasses both legal systems, and will only distinguish on these aspects where French and Belgian law have opted for different solutions.

## 2. Overview of the Limited Property Rights in Real Estate

### 2.1. Servitudes

As to servitudes, French and Belgian law have remained unchanged since the introduction of the Civil Code in 1804. Article 637 of the French and Belgian Civil Code provides a mandatory definition with strict requirements: a servitude is 'a charge imposed on a real estate for the use and utility of another real estate belonging to another owner.'<sup>1</sup> A servitude only allows a limited use of the servient tenement which has to be described expressly when the servitude is created. They are different from the general rights to use a land, as it is conferred to the holder of a long lease or (to a certain extent) to the usufructuary of a land.

Three requirements can be set out as essential characteristics of servitudes: (1) it is a burden on land (2) in favour of land and (3) the servient tenement and the dominant tenement have a different owner.

1. The first requirement is that the passive side of the servitude must have an objective nature, e.g. it must be a burden on the servient tenement, not on its owner. The objective nature of the servitude at its passive side is equated to its negative nature. A servitude can only compel the owner of the servient tenement to passive behaviour, i.e. an obligation not to do something (*'non faciendo'*). This passive obligation can take two forms: either the owner of the servient tenement can not

<sup>1</sup> This translation and all other English translations from the Civil Code which are used hereunder, are based on the translation on the French governmental website: <<http://www.legifrance.gouv.fr>>. Given the inadequacy of some wordings, there have been some adaptations.

make a specified use of his land which he would have been entitled to if the land had not been burdened, or the owner of the dominant tenement can make a specified use of the servient tenement which he would not have been entitled to make if the land had not been burdened.

A positive obligation can not be constitutive for a servitude, because that would be a burden on the person of the owner of the servient tenement, not on the servient tenement itself. For instance: an obligation to supply the owner of the servient tenement with certain goods<sup>2</sup> or an obligation to construct a building within a certain time-limit<sup>3</sup> are incompatible with a servitude. That is also the case for the obligation of the owner who runs a bar in his building to buy beer from the brewery which is the owner of the bar.<sup>4</sup> These rights are purely contractual and do not run with the servient tenement, e.g. in case of a sale the new owner will normally not be bound by this obligation.

2. A servitude must be objectively useful to the dominant tenement. In other words, the servitude must be useful to the ownership of the land as such, without taking into account the actual owner.<sup>5</sup> A right to hunt or to fish on a neighbouring parcel merely constitutes a personal relationship between neighbours, but not a (real) servitude.<sup>6</sup> Such a right is vested in the exclusive interest of the actual owner of the dominant tenement.<sup>7</sup>

This does not exclude the servitude from being profitable for the current owner personally: the mere fact that the burden grants a personal favour to the owner of the one parcel does not defer its qualification as a servitude if the charge has a direct relationship with the use of the land. It is sufficient that the servitude gave rise to the increased value of the land, and this almost always grants an indirect advantage to the owner of that land.<sup>8</sup>

<sup>2</sup> E. Dirix, *Obligatoire verhoudingen tussen contractanten en derden*, Antwerp, Kluwer, 1984, p. 34, No. 24; L. Lindemans, 'Erfdienstbaarheden,' in *Algemene Praktische Rechtsverzameling*, Brussel, Larcier, No. 140 et seq.

<sup>3</sup> H. De Page, *Traité élémentaire de droit civil belge*, Brussel, Bruylant, 1964, VI, p. 402, No. 498.

<sup>4</sup> Ghent 8 May 1895, *Pasicrisie* 1895, II, 391; H. De Page, *supra* note 3, VI, p. 402, No. 498.

<sup>5</sup> R. Dekkers, *Handboek Burgerlijk Recht*, Brussel, Bruylant, 1971, I, p. 711, No. 1343; H. De Page, *supra* note 3, VI, No. 501: 'La servitude doit présenter de l'utilité pour quiconque sera en droit d'user de tel fonds; elle s'attache à la qualité de propriétaire'; R. Derine, F. Van Neste and H. Vandenberghe, 'Zakenrecht,' in *Beginselen van Belgisch Privaatrecht*, Antwerp, Standaard, 1974, IIB, p. 599-600, No. 921C. It is not required that the servitude provides an economic advantage. The advantage can also exist in the more comfortable use of the dominant tenement or in an intellectual advantage. A traditional example is that of the right to maintain the view over the adjacent parcel (H. De Page, *supra* note 3, VI, No. 496).

<sup>6</sup> For a more moderated view: B. Bouckaert, 'Een moderne zingeving voor juridische brocante. De "tragedy of the anti-commons" en de erfdienstbaarheden,' in K. Bernauw (ed.), *Liber amicorum Yvette Merchiers*, Bruges, Die Keure, 2002, p. 959, No. 18.

<sup>7</sup> R. Derine, F. Van Neste and H. Vandenberghe, *supra* note 5, IIB, No. 922. See also Liège 28 March 1908, *Pasicrisie* 1908, II, 329.

<sup>8</sup> Cass. 28 January 2000, *Arresten van het Hof van Cassatie* 2000, 76 and *Revue du notariat belge*, 2000, 226, note J. Sace: 'les termes des articles 637 et 686, alinéa 1er, du Code civil, sur lesquels se fonde le moyen, ne peuvent être pris dans leur sens littéral; que le service foncier profite toujours à des personnes; qu'il y a servitude dès que le service est en rapport direct et immé-

We can refer to a recent case which the French Cour de cassation was confronted with: A sells to B a commercial building, and in the purchase agreement it is agreed that B can not start up a bakery, in honour of the memory of mister X, who was a predecessor of A. B re-sold the commercial building afterwards to C, and the prohibition is not repeated in the agreement of re-sale. The *Cour de cassation* ruled that the prohibition to use the real estate for a specific purpose is of personal nature.<sup>9</sup>

3. The servient tenement and the dominant tenement belong to different owners. If the servient tenement and the dominant tenement belong to the same owner, the use of the servient tenement is not the expression of a limited property right, but is the mere exercise of the ownership. In that case, there is no servitude. We will not deal with this requirement anymore in the analysis below.

It is not always very obvious whether the passive and active side of the land burden comply with the objective nature. There remains a considerable amount of legal uncertainty with regard to the (contractual or proprietary) nature of some clauses, for instance non-competition clauses. These are clauses inserted in the sale of a commercial building which prohibits to the purchaser to use the building for specified commercial purposes. Some consider such a clause to be only useful to the business activities of the current owner, while others recognise an obvious link with the interest of the dominant land itself.<sup>10</sup> De Page advocates that the qualification of these clauses must be judged according to the specific circumstances of each case, e.g. whether the clause is objectively useful for another real estate of the seller. It can only be considered a servitude if, for instance, the dominant tenement is especially equipped for the purpose of the business activities involved.<sup>11</sup> The French *Cour de Cassation* seems more favourable to the proprietary effects of these clauses in recognizing that they can be opposed to the purchaser of the burdened land.<sup>12</sup>

The fragmentation of French and Belgian property law influences even the structure of this property right. A large number of servitudes can be distinguished, such as rights of passage, building restrictions, prohibitions to commercialize land, prohibitions to affect real estate to a certain destination, etc. A major distinction can

diat avec l'usage et l'exploitation d'un fonds, n'eût-il d'autre effet que d'accroître la commodité de cet usage et de cette exploitation; que, par cette commodité accrue, le service procure au fonds une plus-value et est donc établi pour ce fonds, au sens des dispositions légales précitées.' See also Cass. 16 May 1952, *Pasicrisie* 1952, I, 597.

<sup>9</sup> Cass. fr. 4 July 2001, *Bull. civ.*, III, No. 94, D. 2002, 433, note R. Libchaber, *Revue Trimestrielle de Droit Civil*, 2002, 125, note T. Revet and J.C.P. 2002, I, No. 126, No. 17, note H. Perinet-Marquet: 'L'interdiction faite à l'acquéreur d'un fonds immobilier de l'affecter à un usage déterminé peut revêtir le caractère d'une obligation personnelle.'

<sup>10</sup> A personal obligation: Brussels 25 July 1906, *Bull. jur.* 1906, 1169; Trib. Antwerp 16 June 1922, *Pasicrisie* 1923, III, 143; Trib. Liège 22 June 1910, *Pasicrisie* 1910, III, 288; F. Laurent, *Principes de droit civil français*, Brussels, Paris, Bruylant-Cristophe & Ce Librairie A. Marescq, 1898, VII, No. 146. A servitude: Brussels 29 March 1933, *Pasicrisie* 1933, II, 189.

<sup>11</sup> H. De Page, *supra* note 3, VI, No. 502 *et seq.*

<sup>12</sup> Cass. fr. 24 March 1993, *Bull. civ.*, III, No. 45, *Revue Trimestrielle de Droit Civil*, 1993, 853, note F. Zenati; Cass. fr. 15 July 1987, *Bull. civ.*, IV, No. 184, *Dalloz* 1988, jur., 360, note C. Atias and C. Mouly, *Revue Trimestrielle de Droit Civil*, 1989, 351, note F. Zenati.

be made on the basis of the source of the servitudes: servitudes can come into existence in different ways. They can be contractually agreed upon by the adjacent owners, but they also come into existence by force of law. The Civil Code has contractualized most of the servitudes existing in the feudal regime, but has nevertheless maintained some legal servitudes. Two of the most important legal servitudes are the right of passage and the servitude of 'views and windows.'

The legal servitude of way is governed by article 682 and further of the French and Belgian Civil Code. An owner whose tenements are enclaved and who has no way out to the public road, or only one which is insufficient either for an agricultural, industrial or commercial purpose of his property, or for carrying out operations of building or development, is entitled to claim on his neighbours' tenements a way sufficient for the complete purpose of his own tenement (art. 682 C.C.). The owner of the burdened land can appeal for a compensation in proportion to the damage the servitude may cause.

The servitude of views and windows burdens each land, restraining the possibility to have views or windows too close to the borderline with the adjacent parcel. It is prohibited to have windows or views in a common wall (art. 675 C.C.), and views are even restricted in a proper wall: One is not allowed to have straight views or low windows, or balconies or similar access to a view over the neighbour's property, if there is not a distance of nineteen decimetres between the wall in which they exist and the said property, unless the tenement or the part of the tenement which is the object of the view, is already burdened, for the benefit of the tenement which profits by it, with a servitude of way which prevents the erecting of constructions. One may not even have side or oblique views on the same property, unless there is a distance of six decimetres (art. 678-679 C.C.). The reason behind these legal land burdens are obvious: to avoid that the privacy of the neighbour can be violated or that quarrels between neighbours are concluded in physical ways by throwing things from one parcel to another.

In exercising the servitude, the owner of the dominant tenement must take into account different restrictions. The most important is the restriction that he may only use the servitude in accordance with his instrument of title, without being allowed to make, either on the tenement which owes the servitude, or on the tenement to which it is due, any change which would render the condition of the former more burdensome (art. 702 C.C.). This provision contains two obligations: (1) the owner of the dominant tenement may not make a use of the servitude which goes beyond the contractual or legal restriction of the servitude and (2) even if the borders of the servitude are respected, the owner of the dominant tenement may not enhance or change the servitude in such way that he deteriorates the position of the owner of the servient tenement. The classic example is that of a pass way which was constituted to be used for family purposes, and which is now used by tourists because the owner of the dominant tenement has decided to start up camping facilities on his land.

## 2.2. Long Lease

The long lease (*emphyteusis*) is the most general property right a non-owner can have on an immovable asset. Long lease is defined by the Belgian legislator as the 'property right to have the full enjoyment of a real estate belonging to someone else, under the obligation to pay to the latter an annual compensation in money or in proceeds or fruits.' Both French and Belgian statutory law emphasize the proprietary nature of the long lease rights. It grants to the long leaseholder a general right to use an immovable asset for a long period. He is merely subject to one restriction: he may not diminish the value of the real estate. The long leaseholder is not obliged to maintain the destination to which the real estate was affected by the ground owner. The long leaseholder can erect buildings on the real estate, without any restriction.<sup>13</sup>

Long leases have been created in Roman law, where they enabled the leaseholder to farm extensive lands which the owner would otherwise have left fallow. The occupation of the land was favourable both to the leaseholder, who could ensure an income of land farming, and to the owner, who could upgrade the value of his immovable assets.

The Codification Commission of the Civil Code did not recognize the long leasehold as a type of property right. The underlying idea was that this property right, because of its long duration and extensiveness, created a burden which risked to erode the land ownership.

This property right was re-introduced in *French law* only in the Rural Code of 25 June 1902. Nowadays, the statutory provisions on long leasehold can be found in L-451-1 to 451-13 of the Rural Code. However, French case law has never ceased to recognize this property right, even in the period that the statute remained silent on this issue.

As far as *Belgian law* is concerned, the long lease right was re-introduced in 1824, when Belgium was part of the Dutch Kingdom. The Act of 10 January 1824 provides for statutory rules with regard to the long lease. This Act has remained unamended since 1824, even if the economic development of long lease has been very fast and radical during the last decades. Long lease has for a long time been rather anonymous for the real estate practitioners, but this has been a frequent instrument in real estate commercialization during the last decades of the 20<sup>th</sup> century.

Contrary to more modern Codes (e.g. Dutch Civil Code), long leaseholds are restricted in time. In French law, a long lease agreement has a minimum duration of 18 years and a maximum duration of 99 years, in Belgium law the duration must be between 27 years and 99 years. This long duration has its historical background in the Roman period, in which it was meant to ensure the use of the land for a long period (cf. *supra*). A renewal is possible, but can only be agreed upon at the end of the initial term.

<sup>13</sup> Normally, the long leaseholder will not be entitled to any compensation at the end of the long lease for the surplus value, but parties can agree in another way.



In the last decades, long leasehold agreements have been subject to a revival. They have become fairly common in Belgian and French business practice because they are frequently used in leasing operations with regard to immovable assets. Moreover, it is common that public authorities realize projects of public interests in co-operation with private partners, for instance sports infrastructure, concert halls, parking spaces, etc. It is not unusual that the public partner grants to the private partner the free use for a long term of grounds belonging to the public partner, and stipulates that the private partner must build public infrastructure which must comply with certain conditions of public interest.

The economic attractiveness of long leaseholds is caused by the flexibility of these rights. The parties have been awarded very large freedom to model a long lease agreement. The only two requirements they have to comply with, are the limitations with regard to the duration, and the obligation to agree upon a compensation. Other requirements are not set out, but parties can however not denature the rights of a long leaseholder. If the rights which have been installed, do not meet the essential characteristics of a long lease, the judge can – in spite of the qualification as long lease – give another qualification to the agreement

### 2.3. *Building Rights*

Another way to burden real estate with property rights, is the creation of a building right (*superficies*). A building right creates a splitting up of the ownership of immovables in horizontal perspective. A building right is the right to have buildings, works or plants on the land of another.<sup>14</sup> The ownership of the land is separated from the ownership of the buildings. In other words, building rights deprive the land owner of the ‘immovable accession.’ The creation of a building right is a contractual deviation from the *‘superficies solo cedit’* rule.

In French law, there are no specific statutory rules with regard to building rights. The recognition of building rights can be found implicitly in article 553 of the Civil Code.<sup>15</sup> This provision states that ‘all constructions, plantings and works on or inside a piece of land are presumed made by the owner, at his expenses and belonging to him, unless the contrary is proved.’ The reversibility of the presumption would be the ground for the existence of building rights.

In Belgian law, the legislator has enacted specific statutory rules with regard to building rights in the Act of 10 January 1824.<sup>16</sup> Except for the duration of the building right, all the provisions of this Act are of supplementary law. Parties can deviate contractually, and they often make use of this possibility. This is one of the reasons for the revival of building rights in the last decades.

A major difference between French and Belgian law exists with regard to the duration of building rights. Belgian law takes a strict starting point. Building rights

<sup>14</sup> This is the definition of art. 1 of the Belgian Act with regard to building rights. See, in French law: M. Planiol and G. Ripert, *Traité pratique de droit civil français*, Parijs, L.G.D.J., 1952-1960, III, p. 314, No. 330.

<sup>15</sup> C. Larroumet, *Droit civil. Les biens*, Paris, Economica, 1995, p. 432, No. 754.

<sup>16</sup> *Official Gazette of the Duch Kingdom*, 1824, No. 13.

can only be constituted for a maximum period of 50 years. If the holder of the building right does not exercise his powers conferred to him, his right will come to an end through prescription after 30 years. French case law allows the constitution of building rights far beyond the time limits imposed by Belgian law. It is possible to constitute, according to French law, a perpetual horizontal splitting up of a building right. Immovable accession to the ground is excluded eternally for the future.<sup>17</sup> Moreover, the building rights can not come to an end due to non-use. In other words, extinctive prescription is excluded.<sup>18</sup> Even if the holder of the building right does not exercise that right for more than 30 years, the right will persist. The fact that the right has become useless or economically harmful, is not taken into account.<sup>19</sup>

The distinction between Belgian and French law is remarkable. It can be attributed to the different way in which the building rights have been re-introduced in French and Belgian law. In Belgian law, building rights have been enacted by the 1824 Statute, in which the Revolutionary ideas and emphasis on the indivisibility of ownership is still reflected. French law, on the other hand, has come to the recognition of building rights in a more organic way by case law.

There is a theoretical discussion going on in French law with regard to the question whether a building right can be seen as a 'land burden.' Some scholars argue that there is no land burden, as the holder of the building right and the owner of land are to be considered as different full owners with regard to a different object.<sup>20</sup> Whatever may be the result of the debate, it cannot be denied that factually the building right restricts the powers of the land owner and burdens the land. Therefore, it must be considered, economically speaking, as a land burden.

According to Belgian law, each derogation to the principle of accession is to be considered as the constitution of a building right. The Belgian Supreme Court has ruled that each waiver of accession by the land owner creates a building right. Leaving aside the tax consequences, this case law has as its main result the fact that the waiver of accession by the land owner is also subject to the upper limit of 50 years.<sup>21</sup> In this way, Belgian case law has aimed to protect the legal and physical indivisibility of ownership. This strict time constraint is the basis for a large amount of problems for real estate practitioners because it makes it impossible to create different investment schemes for different horizontal shelves of a same parcel of land. If a supermarket is built in the underground under a complex of apartment buildings, it is rather uncertain whether accession will not apply after 50 years. This situation is disadvantageous for both the owner of the underground and the owner(s) of the apartments.

<sup>17</sup> C. Larroumet, *supra* note 15, p. 439, No. 762.

<sup>18</sup> Req. 27 April 1891, Sirey 1891, 1369, note Labbe, Dalloz 1892, I, 219. Cf. Cass. fr. 16 December 1873, Dalloz 1874, I, 249 and Sirey 1874, I, 457, note J. Labbe.

<sup>19</sup> We will see that French law lacks generally for sensitivity for the restriction or termination of harmful or useless land burdens (cf. *infra*, 4.1 and further).

<sup>20</sup> C. Larroumet, *supra* note 17, p. 429, No. 751.

<sup>21</sup> Cass. 19 May 1988, *Pasicrisie* 1988, I, 1142, *Rechtskundig Weekblad* 1988-89, 572.

## 2.4. *Usufruct*

The right of usufruct is not a typical real burden. It may be established on any kind of movable and immovable property (art. 581 Civil Code). The same statutory provisions apply to movable and immovable usufruct. In the following paragraphs, we will limit ourselves to the right of usufruct on immovables.

Article 578 of the French and Belgian Civil Code describes usufruct as ‘the right to enjoy things of which another has ownership in the same manner as the owner himself, but on condition that their substance be preserved.’ This definition can however be criticised, as the usufructuary can not use the burdened land in the same way as the owner of the land.

The right of the usufructuary to use the land, is more restricted than the rights of the holder of a long lease. The usufructuary is subject to two restrictions which do not apply to long lessees:

1. The usufructuary has the obligation to maintain the purpose of the real estate, to which to the land has been used by the owner. For instance, the usufructuary can not transform a residential house into a commercial business,<sup>22</sup> or he can not even change a grass field into a corn field.<sup>23</sup> This restriction has its legal ground in the obligation of the usufructuary to make restitution of the burdened land when the right of usufruct is terminated. This also entails the obligation to maintain the land (art. 605 C.C.).
2. The usufructuary has to exercise his right to use and enjoy the land in compliance with the standard of a ‘*bonus pater familias*.’ This obligation, which is not expressly mentioned in the Civil Code,<sup>24</sup> prevails on the first restriction: if the owner of the assets did not make use of his assets in compliance with the standard of a ‘*bonus pater familias*,’ the usufructuary is not entitled to maintain this harmful use.

However, the right of usufruct is often less adequate to be used as instrument for land burdens, because it is subject to strict limits of duration. A right of usufruct has a maximum duration of the life of the usufructuary (art. 617 C.C.). If the latter is a legal person, the right of usufruct is moreover restricted to thirty years (art. 619 C.C.). So, the right of usufruct does not provide a stable basis to the land which benefits from the land burden because it is connected to the person of the initial usufructuary. The granting of a right of usufruct to a natural person is an aleatory contract, which risks to come to an end at each moment. From an economic point of view, this practically excludes the use of the right of usufruct as an instrument for immovable investment schemes.

<sup>22</sup> M. Planiol and G. Ripert, *supra* note 14, III, p. 779, No. 839.

<sup>23</sup> J. Hansenne, *Les biens*, Liège, University Press, 1996, II, p. 1055, No. 1041.

<sup>24</sup> It is implicitly founded in art. 601 C.C., which provides that ‘the usufructuary shall give security to use and enjoy as a prudent administrator, unless he is dispensed with by the instrument creating the usufruct’ (M. Planiol and G. Ripert, *supra* note 14, III, p. 772, No. 831).

The Civil Code has two property rights which are a mere variation on the right of usufruct. A person who has the use of the fruits of a tenement may only demand what is necessary for his needs and those of his family (art. 630 C.C.). A right of habitation can only be vested on a house. A person who has a right of habitation with regard to a house, may live there with his family, even though he was not married at the time when that right was granted to him (art. 632 C.C.). These property rights are rather seldom, even if they are sometimes used as an instrument for estate planning.

## 2.5. *Other Rights with a Proprietary or Non-Proprietary Nature*

### 2.5.1. The Numerus Clausus Principle

Is the enumeration of the property rights in the Civil Code restrictive or is it possible to agree contractually upon land burdens which do not correspond to the categories which have been described? This is the issue of the open-ended nature of the land burdens which can be vested. Is it possible to burden immovable assets with rights which have not been provided by the Civil Code or later Acts? This would be useful for legal practice, particularly in order to circumvent the severe requirements set out for servitudes.

The starting point is that the freedom of contract of the parties is seriously curtailed by the most fundamental characteristic of property law, i.e. the *numerus clausus* principle.<sup>25</sup> This principle provides that the number and substance of property rights are limited in the sense that parties can not create property rights which do not correspond to the essential characteristics of the property rights which have been provided by the legislator. Belgian legal scholars argue that this principle is part of their property law system.<sup>26</sup> The Belgian Supreme Court has, according to the prevailing view, confirmed this view in the *Blieck* judgement of 16 September 1966, in which the obligation to lay out and maintain a park on the part of a parcel in favour of the municipality, was not to be considered as a servitude. The second condition for the valid creation of a servitude, i.e. that it is vested in favour of a dominant tenement, was not fulfilled.<sup>27</sup> The freedom of contract would be opposite to the compulsory nature of the statutes with regard to property law. To repeat the

<sup>25</sup> For an extensive analysis of the scope of this principle in Belgian law and comparative perspective: see V. Sagaert, 'Het goederenrecht als open systeem van verbintenissen? Poging tot een nieuwe kwalificatie van de vermogensrechten,' 3 *Tijdschrift voor Privaatrecht*, 2005, p. 983 ff.

<sup>26</sup> J. Dabin, 'Une nouvelle définition du droit réel,' *Revue Trimestrielle de Droit Civil*, 1962, p. 29; H. De Page, *supra* note 3, I, No. 130; R. Derine, F. Van Neste and H. Vandenberghe, *supra* note 5, IA, p. 59, No. 30; F. Glansdorff, 'Chronique de jurisprudence. Les droits réels,' *Journal des Tribunaux*, 1968, p. 1; W. Van Gerven, 'Algemeen Deel,' in *Beginselen van Belgisch Privaatrecht*, 1987, p. 96, No. 34.

<sup>27</sup> Cass. 16 September 1966, *Arresten van het Hof van Cassatie 1967*, 67, *Journal des Tribunaux 1967*, 59, *Revue critique de jurisprudence belge* 1968, 166, note J. Hansenne.

wordings of Bernard Rudden: “‘fancies’ are for contract, not for property.”<sup>28</sup> Innominate contracts are allowed, but innominate property rights are degraded to personal rights.

The position of French law with regard to the *numerus clausus* principle is rather ambiguous. French legal handbooks formally pay lip service to the closed nature of property law.<sup>29</sup> However, the developments in French property law have resulted in case law which seems to abandon a strict application of the *numerus clausus* principle. Already in 1834, the French *Cour de cassation* rendered the famous *Caquelard*-judgement, in which it denied any restriction on the property rights which split up immovable ownership.<sup>30</sup> The French *Cour de cassation* adopts a flexible viewpoint with regard to the closed system of property rights, recognizing property rights are difficultly reconcilable with the *numerus clausus* principle.<sup>31</sup>

The principle has been subject to pressure even more the last decades. For instance, in 1984 the *Cour de cassation* ruled that a perpetual right to fix a placard to another’s wall, had proprietary effects. As it was, in this specific case, impossible to classify this right as a servitude, it is hard to determine under which legal property right it can be brought.<sup>32</sup> This view is supported by the leading legal scholars, who criticize this *numerus clausus* principle, especially in French law, because it would be founded in historical reasons which are not valid anymore at the beginning of the 21<sup>st</sup> century.<sup>33</sup>

The uncertainty and divergence of positions in French and Belgian law with regard to the *numerus clausus* principle are attributable to the lack of statutory provision dealing with this issue. Even if this principle is traditionally considered as the starting point for the property law systems, the Civil Code has not sealed this principle. It is remarkable that such a fundamental legal rule has no stable legal ground.

The only provision in the Civil Code expressing the *numerus clausus* principle deals with real security rights and liens.<sup>34</sup> Article 543 Civil Code could also be considered as a legal basis for this principle, as it states that ‘one may have a right of ownership, or a mere right of enjoyment, or a mere servitude to be claimed on property.’ The incompleteness of this enumeration is an indication of the fact that

<sup>28</sup> B. Rudden, ‘Economic Theory v. Property Law: The Numerus Clausus Problem,’ in J. Eeklaar and J. Bell (eds), *Oxford Essays in Jurisprudence, Third Series*, Oxford, Clarendon, 1987, p. 243.

<sup>29</sup> C. Beudant, *Cours de droit civil français*, Paris, Rousseau, 1948, IV, p. 63, No. 70; L. Josserand, *Cours de droit civil positif français*, Paris, Sirey, 1932, I, No. 1337; C. Witz, *La fiducie en droit privé français*, Paris, Economica, 1981, p. 76, No. 84; F. Zenati, *Les biens*, Paris, PUF, 1988, p. 216, No. 196.

<sup>30</sup> Cass. fr. 13 February 1834, Dalloz 1834, I, 118.

<sup>31</sup> Cass. fr. 12 December 1899, Sirey 1901, I, 497; Cass. 25 October 1886, Sirey 1887, I, 373; Cass. 5 November 1866, Dalloz 1867, I, 32; Cass. fr. 20 February 1851, Dalloz 1851, I, 54.

<sup>32</sup> Cass. fr. 18 January 1984, *Bull. civ.*, III, No. 16, Dalloz 1985, jur., 504, note F. Zenati, *J.C.P.* 1986, II, No. 20547, note J.F. Barbieri.

<sup>33</sup> P. Crocq, *Propriété et garantie*, Paris, L.G.D.J., 1995, p. 201, No. 248-249; M. Planiol and G. Ripert, *supra* note 14, III, p. 54, No. 48; A. Weill, F. Terre and P. Simler, *Droit civil. Les biens*, Paris, Dalloz, 1985, p. 47, No. 41.

<sup>34</sup> Art. 2093 French Civil Code and art. 7 Belgian Mortgage Act: ‘The property of a debtor is the common pledge of his creditors; and the proceeds of it shall be distributed among them pro rata, unless there are lawful causes of priority between the creditors.’

the provision is not limitative in nature: long leases and building rights are not mentioned (as these rights were only introduced afterwards), co-ownership is not mentioned either, and the real security rights and liens – which are traditionally considered as property rights in French and Belgian law – have also been omitted.<sup>35</sup> This provision was meant to be a mere introductory provision, announcing generally that the content of the property rights is dealt with in later provisions. Case law has used this introductory provision as the legal ground for the most fundamental principle of the area of property law.<sup>36</sup>

The *numerus clausus* principle has often been traced back to the preparatory works of the Civil Code, more specifically in the declarations of Treilhard. He was one of the most influential members of the Codification commission, and declared during the preparatory works that '*l'on ne peut avoir sur les biens que trois espèces de droits: ou un droit de propriété, ou une simple jouissance, ou seulement des services fonciers. Ainsi notre Code abolit jusqu'au moindre vestige de ce domaine de supériorité jadis connu sous les noms de seigneur féodal et censuel.*'<sup>37</sup> Another legal ground is found in the idea that property law would be of public order, in such way that one could not contractually deviate. It is however questionable whether one can argue that the entire area of property law is of public order. As it has been seen, most of the rules with regard to long leases and building rights are of supplementary law and very flexible.

The legal-economic arguments with regard to the *numerus clausus* principle have come into the debate during the last decades in French and Belgian law.<sup>38</sup> The legal-economic arguments seem to contradict. Both arguments in favour and against the *numerus clausus* principle are brought into the debate.

The restriction of the number of property rights would render the registers with regard to real estate less complex and, by consequence, easier to consult. This would entail major advantages from a legal-economic perspective, because it would enable to lower the expenses of transactions with regard to real estate. The expenses to gain information from the mortgage registry would by consequence be reduced. Moreover, the restriction of the number of land burdens reduces the expenses of the sale of real estate and enlarges the legal certainty of the buyer.<sup>39</sup> The same reasoning applies even more with regard to real security rights on immovables. The limitation of the number of property rights would contribute to the flexible creation of a mortgage, and thus to more flexible credit facilities.<sup>40</sup>

<sup>35</sup> In French law: P. Crocq, *supra* note 33, p. 196, No. 244. In Belgian law: H. De Page, *supra* note 3, V, No. 825; R. Derine, F. Van Neste and H. Vandenberghe, *supra* note 5, IA, p. 56, No. 29; F. Gotzen, 'Zakelijke rechten: plaats en aantal in het burgerlijk recht,' *Rechtskundig Weekblad*, 1978-79, (2337) p. 2339, No. 4.

<sup>36</sup> Cf. R. Libchaber, 'La recodification du droit des biens,' in *Le bicentenaire du Code civil*, Paris, Dalloz, 2004, p. 353, No. 51.

<sup>37</sup> Locre, VI, 32.

<sup>38</sup> B. Depoorter, *Fragmentation of Property: the law and economics of the anticommons*, Ph. D., University of Ghent, 2003; B. Bouckaert, *supra* note 6, p. 949-961.

<sup>39</sup> P. Crocq, *supra* note 33, p. 199, No. 247.

<sup>40</sup> R. Dekkers and E. Dirix, *Handboek Burgerlijk Recht. Deel II Zakenrecht, Zekerheden, Verjaring*, Antwerpen, Intersentia, 2004, p. 57, No. 128.

On the other hand, it is argued that the *numerus clausus* principle might be harmful from an economic point of view. It would immobilize the land in the hands of the owner because the land could only be sold as it is burdened with the limited property right. In this way, the burden on the asset would be a burden on the freedom of trade.<sup>41</sup> Moreover, the holder of a limited property right would exercise his rights to use the land in an economic harmful way. He would not take into account the long term perspective. That would be a good rationale why the limited property rights are limited in time.<sup>42</sup>

## 2.5.2. Real Obligations and ‘Chain Clauses’

It has become obvious in the foregoing paragraphs that real burdens can only have a negative obligation for the owner of the burdened land. French and Belgian law, contrary to Dutch law, in principle do not acknowledge the existence of real (‘qualitative’) obligations.<sup>43</sup> An attempt to extend the category of servitudes was initiated by Ripert, who adopted the view that the rules on servitudes enable parties to agree upon positive obligations such as servitudes, so that the rule ‘*servitus in faciendo nequit consistere*’ should remain inapplicable.<sup>44</sup> This opinion was supported by a number of other French authors. Rigaud also considered that services rendered by a neighbour must be qualified as real rights, if these are objectively useful to the dominant tenement.<sup>45</sup> This viewpoint has however not been accepted by French case law, which adheres to the negative nature of land burdens.

A real obligation (‘*obligation réelle*’ or ‘*obligation propter rem*’) is an obligation which is closely related to an asset and which therefore not only has features of a personal right, but also adopts some characteristics of a real right. On the one hand, such an obligation only grants a personal right to the holder who is entitled to claim the performance which he agreed upon. At the active side, a real obligation has features of a merely personal legal relationship. But, on the other hand, a real obligation has real effects at the passive side of the relationship: the obligation is agreed upon *in rem* because it is legally considered to be accessory to an asset. This entails the most fundamental feature of a real obligation, namely that it is transferred automatically to all subsequent acquirers of the asset (‘*accessorium sequitur princi-*

<sup>41</sup> S. Ginossar, *Droit réel, propriété et créance*, Paris, L.G.D.J., 1960, p. 147: ‘Le droit réel, on le voit, est une anomalie juridique. Il est aussi une anomalie sous l’angle économique. Quel obstacle à la circulation des biens! Affecter une chose à l’exécution d’une obligation en manière telle qu’elle ne puisse passer de main en main sans demeurer ainsi grevée, c’est entraver gravement la sécurité, voire la liberté, du commerce.’ Also: C. Demolombe, *Cours de Code Napoléon*, Paris, A. Lahure, 1870, IX, p. 431, No. 515.

<sup>42</sup> In with regard to *usufruct*: R. Derine, F. Van Neste and H. Vandenberghe, *supra* note 5, IIA, p. 341, No. 843.

<sup>43</sup> For an extensive analysis of the Belgian position with regard to real obligations: see V. Sagaert, ‘Real rights and real obligations in Belgian and French law,’ in J. Milo and S. Bartels, *The content of real rights*, Deventer, Boom Uitgeverij, 2005, p. 47-70.

<sup>44</sup> G. Ripert, *De l’exercice du droit de propriété dans ses rapports avec les propriétés voisines*, Paris, Rousseau, 1902, p. 146 ff.

<sup>45</sup> M. Rigaud, *Le droit réel: histoire et théories: son origine institutionnelle*, Toulouse, Thesis, 1912.

*pale'*).<sup>46</sup> The real obligation runs with the servient tenement. In this way, real obligations seem to be situated half-way between real rights and personal rights.<sup>47</sup>

French and Belgian law are opposed to the recognition of real obligations, although some scholars who dedicated fundamental research to real obligations, have pleaded in favour of a generalization of this concept. Such generalization is however irreconcilable with the principle of the 'privity of contracts.' Contracts can only bind the contracting parties and their successors under 'general title', but not the successors under 'specific title', e.g. a buyer. Moreover, a general concept of real obligations would be contrary to the *numerus clausus* principle. It would enable parties to have recourse to characteristics which are common characteristics of property rights.

This viewpoint was confirmed by the Belgian Supreme Court in a case decided in 1913. In the facts underlying this case, a number of parcels of land, belonging in co-ownership to A, B and C, were divided between the three co-owners. In the deed regulating the division, it was laid down that the part allocated to C should remain free from buildings. The parcel of land attributed to C was sold and it became – after a number of sub-sales – part of the estate of D. He infringed the building prohibition. A claimed that the building constructed by D should be demolished because of the provision in the deed of division. The *Cour de Cassation* rejected this claim. The judgement was mainly founded on the principle of the privity of contracts. According to the Court, this approach is not incompatible with article 1122 C.C., which provides that each contracting party is deemed to have entered into the agreement for his own benefit or for his heirs, except when it is expressly stated otherwise or when the contrary follows from the nature of the agreement.<sup>48</sup>

The foregoing developments may not blind us for the fact that there is a tendency to accept more frequently the existence of real obligations, in particular when they are accessory to a (principal) property right. In that case, the *accessorium sequitur principale* rule can become effective. The accessory obligation has the same proprietary effects as the right it follows.<sup>49</sup>

However, legal practice has been looking for possibilities to get round these restrictions. A major notarial instrument in order to enable parties to burden land with rights which are not 'named' by the statutes, are the so called 'chain clauses' or 'perpetual clauses.'

These are agreements in which B is charged with an *obligatio in faciendo* towards A and in the meantime agrees to impose this same obligation upon a subsequent purchaser of the asset with which the obligation is associated (C) and to make

<sup>46</sup> R. Derine, F. Van Neste and H. Vandenberghe, *supra* note 5, IIB, p. 633, No. 933; A. Verhoeven, 'De juridische grondslag van kwalitatieve rechten en plichten,' *Jura Falconis*, 1988-89, p. 161.

<sup>47</sup> M. De Juglart, *Obligation réelle et servitude*, Bordeaux, 1937, p. 282-284; contra: J. Hansenne, 'La limitation du nombre des droits réels et le champ d'application du concept de service foncier,' (noot onder Cass. 16 september 1966), *Revue Critique de Jurisprudence Belge*, 1968, p. 179, No. 11.

<sup>48</sup> Cass. 6 February 1913, *Pasicrisie* 1913, I, 93.

<sup>49</sup> For examples of such real accessory obligations: see V. Sagaert, *supra* note 43, p. 47-70.



him promise to insert a similar clause in a subsequent sales agreement relating to the same asset.<sup>50</sup> A perpetual clause is very often complemented by a stipulation in favour of a third party which is inserted in these subsequent sales agreements. The beneficiary of the clause is of course the original seller.<sup>51</sup> If the purchaser of the asset involved acts in breach of this clause, the stipulation in favour of a third party will enable the original seller to immediately sue the purchaser in the sub-sale.<sup>52</sup> However, it must be observed that case law does not readily accept the presence of a stipulation in favour of a third party. It is assumed that such a stipulation in a perpetual clause is illicit because it does not create a right in favour of a third party but only confirms this right and facilitates its exercise.<sup>53</sup>

## 2.6. *Synthesis*

What is the general view appearing out of the analysis of the different property rights one can have on immovable assets?

French and Belgian property law appear to be, at first sight, more closed than Dutch property law.<sup>54</sup> This is especially the case with regard to the prohibition to engage positive obligations in the framework of a proprietary relationship. Neither French or Belgian law recognize property rights which entail an obligation for the owner of the burdened land not to do something (*in non faciendo*). A property right is contradictory to a positive obligation.<sup>55</sup> It is not void to engage positive obligations, but these obligations will then have no proprietary effects. The positive obligation will only bind the current owner, and not the purchaser of the burdened land, except indirectly by a chain clause.

However, this does not mean that the freedom of contract has no role to play in the area of property law. Especially with regard to general rights to use immovable assets, it has been analysed that the statutory rules are of supplementary law, so that parties can contractually deviate. The freedom of contract with regard to those property rights is very large, because the number of requirements is very limited. The restrictions which have to be complied with, are the immovable nature, the time limits and, with regard to long leases, the obligation of the long lessee to pay a periodical compensation. Legal scholars therefore argue that the *numerus clausus* principle has no important role to play with regard to those general rights to use the

<sup>50</sup> V. Sagaert, 'Kwalitatieve verbintenissen in het Belgische en Nederlandse recht,' in J. Smits and S. Stijns (eds), *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht*, Antwerp, Intersentia, 2005, p. 341-363; E. Dirix, *supra* note 2, p. 35, No. 27.

<sup>51</sup> A. Verhoeven, *supra* note 46, p. 164.

<sup>52</sup> Comm. Liège 18 June 1920, *Pasicrisie* 1920, III, 208.

<sup>53</sup> Trib. Bruges 17 February 1953, *Journ. Trib.* 1953, 549.

<sup>54</sup> There are undoubtedly other areas in which Dutch property law is more closed than French and Belgian law, for instance with regard to all issues relating to trustlike relationships and fiduciary ownership.

<sup>55</sup> J. Dabin, *supra* note 26, p. 35; J. Hansenne, *supra* note 47, p. 181, No. 13.

land of another.<sup>56</sup> In admitting the contractual freedom with regard to general rights to use lands, parties will encounter one remaining requirement: the strict time limits which are imposed to these rights. These time limits have been imposed by the legislator in the early 19th century in an attempt to prevent that the real burdens would charge these real estate assets in a too large degree, but risk to restrain the cost-effectiveness of real estate.

In conclusion: the 'nucleus' of this principle is to be situated within the field of the servitudes, i.e. the rights to make a specific use of another's land. The general rights to use real estate are much more flexible.

### 3. Historical Background and Current Debate on the Content of Servitudes in French and Belgian Law

Both specific and general land burdens can, as it appears from the overview, only have a negative nature. The Civil Code inherited this rule from Roman law, where it was expressed in the maxim '*servitus in faciendo consistere nequit, sed tantummodo in patiendo aut in non faciendo*.'<sup>57</sup> The search for a legal, historical and economic justification of the restrictive requirements of land burdens is rather hazardous. The theories and principles underlying these theories, are often contradicting or, at least, divergent.

Traditionally, the *numerus clausus* principle is founded in the reaction of the Civil Code against the feudal regime which existed before. This feudal system was, from a legal point of view, built on the mixture between property law and the law of obligations: the vassal had to render personal services to the lord, but these obligations were connected to the property of the servient tenement, and had therefore a proprietary nature. In other words: land services were the instrument for the personal bondage of the vassal. Real estate itself became a source of obligations.<sup>58</sup>

The French Revolution has established the 'exclusive nature' of ownership. All limited property rights endanger this characteristic and are therefore to be considered in a restricted way.<sup>59</sup> The strict distinction between personal obligations and land services was a manner to liberate the land and its owners.<sup>60</sup> This was the legal concept which was used as an instrument for the abolishment of the social structure. The *numerus clausus* principle would be the legal result of the French Revolution.<sup>61</sup>

<sup>56</sup> Cf. R. Dekkers and E. Dirix, *supra* note 40, p. 57, No. 128; V. Sagaert, 'Oude zakenrechtelijke figuren met nut voor een moderne familiale vermogensplanning,' in auteur? *Cyclus Willy Delva. Levenslag en verder*, Antwerp, Kluwer, 2004, 205-274.

<sup>57</sup> Digesta, VIII, I, fr. 15, §1.

<sup>58</sup> H. De Page, *supra* note 3, VI, No. 497B.

<sup>59</sup> This development to an exclusive ownership has been extensively described by A.M. Patault, *Introduction historique au droit des biens*, Paris, PUF, 1989.

<sup>60</sup> Cf. art. 1 of the Decree of Decree van 28 September 1791: 'le territoire de la France [...] est libre comme les personnes qui l'habitent.'

<sup>61</sup> See also F. Parisi, 'Entropy in Property,' *American Journal of Comparative Law*, 2002, p. 602-604.

However, the writings of the leading French and Belgian scholars of the 19<sup>th</sup> century justify serious doubts on this traditional explanation. The scholars of the beginning of the 19<sup>th</sup> century did not accept a closed system of property law. For instance, Demolombe writes that ‘the question whether private parties can create other property rights than the ones which have been established in the Napoleonic Code, is generally answered in an affirmative way by case law and scholars.’<sup>62</sup> The case law of the early 19<sup>th</sup> century confirms their writings. The French *Cour de cassation* ruled already in 1834 in the famous *Caquelard*-judgement that ‘*ni les articles 544, 546 et 552 du Code Napoléon, ni aucune autre loi, n’excluent les diverses modifications et décompositions dont le droit de propriété est susceptible.*’<sup>63</sup>

This approach gives support to the *Critical Legal Studies* (CLS). According to this doctrine, the *numerus clausus* principle was not an abandonment of feudal concepts, but a restoration of feudal concepts: ‘The *numerus clausus* reflects a feudal vision of property relationships designed to force people into pre-set social relationships.’<sup>64</sup> Even if this theory finds support in the case law and legal writings of the early 19<sup>th</sup> century, it is doubtful whether the restoration of the feudal system was the philosophical rationale behind these ideas.

#### 4. Do French and Belgian Law Allow the Release of Useless or Obsolete Servitudes?

The preceding paragraphs have shown that French and Belgian law are far away from the uniform approach which has been adopted by the American Restatement on Servitudes and, to a certain extent, by the new Scots land law. There is one remaining issue: does the French and the Belgian law safeguard the land from harmful burdens? Servitudes are, according to French and Belgian law, the sole limited real rights which can be perpetual. This perpetual nature can raise problems if a servitude has lost the use it had for the dominant tenement at the moment of the creation. As in other legal systems, French and Belgian law have struggled with regard to the fate of these servitudes. The original Civil Code of 1804 did not provide any article with regard to this issue.

Is it possible to eliminate land burdens which have become useless or obsolete? This ‘*ex post*’ control of the servitude is very obvious in the American Restatement of Property with regard to servitudes, where it is denominated as the requirement of ‘Touch and Concern.’<sup>65</sup> The issue arising in the following paragraph is therefore whether it is possible to enforce land burdens which are against public policy because they are useless. Since 1804, the statutory rules in French and Belgian law have developed in a different way, which makes a separate analysis of both legal systems necessary.

<sup>62</sup> C. Demolombe, *supra* note 41, IX, p. 426, No. 511. Also: F. Laurent, *Principes de droit civil français*, Brussel, Bruylant, 1878, VI, No. 84.

<sup>63</sup> Cass. fr. 13 February 1834, Dalloz 1834, I, 118.

<sup>64</sup> C.J. Berger and J.C. Williams, *Property: land ownership and use*, New York, Aspen Pub, 1997, p. 211.

<sup>65</sup> See for a more extensive analysis the contribution of Prof. S. French in this book.

#### 4.1. French Law

The French Civil Code contains no general rules with regard to the extinction of servitudes which have become useless. Article 637 of the French Civil Code provides that the servitude must, at the moment of its creation, be useful to the dominant land. This requirement is however not repeated in the section on the extinction of servitudes. Hence, it would not be required that the servitude remains objectively useful during the course of its existence, it is sufficient that it is the case at the moment of the coming into existence of the real right.

According to the French Civil Code, there are two legal ways in which a servitude can come to an end, i.e. the impossibility to use the servitude (art. 703 C.C.)<sup>66</sup> and the non-use of the servitude during more than 30 years (art. 706 C.C.).

There is one statutory exception on this starting point, i.e. for a legal right of way. If a tenement is enclaved, in such a way that there is no or insufficient possibility to reach the tenement from the public road, the owner can claim the attribution of a legal right of passage over an adjacent parcel. This is provided in article 682 C.C.<sup>67</sup> According to article 685-1 C.C., this servitude takes an end if the enclavement has taken an end: 'In case of discontinuance of the enclavement and whatever be the way in which the location and manner of the servitude were determined, the owner of the servient tenement may, at any time, invoke the extinction of the servitude where the service of the dominant tenement is ensured under the conditions of Article 682.' This is logical: as the right of passage has been attributed because of the enclavement, the right can only exist as long as the enclavement exists.<sup>68</sup>

As this provision is an exception to the general rule, it must be interpreted in a restrictive way. For instance, it only applies to the legal right of way, not to the contractual right of passage in favour of a non-enclaved tenement.<sup>69</sup>

<sup>66</sup> The impossibility to exercise the servitude is, in more exact terms, a ground for suspension, not for termination of the servitude. The powers attributed to the owner of the dominant tenement are not terminated, but paralyzed as long as the servitude persists. The servitude only extinguishes if the situation of impossibility to exercise continues for over 30 years (see J.-F. Barbieri, note under Cass. fr. 3 November 1981, *J.C.P.* 1982, II, No. 19.909A; F. Zenati, *Revue Trimestrielle de Droit Civil*, 1990, p. 118). In this opinion, there only remains only legal manner in which servitudes come to an end, e.g. the extinctive prescription by non-use during 30 years.

<sup>67</sup> This article provides as follows: 'An owner whose tenements are enclaved and who has no way out to the public highway, or only one which is insufficient either for an agricultural, industrial or commercial working of his property, or for carrying out operations of building or development, is entitled to claim on his neighbours' tenements a way sufficient for the complete servicing of his own tenements, provided he pays a compensation in proportion to the damage he may cause.'

<sup>68</sup> The French *Cour de cassation* judged that the legal right of way is even extinguished if the owner of the dominant tenement has continued to exercise the passage for more than 30 years after the enclavement stopped (Cass. fr. 12 May 1975, *J.C.P.* 1976, II, No. 18.233, note G. Goubeaux).

<sup>69</sup> Cass. fr. 16 July 1974, *Bull. civ.*, III, No. 309; Cass. fr. 27 February 1974, *Bull. civ.*, III, No. 96; Versailles 15 January 1988, *Revue Trimestrielle de Droit Civil*, 1990, p. 118, note F. Zenati.

Some (lower) Courts have argued that article 685-1 C.C. is an illustration of a general legal principle according to which a servitude should be extinguished if it has become useless.<sup>70</sup> The legal ground for the extinction of the servitude on the basis of usefulness, is – according to this view – found in article 703 C.C., which provides that ‘servitudes cease when things are in such a condition that they can no longer be used.’ An alternative legal foundation has been found in article 637 C.C.: if the servitude was vested in favour of the dominant tenement, the servitude is terminated if the use for the dominant tenement comes to an end.

This point of view has been supported by legal scholars. For instance, the leading authors Aubry and Rau argued that ‘*Toute servitude cesse lorsqu’elle n’a plus aucune utilité pour l’héritage dominant.*’<sup>71</sup> More recently, Larroumet has argued in favour of the possibility to terminate a useless land burden.<sup>72</sup>

The *Cour de cassation* originally seemed to adhere to this position. In a judgement of 1857, the Court decided to take into account the usefulness of the servitude in order to determine the continuation of the servitude: ‘*Le changement dans l’état des lieux peut bien modifier l’exercice d’un droit de servitude, mais il faut, pour son extinction, que l’héritage dominant n’ait plus ni profit ni utilité pour en jouir en tout ou partie.*’<sup>73</sup>

However, the Court made clear in the course of the 20th century that the loss of utility according to French civil law was not a cause of termination of the servitude. By way of illustration, the Court had to decide in 1981 on the following case: A had attributed a right to draw water from a well to B, whose house was not connected to the water mains. In the agreement, A accepted to pay for any structural reparations of the well, while the maintenance expenses are equally to be paid by A and B. Many years afterwards, B sued A in order to effect structural reparations to the well. A argues that this claim should be rejected, as the house of B has meanwhile been connected to the water mains. The Court of Appeal of Amiens rejected the claim because the servitude had been extinguished. The *Cour de cassation* revised this judgement, stating that ‘*l’inutilité de cette servitude n’était pas une cause d’extinction mais l’impossibilité d’en user.*’<sup>74</sup>

<sup>70</sup> Court Pau 17 December 1968, *J.C.P.* 1969, II, No. 14.878, note M.B. and *Revue Trimestrielle de Droit Civil* 1969, p. 592, note Bredin; Trib. Saint-Denis de la Réunion 18 May 1973, *J.C.P.* 1974, IV, 77.

<sup>71</sup> C. Aubry and C. Rau, *Cours de droit civil français*, Paris, Librairie Générale de Droit et de Jurisprudence, 1950-1968 (sixth print), III, § 255. See also: P. Jourdain, ‘Les biens,’ in G. Marty and P. Raynaud, *Droit civil*, Parijs, Dalloz, 1995, p. 226-227, No. 169.

<sup>72</sup> C. Larroumet, *Les biens. Droit réels principaux*, Paris, Economica, p. 532, No. 879.

<sup>73</sup> Cass. fr. 9 December 1857, *D.* 1858, I, 110. It concerned a case in which a servitude of passage was vested by contract in favour of a parcel which had a doorway to the public road, but this was too narrow for the horses and barrows which had to pass in order to cultivate the land. The agreement dated from 1677. After 200 years, the dominant tenement was not cultivated anymore but was used for residential purposes, in such way that the existing passage (other than the one which was contractually agreed upon) was sufficient.

<sup>74</sup> Cass. fr. 3 November 1981, *J.C.P.* 1982, II, No. 19.909, note J.F. Barbieri. Also: Cass. fr. 7 December 1966, *Dalloz* 1967, 21, note Voulet: ‘La servitude ne pouvait disparaître que si semblable intention du père de famille avait été nettement exprimée dans l’acte séparatif des héritages [...]. Elle ne saurait être éteinte du seul fait de son inutilité.’

This case law has been supported by some legal scholars, because the servitude could still have a potential use. For instance, the water of the well could be colder and more fresh than the water in the mains, the water distribution can be cut in case of a strike, etc.

However, a larger majority of the leading scholars have criticized the judgments of the French *Cour de cassation* from a legal-economic point of view. The theory of the *Cour de cassation* is characterized as the '*philosophy du bon plaisir*.'<sup>75</sup> It is inefficient to continue a servitude and to maintain its existence in the mortgage registry if it has become useless. This is even more true, as it is mostly not possible for the owner of the dominant tenement to exercise this useless servitude: if he exercises the servitude, he will mostly abuse his right, which means that he commits an unlawful act. One of the criteria for abuse of rights is the exercise of a right with the sole purpose to cause damage to another person, without having any advantage of this exercise.<sup>76</sup> In other words: a servitude continues to exist, continues to appear in the mortgage registry, and so continues to burden the servient tenement and to diminish the market value of it, without any useful purpose. The servitude has a mere theoretical existence from a property perspective, but creates large disadvantage for the owner of the servient tenement from an economic perspective.

#### 4.2. *Belgian Law*

Belgian law with regard to servitudes which have lost their objective usefulness, deviates from the French point of view. An amendment to the Civil Code of 1983<sup>77</sup> has resulted in the adoption of article 710*bis* Belgian Civil Code: The judge can, upon request of the owner of the servient tenement, impose the extinction of the servitude when the latter has lost all usefulness for the dominant tenement.<sup>78</sup> When a party makes a claim, he has to publish that chose in action in the margin of the mortgage registry.<sup>79</sup> This obligation tends to warn third parties, notably third interested parties who would purchase the dominant tenement, that the status of this servitude is precarious.

For instance, the Court of Appeal of Liège had to decide in a recent case with regard to a contractual servitude of passage, conferring the right to cross the servient tenement for pedestrians and agricultural purposes. Afterwards, it appeared that the servitude was only used for pedestrian purposes, and that the neighbourhood had changed in a residential neighbourhood, where all agricultural activities

<sup>75</sup> P.-Y. Gauthier, 'Contre Bentham: l'inutile et le droit,' *Revue Trimestrielle de Droit Civil*, 1995, p. (797) 817, No. 34: 'Peut-on admettre raisonnablement qu'un sujet de droits cause à autrui une gêne considérable, prenant ici la forme d'une servitude réelle, sous prétexte de l'exercice confortable et finalement superfétatoire de ses droits?'

<sup>76</sup> C. Larroumet, *supra* note 72, p. 532, No. 879.

<sup>77</sup> Act of 22 February 1983, *Belgian Official Gazette* 17 maart 1983.

<sup>78</sup> This is a free translation. The authentic French version is as follows: 'A la demande du propriétaire du fonds servant, le juge peut ordonner la suppression d'une servitude, lorsque celle-ci a perdu toute utilité pour le fonds dominant.'

<sup>79</sup> Art. 3 Mortgage Registry Act.

had disappeared. The Court decided that, to that extent, the servitude was extinguished.<sup>80</sup>

The general view with regard to this provision, is however that case law is very restrictive in applying it.<sup>81</sup> Only if all usefulness has disappeared, there is a possibility to appeal to article 710bis Belgian Civil Code. In interpreting this provision restrictively, case law reduces the legal uncertainty.

#### 4.3. *Criticism from a Law and Economics Viewpoint*

French law does not allow the abolishment of useless servitudes. Belgian law has a specific statutory provision, which is however interpreted in a restrictive way.

The field of servitudes in French law, and to a certain extent of Belgian law, has the image of a trap: it is easy to create new ones, but it is very difficult to get rid of the existing servitudes. Servitudes get accumulated, diminish the value of the real estate. The abolishment of servitudes requires however procedural expenses (negotiation, cost of the legal proceeding, etc.), which makes it – from a law and economics point of view – a ‘negative sum game.’<sup>82</sup>

This does not mean that French and Belgian law are completely insensitive towards this issue. The requirement that the servitude must be objectively useful to the dominant tenement and is not restricted to a personal favour to his owner, guarantees to a certain extent the usefulness of the servitude. It is much more likely that a personal favour for the owner of the dominant tenement will become useless than a servitude. The same is true for the requirement that the servitude must burden the servient tenement and not its owner: it would be much more likely that the burden will become useless in relation to the successor of the initial owner of the servient tenement because it would be uncertain whether he can render the same services.

This law and economics approach could also contribute to explain the restrictive position of Belgian case law with regard to the possibility to abolish useless servitudes. Taking a more general viewpoint, Belgian law would combine an *ex ante* approach with an *ex post* approach. This would entail the tragedy of the anti-commons, e.g. a lack of legal instruments to optimize the cost-effectiveness of land. It would create too many restrictions on the possibility to grant rights of use on land to third parties.

## 5. Conclusion

Real estate practitioners often have the ambiguous concern to have, on the one hand, as much freedom as possible in vesting real burdens, but on the other hand to

<sup>80</sup> Court of Appeal of Liège 9 February 2005, *J.L.M.B.* 2005, 1708, note P. Lecocq.

<sup>81</sup> J. Hansenne, *supra* note 23, p. 1154-1155, No. 1144. See also: H. Vuye, ‘De nutteloos geworden privaatrechtelijke erfdienstbaarheid: recente tendensen in België, Frankrijk en Nederland,’ *Revue générale de droit civil*, 1991, p. 323.

<sup>82</sup> This is the concept used by B. Bouckaert, *supra* note 6, p. 958, No. 16.

maintain the advantages of a property right, e.g. the fact that the right runs with the land (right to follow). We have seen that both Belgian and French law do not respond entirely to these needs, by adhering to the 19<sup>th</sup> century fragmentated system which restricts the possibility to have specific rights to use another's land to the strict categories of the Civil Code. When parties cross these limits set by the law, their right has no proprietary effects, and does not follow the land. The main borderline which has been detected is that the servitude must have an objective nature, both at the passive side (servient tenement) and at the active side (dominant tenement).

These strict rules for servitudes, seem at first glance incoherent with the fact that the statutory rules with regard to general rights to use land (long lease, building rights, usufruct) are very liberal, and offer a great deal of contractual freedom to parties. There is so much contractual freedom that a situation can be structured using multiple rights. However, there is one main restriction to all these general immovable property rights: it is a common characteristic of these rights conferring the general right to use the real estate are restricted in time.

However, it has also become obvious that the requirements set out at the creation of the servitude, could have a law and economics rationale: they make it more unlikely that the servitude will become useless after lapse of a certain time, so that the existing land burdens have an objective usefulness. A better way to realize this purpose is to implement in the Civil Code a provision which allows the abolishment of useless land burdens. Belgian law has done this, French law has remained silent.



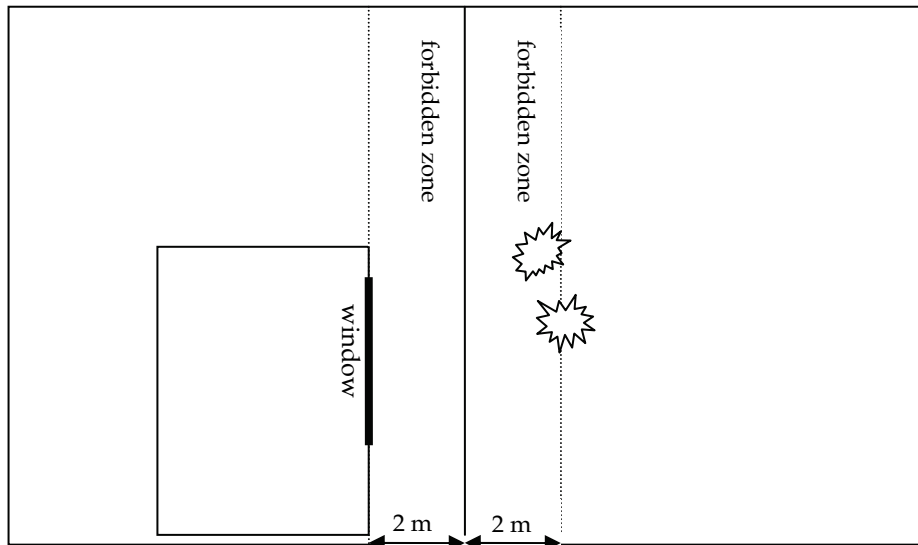
## ACQUISITION OF A SERVITUDE BY PRESCRIPTION IN DUTCH LAW

### 1. Introduction

According to article 5:72 BW a servitude may come into being as a result of creation by legal act or as a result of prescription. There are two different ways to acquire a servitude by prescription. First, after 10 years the possessor of a right of servitude may acquire the right of servitude under article 3:99 BW, provided he be in good faith. Second, the possessor of a servitude may even acquire a servitude if he is not in good faith, but in the latter case the prescription period is 20 years (art. 3:105 and 3:306 BW). At first sight it seems relatively easy to acquire a right of servitude by prescription. The Dutch civil code requires *possession* of a right of servitude and a certain *lapse of time*, and for the 10 year prescription, in addition, *good faith* is needed. In this essay it will be seen that it is quite difficult to meet all these requirements and acquire a servitude by prescription. Due to the principle that permission or toleration should not lead to a loss of right, possession of a right of servitude should not readily be accepted. It is surprising to see how much uncertainty is left by the Dutch Supreme Court in these matters. Some important questions have never been answered in case law.

Many of the cases referred to in the essay are about trees or windows in the so-called forbidden zone. Under article 5:42 BW is it in principle forbidden to have trees or high shrubs within two meters of the border to another's land, unless the owner of the neighbouring land agrees. Similarly, for privacy reasons, it is not allowed to have windows within two meters of another's land that give a view on the neighbouring land, unless the owner of the neighbouring land agrees (art. 5:50 BW).

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## 2. The 10 Year Period and the Difficult Requirement of Good Faith

Although in theory it is possible to acquire a servitude by prescription in ten years time, in practice this is almost impossible as a result of the stern requirements that apply. In *Huizing v. NSAW*,<sup>1</sup> a case about trees within the forbidden zone, the Supreme Court stressed that article 3:99 BW requires possession in good faith, that is possession in good faith *of the right of servitude*.<sup>2</sup> For article 3:99 BW requires possession in good faith of the right to be acquired, and in our case that is the right of servitude.<sup>3</sup>

In principle the possessor of a servitude can be in good faith only if a notarial deed has been made to create a right of servitude. It is difficult to imagine that someone thinks in good faith that he has a right of servitude if a notarial deed creating a right of servitude has never been made. The standard example of acquisition of a servitude by prescription in good faith will be the case in which a notarial deed was made but did not result in the creation of a valid right of servitude, for example because the deed was invalid or because the contract underlying the creation was void or has been avoided with retroactive effect. Another but very rare case in which someone may believe in good faith that he has a right of servitude is the case in which he thinks his predecessor in title had acquired a right of servitude by pre-

<sup>1</sup> HR 3 May 1996, *NJ* 1996/501.

<sup>2</sup> See already HR 16 December 1942, *NJ* 1943/61. See also the judgment of the Appeal Court in HR 16 November 1934, *NJ* 1935, p. 446.

<sup>3</sup> Art. 3:99 subs 1 BW reads: 'Rights in movable non-registered things and bearer or order rights are acquired by a possessor in good faith as a result of a continuous possession of three years, other assets as a result of a continuous possession of ten years.'

scription. In this instance as a matter of course no notarial deed has even been made.

### 3. The 20 Year Period of Article 3:105 BW

The 20 year prescription period of article 3:105 BW does not require good faith. As a result, the article in practice offers a much better opportunity to acquire a servitude by prescription. Planting trees within the forbidden two meter zone amounts to an infringement of the neighbour's right of ownership in the same way as adverse possession of the land itself does (trespassing). As a consequence, the neighbour has an action to have the infringement undone. This is an action of revindication. For revindication means asserting your right of ownership. It is not confined to cases in which a stolen movable object is claimed back. After the action of stopping the infringement, the revindication, has been barred by limitation, the person who has the trees within the two meter zone acquires a right of servitude allowing him to have these trees on that spot, provided he can show that on this moment he actually has possession of a servitude.

### 4. Possession of a Servitude

#### 4.1. *Recognizability*

Possession of a right consists in the factual exercise of the right as if one owns the right in question.<sup>4</sup> This intention should be recognizable to third parties. In the case of a servitude the requirement of recognizability is met if the circumstances of the case clearly show that the person infringing another's right of ownership has the intention of exercising a right of servitude.<sup>5</sup>

#### 4.2. *Visibility and Permanence*

The factual exercise of a right of servitude should appear from outward facts (art. 3:108 BW). Therefore, possession of a servitude can in principle exist only where there is a visible infringement of the ownership of a neighbouring land. And this is indeed what is present in our example of the trees. True, in a judgment from 1901<sup>6</sup> the Dutch Supreme Court held that possession of a servitude to have trees within the forbidden zone can exist only if the trees are held there with the *intention* to exercise a servitude, but from the presence of these trees, or windows, as the case may be, the possession of a servitude can easily be inferred.<sup>7</sup> The subjective intention of

<sup>4</sup> See in relation to servitudes HR 20 December 1901, W 7701.

<sup>5</sup> In the case of a servitude of view (*servitus prospectus*) the exercise does not consist in an infringement but in summoning the owner of the servient land not to block the view.

<sup>6</sup> HR 20 December 1901, W 7701.

<sup>7</sup> C. Asser and P. Scholten, *Zakenrecht*, Zwolle, Tjeenk Willink, 8<sup>th</sup> ed., 1945, p. 253; J.Ph. Suijling, *Zakenrecht*, Haarlem, De Erven F. Bohn, 1940, nr. 201.

the person having trees or windows in the forbidden zone cannot be relevant for the question of possession because this intention is invisible. Relevant is therefore the objective intention which is apparent from the mere presence of the trees or windows in the forbidden zone.

An example of possession of a servitude which is invisible to others is the case in which someone claims to possess a servitude of view (*servitus prospectus*). If the person has enjoyed an undisturbed view over the undeveloped land of his neighbour there are no visible facts from which possession of this servitude can be inferred. Possession of such a servitude is conceivable only where the servitude was created by deed and entered into the public land register but did not come into being as a result of some defect. In this instance entry into the land register is vital as without such an entry possession would not be recognizable to others and would therefore be impossible (art. 3:108 BW). The mere fact that someone for a long time did not develop his land or part of his land cannot lead to the conclusion that his neighbour possesses a servitude of view. Similarly, the presence of windows within the forbidden zone points at possession of a servitude to maintain these windows, but it does not point at a servitude of an undisturbed view from these windows, because the first servitude does not encompass the second servitude and the second, the servitude of view, is invisible. Thus, possession of the servitude of view, which can lead to acquisition by prescription, cannot be accepted,<sup>8</sup> apart from the above-mentioned case in which the right has been entered into the land register.

The old Dutch civil code of 1838 provided that a servitude could be acquired by prescription only if the servitude is visible and permanent. Moreover, it provided that *possession* of an invisible or non-permanent servitude was impossible.<sup>9</sup> The old civil code considered a right of way as a non-permanent servitude which could not be acquired by prescription.<sup>10</sup> An exception to this rule applied where the possession of a right of way was visible from the presence of for example a door leading to the neighbour's land or a path on the neighbour's land which can serve only the possessor of the servitude. In these instances the possession of the servitude is permanently visible to others.<sup>11</sup> Possession of a servitude of waterway was accepted where the waterway could only be used for the benefit of the possessor of the servitude and could not be of any benefit to the owner of the 'servient' land.

Meijers, when drafting the text of the new civil code, deleted the requirements of visibility and permanence because these requirements are already included in the requirement of possession.<sup>12</sup> Possession is of consequence only if it is visible and not secret, because if invisible and secret possession, which is really a contradiction in terms, could lead to acquisitive prescription, the owner of the 'servient' land would

<sup>8</sup> HR 30 December 1904, W 8165.

<sup>9</sup> Art. 744, 746 and 593 § 2 BW 1838.

<sup>10</sup> Art. 724 § 3 BW 1838.

<sup>11</sup> See HR 27 September 1996, NJ 1997/496 and HR 24 September 1999, NJ 2000/18. See also HR 27 May 1950, NJ 1951/197 (a toilet that was accessible only from the 'dominant' land) and HR 30 June 1978, NJ 1979/117 (right of waterway) and the comment by Kleijn to the judgment of 1978 (in NJ 1979).

<sup>12</sup> Meijers' official comment on art. 3.4.3.1 and art. 5.6.3 of the draft civil code.

be taken by surprise by this prescription. He would not have had a chance to prevent the prescription by exercising his right of revindication. Such a prescription is not allowed in Dutch land law.<sup>13</sup> Although Meijers is less clear about the requirement of permanence, it seems that to his opinion this requirement is also included in the notion of possession. True, because the requirement of visibility and permanence are deleted in the text of the civil code, it is in theory possible to acquire a servitude which does not meet these two requirements, but in practice it will be extremely difficult to meet the requirement of possession over a certain period of time if the exercise of the servitude is invisible or not continuous. So, in this respect the new civil code hardly deviates from the old civil code. As an example of a servitude that can be acquired by prescription under the new civil code but which could not be so acquired under the old civil code Meijers mentioned the servitude of way. Where a right of way is exercised regularly possession of a servitude may be present.

However, we should still conclude that possession of a servitude can hardly ever be accepted without visibility. If the possession is invisible it will almost always be secret and thus irrelevant, even non-existent. In addition, it is also difficult to conclude to possession if the possession is not permanent. Besides, in the case of many servitudes of way visibility and permanence are intertwined. If the exercise of a right of way does not continue, it is often invisible to others. There are, however, cases in which the two requirements are clearly separated. In the case of a drain pipe hidden under a meadow there is permanence but no visibility.<sup>14</sup>

Under the new civil code acquisition by prescription of a right of way seems possible only in two instances: first, where possession is visible from the presence of a path, door etcetera that can be of use only for the possessor of the right of way and, second, where the use of the way is so frequent that it can no longer be seen as a series of separate infringements but should be seen as a continuing and visible unlawful situation.

### 4.3. *Unequivocal Possession*

Possession should be unequivocal. This requirement was also deleted in the new civil code because the requirement is already included in the concept of possession.<sup>15</sup> The requirement is closely linked to the requirement of visibility in that both requirements stem from the general principle of property law that property rela-

<sup>13</sup> In the case of stolen movable property, on the other hand, it is held that a prescription period starts to run even though the owner is unable to exercise his action of revindication as he does not know who possesses the thing. Dutch property law seems inconsistent in this respect. See HR 8 May 1998, *NJ* 1999/44. The solution in these cases seems to be based on the interest of certainty. In land law, however, it is always known against whom the action of revindication should be exercised.

<sup>14</sup> Different: comment on art. 1538 old civil code, in: J.C. Voorduin, *Geschiedenis en beginselen der Nederlandsche Wetboeken*, vol. V, Utrecht, Robert Natan, akademie-boekhandelaar, 1838, p. 183 and HR 26 January 1883, *Ned. Regtspraak*, vol. 133, p. 60 and HR 20 February 1890, *Ned. Regtspraak*, vol. 154, p. 133.

<sup>15</sup> Comment of Meijers on art. 3.4.3.1.

tionships, among which possession, should be recognizable. An example of equivocal possession is the case in HR 7 March 1980.<sup>16</sup> Somewhat simplified the case was as follows: two persons who had leased two neighbouring pieces of land from the same owner bought and acquired the land they had in lease. Later it turns out that according to the cadastre the border between the two plots of land runs on a different place than the parties had always presumed. One of the owners had used too much land for many years thinking that the small strip of land belonged to the land he had in lease and, later, to the land he owned. When the cadastral border became apparent he claimed acquisitive prescription of the strip of land. He failed because it was not clear to the neighbour whether he had used the strip of land on the basis of a supposed lease or a supposed right of ownership. As a result, the possession was equivocal. The requirement of unequivocal possession is a relative one. What third parties in general should have inferred from the facts is irrelevant. Relevant is only whether the person whose right is infringed upon could reasonably have thought that the infringement was based on something different than a supposed right of ownership (here a supposed lease). If the neighbour could reasonably have been in such doubt, he should not have expected that his right of ownership was violated with the intention of exercising possession. Therefore, the possession should not be able to lead to acquisitive prescription. In short, the relevant question is: should the owner reasonably have expected a loss of his right.

#### **4.4. No Possession in the Case of Permission**

Where the infringement of the right of ownership is based on permission, possession of a servitude can never be accepted, not even possession in bad faith. No period of prescription or limitation will run against a person who gave permission for the infringement. The reason is that since the owner gave his permission he cannot and should not expect a loss of his right. No prescription or limitation period shall run against an unsuspecting owner.

This changes only from the moment that the person who was given permission (the user) claims to have more than just a personal right of use based on permission, for example a right of servitude or even a right of ownership. Moreover, he should inform the owner about this claim because otherwise the owner still thinks that the continuing use of his land is based on the permission he has given. A prescription and limitation period will only start to run from the moment that the user informed the owner about his claim. The owner will then have plenty of time to assert his rights and prevent any prescription or limitation.

### **5. No Prescription beyond your Possession**

When possession of a servitude to maintain a tree within the forbidden zone has led to acquisition of the servitude in question the servitude is confined to maintaining that specific tree. The possessor does not acquire a servitude to plant and maintain

<sup>16</sup> NJ 1980/549.

other trees within the forbidden zone. So, he is not allowed to plant extra trees in the zone. What is more, if the original tree dies or if it is blown over, he is not allowed to plant a new tree on the same spot as a substitute.<sup>17</sup> Acquisitive prescription is limited to what the acquirer possesses. Sometimes this thought is expressed by the adage *tantum praescriptum quantum possessum* (as much has prescribed as was held in possession). To give another example, from the presence of a window within the forbidden zone we may infer possession of a servitude to maintain the window, but not more than that. We cannot infer from these facts the possession of a servitude of view or a servitude that the neighbour shall not erect a building over a certain height. As said previously, in principle a servitude of view cannot be possessed as possession of such a right is invisible.<sup>18</sup>

## 6. The Consequence of Permission (other than Toleration)

Permission given to the owner of a neighbouring piece of land to deviate from the rules of neighbour law creates a personal right of use. Where, however, someone has a right to claim a compulsory right of way, and permission is given to him to walk or drive over his neighbour's land his right should really be seen as a proprietary right rather than a mere personal right. Less clear is the legal status of permission to have trees or windows in the forbidden zone. The articles 5:42 and 5:50 BW both state that having trees or windows in this zone is allowed if the neighbour whose right of ownership is thus violated, gives his permission to have or maintain these trees or windows. It is unclear whether this permission creates a mere personal right or rather a proprietary right. Anyhow, the permission can be entered into the public land register and, if so entered, it works against subsequent owners of the 'burdened' property. Therefore, the right so acquired shares an important feature of proprietary rights: it has absolute effect, that is, it works against third parties.

## 7. The Consequence of Toleration

Article 1993 of the old 1838 civil code provided that toleration could not give rise to possession which could lead to acquisitive prescription. Diephuis writes that the rule does not pose a new requirement and that it is therefore superfluous. It merely warns that we should not regard as possession that which is not possession. In order to live together as good neighbours it should safely be possible to tolerate minor violations of the right of ownership without the risk that it will lead to a right or duty.<sup>19</sup> Diephuis thus holds the view that toleration cannot give rise to possession and that, as a consequence, acquisitive prescription is impossible. This line of

<sup>17</sup> HR 20 December 1901, W 7701. See also J.Ph. Suijling, *supra* note 7, nr. 201; A. Pitlo and W.H.M. Reehuis, *Goederenrecht*, 11<sup>th</sup> revised and extended ed., Deventer, Gouda Quint, 2001, nr. 631.

<sup>18</sup> Unless such a right has been created by notarial deed and entered into the land register.

<sup>19</sup> G. Diephuis, *Het Nederlandsch burgerlijk regt*, vol. 6, Groningen, Wolters, 1880, p. 443-444.

thought is even more clearly laid down in article 2232 of the French civil code: '*Les actes de pure faculté et ceux de simple tolérance ne peuvent fonder ni possession ni prescription.*'<sup>20</sup> The rationale applying to permission applies to toleration in the same way. The person who tolerates or has given his permission should not be aware of any limitation or prescription period running against him. No action of revindication comes into being and consequently there is no scope for limitation of this action.

How should we know that the infringement was tolerated? After all, there will be no deed or other paper documenting the toleration. We should infer this from the circumstances of the case, the most important one being the degree of infringement. The smaller the infringement the more likely it is that the infringement was tolerated.

## 8. Limitation without Acquisitive Prescription

The action of revindication will be barred by limitation 20 years after the action arose (art. 3:306 BW). The person who possesses a servitude at that moment will acquire the right of servitude (art. 3:105 BW). But, what happens if the person claiming acquisitive prescription cannot show possession of the servitude. He will certainly not acquire a servitude. However, his neighbour will be barred from bringing an action to stop the infringement. The limitation will even work against subsequent owners of the 'burdened' property and it will work in favour of subsequent owners of the 'dominant' property. Materially there will be no difference between the case in which the limitation did and did not lead to the acquisition of a servitude. As a consequence, many of the requirements for acquisitive prescription will apply also in the case of limitation. The infringement should be visible and permanent, it should not be equivocal and it should not be based on permission or tolerance.

## 9. Compulsory Right of Way

When answering the question whether the owner of a piece of land has acquired a right of way by prescription we should note that in some cases a person is under a duty to allow his neighbour to walk or drive over his land even if there is no servitude to that effect. This is called a compulsory right of way (*noodweg* in Dutch) (art. 5:57 BW). The owner has the right to require a compulsory right of way if his plot of land has no (adequate) entry to a public road or public waterway. The owner of the neighbouring piece of land over which the public road or waterway would be accessible has to give a right of way to the owner of the landlocked plot of land. If access is possible over different pieces of land from different owners the owners of these lands should negotiate who is to give a right of way. If they cannot reach

<sup>20</sup> In the case of tolerance there will be no possession of a servitude in French law. See P. Jourdain, *Les biens*, Paris, Dalloz, 1995, nr. 187; G. Baudry-Lacantinerie, *Traité théorique et pratique de droit civil*, vol. 28 (De la prescription), A. Tissier (ed.), Paris, Librairie de la Société du Recueil J.-B. Sirey et du Journal du Palais, 3<sup>rd</sup> ed., 1905, nr. 282.



agreement the judge will determine who is to give a right of way. The neighbour acquiring the compulsory right of way has to pay a fair compensation.

## 10. Conclusion

As we have seen, the requirements for acquisitive prescription of a servitude are very severe. In practice a servitude will not often be acquired by prescription. Good faith, needed to acquire a servitude in 10 years time, will normally be present only if in the past a deed was made to create a servitude. In the absence of such good faith a servitude can still be acquired after 20 years. However, acquisitive prescription of a servitude always requires possession of a servitude and this possession will be present only if the person claiming prescription has acted as if he had such a right of servitude. To be legally relevant the possession should be visible and not secret, it should be permanent and unequivocal. If an intention to exercise a servitude cannot be established, the action of revindication may still become barred by limitation after 20 years, even though it does not create a servitude. Again, the infringement should be visible, permanent and unequivocal. As the limitation works against successors in title on both the active and passive side, it will practically have the same result as the acquisition of a servitude. We have also seen that if the infringement on the neighbour's land is based on permission or tolerance there can be no possession of a servitude nor limitation of the action of revindication. The reason is that the neighbour whose rights are infringed upon has no reason to suspect that he will lose his rights. In the case of minor infringements it should be assumed that they are tolerated so that it will be for the person violating his neighbour's right of ownership to prove that there was no tolerance and that as a result a limitation period running against the neighbour has been completed.



## MODERNISING LAND BURDENS: THE NEW LAW IN SCOTLAND

### 1. Becoming Stuck: the Decline of Servitudes

As a mixed legal system,<sup>1</sup> Scots law received much of the Roman law of property including the law of praedial servitudes.<sup>2</sup> The oldest printed decision on servitudes in Scotland dates from 1583,<sup>3</sup> and there were a further 45 such decisions before the end of the eighteenth century.<sup>4</sup> In this period, and for a long time thereafter, the law of servitudes was a close copy of the Roman law. The servitudes standardly recognised in Roman law were recognised in Scotland also, and Latin names were often used: *via*, *aquaeductus*, *aquaehaustus*, *non aedificandi*, *altius non tollendi*, and so on. Even today these traditional servitudes remain at the heart of the law.<sup>5</sup>

By the end of the eighteenth century a too faithful adherence to the law of Rome was beginning to seem a disadvantage. Scotland was undergoing a period of rapid industrialisation and urbanisation. And as land was sold for development, and new houses built, it became urgently necessary to find more sophisticated methods of land regulation. A hundred years later the matter might have been controlled by public law, but in 1800 it was not considered the duty of the state to inter-

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<sup>1</sup> I.e. a legal system which draws from both the common law and the civil law. See e.g. V.V. Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family*, Cambridge, Cambridge University Press, 2001. For a comparison of land burdens in two mixed legal systems, see W.M. Gordon and M.J. de Waal, 'Servitudes and Real Burdens,' in R. Zimmermann, D. Visser and K. Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*, Oxford, Oxford University Press, 2004, p. 735-157.

<sup>2</sup> In this paper referred to as 'servitudes.' I do not deal here with personal servitudes such as *usufruct*, although that too was received in Scotland. In the United States 'servitude' is sometimes used as a generic term for easements, profits and covenants, but that is not the usage of this paper.

<sup>3</sup> *Knockdolian v. Tenants of Parthick* (1583) Mor. 14540.

<sup>4</sup> They can be found in W.M. Morison, *The Decisions of the Court of Session from its first Institution to the Present Time, Abridged, and Digested under Proper Heads, in the form of a Dictionary* (1801-04) under the heading of 'Servitude.'

<sup>5</sup> The standard modern work is D.J. Cusine and R.R.M. Paisley, *Servitudes and Rights of Way*, Edinburgh, W. Green, 1998.

fere with private land. Regulation, if it was to be done at all, must be done by private law. Yet as received from Roman law, the law of servitudes was inadequate for the task. Either it must change or give way to some more suitable device.

The difficulties with servitude law are conveniently encapsulated in the case of *Nicolson v. Melvill*, litigated in 1708.<sup>6</sup> The brief report describes the facts in this way:

Robert Miln, mason, and Andrew Paterson, wright, having rebuilt the burnt land<sup>7</sup> at the entry to the Parliament close, and covered it with a lead roof, and considering, that if the uppermost stories were burdened with the maintenance and upholding of the roof, none would buy them; and it being in the interest of the whole land from top to bottom, to have the roof kept tight, otherwise the rain will fall down upon them; therefore, in selling the several tenements and stories of that land, they take the sundry purchasers, in their dispositions,<sup>8</sup> bound and obliged by their acceptation thereof, to repair, uphold, and maintain the roof, at least *quoad* their share and proportion thereof, effering to the price. Andrew Law having bought the lowmost storey, and accepted his disposition with that quality and burden, he infefts Bethia Melvill, his wife, therein,<sup>9</sup> but her disposition mentions no such burden; and she declining to pay her proportion, extending to £3 13s Sterling, is pursued for the same.

The initial obligation to pay for maintenance of the roof was, of course, binding on Andrew Law as a matter of contract law. But was it binding on Bethia Melvill, his successor? In other words, did the obligation run with the land? The neighbours who were trying to recover the money argued that the obligation was a servitude and hence binding on successors. By a majority of 6 to 5, the Court of Session disagreed. Their reasons are instructive. In the first place, servitudes were said to be passive in nature and so could not usually impose affirmative obligations such as an obligation to maintain or to pay for maintenance.<sup>10</sup> And in the second place an obligation to maintain a roof was not one of the ‘known’ servitudes, i.e. one of the servitudes derived from Roman law or otherwise recognised under the law of Scotland. This refers to the virtual *numerus clausus* of servitudes in Scotland – a fixed list which could only rarely be extended.<sup>11</sup> The court was not disposed to extend the list in the present case. In that connection the ‘floodgates’ argument presented by Bethia Melvill has a distinctly modern ring:

if this were once allowed, then other unheard of servitudes might be introduced, such as that you shall bear a share of the expenses of the floors, and glass windows of your neighbouring tenements, seeing you are benefited thereby.

<sup>6</sup> (1708) Mor. 14516.

<sup>7</sup> I.e. multi-storey building or ‘tenement.’

<sup>8</sup> A ‘disposition’ is the document which is used to transfer ownership of land.

<sup>9</sup> I.e. Law transfers ownership of the flat (‘storey’) to his wife.

<sup>10</sup> ‘[T]he nature of servitudes by the common law, is only *aliquid pati vel non facere in suo*, whereof the *servitus oneris ferendi* is the only exception....’

<sup>11</sup> This is a *numerus clausus* with a *numerus clausus*, for there is also a *numerus clausus* of real rights. In other words, it is *Typenfixierung* rather than *Typenzwang*.

## 2. Moving forward: the Rise of Real Burdens

*Nicolson v. Melvill* was decided at the beginning of the eighteenth century, but even by the end of that century there was little indication from the courts that the law of servitudes was capable of developing in a manner sufficient for the needs of the times. In the event, practising lawyers tried something else.<sup>12</sup> Beginning in the 1790s the practice grew up of including in deeds of conveyance a number of conditions for the future use of the land which was being sold.<sup>13</sup> Typically there was an obligation to build a house or other building, to maintain it in the future, and to use it for certain purposes and not for certain other purposes. By the 1820s the practice had become widespread and the obligations increasingly ornate, often running to several pages. In particular there were detailed provisions about the type of building which was to be built, covering matters such as materials, size, and architectural style. Yet it remained unclear whether these conditions were enforceable against successive owners and, if so, on what basis. The test case did not come until 1840: in *Tailors of Aberdeen v. Coutts*<sup>14</sup> the House of Lords upheld the validity of the conditions as a new type of land burden which came to be known as a 'real burden.' The decision was a victory for the persistence of ordinary lawyers, and so a triumph of practice over theory. By 1840 it would have been a reckless act to deny enforceability to the burdens on which Scotland's towns and cities had come to depend. Instead the task of the court was the strenuous one of explaining how such burdens worked.

As the law evolved in the nineteenth century it became plain that real burdens were part of the law of property and not of the law of obligations. They were like servitudes but without the limitations which had made servitudes unsuited to the task of urban regulation. Comparatively speaking, real burdens were unrestricted as to content. It is true that, like servitudes, they were subject to the praedial rule – that is to say, the rule that they must regulate the burdened property for the benefited of a benefited property<sup>15</sup> – but in other respects matters were left open. There was no *numerus clausus* of real burdens in the same way as there was a *numerus clausus* of servitudes; and a real burden could impose an affirmative obligation such as the maintenance obligation which had been rejected in *Nicolson v. Melvill*.

With their greater flexibility, real burdens came to be used much more than servitudes. Servitudes were largely confined to such traditional rights as rights of way or aqueduct. Otherwise real burdens were used instead. And they were used on an enormous scale. By the middle of the nineteenth century land sold for development was almost invariably made subject to detailed regulation by real burden. By the start of the twentieth century the practice had grown up of using real bur-

<sup>12</sup> K.G.C. Reid, 'Vassals No More: Feudalism and Post-feudalism in Scotland,' *European Review of Private Law*, 11 2003, p. 282.

<sup>13</sup> For the history, see K.G.C. Reid, *The Law of Property in Scotland*, Edinburgh, Butterworths, 1996, § 376-85. The account in the text simplifies an often complex story.

<sup>14</sup> (1840) 1 Rob 296.

<sup>15</sup> This is the close equivalent of the 'touch and concern' rule found in common law systems. But as will be seen later, in the case of real burdens imposed feudally there was no proper benefited property.

dens to regulate relations *within* a community such as a housing estate or block of flats. So if a developer built and sold 100 houses, each house would be made subject to uniform burdens which were mutually enforceable amongst the owners. In effect these 'community burdens' operated as a local law; and in the case of flatted property they allowed an individualistic regulation of matters, including maintenance, which in other countries tended to be regulated by statute.<sup>16</sup> Today most land in Scotland is subject to at least one set of real burdens, dating from the time when the land was first developed; and often there are two or three different sets of burdens, representing the occasions on which the current plot was carved out of successively smaller areas of land.

### 3. Keeping both: a Dual System of Land Burdens

This historical evolution explains the present law. In Scotland there are not one but two types of land burden,<sup>17</sup> for the servitude of Roman law has been supplemented, and often replaced, by the real burden. The experience of other European countries was different. There the servitude was generally persevered with and developed, with the result that land burdens are typically less flexible, and less common, than in Scotland. To this statement England is an exception. In England, at much the same time and for much the same reasons as in Scotland, the easement<sup>18</sup> was supplemented by the equitable freehold covenant, and today such covenants are in widespread use.<sup>19</sup> Unlike the Scottish real burden, however, the covenant can only be 'restrictive' in character and so cannot impose affirmative obligations.

These historical events have led to a difference between the common law and civil law world. Under English influence common law countries often exhibit a dual system of land burdens. In civil law countries, by contrast, there is typically only a single device, the servitude, and in situations where this is found inadequate it tends to be supplemented by devices drawn from the law of obligations rather than from the law of property.<sup>20</sup> In this respect at least, Scotland is in the common law camp; but although the real burden in Scotland developed at much the same time as the equitable covenant in England, there is little sign of mutual influence.

<sup>16</sup> There was no statutory regulation of flatted property until the Tenements (Scotland) Act 2004, mentioned below.

<sup>17</sup> 'Land burden' is used in this paper as a general term for servitudes and servitude-like burdens. It is not a technical term of Scots law.

<sup>18</sup> I.e. servitude.

<sup>19</sup> A.W.B. Simpson, *A History of the Land Law*, Oxford, Clarendon, 2<sup>nd</sup> ed., 1986, p. 257 *et seq.*

<sup>20</sup> A notable example is provided, in The Netherlands, by art 6:252 BW, by which a contractual obligation contained in a notarial deed and duly registered can run with the land of the obligant. Both Germany and Austria, however, recognise the *Reallast*, an obligation which both binds successive owners personally as well (and unlike the Scottish real burden) as being secured on the land. In practice it is little used.

#### 4. The Impetus for Reform

In Scotland the real burden (but not the servitude) was intimately connected with the feudal system of land tenure. For when real burdens first came into use, at the beginning of the nineteenth century, land law in Scotland was still feudal; and, partly due to the very success of real burdens, it was to remain feudal until much later than in most other countries of Europe. Although in a state of terminal decline for 100 years or more, the feudal system of land tenure was not finally abolished until as recently as 2004. Abolition, when it came, had important implications for real burdens. It was the feudal system which had paved the way for burdens of an affirmative nature, for what seemed impossible under the law of servitudes seemed perfectly natural in a system where obligations to pay money or perform services were routinely imposed on the feudal 'vassal' by the feudal 'superior.'<sup>21</sup> And many real burdens – perhaps as many as one half – had been created as part of a feudal transaction and so were enforceable by the superior. With feudal abolition there was an end to feudal superiors and hence, potentially, to real burdens created by feudal means. If something were not done to preserve them there would be a dramatic and undifferentiated extinction of real burdens, resulting in a massive deregulation of land. In those circumstances it was inevitable that the abolition of the feudal system would be accompanied by a reform of the law of real burdens.

The task of preparing draft legislation was given to the Scottish Law Commission, which earlier had prepared the legislation for feudal abolition.<sup>22</sup> As is its usual practice, the Commission produced a discussion paper for consultation<sup>23</sup> followed in 2000 by its final report with a draft Title Conditions Bill.<sup>24</sup> The Bill was passed by the Scottish Parliament with only minor changes in 2003 and came into force on the day on which the feudal system was abolished: 28 November 2004.<sup>25</sup>

The Title Conditions (Scotland) Act 2003 is a substantial piece of legislation running, in the official version, to some 112 pages.<sup>26</sup> Large parts of it are concerned with transitional matters, and in particular with the fate of real burdens created under the feudal system. These rather specialised matters are not discussed further

<sup>21</sup> K.G.C. Reid, 'Real Rights and Real Obligations,' in S. Bartels and M. Milo (eds), *Contents of Real Rights*, Nijmegen, Wolf Legal Publishers, 2004, p. 25-45.

<sup>22</sup> The present writer was the Law Commissioner who directed both projects. The legislation abolishing the feudal system is the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

<sup>23</sup> Scottish Law Commission, Discussion Paper on Real Burdens (Scot Law Com DP No. 106, 1998; available on <<http://www.scotlawcom.gov.uk>>).

<sup>24</sup> Scottish Law Commission, Report on Real Burdens (Scot Law Com No. 181, 2000; available on <<http://www.scotlawcom.gov.uk>>).

<sup>25</sup> A third major Act in the field of property law, the Tenements (Scotland) Act 2004, came into force on the same day. This Act, also the work of the Scottish Law Commission, provided for the first time a set of statutory rules for the ownership, management and maintenance of 'tenements' (i.e. blocks of flats). But the rules are default rules and apply only to the extent that no provision is made in the title deeds by real burden.

<sup>26</sup> Like all legislation of the Scottish Parliament it is readily available on <<http://www.opsi.gov.uk>>.

here.<sup>27</sup> But the Act also makes provision for the future. Part 1 of the Act contains what is virtually a real burdens code, setting out, with important changes, the law as developed by the courts in the period since 1840. In addition, part 7 makes a number of changes to the law of servitudes but without attempting a codification.

## 5. Policy Considerations

Any reform of land burdens must reconcile two opposing factors. One is the desire of a person to hold rights in the property of another, fortified sometimes by necessity. The other is the view that land, being a finite and scarce resource, should not be unduly encumbered or restricted as to use. The conflict is between party autonomy and the protection of future owners: between the right to agree a restriction with the current owner and the rights of future owners who were not party to the original agreement and did not receive payment for it. Of course this conflict is not unique to land burdens but is capable of applying to all limited real rights; but with land burdens it is particularly acute. Partly this is because land burdens last longer than other limited real rights. They are rights without term, potentially enduring as long as the land itself and without regard to changes in circumstances. Partly too it is because land burdens are often relatively open as to content and hence potentially onerous.<sup>28</sup>

The conflict is, of course, an eternal one in which neither side can be allowed to prevail. The resolution, therefore, is to allow land to be encumbered – but not too much. Just how much, however, is not easy to say, and particular solutions are correspondingly difficult to defend. Although theoretical models can be devised,<sup>29</sup> these may fail to respond to the full range of obligations which are encompassed by land burdens<sup>30</sup> as well as being, in a practical sense, difficult to turn into a legislative rule. In the event the law reformer is likely to rely on more familiar aids: on a consideration of the state of the law as it is now coupled with an instinctive sense of where it ought to be going. And if law reform is to be workable and acceptable the point of arrival cannot usually be too remote from the point of departure.

In preparing the Title Conditions Act there was also a second policy consideration. Land registration was introduced to Scotland in 1617. Servitudes, having been received into the law before 1617, did not require to be registered.<sup>31</sup> Real burdens, a much later arrival, did. The publicity principle was thus imperfectly observed. Two important changes are made by the Title Conditions Act. First, all servitudes created

<sup>27</sup> For a detailed discussion see K.G.C. Reid, *The Abolition of Feudal Tenure in Scotland*, Edinburgh, Butterworths, 2003.

<sup>28</sup> See generally S. Bartels and M. Milo (eds), *Contents of Real Rights*, Nijmegen, Wolf Legal Publishers, 2004.

<sup>29</sup> Recent examples are: B.W.F. Depoorter and F. Parisi, 'Fragmentation of Property rights: A Functional Interpretation of the Law of Servitudes,' vol. 3, 1 *Global Jurist Frontiers*, 2003, Article 2; J.R. Gordley, 'Servitudes,' vol. 3, 1 *Global Jurist Frontiers*, 2003, Article 3.

<sup>30</sup> In particular the important differences between the three types of obligation discussed below.

<sup>31</sup> Although in practice they usually were, except where created by prescription.



by deed must now be registered;<sup>32</sup> but as before it will remain possible to create servitudes by acquisitive ('positive') prescription following possession for 20 years.<sup>33</sup> Secondly, in recognition of the fact that land burdens (unlike other real rights) involve two properties and not one, there must be registration against both.<sup>34</sup> Under the previous law a real burden was registered only against the property which was being burdened with the result that owners of the benefited properties might have no idea as to the existence of their rights.

The second policy consideration has an obvious connection to the first, for the less that publicity is given to land burdens the more a person acquiring the burdened land needs to be protected. Conversely, if an acquirer is able to know from the land register that the land is burdened, and to what extent, he can make an informed choice as to whether to buy the land or not, and whether to seek a reduction in the price on account of the burden. This point must not, however, be overstated. While it is true that the ignorant acquirer stands in need of protection, it is less obviously true that a knowledgeable acquirer can fend for himself. On the contrary, given the scarcity of land on the market, a person who needs to buy may be disinclined to reject a property merely on the ground that he dislikes some of the burdens. Nor, experience suggests, is he likely to be successful in negotiating a reduction in the price.

## 6. Three Obligations

In seeking to apply these policy considerations it is necessary to have regard to context and in particular to the potential variety of obligations which can be constituted as land burdens. It is possible to distinguish three broad categories:

- (1) an obligation on the burdened owner to do something, such as to use the property for a particular purpose or to maintain a wall or a building;
- (2) an obligation not to do something, such as to build on the property or to use it for commercial purposes; and
- (3) an obligation to allow a person some limited use of the property, such as to walk or drive over part of it or to run a pipe through it.

In Scotland, as in other countries, servitudes were confined to the second and third categories, with the third preponderant.<sup>35</sup> Real burdens, however, could encompass obligations in all three categories, although, in view of the availability of servitudes, they were rarely used for the last category.

One response to this rather confused picture would have been to fuse real burdens and servitudes. As in many civil law countries there would then have been

<sup>32</sup> Title Conditions (Scotland) Act 2003 s 75.

<sup>33</sup> Prescription and Limitation (Scotland) Act 1973 s 3.

<sup>34</sup> Title Conditions (Scotland) Act 2003 ss 4(1), (5), 75(1).

<sup>35</sup> Type (2) servitudes were known as 'negative' servitudes and type (3) 'positive.' Negative servitudes were limited to restrictions designed to preserve light or prospect.

only a single type of land burden although, unlike in those countries, it would have been very wide in scope. This in essence was the approach taken by the American Law Institute in its important and influential Restatement of the law of Servitudes<sup>36</sup> which was being carried out at the same time as the Scottish Law Commission's work and which was completed in 2000.<sup>37</sup> Though tempted by this idea the Scottish Law Commission did not in the end succumb.<sup>38</sup> In the Commission's view the differences between type (3) obligations – the main occurrence of servitudes – and obligations of the other two types were sufficiently great to justify a continuing distinction. This was partly because, as already mentioned, servitudes could be created by prescription, a rule which had proved extremely convenient in practice and which there was no desire to change. But it was also because in type (3) obligations the balance of virtue as between creditor and debtor is much more likely to favour the creditor. For the traditional Roman servitudes deal with matters which are often essential to the use of the benefited property – access, the laying of pipes, the withdrawal of water, and so on – and without them the land may be virtually unusable. That could rarely be said of obligations of the other two types. So while an owner may *wish* to stop his neighbour keeping a dog or erecting a greenhouse – restrictions which might be imposed as a type (2) real burden – he may absolutely *need* to take access over his neighbour's land in order to reach a public road. In relation to obligations of types (1) and (2) the broad tendency of the Title Conditions Act is to adjust the balance in favour of the debtor – to restrict creation and to facilitate extinction. For type (3) obligations that would not be appropriate.

Instead of fusion the Scottish Law Commission proposed a more efficient separation.<sup>39</sup> If type (3) obligations could be created as real burdens but were usually created as servitudes, there was no value in retaining the facility to use real burdens. And similarly if type (2) obligations could, in limited cases at least, be created as servitudes but were usually created as real burdens, there was no value in retaining the facility to use servitudes. Servitudes should be confined to type (3) obligations, while obligations of the first two types should be the sole province of real burdens. Under the new law, therefore the division is as follows:

- (1) *affirmative burdens* i.e. obligations to do something;
- (2) *negative burdens* i.e. obligations not to do something; and
- (3) *servitudes* i.e. obligations to allow a person some limited use of the property.

<sup>36</sup> By 'servitudes' is meant not merely the traditional Roman servitudes (which is the usage adopted in this paper) but rather easements, profits and covenants.

<sup>37</sup> American Law Institute, Restatement of the Law Third, Property: Servitudes § 1.1 (hereafter 'Restatement Servitudes').

<sup>38</sup> Scottish Law Commission, Discussion Paper on Real Burdens (Scot Law Com DP No. 106, 1998) § 1.20. 'Title Condition' is, however, introduced as new generic term for real burdens, servitudes, and certain other rights, most notably conditions binding the tenant in a lease of more than 20 years. See the definition of the term in s 122(1) of the Title Conditions (Scotland) Act 2003. The only connecting thread among the different title conditions is that all can be judicially varied or discharged under part 9 of the Act.

<sup>39</sup> Scottish Law Commission, Report on Real Burdens § 2.1-2.4.

Affirmative and negative burdens are subcategories of real burden.<sup>40</sup> Servitude remains a separate juridical category. Existing burdens of the ‘wrong’ kind were automatically converted to the ‘right’ kind on the day the legislation came into force.<sup>41</sup>

It will be convenient to consider each category in turn, beginning with servitudes.

## 7. Servitudes

The Scottish Law Commission’s terms of reference were directed at real burdens rather than at servitudes, and for the most part the law of servitudes (which derives almost entirely from case law) was left alone. One significant change – the requirement of (dual) registration for servitudes created by deed – has already been mentioned. The other main change brought about by the Title Conditions Act was a partial abandonment of the *numerus clausus*.<sup>42</sup> The *numerus clausus* remains in place for servitudes created by prescription, on the basis that an acquirer who may not have notice of prescriptive servitudes should at least have the reassurance that they are confined to certain known types; but for servitudes created by deed and registration the *numerus clausus* is broken. The change is less dramatic than it sounds, however, because under the previous law the *numerus clausus* could already be avoided by using a real burden rather than a servitude. Under the Title Conditions Act real burdens cease to be available for type (3) obligations. Hence, unless type (3) obligations were now to be limited in scope, it became necessary to break the *numerus clausus* for servitudes.

## 8. Affirmative Burdens

Affirmative burdens have been a feature of the legal landscape in Scotland for more than 200 years. Experience teaches that they cause few problems in practice. Their content is sharply limited by the praedial rule – a feature of the new law as of the old – which requires that ‘a real burden must relate in some way to the burdened property.’<sup>43</sup> An obligation to pay my mortgage or weed my garden could not, therefore, be constituted as an affirmative burden. In practice only two such burdens are common. One is an obligation of initial construction – in relation to a house, for example, or a garden fence. The other is an obligation of maintenance, either of the obligant’s own property or of shared property such as a private road or the roof of a block of flats. The second in particular has proved invaluable in the orderly maintenance of buildings and other structures.

<sup>40</sup> Title Conditions (Scotland) Act 2003 s 2. The choice of name was influenced by the ‘affirmative covenants’ and ‘negative covenants’ of the Restatement Servitudes § 1.3(2).

<sup>41</sup> Title Conditions (Scotland) Act 2003 ss 80, 81. So for example type (3) real burdens were converted into servitudes.

<sup>42</sup> I.e. the rule, described earlier, that only certain ‘known’ obligations can be constituted as servitudes.

<sup>43</sup> Title Conditions (Scotland) Act 2003 s 3(1).

## 9. Negative Burdens

By contrast, the experience with negative burdens has been far less satisfactory. Negative burdens are very common. In Scotland most land burdens are negative burdens. Particularly in modern housing estates they may seek a degree of control which verges on the absurd. Owners of houses may, for example, be forbidden from keeping more than one dog or cat, from parking caravans, and from putting up conspicuous signs or name plates. Other burdens are aggressively general in nature: for example a prohibition on building – a standard burden in many housing estates – prevents not merely nuclear power stations but also garages and treehouses. Of course negative burdens can serve a useful function. A prohibition on building in a certain part of the land may preserve the light or prospect of a neighbour. A prohibition on business use may be a sensible restriction in the interests of the overall amenity of the area. But in Scotland burdens have been over-used: too often they are imposed indiscriminately with little regard to their usefulness or practicality. In consequence they are frequently ignored.

Trivial burdens lead to trivial benefit. Many negative burdens are of little value to those who are entitled to enforce them. As a result they are rarely enforced. And where a genuine benefit is in prospect, the same benefit is often, today, conferred already by public law: for example, even without a private law restriction on the erection of nuclear power stations, the power station would be prevented by planning law. The fact that a burden may not in practice be enforced is, however, of limited help to the burdened owner. Admittedly it means that the prohibited act – the small extension to the house, for example – can go ahead with a reasonable measure of confidence that it will not be stopped. But when, later, the owner comes to sell, a potential buyer is likely to be less indulgent and may require a formal consent from those who were entitled to enforce.

## 10. Techniques of Restraint

Much more than other land burdens, negative burdens raise the question of what kinds of obligation should be admitted by property law to bind successive owners of land and what kinds should be refused. In Scotland the starting point is one of relative liberality, for under the old law burdens were easy to impose and difficult to dislodge. The Scottish Law Commission saw as one of its tasks the introduction of restraints.

In discussing restraints on land burdens a distinction is sometimes made between those which operate *ex ante* and those which operate *ex post*. The former prevent a burden being created in the first place, while the latter restrain its effectiveness once created or provide for its termination. By replacing the touch and concern doctrine with a test of illegality, unconstitutionality and violation of public policy the new American Restatement on Servitudes<sup>44</sup> is said to have moved from

<sup>44</sup> Restatement Servitudes § 3.1.

an *ex ante* approach to one which is *ex post*.<sup>45</sup> The shift produced by the Title Conditions Act is more modest, for while important new methods of termination are introduced, the former restrictions on creation are retained and indeed reinforced.

In fact the distinction between restraints *ex ante* and *ex post* is less marked than might at first seem to be the case; for unless an *ex ante* restraint is so clear that it can be applied without argument – for example, a prohibition on all affirmative burdens – it is likely to require judicial elucidation in particular cases and will often be used as a defence to enforcement. In other words a restraint conceived of as *ex ante* may in practice operate *ex post*. Nonetheless the distinction is of importance in relation to burdens which already existed at the time when reforming legislation comes into force (which for many years to come means most burdens): old burdens are, necessarily, unaffected by new rules of creation – by *ex ante* restraints; but there is no reason why they should not be subject to new rules of enforcement and termination, and the Title Conditions Act so provides.<sup>46</sup>

The proposals of the Scottish Law Commission in this area – now implemented by the Title Conditions Act – are discussed more fully below; but it seems possible to identify three governing principles which underly them. In the first place, a burden should be enforceable by a person if and only if its breach would cause material injury to that person's property. Conversely it should not be enforceable by a person without property, or whose property would not be so affected. Secondly, all burdens should be subject to review by the courts and, if appropriate, should be capable of being varied or discharged. Thirdly, burdens should have a limited life. In particular any burden which is more than 100 years' old should be presumptively discharged, subject to a judicial order to the contrary. With some exceptions the Commission's proposals apply to all real burdens and not merely to negative burdens,<sup>47</sup> but the mischief which they were designed to address was largely a mischief in the law and practice of negative burdens.

## 11. The First Principle: Injury to the Enforcer's Property

A restriction in perpetuity requires powerful justification especially where, as in the case of negative burdens, it is a matter of private right and not of public law. In the ordinary course of events there can be no reason for allowing a private citizen to insist on a restriction on the property of another private citizen; for the disadvantage to the latter will usually far exceed the benefit to the former. Indeed it often is hard to see how *any* benefit could arise, other than the possibility of payment for relinquishing the restriction. In this way negative burdens can all too easily become sources of holdouts and ransom payments.

In one case are matters obviously different. Where the potential enforcer is also a close neighbour a restriction can be justified if it is for the benefit of the en-

<sup>45</sup> B.W.F. Depoorter and F. Parisi, *supra* note 29, p. 31.

<sup>46</sup> Title Conditions (Scotland) Act 2003 s 119.

<sup>47</sup> The main exception is that the sunset rule (i.e. the rule that burdens are presumptively discharged after 100 years) does not apply to 'facility burdens' (i.e. affirmative burdens for the maintenance of a (common) facility: see Title Conditions (Scotland) Act 2003 s 20(3)(c)).

forcer's own property. In the view of the Scottish Law Commission this was the only case in which a real burden should be allowed. This policy objective is achieved in the Title Conditions Act by a combination of three separate rules: there must be a benefited property; the burden must confer benefit on that property; and in order to enforce a burden in any particular case it must be shown that the breach will injure the benefited property.

Before considering these rules in more detail it is instructive to compare negative burdens with servitudes.<sup>48</sup> With a servitude there can be no strong reason of *principle* for insisting on a benefited property. A person can enjoy a right of fishing or car-parking or even a right of way without necessarily owning property in the neighbourhood (or indeed any property at all). Although they are disallowed in many countries (including Scotland), personal servitudes<sup>49</sup> are thus not intrinsically objectionable: for burden is matched by a commensurate benefit. Negative burdens, however, stand in a different position. In the words of the Scottish Law Commission:<sup>50</sup>

It is difficult to see why a person who lives in Aberdeen, or Sydney, should be able to control the use of land in Edinburgh. He has no proper interest in such land. It is not his. He has no right of use over it. It is not a security for money owed to him. The manner in which it is used cannot possibly affect any property right held by him. In those circumstances, a real burden would often be little more than a sham. Its true purpose would be, not to control land use, but to extract money for minutes of waiver.<sup>51</sup> The abuse of burdens in this way has been an unwelcome feature of the feudal system. It should not be reproduced in post-feudal Scotland.

### 11.1. A Benefited Property

The Title Conditions Act requires a benefited property. This is apparent from its opening words:<sup>52</sup>

A real burden is an encumbrance on land constituted in favour of the owner of other land in that person's capacity as owner of that other land.

That is a change in the law. Around half of all burdens created before 2004 were constituted by feudal means, and a feudal real burden was enforceable by the superior personally and without reference to any property.<sup>53</sup> Today that is no longer possible. A person who transfers part of his land can, naturally, impose burdens on

<sup>48</sup> I.e. type (2) obligations with type (3) obligations.

<sup>49</sup> I.e. servitudes in favour of a person rather than a property – servitudes 'in gross,' in the terminology of the common law.

<sup>50</sup> Report on Real Burdens § 9.8.

<sup>51</sup> I.e. for a discharge of the burden.

<sup>52</sup> Title Conditions (Scotland) Act 2003 s 1(1).

<sup>53</sup> Other than the notional right of *dominium directum* which was left to a superior after feuing land. But while there was no benefited property as such, it was sometimes argued that a superior could not enforce a real burden unless he owned at least some land in the neighbourhood. The point, however, was never settled.

the part transferred for the benefit of the part retained; but a person who transfers all of his land cannot impose burdens at all because there is no land left to serve as a benefited property.<sup>54</sup>

There can be more than one benefited property. Reference was made earlier to the practice of developers using 'community burdens'<sup>55</sup> for 'communities' such as housing estates and blocks of flats. In such cases each separate house or flat is *both* a burdened property *and also* a benefited property, with the result that the burdens are mutually enforceable amongst the owners. Today that it is the typical occasion for creating real burdens.

In one type of case the requirement of a benefited property is waived by the Title Conditions Act. In strictly limited circumstances the Act allows a real burden created directly in favour of a local council or the government.<sup>56</sup> Here public interest replaces the private interest justification which applies to ordinary neighbours. Such 'personal real burdens' are also available for designated conservation bodies if the purpose of the burden is conservation, whether of the natural or of the built environment.

### 11.2. *The Praedial Rule: Conferral of Benefit*

The praedial rule derives from Roman law<sup>57</sup> and is standardly observed in civil law systems. In the Title Conditions Act it is expressed in this way:<sup>58</sup>

A real burden must relate in some way to the burdened property.

In a case in which there is a benefited property,<sup>59</sup> a real burden must, unless it is a community burden, be for the benefit of that property.

While both aspects of this rule are important, our concern for present purposes is only with the second (i.e. benefit of the benefited property). The American Restatement on Servitudes discards the equivalent ('touch and concern') rule of the common law in favour of a test based on public policy.<sup>60</sup> This, it is said, will 'permit

<sup>54</sup> Unless he nominates as a benefited property land belonging to a third party.

<sup>55</sup> 'Community burdens' are defined in the Title Conditions (Scotland) Act 2003 s 25 as real burdens imposed on a common scheme on two or more units in circumstances where each unit is both a benefited and a burdened property. Part 2 of the Act contains a number of special rules for community burdens – for example to allow certain decisions (including the decision to vary or discharge a burden) to be taken by a majority of owners.

<sup>56</sup> See generally part 3 of the Title Conditions Act. Unlike other real burdens, content is strictly regulated by means of a list of (named) permissible burdens. For example, by s 45 of the Act it is possible to create an 'economic development burden,' defined as one which is 'for the purpose of promoting economic development.'

<sup>57</sup> See e.g. Paul, D.8.1.8.

<sup>58</sup> Title Conditions (Scotland) Act 2003 s 3(1), (3). As to the relationship to the burdened property, s 3(2) provides that: 'The relationship may be direct or indirect but shall not merely be that the obligated person is the owner of the burdened property.'

<sup>59</sup> I.e. in all cases other than the case of personal real burdens discussed above.

<sup>60</sup> Restatement Servitudes § 3.1, 3.2.

innovative land-development practices using servitudes without the sometimes irrational impediments imposed by the touch-or-concern doctrine.<sup>61</sup> In Scotland the praedial rule has seemed less intrusive and the Scottish Law Commission recommended its retention. This is in addition to a public policy test which was already present in the previous law.<sup>62</sup> The argument about 'innovative land-development practices' is met, at least in part, by providing a special form of the praedial rule for communities such as housing developments. Thus, rather than having to benefit a particular property within the community:<sup>63</sup>

A community burden may be for the benefit of the community to which it relates or of some part of that community.

If it is easy to smile at a rule which insists on benefit to a 'property,' this may be forgiven as a shorthand for the idea that a person must be benefited as owner of property and not in some other, more personal, way. In fact the real objection to the praedial rule is different: it is that the rule is rarely of practical help. This is because many obligations can be represented as benefiting *both* the property *and* the person. An example recently litigated in Scotland was an obligation, imposed in 1927 on land used as tennis courts, that no tennis should be played on a Sunday.<sup>64</sup> Such a restriction was presumably in accord with the religious beliefs of the original benefited owner. To that extent it was personal. But there was at least vestigial benefit to the houses on the benefited property in the form of a quieter neighbourhood one day out of seven. Of course this is not to argue that the praedial rule is worthless. It has the merit of excluding the obviously personal; and it stresses the importance of *vicinitas*, because no benefit can be taken by a property which is some distance away. But for a more refined form of control it is necessary to look elsewhere.

### ***11.3. Interest to Enforce: Injury to the Benefited Property***

Much more effective than the praedial rule is the concept of interest to enforce. It has always been the case in Scotland that, to enforce a real burden, a person must be able to show interest as well as title; but the concept of interest was vague and undeveloped and it was rarely a ground on which enforcement was refused. The position is changed by the Title Conditions Act. Where a breach of a burden has occurred, or is in prospect, a benefited owner has interest to enforce if and only if the breach would result in material injury to his property. By 'injury' is meant damage to the value of the property or to its enjoyment.<sup>65</sup> This is a significant hurdle.

<sup>61</sup> Restatement Servitudes vol. 1, p. 411.

<sup>62</sup> Title Conditions (Scotland) Act 2003 s 3(6): 'A real burden must not be contrary to public policy as for example in unreasonable restraint of trade and must not be repugnant with ownership (nor must it be illegal).' See also s 3(7) which forbids monopolies.

<sup>63</sup> Title Conditions (Scotland) Act 2003 s 3(4).

<sup>64</sup> *Marsden v. Craighelen Lawn Tennis and Squash Club* (1999) GWD 37-1820.

<sup>65</sup> Title Conditions (Scotland) Act 2003 s 8(1), (3). There is a special rule for affirmative burdens which allow payments of money to be exacted.



Few burdens are such that their breach will cause a material decline in the value of a neighbour's property, and even injury to enjoyment will often be hard to demonstrate. Of course absence of interest to enforce in respect of one particular breach does not connote lack of interest in respect of the next. Interest is a rule of enforcement and not of constitution; and burdens may be breached in great ways as well as small. But if a burden is of its nature trivial, even an unqualified breach is unlikely to trigger interest to enforce. In that case, and notwithstanding compliance with the praedial rule, the burden is a nullity.

## 12. The Second Principle: Review by the Courts

Land burdens in Scotland have been subject to review by the courts since 1970. The 1970 legislation,<sup>66</sup> which was in conscious imitation of English provisions dating from 1922,<sup>67</sup> conferred exclusive jurisdiction on a special court, the Lands Tribunal for Scotland. The Title Conditions Act confirms this jurisdiction but alters the grounds on which the Tribunal's discretion must be exercised. Under the Act, where a person subject to a real burden or servitude makes an application to have the burden varied or discharged, the Tribunal must grant the application if it is satisfied, having regard to the factors set out in section 100, that it would be reasonable to do so.<sup>68</sup> The factors in section 100 seem worth quoting in full:

- (a) any change in circumstances since the title condition was created (including, without prejudice to that generality, any change in the character of the benefited property, of the burdened property or of the neighbourhood of the properties);
- (b) the extent to which the condition -
  - (i) confers benefit on the benefited property; or
  - (ii) where there is no benefited property, confers benefit on the public;
- (c) the extent to which the condition impedes enjoyment of the burdened property;
- (d) if the condition is an obligation to do something, how -
  - (i) practicable; or
  - (ii) costly,
 it is to comply with the condition;
- (e) the length of time which has elapsed since the condition was created;
- (f) the purpose of the title condition;
- (g) whether in relation to the burdened property there is the consent, or deemed consent, of a planning authority, or the consent of some other regulatory authority, for a use which the condition prevents;
- (h) whether the owner of the burdened property is willing to pay compensation;

<sup>66</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 1.

<sup>67</sup> Law of Property Act 1922 s 90, since replaced by the Law of Property Act 1925 s 84. These provisions can in turn be traced back to much earlier legislation in England, in particular to the Land Registry Act 1862 s 29.

<sup>68</sup> Title Conditions (Scotland) Act 2003 s 98. For decisions by the Lands Tribunal, see <<http://www.lands-tribunal-Scotland.org.uk/title.html>>.

- (i) if the application is under section 90(1)(b)(ii) of this Act, the purpose for which the land is being acquired by the person proposing to register the conveyance; and
- (j) any other factor which the Lands Tribunal consider to be material.

Some of the factors, as might be expected, are directed at the age of the burden. If a burden is old, local circumstances might have changed in a way which makes it inconvenient or inappropriate (factor (a)); and even if there has been no such change, age is of itself a ground for discharge (factor (e)). Whatever the age of the burden, however, the Tribunal is invited to weigh benefit against inconvenience (factors (b) and (c)), so that a burden which imposes a heavy restraint without conferring a commensurate benefit is likely to be discharged. The emphasis on benefit looks back to the first principle,<sup>69</sup> while the emphasis on age looks forward to the third.<sup>70</sup>

In practice applications to the Lands Tribunal are often unopposed. In that case they are granted without further inquiry, for a benefit which is not defended may be taken as one which is either valueless or not valued.<sup>71</sup>

### 13. The Third Principle: a Limited Life

For more than 200 years in Scotland real burdens have been imposed whenever land was being sold for development. The zeal of the Victorian conveyancer has left its mark, and many properties continue to be affected by the burdens of an earlier age. Not all burdens, of course, are obsolete; not all that are obsolete are harmful; and not all that are harmful are obsolete or even old. The correlation between age and utility is inexact. Nonetheless the problem of ageing burdens is a serious one. The response of the Scottish Law Commission was to propose a time limit.<sup>72</sup> The idea in itself is not new. In Massachusetts burdens are limited to 30 years,<sup>73</sup> in Ontario to 40.<sup>74</sup> A limit of 80 years was recommended by the Law Commission of England and Wales but not taken up the government.<sup>75</sup> Such 'sunset' rules have the advantage of certainty but the disadvantage of over-achievement. They are effective but crude. They throw out, not only the bad, but the good as well. In a residential area settled in the nineteenth century a burden might be as useful today as on the day in which it was first created; yet a sunset rule will result in indiscriminate extinction.

<sup>69</sup> I.e. the principle, already discussed, that a burden should be enforceable only if its breach would cause material injury to property.

<sup>70</sup> I.e. the principle, discussed below, that burdens should have a limited life.

<sup>71</sup> Title Conditions (Scotland) Act 2003 s 97. This was a change in the law. The rule does not apply to servitudes or to affirmative burdens for maintenance of (shared) facilities.

<sup>72</sup> Scottish Law Commission, Report on Real Burdens § 5.18-5.57.

<sup>73</sup> Massachusetts General Laws ch. 184 ss 27, 28 (inserted by an Act of 1961 ch. 448).

<sup>74</sup> Land Titles Act c 230 s 118(9); Registry Act c 445 ss 104, 106.

<sup>75</sup> Law Commission, Transfer of Land: Obsolete Restrictive Covenants (Law Com No. 201, 1991) part III.

The problem can, of course, be ameliorated. In jurisdictions where a sunset rule is in place, a standard response is to allow renewal by the benefited owner before the burden expires. Renewal is either by notice or application to the court. But renewal supposes a degree of vigilance on the part of the owner which is often unrealistic. Following the recommendations of the Scottish Law Commission, the Title Conditions Act attempts a compromise. Subject to some exceptions, all real burdens are presumptively discharged after 100 years. But the discharge is not automatic. Instead it must be triggered by a notice by the burdened owner which is intimated to the benefited owner or owners.<sup>76</sup> Following intimation, any benefited owner can seek renewal by application to the Lands Tribunal. The grounds for renewal are the same as those, considered earlier, on which the Tribunal may grant a discharge.<sup>77</sup> The overall result is an appeal to market forces. If the benefit of a burden is sufficiently valuable, it is assumed that renewal will be sought, and in most cases granted. Otherwise the burden will fall.

Taken together, these three principles attempt to strike a balance between the need for negative burdens and the risk of their abuse. Such a balance needs to be found by all countries which admit such burdens, although particular circumstances will vary. Whether the Scottish solution will work, at least in Scotland, is a matter for the future.

<sup>76</sup> Title Conditions (Scotland) Act 2003 ss 20-24.

<sup>77</sup> Title Conditions (Scotland) Act 2003 ss 90(1)(b)(i), 98, 100.

## 14. Annex I Title Conditions (Scotland) Act 2003

### PART 1

#### REAL BURDENS: GENERAL

##### Meaning and creation

#### 1 The expression "real burden"

(1) A real burden is an encumbrance on land constituted in favour of the owner of other land in that person's capacity as owner of that other land.

(2) In relation to a real burden-

- (a) the encumbered land is known as the "burdened property"; and
- (b) the other land is known as the "benefited property".

(3) Notwithstanding subsections (1) and (2) above, the expression "real burden" includes a personal real burden; that is to say a conservation burden, a rural housing burden, a maritime burden, an economic development burden, a health care burden, a manager burden, a personal pre-emption burden and a personal redemption burden (being burdens constituted in favour of a person other than by reference to the person's capacity as owner of any land).

#### 2 Affirmative, negative and ancillary burdens

(1) Subject to subsection (3) below, a real burden may be created only as-

- (a) an obligation to do something (including an obligation to defray, or contribute towards, some cost); or
- (b) an obligation to refrain from doing something.

(2) An obligation created as is described in-

- (a) paragraph (a) of subsection (1) above is known as an "affirmative burden"; and
- (b) paragraph (b) of that subsection is known as a "negative burden".

(3) A real burden may be created which-

- (a) consists of a right to enter, or otherwise make use of, property; or

(b) makes provision for management or administration, but only for a purpose ancillary to those of an affirmative burden or a negative burden.

(4) A real burden created as is described in subsection (3) above is known as an "ancillary burden".

(5) In determining whether a real burden is created as is described in subsection (1) or (3) above, regard shall be had to the effect of a provision rather than to the way in which the provision is expressed.

### 3 Other characteristics

(1) A real burden must relate in some way to the burdened property.

(2) The relationship may be direct or indirect but shall not merely be that the obligated person is the owner of the burdened property.

(3) In a case in which there is a benefited property, a real burden must, unless it is a community burden, be for the benefit of that property.

(4) A community burden may be for the benefit of the community to which it relates or of some part of that community.

(5) A real burden may consist of a right of pre-emption; but a real burden created on or after the appointed day must not consist of-

(a) a right of redemption or reversion; or

(b) any other type of option to acquire the burdened property.

(6) A real burden must not be contrary to public policy as for example an unreasonable restraint of trade and must not be repugnant with ownership (nor must it be illegal).

(7) Except in so far as expressly permitted by this Act, a real burden must not have the effect of creating a monopoly (as for example, by providing for a particular person to be or to appoint-

(a) the manager of property; or

(b) the supplier of any services in relation to property).

(8) It shall not be competent-

- (a) to make in the constitutive deed provision; or
- (b) to import under section 6(1) of this Act terms which include provision, to the effect that a person other than the holder of the burden may waive compliance with, or mitigate or otherwise vary, a condition of the burden.

(9) Subsection (8) above is without prejudice to section 33(1)(a) of this Act.

#### 4 Creation

(1) A real burden is created by duly registering the constitutive deed except that, notwithstanding section 3(4) of the 1979 Act (creation of real right or obligation on date of registration etc.), the constitutive deed may provide for the postponement of the effectiveness of the real burden to-

- (a) a date specified in that deed (the specification being of a fixed date and not, for example, of a date determinable by reference to the occurrence of an event); or
- (b) the date of registration of some other deed so specified.

(2) The reference in subsection (1) above to the constitutive deed is to a deed which-

- (a) sets out (employing, unless subsection (3) below is invoked, the expression "real burden") the terms of the prospective real burden;
- (b) is granted by or on behalf of the owner of the land which is to be the burdened property; and
- (c) except in the case mentioned in subsection (4) below, nominates and identifies-
  - (i) that land;
  - (ii) the land (if any) which is to be the benefited property; and
  - (iii) any person in whose favour the real burden is to be constituted (if it is to be constituted other than by reference to the person's capacity as owner of any land).

(3) Where the constitutive deed relates, or purports to relate, to the creation of a nameable type of real burden (such as, for example, a community burden), that deed may, instead of employing the expression "real burden", employ the expression appropriate to that type.

(4) Where the constitutive deed relates to the creation of a community burden, that deed shall nominate and identify the community.

(5) For the purposes of this section, a constitutive deed is duly registered in relation to a real burden only when registered against the land which is to be the burdened property and (except where there will be no benefited property or the land in question is outwith Scotland) the land which is to be the benefited property.

(6) A right of ownership held pro indiviso shall not in itself constitute a property against which a constitutive deed can be duly registered.

(7) This section is subject to sections 53(3A), 73(2) and 90(8) and (8A) of this Act and is without prejudice to section 6 of this Act.

**5** Further provision as respects constitutive deed

(1) It shall not be an objection to the validity of a real burden (whenever created) that-

(a) an amount payable in respect of an obligation to defray some cost is not specified in the constitutive deed; or

(b) a proportion or share payable in respect of an obligation to contribute towards some cost is not so specified provided that the way in which that proportion or share can be arrived at is so specified.

Duration, enforceability and liability

**7** Duration

Subject to any enactment (including this Act) or to any rule of law, the duration of a real burden is perpetual unless the constitutive deed provides for a duration of a specific period.

**8** Right to enforce

(1) A real burden is enforceable by any person who has both title and interest to enforce it.

(2) A person has such title if an owner of the benefited property; but the following persons also have such title-

(a) a person who has a real right of lease or proper liferent in the benefited property

(or has a pro indiviso share in such right);

(b) a person who-

(i) is the non-entitled spouse of an owner of the benefited property or of a person mentioned in paragraph (a) above; and

(ii) has occupancy rights in that property; and

(c) if the real burden was created as mentioned in subsection (3)(b) below, a person who was, at the time the cost in question was incurred-

(i) an owner of the benefited property; or

(ii) a person having such title by virtue of paragraph (a) or (b) above.

(3) A person has such interest if-

(a) in the circumstances of any case, failure to comply with the real burden is resulting in, or will result in, material detriment to the value or enjoyment of the person's ownership of, or right in, the benefited property; or

(b) the real burden being an affirmative burden created as an obligation to defray, or contribute towards, some cost, that person seeks (and has grounds to seek) payment of, or as respects, that cost.

(4) A person has title to enforce a real burden consisting of-

(a) a right of pre-emption, redemption or reversion; or

(b) any other type of option to acquire the burdened property, only if the owner of the benefited property.

(5) In subsection (2)(b) above, "non-entitled spouse" and "occupancy rights" shall be construed in accordance with section 1 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c.59) (right of spouse without title to occupy matrimonial home).

(6) Subsections (2) to (5) above do not apply in relation to a personal real burden.

## 9 Persons against whom burdens are enforceable

(1) An affirmative burden is enforceable against the owner of the burdened property.

(2) A negative burden or an ancillary burden is enforceable against-



- (a) the owner, or tenant, of the burdened property; or
- (b) any other person having the use of that property.

10 Affirmative burdens: continuing liability of former owner

(1) An owner of burdened property shall not, by virtue only of ceasing to be such an owner, cease to be liable for the performance of any relevant obligation.

(2) Subject to subsection (2A) below, a person who becomes an owner of burdened property (any such person being referred to in this section as a "new owner") shall be severally liable with any former owner of the property for any relevant obligation for which the former owner is liable.

(2A) A new owner shall be liable as mentioned in subsection (2) above for any relevant obligation consisting of an obligation to pay a share of costs relating to maintenance or work (other than local authority work) carried out before the acquisition date only if-

(a) notice of the maintenance or work-

(i) in, or as near as may be in, the form set out in schedule 1A to this Act; and

(ii) containing the information required by the notes for completion set out in that schedule,

(such a notice being referred to in this section and section 10A of this Act as a "notice of potential liability for costs") was registered in relation to the burdened property at least 14 days before the acquisition date; and

(b) the notice had not expired before the acquisition date.

(2B) In subsection (2A) above-

"acquisition date" means the date on which the new owner acquired right to the burdened property; and

"local authority work" means work carried out by a local authority by virtue of any enactment.

(3) A new owner who incurs expenditure in the performance of any relevant obligation for which a former owner of the property is liable may recover an amount equal to such expenditure from that former owner.

(4) For the purposes of subsections (1) to (3) above, "relevant obligation" means any obligation under an affirmative burden which is due for performance; and such an obligation becomes due-

(a) in a case where-

- (i) the burden is a community burden; and
- (ii) a binding decision to incur expenditure is made, on the date on which that decision is made; or
- (b) in any other case, on-
  - (i) such date; or
  - (ii) the occurrence of such event,as may be stipulated for its performance (whether in the constitutive deed or otherwise).

(5) This section does not apply in any case where section 12 of the Tenements (Scotland) Act 2004 (asp 11) applies.

10A Notice of potential liability for costs: further provision

- (1) A notice of potential liability for costs-
  - (a) may be registered in relation to burdened property only on the application of-
    - (i) an owner of the burdened property;
    - (ii) an owner of the benefited property; or
    - (iii) any manager; and
  - (b) shall not be registered unless it is signed by or on behalf of the applicant.
- (2) A notice of potential liability for costs may be registered-
  - (a) in relation to more than one burdened property in respect of the same maintenance or work; and
  - (b) in relation to any one burdened property, in respect of different maintenance or work.
- (3) A notice of potential liability for costs expires at the end of the period of 3 years beginning with the date of its registration, unless it is renewed by being registered again before the end of that period.
- (4) This section applies to a renewed notice of potential liability for costs as it applies to any other such notice.
- (5) The Keeper of the Registers of Scotland shall not be required to investigate or determine whether the information contained in any notice of potential liability for costs is accurate.

(6) The Scottish Ministers may by order amend schedule 1A to this Act.

Affirmative burdens: shared liability

11

(1) If a burdened property as respects which an affirmative burden is created is divided (whether before or after the appointed day) into two or more parts then, subject to subsections (2) and (4) below, the owners of the parts-

(a) are severally liable in respect of the burden; and

(b) as between (or among) themselves, are liable in the proportions which the areas of their respective parts bear to the area of the burdened property.

(2) "Part" in subsection (1) above does not include a part to which the affirmative burden cannot relate.

(3) In the application of subsection (1) above to parts which are flats in a tenement, the reference in paragraph (b) of that subsection to the areas of the respective parts shall be construed as a reference to the floor areas of the respective flats.

(3A) For the purposes of subsection (3) above, the floor area of a flat is calculated by measuring the total floor area (including the area occupied by any internal wall or other internal dividing structure) within its boundaries; but no account shall be taken of any of the following pertinents of a flat-

(a) a balcony; and

(b) except where it is used for any purpose other than storage, a loft or basement.

(4) Paragraph (a) of subsection (1) above shall not apply if, in the constitutive deed, it is provided that liability as between (or among) the owners of the parts shall be otherwise than is provided for in that paragraph; and paragraph (b) of that subsection shall not apply if, in the constitutive deed or in the conveyance effecting the division, it is provided that liability as between (or among) them shall be otherwise than is provided for in that paragraph.

(5) If two or more persons own in common a burdened property as respects which an affirmative burden is created then, unless the constitutive deed otherwise provides-

(a) they are severally liable in respect of the burden; and

(b) as between (or among) themselves, they are liable in the proportions in which

they own the property.

Division of benefited or burdened property

**12** Division of a benefited property

(1) Where part of a benefited property is conveyed, then on registration of the conveyance the part conveyed shall cease to be a benefited property unless in the conveyance some other provision is made, as for example-

(a) that the part retained and the part conveyed are separately to constitute benefited properties; or

(b) that it is the part retained which is to cease to be a benefited property.

(2) Different provision may, under subsection (1) above, be made in respect of different real burdens.

(3) For the purposes of subsection (1) above, any such provision as is referred to in that subsection shall-

(a) identify the constitutive deed, say where it is registered and give the date of registration;

(b) identify the real burdens; and

(c) be of no effect in so far as it relates to-

(i) a right of pre-emption, redemption or reversion; or

(ii) any other type of option to acquire the burdened property,

if it is other than such provision as is mentioned in paragraph (b) of that subsection.

(4) Subsection (1) above does not apply where-

(a) the property, part of which is conveyed, is a benefited property only by virtue of any of sections 52 to 56 of this Act;

(b) the real burdens are community burdens; or

(c) the real burdens are set out in a common deed of conditions, that is to say in a deed which sets out the terms of the burdens imposed on the part conveyed, that part being one of two or more properties on which they are or will be imposed under a common scheme.

**13** Division of a burdened property

Where part of a burdened property is conveyed (whether before or after the ap-

pointed day), then on registration of the conveyance the part retained and the part conveyed shall separately constitute burdened properties unless the real burden cannot relate to one of the parts, in which case that part shall, on that registration, cease to be a burdened property.

Construction

**14** Construction

Real burdens shall be construed in the same manner as other provisions of deeds which relate to land and are intended for registration.

Extinction

**15** Discharge

(1) A real burden is discharged as respects a benefited property by registering against the burdened property a deed of discharge granted by or on behalf of the owner of the benefited property.

(2) In subsection (1) above, "discharged" means discharged-

(a) wholly; or

(b) to such extent as may be specified in the deed of discharge.

**16** Acquiescence

(1) Where-

(a) a real burden is breached in such a way that material expenditure is incurred;

(b) any benefit arising from such expenditure would be substantially lost were the burden to be enforced; and

(c) in the case of-

(i) a burden other than a conservation burden, economic development burden or health care burden, the owner of the benefited property (if any) has an interest to enforce the burden in respect of the breach and consents to the carrying on of the activity which results in that breach, or every person by whom the burden is enforceable and who has such an interest, either so consents or, being aware of the carrying on of that activity (or, because of its nature, being in a position where that person ought to be aware of it), has not, by the expiry of such period as is in all the circum-

stances reasonable (being in any event a period which does not exceed that of twelve weeks beginning with the day by which that activity has been substantially completed), objected to its being carried on; or

(ii) a conservation burden, economic development burden or health care burden, the person by whom the burden is enforceable consents to the carrying on of that activity,

the burden shall, to the extent of the breach, be extinguished.

(2) Where the period of twelve weeks following the substantial completion of an activity has expired as mentioned in sub-paragraph (i) of subsection (1)(c) above, it shall be presumed, unless the contrary is shown, that the person by whom the real burden was, at the time in question, enforceable (or where a burden is enforceable by more than one person, each of those persons) was, or ought to have been, aware of the carrying on of the activity and did not object as mentioned in that sub-paragraph.

**17** Further provision as regards extinction where no interest to enforce

Where at any time a real burden is breached but at that time no person has an interest to enforce it in respect of the breach, the burden shall, to the extent of the breach, be extinguished.

**18** Negative prescription

(1) Subject to subsection (5) below, if-

(a) a real burden is breached to any extent; and

(b) during the period of five years beginning with the breach neither-

(i) a relevant claim; nor

(ii) a relevant acknowledgement,

is made,

then, subject to subsection (2) below, the burden shall, to the extent of the breach, be extinguished on the expiry of that period.

(2) Subject to subsections (5) and (6) below, where, in relation to a real burden which consists of-

(a) a right of pre-emption, redemption or reversion; or

(b) any other type of option to acquire the burdened property,

the owner of the burdened property fails to comply with an obligation to convey (or, as the case may be, to offer to convey) the property (or part of the property) and paragraph (b) of subsection (1) above is satisfied, the burden shall be extinguished in relation to the property (or part) on the expiry of the period mentioned in the said paragraph (b).

(3) Sections 9 and 10 of the Prescription and Limitation (Scotland) Act 1973 (c.52) (which define the expressions "relevant claim" and "relevant acknowledgement" for the purposes of sections 6, 7 and 8A of that Act) shall apply for the purposes of subsections (1) and (2) above as those sections apply for the purposes of sections 6, 7 and 8A of that Act but subject to the following modifications-

(a) in each of sections 9 and 10 of that Act-

(i) subsection (2) shall not apply;

(ii) for any reference to an obligation there shall be substituted a reference to a real burden; and

(iii) for any reference to a creditor there shall be substituted a reference to any person by whom a real burden is enforceable;

(b) in section 9 of that Act, for the reference to a creditor in an obligation there shall be substituted a reference to any person by whom a real burden is enforceable; and

(c) in section 10 of that Act, for any reference to a debtor there shall be substituted a reference to any person against whom the real burden is enforceable.

(4) Section 14 of the said Act of 1973 (which makes provision as respects the computation of prescriptive periods) shall apply for the purposes of subsections (1) and (2) above as that section applies for the purposes of Part I of that Act except that paragraph (a) of subsection (1) of that section shall for the purposes of those subsections be disregarded.

(5) In relation to a breach occurring before the appointed day, subsections (1) and (2) above apply with the substitution in paragraph (b) of subsection (1), for the words "period of five years beginning with the breach", of the words "appropriate period".

(6) In the case of a right of pre-emption constituted as a rural housing burden, subsection (2) above shall apply with the modification that for the words "the burden shall be extinguished in relation to the property (or part) on" there shall be substituted "it shall not be competent to commence any action in respect of that failure after".

(7) The reference, in subsection (5) above, to the "appropriate period" is to which-

ever first expires of-

- (a) the period of five years beginning with the appointed day; and
- (b) the period of twenty years beginning with the breach.

**19** *Confusio* not to extinguish real burden

A real burden is not extinguished by reason only that-

- (a) the same person is the owner of the benefited property and the burdened property; or
- (b) in a case in which there is no benefited property, the person in whose favour the real burden is constituted is the owner of the burdened property.

Termination

**20** Notice of termination

(1) Subject to section 23 of this Act, if at least one hundred years have elapsed since the date of registration of the constitutive deed (whether or not the real burden has been varied or renewed since that date), an owner of the burdened property, or any other person against whom the burden is enforceable, may, after intimation under section 21(1) of this Act, execute and register, in (or as nearly as may be in) the form contained in schedule 2 to this Act, a notice of termination as respects the real burden.

(2) It shall be no objection to the validity of a notice of termination that it is executed or registered by a successor in title of the person who has given such intimation; and any reference in this Act to the "terminator" shall be construed as a reference to-

(a) except where paragraph (b) below applies, the person who has given such intimation; or

(b) where that person no longer has the right or obligation by virtue of which intimation was given, the person who has most recently acquired that right or obligation.

(3) Subsections (1) and (2) above do not apply in relation to-

(a) a conservation burden;



- (b) a maritime burden;
- (c) a facility burden;
- (d) a service burden; or
- (e) a real burden which is a title condition of a kind specified in schedule 11 to this Act.

(4) The notice of termination shall-

- (a) identify the land which is the burdened property;
- (b) describe the terminator's connection with the property (as for example by identifying the terminator as an owner or as a tenant);
- (c) set out the terms of the real burden and (if it is not wholly to be terminated) specify the extent of the termination;
- (d) specify a date on or before which any application under paragraph (b) of section 90(1) of this Act will require to be made if the real burden is to be renewed or varied under that paragraph (that date being referred to in this Act as the "renewal date");
- (e) specify the date on which, and the means by which, intimation was given under subsection (1) of section 21 of this Act; and
- (f) set out the name (in so far as known) and the address of each person to whom intimation is sent under subsection (2)(a) of that section.

(5) Any date may be specified under paragraph (d) of subsection (4) above provided that it is a date not less than eight weeks after intimation is last given under subsection (1) of the said section 21 (intimation by affixing being taken, for the purposes of this subsection, to be given when first the notice is affixed).

(6) Where a property is subject to two or more real burdens, it shall be competent to execute and register a single notice of termination in respect of both (or all) the real burdens.

## 21 Intimation

(1) A proposal to execute and register a notice of termination shall be intimated-

- (a) to the owner of each benefited property;
- (b) in the case of a personal real burden, to the holder; and
- (c) to the owner (or, if the terminator is an owner, to any other owner) of the burdened property.

(2) Subject to subsection (3) below, such intimation may be given-

(a) by sending a copy of the proposed notice of termination, completed as respects all the matters which must, in pursuance of paragraphs (a) to (d) and (f) of section 20(4) of this Act, be identified, described, set out or specified in the notice and with the explanatory note which immediately follows the form of notice of termination in schedule 2 to this Act;

(b) by affixing to the burdened property and to-

(i) in a case (not being one mentioned in paragraph (c)(ii) below) where there exists one, and only one, lamp post which is situated within one hundred metres of that property, that lamp post; or

(ii) in a case (not being one so mentioned) where there exists more than one lamp post so situated, each of at least two such lamp posts,

a conspicuous notice in the form set out in schedule 3 to this Act; or

(c) in a case where-

(i) it is not possible to comply with paragraph (b) above; or

(ii) the burdened property is minerals or salmon fishings,

by advertisement in a newspaper circulating in the area of the burdened property.

(3) Such intimation shall, except where it is impossible to do so, be given by the means described in subsection (2)(a) above if it is given-

(a) under subsection (1)(b) or (c) above; or

(b) under subsection (1)(a) above in relation to a benefited property which is at some point within four metres of the burdened property.

(4) An advertisement giving intimation under subsection (2)(c) above shall-

(a) identify the land which is the burdened property;

(b) set out the terms of the real burden either in full or by reference to the constitutive deed;

(c) specify the name and address of a person from whom a copy of the proposed notice of termination may be obtained; and

(d) state that any owner of a benefited property, or as the case may be any holder of a personal real burden, may apply to the Lands Tribunal for Scotland for the real burden to be renewed or varied but that if no such application is received by a specified date (being the renewal date) the consequence may be that the real burden is extinguished.

(5) The terminator shall provide a person with a copy of the proposed notice of termination (completed as is mentioned in subsection (2)(a) above and with the ex-

planatory note referred to in that subsection) if so requested by that person.

(6) A person-

(a) is entitled to affix a notice to a lamp post in compliance with subsection (2)(b) above regardless of who owns the lamp post but must-

(i) take all reasonable care not to damage the lamp post in doing so; and

(ii) remove the notice no later than one week after the date specified in it as the renewal date; and

(b) must, until the day immediately following the date so specified, take all reasonable steps to ensure that the notice continues to be displayed and remains conspicuous and readily legible.

(7) Section 184 of the Town and Country Planning (Scotland) Act 1997 (c.8) (planning permission not needed for advertisements complying with regulations) applies in relation to a notice affixed in compliance with subsection (2)(b) above as that section applies in relation to an advertisement displayed in accordance with regulations made under section 182 of that Act (regulations controlling display of advertisements).

**22** Oath or affirmation before notary public

(1) Before submitting a notice of termination for registration, the terminator shall swear or affirm before a notary public that, to the best of the terminator's knowledge and belief, all the information contained in the notice is true and that section 21 of this Act has been complied with.

(2) For the purposes of subsection (1) above, if the terminator is-

(a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of the terminator may swear or affirm;

(b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm;

and any reference in that subsection to a terminator shall be construed accordingly.

**23** Prerequisite certificate for registration of notice of termination

(1) A notice of termination shall not be registrable unless, after the renewal date, there is endorsed on the notice (or on an annexation to it referred to in an endorse-

ment on it and identified, on the face of the annexation, as being the annexation so referred to) a certificate executed by a member of the Lands Tribunal, or by their clerk, to the effect that no application in relation to the proposal to execute and register the notice has been received under section 90(1)(b) (and (4)) of this Act or that any such application which has been received-

(a) has been withdrawn; or

(b) relates (either or both)-

(i) to one or more but not to all of the real burdens the terms of which are set out in the notice (any real burden to which it relates being described in the certificate);

(ii) to one or more but not to all (or probably or possibly not to all) of the benefited properties (any benefited property to which it relates being described in the certificate),

and where more than one such application has been received the certificate shall relate to both (or as the case may be all) applications.

(2) At any time before endorsement under subsection (1) above, a notice of termination, whether or not it has been submitted for such endorsement, may be withdrawn, by intimation in writing to the Lands Tribunal, by the terminator; and it shall not be competent to endorse under that subsection a notice in respect of which such intimation is given.

#### 24 Effect of registration of notice of termination

(1) Subject to subsection (2) below, a notice of termination, when registered against the burdened property, extinguishes the real burden in question wholly or as the case may be to such extent as may be described in that notice.

(2) A notice of termination registrable by virtue of a certificate under paragraph (b) of section 23(1) of this Act shall not, on being registered, extinguish a real burden which is the subject of an application disclosed by the certificate in so far as that burden-

(a) is constituted in favour of the property of which the applicant is owner; or

(b) is a personal real burden of which the applicant is holder,

but if under that section a further certificate is endorsed on the notice (or on an annexation to the notice) the notice may be registered again, the effect of the later registration being determined by reference to the further certificate rather than to the certificate by virtue of which the notice was previously registered.

PART 9

TITLE CONDITIONS: POWERS OF LANDS TRIBUNAL

**100** Factors to which the Lands Tribunal are to have regard in determining applications etc.

The factors mentioned in section 98 of this Act are-

- (a) any change in circumstances since the title condition was created (including, without prejudice to that generality, any change in the character of the benefited property, of the burdened property or of the neighbourhood of the properties);
- (b) the extent to which the condition-
  - (i) confers benefit on the benefited property; or
  - (ii) where there is no benefited property, confers benefit on the public;
- (c) the extent to which the condition impedes enjoyment of the burdened property;
- (d) if the condition is an obligation to do something, how-
  - (i) practicable; or
  - (ii) costly,it is to comply with the condition;
- (e) the length of time which has elapsed since the condition was created;
- (f) the purpose of the title condition;
- (g) whether in relation to the burdened property there is the consent, or deemed consent, of a planning authority, or the consent of some other regulatory authority, for a use which the condition prevents;
- (h) whether the owner of the burdened property is willing to pay compensation;
- (i) if the application is under section 90(1)(b)(ii) of this Act, the purpose for which the land is being acquired by the person proposing to register the conveyance; and
- (j) any other factor which the Lands Tribunal consider to be material.

15. Annex II Copy of a Scottish Land Certificate



LAND REGISTER OF SCOTLAND



LAND CERTIFICATE

**Title Number:** ELN12345  
**Subjects:** 11 BURNS WALK, HADDINGTON EH41 3QQ.







LAND REGISTER OF SCOTLAND



TITLE NUMBER ELN12345

A 1

A. PROPERTY SECTION

DATE OF FIRST REGISTRATION  
28 FEB 2000

DATE TITLE SHEET UPDATED TO  
28 FEB 2000

DATE LAND CERTIFICATE UPDATED  
TO  
28 FEB 2000

INTEREST  
PROPRIETOR

MAP REFERENCE  
NT5073

DESCRIPTION

Subjects 11 BURNS WALK, HADDINGTON EH41 3QQ being the north eastmost house tinted blue on the Title Plan on the upper floor of the Block 5 to 11 (odd numbers) BURNS WALK with the garage tinted mauve on the said Plan and the garden ground tinted pink on the said Plan, together with (FIRST) a right in common with the proprietors of the other garages and the store and gas governor installation surrounding the same to the garage courtyard and the road and path leading thereto aftermentioned; (SECOND) a right in common with the proprietor of the dwellinghouse 9 Burns Walk to the footpath leading to the two dwellinghouses as the said footpath is tinted brown on said plan; (THIRD) a right in common with the proprietor of the said dwellinghouse 9 Burns Walk to the solum on which the said building comprising the dwellinghouse in this Title and the said dwellinghouse 9 Burns Walk is erected; (FOURTH) a right of access to the roof and chimney heads over the said dwellinghouse in this Title and the dwellinghouse 9 Burns Walk aforesaid for the purpose of cleaning vents and for all other necessary purposes; (FIFTH) a right in common with the respective proprietors of each of the other dwellinghouses served thereby to the drains and soil pipes, electricity pipes and conduits, gas mains and all others serving the subjects in this Title and the said respective other dwellinghouses; (SIXTH) a right in common with the respective proprietors of the other adjoining subjects to the fences or walls separating the said subjects from the said respective adjoining subjects which fences or walls are hereby declared to be mutual; (SEVENTH) right to enter, examine and lay open the ground and/or footpaths appropriated to the dwellinghouses 5, 7 and 9 Burns Walk along the line of the drains and soil pipes, electricity pipes and conduits, gas mains and all others belonging either solely to the said subjects or jointly to the said subjects and other subjects and that for the purposes of reconstructing, altering, repairing or renewing the said drains and soil pipes, electricity pipes and conduits, gas mains and all others and for any other necessary purpose; (EIGHTH) right of access over so much of the ground appropriated to the said dwellinghouse 9 Burns Walk as is necessary for the purpose of renewing and repairing the gable walls and windows of the said subjects and for all other necessary purposes; (NINTH) a right of access along, over and across the public footpath leading to the garage courtyard aftermentioned and over and across the garage courtyard entering from the street or road known as Poets Corner, Haddington, and the road leading thereto from said Poets Corner, which garage courtyard, the said public path and the said road leading to said garage courtyard are tinted yellow on said plan along with the proprietors of the thirteen other garages and the store and gas governor installation surrounding the said courtyard, for both vehicular and pedestrian traffic.





# LAND REGISTER OF SCOTLAND



TITLE NUMBER ELN12345

B 1

## B. PROPRIETORSHIP SECTION

<b>ENTRY NO</b>	<b>PROPRIETOR</b>	<b>DATE OF REGISTRATION</b>	<b>CONSIDERATION</b>	<b>DATE OF ENTRY</b>
1	DAVID JAMES WILKINSON and MONICA WILKINSON, spouses, 10 Beil Park, Dunbar, equally between them and the survivor of them.	28 FEB 2000	£68000	18 FEB 2000

Note: There are in respect of the subjects in this Title no subsisting occupancy rights in terms of the Matrimonial Homes (Family Protection)(Scotland) Act 1981 of spouses of persons who were formerly entitled to the said subjects.



**LAND REGISTER OF SCOTLAND**



**TITLE NUMBER** ELN12345

**C 1**

**C. CHARGES SECTION**

<b>ENTRY NO</b>	<b>SPECIFICATION</b>	<b>DATE OF REGISTRATION</b>
1	Standard Security for £55000 and further sums by said DAVID JAMES WILKINSON and MONICA WILKINSON to ROYAL BANK OF SCOTLAND PLC, Mortgage Centre, Royal Bank House, Cartsdyke Avenue, Cartsburn East, Greenock.	28 FEB 2000



# LAND REGISTER OF SCOTLAND



TITLE NUMBER ELN12345

D 1

## D. BURDENS SECTION

ENTRY NO	SPECIFICATION
1	<p data-bbox="403 580 1233 694">Feu Contract containing Feu Disposition by Provost, Magistrates and Councillors of the Royal Burgh of Haddington (who and whose successors are hereinafter called "the Superiors") to John T. Bell and Sons Limited and their successors and assignees (hereinafter called "the Feuars"), recorded G.R.S. (East Lothian) 20 Jan. 1967, of (First) 9.739 acres of ground and (Second) 4.960 acres of ground, of which the subjects in this Title form part, contains the following burdens:</p> <p data-bbox="403 719 464 739">(FIRST)</p> <p data-bbox="403 763 1233 831">The Feuars shall be bound to enclose the feu where it is not already enclosed with fences or hedges, with a stob and wire fence not less than four feet in height and shall be bound in all time coming to maintain the boundary fences and/or hedges of the feu in a neat and tidy condition;</p> <p data-bbox="403 855 485 875">(SECOND)</p> <p data-bbox="403 900 1233 945">The Feuars shall be bound to erect on the sub-feus into which the feu is to be divided and to complete in a condition fit for habitation detached or semi-detached or flatted or terraced dwelling houses;</p> <p data-bbox="403 969 464 990">(THIRD)</p> <p data-bbox="403 1014 1233 1104">The said dwelling houses shall not exceed two storeys in height and shall be built of stone, artificial stone or brick (harled or pebble dashed) or of an approved facing brick with tile, wood or rendered facings and with a pitched roof of slates or approved tiles all in accordance with plans, elevations and specifications to be approved in writing by the Superiors;</p> <p data-bbox="403 1128 485 1149">(FOURTH)</p> <p data-bbox="403 1173 1233 1263">The Feuars shall erect a brick built garage for use in connection with the dwelling houses to be erected on the said sub-feus as such garages are required by the purchasers of the said dwelling houses and which said garages shall be erected on the sites shown on the said plan annexed and executed as relative hereto, in accordance with plans, elevations and specifications to be approved by the Superiors in writing;</p> <p data-bbox="403 1288 464 1308">(FIFTH)</p> <p data-bbox="403 1332 1233 1444">The Feuars shall not be entitled except with the written consent of the Superiors to erect upon the ground attached to each of the said dwelling houses any hut greenhouse summer house or any other erection or building; But in the event of permission for any of the foresaid buildings or erections being granted the said buildings or erections shall be erected and maintained on sites and in accordance with plans, elevations and specifications approved by the Superiors in writing;</p> <p data-bbox="403 1469 464 1489">(SIXTH)</p> <p data-bbox="403 1514 1233 1559">Each dwelling house erected on the feu shall, in all time coming be appropriated to and used for the sole use and purpose of a private dwelling house and domestic offices in connection therewith for the accommodation of one</p>



## LAND REGISTER OF SCOTLAND



TITLE NUMBER ELN12345

D 2

### D. BURDENS SECTION

**ENTRY  
NO**

**SPECIFICATION**

family only and not otherwise;

(SEVENTH)

The Feuars are prohibited from using the feu or any of the erections thereon or any part thereof for the purposes of a trade or manufacture and without prejudice to the foregoing generality are prohibited from selling any malt or spirituous liquors, beer, cider or perry or any other alcoholic drink or beverage and from using the feu or any of the erections thereon or any part thereof as a shop, warehouse, hotel, store, lodging house or public house;

(EIGHTH)

The Feuars shall be bound in all time coming to keep and maintain the whole erections on the feu in good repair and in a good habitable and usable condition and in the event of the said erections being damaged and/or destroyed by fire or otherwise the feuars shall be bound to repair and/or rebuild the same in a similar manner and to a similar condition to that prior to such damage and/or destruction and to the same value;

(NINTH)

The Feuars shall be bound to insure the erections on the feu with an established insurance company against damage and/or destruction by fire tempest and flood to their full re-instatement value and shall keep said insurance in force by prompt and punctual payment of the premium or premiums due and shall when called upon by the Superiors so to do exhibit to them the receipt or receipts vouching the payment thereof and the feuars shall expend all monies received by them in respect of the said insurance Policy or insurance Policies on repairing and/or rebuilding the said erections;

(TENTH)

The Feuars shall be bound to have the Feu and the whole erections thereon sufficiently and properly drained in all time coming to the satisfaction of the Superiors and without prejudice to the foregoing generality to provide to the satisfaction of the Burgh Surveyor of the Burgh of Haddington suitable and satisfactory drainage connections and suitable and satisfactory private drains from the erections on the said sub-feus to the nearest sewer or main drain laid under the roadways or footpaths to be formed in the feu or in any part thereof as part of the sewage system of the said Royal Burgh of Haddington and to maintain the said drains and drain connections at all times in a good and efficient and useable state of repair;

(ELEVENTH)

The Feuars are prohibited from parking within the feu or any part thereof any caravans or caravan trailers or trailers for the transport of boats of any kind;

(TWELFTH)

The Feuars are prohibited in all time coming from keeping on the feu or in any erections on any part thereof any poultry, pigeons, cattle, horses, sheep or pigs;



# LAND REGISTER OF SCOTLAND



TITLE NUMBER ELN12345

D 3

## D. BURDENS SECTION

### ENTRY NO

### SPECIFICATION

(THIRTEENTH)

That part of the area of ground attached to each dwelling house erected on the Feu lying between the front building line and the footpath or roadway ex adverso thereof shall be laid out in grass and shall be maintained in a neat and tidy condition in all time coming;

(FOURTEENTH)

The Feuars are prohibited from erecting or maintaining on that part of the area of ground attached to each dwelling house erected on the Feu lying between the front building line and the footpath or roadway ex adverso thereof any buildings, walls, fences or hedges or obstructions of any kind and are also prohibited from planting or cultivating in the said area or piece of ground any trees shrubs or plants; but declaring that with the consent in writing of the Superiors the feuars may plant and cultivate on the said area or piece of ground trees shrubs or plants but only such as shall on mature growth not exceed a height of three feet above the height of the roadway ex adverso of the said dwelling houses but further declaring that the feuars may on receiving the permission of the Superiors in writing so to do plant and cultivate in the said area at points designated by the Superiors flowering and/or ornamental trees and/or shrubs which may exceed three feet in height on mature growth;

(FIFTEENTH)

That part of the ground attached to each dwelling house erected on the feu other than that to which Clause Fourteenth hereof applies shall, in all time coming, so far as the same is not laid out for the purposes of and used as a drying green, be laid out and cultivated only as ornamental garden ground or vegetable garden ground and shall be maintained in all time coming in a neat and tidy state of cultivation;

(SIXTEENTH)

The Feuars shall erect and maintain in each sub-feu and along lines designated by the Superiors screen fences of a design and of materials and of a colour to be approved by the Superiors and the said fences shall be treated with creosote or Solignum dark brown wood preservative not less than once in every five years and shall in all time coming be maintained and preserved in the colour approved by the Superiors;

(SEVENTEENTH)

In the event of the said screen fences requiring to be replaced for any reason then the screen fences erected or to be erected in replacement thereof shall be so erected along the same lines, to the same design and of the same materials as the original fences or of such design and materials as may be approved by the Superiors and shall be maintained in accordance with condition Seventeenth hereof;

(EIGHTEENTH)

The Feuars shall provide within the feu at points designated by the Superiors spaces for the off-street parking of motor cars and vehicles and which said spaces shall be used only for the purposes of the parking of private motor cars or other vehicles but no commercial vehicles except mobile or travelling shops during such times as



## LAND REGISTER OF SCOTLAND



TITLE NUMBER ELN12345

D 4

### D. BURDENS SECTION

**ENTRY  
NO**

**SPECIFICATION**

may be designated by the Superiors from time to time;

(NINETEENTH)

The Feuars shall grant in favour of the South of Scotland Electricity Board, the Scottish Gas Board, the General Post Office and the East Lothian Water Board rights of wayleave for the laying down and maintenance within the feu and the said sub-feus in all time coming of electricity conduits and cables, gas mains and pipes, telephone cables and water mains and pipes as may be necessary for the provisions of electricity, gas, telephone and water services to the dwelling houses to be erected on the sub-feus into which the feu is to be divided and for all other usual and necessary purposes but declaring that the said Boards and Authority by the exercise of the right or rights of Wayleave hereby conferred or to be conferred shall only lay the said conduits cables, mains and pipes along lines agreed with the feuars and in the event of disagreement along lines designated by the feuars and shall restore and repair the ground beneath which the said conduits, cables, mains and pipes are laid to the condition existing prior to the exercise of the right or rights hereby conferred and shall free and relieve the feuars of all costs claims damages and others arising from the exercise of the right or rights of Wayleave hereby conferred and during the progress of the necessary works for the laying of the said conduits, cables, mains and pipes and the restoration of the surface or surfaces disturbed;

(TWENTIETH)

The Feuars shall grant and hereby grant in favour of the said Boards and Authority a right or rights of access to the feu and to the said sub-feus into which it is to be divided for the inspection maintenance and repair of the said conduits, cables, mains and pipes but declaring that by the exercise by them and each of them of the rights hereby granted the said Boards and Authority shall be liable for the restoration of the ground disturbed during the exercise of the said right or rights hereby granted and the operations arising therefrom to its condition prior to the exercise of the said right or rights and shall free and relieve the Feuars of all costs, claims, damages and others arising from the exercise of the said right or rights and the operations resulting therefrom;

(TWENTY-FIRST)

The Feuars shall not cause or permit to be erected on any part of the Feu any poles for carrying telephone cables or other equipment but the feuars shall be entitled to erect within the feu at a point or at points designated by the Superiors a communal television aerial or aerials for the common and mutual use of the proprietors of the dwelling houses erected on the sub-feus;

(TWENTY-SECOND)

The Feuars shall lay down and maintain in all time coming from a convenient point immediately adjacent to each of the dwelling houses to be erected on the said sub-feus to the centre of the nearest footpath adjacent to each of said dwelling houses in which a telephone cable has been or may be laid a pipe or conduit of not less than one inch in diameter for the purpose of providing telephone services to each of the said dwelling houses;

(TWENTY-THIRD)

It is hereby specially provided and declared that if the feuars shall contravene or fail to implement any of the



# LAND REGISTER OF SCOTLAND



TITLE NUMBER ELN12345

D 5

## D. BURDENS SECTION

ENTRY  
NO

SPECIFICATION

foregoing prohibitions, obligations, conditions, provisions, burdens and others before written or referred to then this right shall, without prejudice to the right of the Superiors to enforce fulfilment become null and void without any declarator or process of law to that effect and the Feuars shall at the option of the Superiors amit lose and forfeit all right and interest in the Feu which with all buildings erected thereon shall revert to the Superiors, but without prejudice to the right of the Superiors to insist on performance of all obligations incumbent on the feuars to the date of forfeiture.

- 2 Disposition by John T. Bell & Sons Limited to Albert Wilson Smith and another and their assignees and disponees, recorded G.R.S. (East Lothian) 20 May 1968, of the subjects in this Title, contains the following burdens:

(One) There shall be reserved to the proprietors of any property having a connection to the drains and soil pipes, electricity pipes and conduits, gas mains and all others passing through the ground and/or footpaths appropriated to the dwellinghouse hereby disposed, 11 Burns Walk, Haddington, and in particular and without prejudice to the foregoing generality to the proprietors of the dwellinghouses 5, 7 and 9 Burns Walk aforesaid, right to enter, examine and lay open the said ground and/or footpaths along the line of the foresaid drains and soil pipes, electricity pipes and conduits, gas mains and all others belonging to any one or more of the said dwellinghouses or jointly to any one or more of said dwellinghouses and the dwellinghouse hereby disposed for the purpose of reconstructing, altering, repairing or renewing the foresaid drains and soil pipes, electricity pipes and conduits, gas mains and all others and for any necessary purposes; Declaring that the proprietors of the dwellinghouses concerned shall be bound to restore or join with our said disponees and their foresaids in restoring the said ground and/or footpaths to their former state and condition and to repair, or join with our said disponees and their foresaids in repairing any damage which the said ground and/or footpaths may sustain in and through the operations necessary for the exercise of the said reserved right; And in the event of any dispute arising between our said disponees and their foresaids and the said other proprietors as to the rights and obligations of our said disponees and their foresaids and such proprietors under the immediately preceding clause such dispute shall be submitted to arbitration;

(Two) There shall be reserved to the proprietor of the said dwellinghouse 9 Burns Walk aforesaid right of access over so much of the ground appropriated to the dwellinghouse hereby disposed as is necessary for the purpose of renewing and repairing the walls and windows of the said dwellinghouse 9 Burns Walk aforesaid and for all other necessary purposes;

(Three) Our said disponees and their foresaids shall be bound to bear a one-half share along with the proprietor of the said dwellinghouse 9 Burns Walk aforesaid of the burden of maintaining the roof covering the said dwellinghouse 9 Burns Walk aforesaid and the dwellinghouse hereby disposed and the chimney heads and rhones on said roof;

(Four) Our said disponees and their foresaids shall be bound to bear a share along with the respective proprietors of the other dwellinghouses served thereby of the burden of maintaining the drains and soil pipes, electricity pipes and conduits, gas mains and all others serving the said subjects hereby disposed and the respective other dwellinghouses and such drains and soil and other pipes shall include the whole connections to the drain and/or sewer taken over by and vested in the Town Council of the Royal Burgh of Haddington as the



## LAND REGISTER OF SCOTLAND



TITLE NUMBER ELN12345

D 6

### D. BURDENS SECTION

ENTRY  
NO

#### SPECIFICATION

local sewerage authority as such share shall failing agreement between the proprietors concerned be determined according to feuduty; of the Royal Burgh of Haddington as the local sewerage authority as such share shall failing agreement between the proprietors concerned be determined according to feuduty;

(Five) Our said disponees and their foresaids shall be bound to bear a one-half share along with the proprietor of the said dwellinghouse 9 Burns Walk aforesaid of the burden of maintaining the footpath tinted brown on the Title Plan;

(Six) Our said disponees and their foresaids shall be bound to maintain and when necessary renew the fences or walls enclosing the subjects hereby disposed and where such fences or walls are mutual to join with the other proprietors interested in maintaining or renewing such mutual fences;

(Seven) Our said disponees and their foresaids shall be bound to bear a one-half share along with the proprietor of the garage 86 adjoining the garage hereinbefore disposed of the burden of maintaining, repairing and renewing the mutual wall separating the said garages;

(Eight) Our said disponees and their foresaids shall be bound to bear a one-sixteenth share along with the proprietors of the other thirteen garages surrounding the garage courtyard entering from the street or road known as Park Lane, Haddington, and the Provost, Magistrates and Councillors of the Royal Burgh of Haddington as proprietors of the store fronting said garage courtyard and the Scottish Gas Board as proprietors of the gas governor station fronting the said public path leading to said garage courtyard and their respective successors in the ownership of said store and gas governor installation of the burden of maintaining, repairing and renewing the surface of the said courtyard and the road and path leading thereto, and of maintaining, repairing and renewing all services thereunder and without prejudice to the foregoing generality all water pipes and taps therein and thereon; and

(Nine) Our said disponees and the their foresaids shall also be bound to bear a proportionate share of the burden of maintaining all other things mutual or common to the subjects hereby disposed and any other subjects as such proportional share shall failing agreement between the proprietors concerned be determined by the Burgh Surveyor of the Royal Burgh of Haddington.



**THE AMERICAN RESTATEMENT OF SERVICUTES LAW: REFORMING DOCTRINE BY SHIFTING FROM EX ANTE TO EX POST CONTROLS ON THE RISKS POSED BY SERVICUTES**

American courts and legislatures have been very responsive to the demands for increasing the availability of servitudes since the time of the Industrial Revolution. By creating exceptions, adopting new categories, and changing the content of doctrines received from English law, courts managed to free American law from the most severe constraints imposed by classical servitudes doctrine in the 19<sup>th</sup> and early 20<sup>th</sup> centuries. In addition, when demand arose in the second half of the 20<sup>th</sup> century for enforceable servitudes for condominium regimes, scenic highways, conservation of agricultural land and wildlife habitat, and historic preservation, legislatures responded with statutes that eliminated more of the inconvenient old doctrines. Throughout American history, land owners have, in fact, been able to use servitudes for almost any desired purpose, so long as they had expert legal counsel.

The process by which this practical reform of servitudes law was carried out in America, however, left a terrible doctrinal tangle. In an article I wrote in 1982, I said: "The law of easements, real covenants, and equitable servitudes is the most complex and archaic body of American property law remaining in the twentieth century."<sup>1</sup> That article, together with Uriel Reichman's *Toward a Unified Concept of Servitudes*,<sup>2</sup> provided the inspiration for the American Law Institute's Restatement

\* Professor of Law, UCLA Law School and Reporter for the Restatement (Third) of Property, Servitudes (2000).

<sup>1</sup> S.F. French, 'Toward A Modern Law of Servitudes: Reweaving the Ancient Strands,' *Southern California Law Review*, 55 1982, p. 1261. The footnote to that statement was as follows: "The literature of servitudes law is rich in derogatory epithets. Among my favorites are: "The law in this area is an unspeakable quagmire. The intrepid soul who ventures into this formidable wilderness never emerges unscarred. Some, the smarter ones, quickly turn back to take up something easier like the income taxation of trusts and estates. Others, having lost their way, plunge on and after weeks of effort emerge not far from where they began, clearly the worse for wear. On looking back they see the trail they thought they broke obscured with foul smelling waters and noxious weeds. Few willingly take up the challenge again." E. Rabin, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* 489 (1974). "This is not an area of land law in which the common law performance deserves admiration. Rather it is one where rigid →

project to clarify and simplify the law of servitudes. Begun in 1986, that project culminated with adoption of the Restatement (Third) of Property, Servitudes (2000).<sup>3</sup>

The primary change in servitudes doctrine adopted by the Restatement is to shift from *ex ante*, categorical, controls on servitude creation to *ex post*, remedial, controls on servitude duration. This change was made possible by recognizing that the central problem of servitudes law is how to avoid or reduce the harmful effects that will result when servitude arrangements become obsolete, inefficient, or otherwise undesirable. Very few servitudes are objectionable between the original parties, and when they are, the problems can ordinarily be readily resolved by applying standard contract doctrines. Servitudes become problematic because they run to successors (who are bound automatically) and may endure for a very long time. Absent agreement among all parties, a servitude may persist even though it serves little useful purpose and reduces land values by clogging titles, imposing onerous burdens on the land owner, or preventing advantageous development. Even if modification or termination would be desirable, transaction costs will often prevent agreements from being reached.

Classical servitudes law approached this central problem by sharply limiting the kinds of servitudes that could be created. Three limiting principles were applied in both Anglo-American common law and European civil law, albeit with different terminology:

1. **Prediality:** servitudes can be used only to serve other land. In Anglo-American law this is expressed as a prohibition on ‘benefits in gross’ or a requirement that the benefit of a covenant ‘touch or concern’ a benefited parcel of land.

categories, silly distinctions, and unreconciled conflicts over basic values have often led to unhappy results for landowners.” C. Haar & L. Liebman, *PROPERTY AND LAW* 703 (1977). “Among the most complicated and confusing of all legal rules are those which concern the enforceability of promises on behalf of and against successors of the original parties to the agreement... Since the first English case interpreting the first English statute on the subject, commentators have doubted that the courts understood the law, and a study of judicial opinions, from *Spencer's Case* on, is bewildering at best.” G. Lefcoe, *LAND DEVELOPMENT LAW* 768-69 (1974) (footnote omitted). “Unfortunately, the law that relates to affirmative covenants presents the ordinary mortal with one of the most confounding intellectual experiences he can suffer.” Krasnowiecki, *Townhouses with Homes Associations: A New Perspective*, 123 *U. Pa. L. Rev.* 711, 717 (1975).’

<sup>2</sup> U. Reichman, ‘Toward a Unified Concept of Servitudes,’ *Southern California Law Review*, 55 1982, p. 1177. These two articles were the basis for a symposium held at the University of Southern California in February, 1983. Other contributions to the symposium may be found in the same issue of the *Southern California Law Review*.

<sup>3</sup> Articles I wrote describing progress of the Restatement project are: ‘Design Proposal for the New Restatement of the Law of Property Servitudes,’ *U.C. Davis Law Review*, 21 1988, p. 1213; ‘Servitudes Reform And The New Restatement Of Property: Creation, Doctrines And Structural Simplification,’ *Cornell Law Review*, 73 1988, p. 928; ‘Tradition And Innovation In The New Restatement Of Servitudes: A Report From Midpoint,’ *Connecticut Law Review*, 27 1994, p. 119; and ‘Highlights of The New Restatement (Third) Of Property: Servitudes,’ *Real Property, Probate and Trust Journal*, 35 2000, p. 225.

2. **Passivity:** a servitude may not require affirmative action by the burdened land owner or occupier (the holder of the servient estate) who may only be required to refrain from action.
3. **Limited purposes, or *numerus clausus*:** only certain types of servitudes are allowed; landowners are not free to create servitudes for purposes that do not fit within the established list.

Each of these principles served to limit the risks posed by servitudes. Very briefly,<sup>4</sup> by requiring the existence of a dominant estate, the prediality principle limits risk by enabling servient owners to identify servitude beneficiaries, with whom they must negotiate to modify or terminate the servitude. The requirement also tends to ensure that anyone seeking to enforce a servitude has a legitimate interest in its enforcement because the servitude must be useful to the dominant estate. In addition, the holder of a dominant estate may be more likely to negotiate modification and termination of the servitude if the value of the servient estate affects the value of other land in the vicinity, particularly that of the dominant estate.<sup>5</sup>

The passivity principle limits risk by ensuring that a landowner with limited resources can comply with a servitude. By prohibiting affirmative duties, the rule ensures that neither the servient estate, nor the landowner's other assets are put at risk for failure to make payments or provide some other performance. In general, prospective purchasers can more easily assess the extent of risk involved in buying property subject to negative burdens than those involved in buying land subject to affirmative servitude burdens. Particularly in legal systems that failed to protect purchasers without notice from servitude burdens, the passivity principle helped to protect marketability of land.<sup>6</sup>

The limited purposes, or *numerus clausus*, principle also helps to maintain marketability of land by limiting the information costs involved in investigating titles and reducing the opportunities to clog titles with servitudes.<sup>7</sup> When the purposes for which servitudes can be created are strictly limited, a prospective purchaser need not inquire whether others exist, and if others appear, can safely ignore them.

In the United States, the desire for servitudes far outstripped those that could be supplied within the traditional limits, and as mentioned above, American courts and legislatures responded with pragmatic changes and exceptions that left only vestigial traces of the traditional principles. They were able to do so in part because

<sup>4</sup> For a thorough analysis of the functions served by all the various requirements of Anglo-American servitudes law, see S.F. French, *supra* note 1.

<sup>5</sup> I am indebted to Gerald Korngold for this insight. See G. Korngold, 'Privately Held Conservation Servitudes: A Policy Analysis,' *Texas Law Review* 63 1984, p. 433.

<sup>6</sup> Lack of an adequate land records system and failure to protect purchasers from so-called 'legal' interests in land helps to explain some of 19<sup>th</sup> Century English servitudes law's refusal to allow covenant burdens to run to successors prior to *Tulk v. Moxhay*, 2 Ph. 774, 41 Eng.Rep. 1143 (Ch.1848). See S.F. French, *supra* note 1, at p. 1282-83.

<sup>7</sup> See T.W. Merrill and H.E. Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle,' *Yale Law Journal*, 110 2000, p. 1.

American law provided easy access to land title records and provided nearly complete protection against servitudes to purchasers without notice. In addition, development of the changed conditions doctrine in the late 19<sup>th</sup> – early 20<sup>th</sup> centuries gave some assurance that obsolete servitudes could be terminated even if all the parties could not be located, or could not be persuaded to join in a modification or termination.

Instead of trying to maintain that American law was still built around a framework consisting of principles limiting creation of servitudes, and then trying to list and rationalize the many exceptions, the Restatement adopted the principle that landowners may freely create servitudes and shifted the focus to rules of interpretation and doctrines governing modification and termination of servitudes. Two basic ideas underlay this shift in approach from *ex ante* to *ex post* controls: servitudes have proved enormously useful and landowners are the best judges of the kinds of servitudes that are desirable for development of their lands. The *ex ante* rules create substantial costs because landowners and others seeking new ways to develop and preserve land expend substantial resources in seeking expert advice to get around the rules, in persuading courts to create exceptions to the rules, and in securing legislation authorizing new servitude uses. By shifting the focus to interpretation and implementation of still-useful servitudes and modification and termination of those that have become obsolete, the Restatement aims to ensure a more productive use of legal resources.

The Restatement implements the basic principle that landowners may freely create servitudes in Chapters 2 and 3, which limit required formalities to those imposed by the Statute of Frauds (interests in land must be created by written instruments) and substantive limitations to those imposed by general law. The principle that landowners may freely create servitudes is expressed in § 3.1, which provides as follows:

#### § 3.1 Validity of Servitudes: General Rule

A servitude created as provided in Chapter 2 is valid unless it is illegal or unconstitutional or violates public policy.

Servitudes that are invalid because they violate public policy include, but are not limited to:

- (1) a servitude that is arbitrary, spiteful, or capricious;
- (2) a servitude that unreasonably burdens a fundamental constitutional right;
- (3) a servitude that imposes an unreasonable restraint on alienation under § 3.4 or § 3.5;
- (4) a servitude that imposes an unreasonable restraint on trade or competition under § 3.6; and
- (5) a servitude that is unconscionable under § 3.7.

The changed conditions doctrine, which in the Restatement does the basic work in protection against obsolete servitudes, is stated in two sections, which provide as follows:

§ 7.10 Modification and Termination of a Servitude Because of Changed Conditions

- (1) When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. If modification is not practicable, or would not be effective, a court may terminate the servitude. Compensation for resulting harm to the beneficiaries may be awarded as a condition of modifying or terminating the servitude.
- (2) If the purpose of a servitude can be accomplished, but because of changed conditions the servient estate is no longer suitable for uses permitted by the servitude, a court may modify the servitude to permit other uses under conditions designed to preserve the benefits of the original servitude.
- (3) The rules stated in § 7.11 govern modification or termination of conservation servitudes held by public bodies and conservation organizations, which are not subject to this section.

§ 7.11 Modification and Termination of a Conservation Servitude Because of Changed Conditions

A conservation servitude held by a governmental body or conservation organization may not be modified or terminated because of changes that have taken place since its creation except as follows:

If the particular purpose for which the servitude was created becomes impracticable, the servitude may be modified to permit its use for other purposes selected in accordance with the *cy pres* doctrine, except as otherwise provided by the document that created the servitude.

If the servitude can no longer be used to accomplish any conservation purpose, it may be terminated on payment of appropriate damages and restitution. Restitution may include expenditures made to acquire or improve the servitude and the value of tax and other government benefits received on account of the servitude.

If the changed conditions are attributable to the holder of the servient estate, appropriate damages may include the amount necessary to replace the servitude, or the increase in value of the servient estate resulting from the modification or termination.

Changes in the value of the servient estate for development purposes are not changed conditions that permit modification or termination of a conservation servitude.

Additional protection against the problems of servitudes that, for one reason or another, have become undesirable, is provided by granting courts flexibility in the way servitudes are enforced. Section 8.3 provides:

#### § 8.3 Availability and Selection of Remedies for Enforcement of a Servitude

- (1) A servitude may be enforced by any appropriate remedy or combination of remedies, which may include declaratory judgment, compensatory damages, punitive damages, nominal damages, injunctions, restitution, and imposition of liens. Factors that may be considered in determining the availability and appropriate choice of remedy include the nature and purpose of the servitude, the conduct of the parties, the fairness of the servitude and the transaction that created it, and the costs and benefits of enforcement to the parties, to third parties, and to the public...

In addition to these general rules, the Restatement includes several rules that address the specific concerns that arise from allowing benefits in gross and affirmative burdens. Two special rules, set forth in sections 8.1 and 7.13, limit the risks posed by allowing benefits in gross:

#### § 8.1 Right to Enforce A Servitude

A person who holds the benefit of a servitude under any provision of this Restatement has a legal right to enforce the servitude. Ownership of land intended to benefit from enforcement of the servitude is not a prerequisite to enforcement, but a person who holds the benefit of a covenant in gross must establish a legitimate interest in enforcing the covenant.

#### § 7.13 Modification and Termination of a Servitude Held in Gross

If it has become impossible or impracticable to locate the beneficiaries of a servitude held in gross, a court may modify or terminate the servitude with the consent of those beneficiaries who can be located, subject to suitable provisions for protection of the interests of those who have not been located.

Another special rule, contained in section 7.12, limits the risks posed by affirmative burdens:

#### § 7.12 Modification and Termination of Certain Affirmative Covenants

- (1) A covenant to pay money or provide services terminates after a reasonable time if the instrument that created the covenant does not specify the total sum due or a definite termination point. This subsection does not apply to an obligation to pay for services or facilities concurrently provided to the burdened estate.
- (2) A covenant to pay money or provide services in exchange for services or facilities provided to the burdened estate may be modified or terminated if the obligation becomes excessive in relation to the cost of providing the services or facilities or to the value received by the burdened estate; provided, however, that modification based on a decrease in value to the burdened estate should take account of any investment made by the covenantee in reasonable reliance on continued validity of the covenant obligation. This subsection does not apply if the servient owner is obliged to pay only for services or facilities actually used and the servient owner may practicably obtain the services or facilities from other sources.
- (3) The rules stated in (1) and (2) above do not apply to obligations to a common interest community or to obligations imposed pursuant to a conservation servitude.

The concerns addressed by the limited purposes, or *numerus clausus* principle – reducing the costs of investigating titles, reducing the opportunities for clogging titles, and eliminating the need to take account of unusual servitudes – are not directly addressed in the Restatement. However, American recording acts generally make it easy to learn of the existence of servitudes and land purchasers routinely obtain title reports that include information about any recorded servitudes burdening the property. Unusual servitudes, as well as more usual ones, must be taken into account, which may increase the costs involved in buying property. However, this increased cost may well be offset by the increased utility created by the general availability of servitudes, and the reduced costs of creating servitudes under the Restatement approach. Whether increased availability of servitudes will result in substantial clogging of titles remains to be seen. Obsolete servitudes, of course, can be removed using the changed conditions doctrine, but that may prove expensive. On the other hand, given the readiness with which American courts have embraced new forms of servitude over the past two centuries, it would be very risky to rely on the numerous clausus principle to render a properly recorded servitude unenforceable in any event.

The extent to which American courts will adopt the Restatement's simplified doctrinal approach remains to be seen. Most courts still recite the old litany of requirements for creating covenants, but that seems to be primarily a matter of habit. American courts very seldom refuse to enforce a servitude because one of the old classic principles has been violated. Law school casebooks now include extensive discussions of the Restatement and it seems likely that the next generation of lawyers, law clerks, and judges will find themselves more comfortable with the Restatement's simplified doctrinal structure and focus on tackling problems when they actually arise, rather than on *ex ante* requirements that interfere with innovative land use and development practices.

Two useful by-products of adopting the Restatement approach are that the amount of intellectual effort required to understand servitudes law is substantially reduced and courts that refuse to enforce servitudes will be much more likely to explain why the servitude should not be enforced. American servitudes doctrine before the Restatement was exceedingly difficult to understand. The language was obsolete and virtually meaningless; the recognized servitudes categories had considerable overlaps and unintelligible differences; and decisions refusing to enforce servitudes on traditional grounds seldom gave satisfactory reasons for frustrating the intent of the parties who created the servitude or the expectations of persons who bought in reliance on their enforceability.

The Restatement (Third) of Property, Servitudes, presents a doctrinally coherent law of servitudes that allows use of the servitudes to meet demand for changing patterns of land use without having to go through the costly process of securing legislation or court decisions that authorize exceptions to the old classic limitations on servitudes. At the same time, the Restatement offers a set of judicial controls on the social harms that servitudes of indefinite duration can create. If Europe is interested in adapting servitudes law to accommodate dynamic modern patterns of land use and development (and non-development), the Restatement offers an alternative to the process of creating an ever-expanding list of exceptions to the classic *ex ante* limits, prediality, passivity, and *numerus clausus*. *Ex post*, rather than *ex ante* controls may be the way of the future.



## LAND BURDENS – AN ENGLISH PERSPECTIVE

### 1. Introduction

#### 1.1. *The Idea of a Land Burden*

'Land burden' is not a term often used by common lawyers, though, for civilian lawyers, the idea is a commonplace: a land burden is a right burdening the ownership of land through successive transfers of ownership. It is, in other words, a proprietary right over land, though one less than ownership. But for common lawyers, this does not work, for we have no concept of 'ownership',<sup>1</sup> and therefore no idea of a right 'less than ownership.' This is so for a number of reasons.

The first is the fundamentally feudal nature of English land law. Land in England was never 'owned' but 'held of' (*tenez*) another. And though the ultimate feudal lord was the King, it was not even accurate to describe him as 'owner,' for his right to possession of the land was in abeyance so long as the feudal obligations owed by his tenant were performed.<sup>2</sup> Thus, an English lawyer uses the language of tenure to describe the holding of those entitled to possession of land. Moreover, these relationships of tenure can last for different periods of time, the word 'estate' being used to denote the period for which it is held. Thus, a person might have a life estate, an estate which will last only so long as the original grantee survives, or a fee

\* Fellow and Tutor in Law, Brasenose College, Oxford.

<sup>1</sup> B. Rudden, 'Notes Towards a Grammar of Property,' [1980] Conv 325. For a discussion of this concept from a jurisprudential and comparative perspective, see A.M. Honoré, 'Ownership,' in A.G. Guest (ed.), *Oxford Essays in Jurisprudence*, Oxford, Oxford University Press, 1961, p. 107-147. And for an argument that 'ownership' has legal as well as political and social relevance in England, see J.W. Harris, 'Ownership of Land in English Law,' in N. MacCormick and P. Birks, *The Legal Mind: Essays for Tony Honoré*, Oxford, Clarendon Press, 1986, p. 143-161.

<sup>2</sup> The most accessible historical account is to be found in E.H. Burn, *Cheshire and Burn's Modern Law of Real Property*, London, Butterworths, 16<sup>th</sup> ed., chs. 1 & 2, 2000. For a more detailed account, see A.W.B. Simpson, *A History of the Land Law*, Oxford, Clarendon Press, 2<sup>nd</sup> ed., chs. 1-3, 1986.

simple absolute<sup>3</sup> in possession, an estate which, for all intents and purposes, will last forever.<sup>4</sup>

A second reason for the lack of a concept of ownership in English law is the proprietary status of the lease of land.<sup>5</sup> English law recognizes the grant of a right to exclusive possession of land for a fixed period of time,<sup>6</sup> e.g., a week, a year, 99-years, or even three million years, as giving the right-holder a proprietary right to possession of the land concerned. Thus, if someone holding a fee simple absolute in possession grants a 999-year lease of the land to Albert and then conveys his fee simple estate to Brian, Brian takes his estate subject to the rights of Albert. In such a situation, it is difficult to describe either Albert or Brian as ‘owner’ of the land concerned.

The third and final reason why it is inappropriate to talk of ‘ownership’ is that English law operates a system of relative titles. This is not peculiar to land; it applies to all things capable of being physically possessed. English law has no equivalent of the *vindicatio*, no action by which ‘ownership’ can be directly asserted. Instead, what is protected is ‘title,’ and only then through the law of torts. The word ‘title’ means a right to exclusive possession. If I have a title to a book, I have a right to exclusive possession of that book. Crucially, however, there may be someone else with a better title, a better right to exclusive possession, than mine. This is what is meant by relativity of title, and in a contest between me and the person with the better title, that person will prevail. But crucially, where the contest is between me and a third party, it is now my turn to prevail.

The leading case is *Armory v. Delamirie*.<sup>7</sup> A chimney-sweeper’s boy found a ring in a chimney. The ring contained a jewel, and the boy took it to a jeweler to be valued. The jeweler handed him back only the empty socket, and the boy sued him in tort (delict). The court held that the fact of the boy’s possession of the jewel was enough to give him a right to sue and awarded him damages based on the value of the jewel.<sup>8</sup> As the case shows, a right to exclusive possession is obtained by the mere fact of taking possession. And that thinking is not confined to goods. A person who takes possession of land will, by that fact alone, acquire a right to the exclusive possession of that land, a right which, potentially, will last forever. It is for that reason that he too is accurately described as having a fee simple title to that land.<sup>9</sup> It will

<sup>3</sup> As opposed to subject to a condition.

<sup>4</sup> The only thing which might bring such an estate to an end would be a failure of heirs on the part of the present right-holder. But this is an extremely unlikely event.

<sup>5</sup> For the question whether English law recognizes a lease of goods as a property right, see W.J. Swadling, ‘The Proprietary Effect of a Hire of Goods,’ in N.E. Palmer and E. McKendrick, *Interests in Goods*, London, LLP, 2<sup>nd</sup> ed., 1998, p. 491-526.

<sup>6</sup> Call a ‘term,’ from ‘terminus’ or end. The period of time must be certain (*Lace v. Chantler* [1944] KB 368; *Prudential Assurance Co Ltd v. London Residuary Body* [1992] 2 AC 386), as opposed to the various estates, where the period of time is uncertain.

<sup>7</sup> (1722) 1 Str 505.

<sup>8</sup> ‘... the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover’: (1722) 1 Str 505 (Pratt CJ).

<sup>9</sup> *Rosenberg v. Cook* (1881) LR 8 QBD 162.

not, of course, be the *best* fee simple title,<sup>10</sup> but it is a fee simple title nonetheless. It should be stressed, however, that it is in no way a burden on the title of the person who has been dispossessed, for, as we have seen, in a contest between the two titles, the title of the person dispossessed will prevail. It is, however, another nail in the coffin of any idea of ‘ownership’ in English law.

Instead of ownership, on the one hand, and burdens on that ownership on the other, English law simply deals with property rights over land. These rights, a list of which is given below, are often divided between those which give a right to exclusive possession of the land, and those which fall short of giving such a right. However, this distinction has no legal significance and is only made for the purposes of exposition. It is, though, useful for our purposes, for the nearest English law comes to the civilian concept of a land burden is with those property rights which give their holder no right to possession of the land concerned, and it is these which form the subject-matter of this chapter. Rights granted by means of security, which in English law might be possessory or non-possessory, are, however, excluded from our discussion.<sup>11</sup>

## 1.2. Sources of Law

It is vital to appreciate that English law has no Land Law Code. In fact, it uses codes only rarely, both in Private and Public Law. English land law is essentially judge-made, though with some major contributions from the legislature, especially in the area of registration.

So far as that judge-made law is concerned, we need to realize that there are two sources: the common law and equity. Indeed, it is not really possible to understand English land law without some knowledge of the difference between common law and equity. At the outset, however, it should be noted that the difference is purely historical; we would probably have the same system of land we have today even if a separate jurisdiction of equity had not grown up. And since the difference is historical, it can only be explained through history.<sup>12</sup> Our starting point is with the law prior to the Norman Conquest in 1066. There was then no centralized system of law: the law differed from one locality to another. With a king of the whole country in the form of William, Duke of Normandy came a more centralized system of law, one issuing from the royal courts. Because the royal law applied regardless of locality, it became known as the ‘common law,’ in the sense that it was common to the whole realm. But the royal or common law did not replace the local law. In this feu-

<sup>10</sup> The squatter’s title will be ‘upgraded,’ so to speak, if his wrongful possession is not challenged by the person he has dispossessed for the duration of the limitation period. However, he does not at the expiry of the limitation period acquire the title of the person dispossessed – there is no ‘Parliamentary conveyance’: *Tichbourne v. Weir* (1892) 67 LT 735. The position is different where titles to land are registered.

<sup>11</sup> For an excellent, though now somewhat dated, account of the different types of security right in English law, see L.A. Sheridan, *Rights in Security*, London, Collins, 1974.

<sup>12</sup> What follows is only a sketch. For a more detailed treatment, see J.H. Baker, *English Legal History*, London, Butterworths LexisNexis, 4<sup>th</sup> ed., chs. 1-6, 2002.

dal society, the royal law was simply laid on top of the existing structures, and it often used those existing structures for its enforcement. At first, the King's courts only entertained suits which had some relevance to the King. An example would be a breach of the King's peace. But as time went on, the common law gradually expanded to cover more and more disputes. However, litigants were not always happy with the common law system, which was a formulary system, and would petition the King as the fount of all justice when unable to obtain what they wanted from his courts.<sup>13</sup> By custom, these petitions were referred to the King's Chancellor, who would issue *ad hoc* instructions to individuals telling them that they were not allowed to rely on their common law rights. Out of this custom grew a court separate from the courts of common law, the Court of Chancery.

The rules administered in the Court of Chancery became known as the rules of Equity. At first, individual chancellors decided cases on the basis of 'conscience,' though this was little more than what they thought was 'just' or 'fair.' But the development of a system of precedent meant that a body of rules came into being, so much so that by the beginning of the nineteenth century, Lord Chancellor Eldon said in a case decided just before his retirement:

Nothing would inflict on me greater pain in quitting this place than the recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot.<sup>14</sup>

And though, since the late nineteenth century, we no longer have separate courts of common law and equity, we do still have two sources of judge-made law. Both, however, are systems of rules. As Sir George Jessel MR famously once said, 'This court is not, as I have often said, a Court of Conscience, but a Court of Law.'<sup>15</sup>

How, then, does this duality impact on land law? There are three contributions by equity to English land law. First, titles to land were often conveyed to trusted friends 'to the use of' (on behalf of) the transferor. The use, the forerunner of the modern-day trust, was a device only recognized in equity. Indeed, it was crucial that it was not recognized by the common law, for the reason why a right-holder would put his right 'in use' was to avoid some of the unpleasant incidents of feudalism, most notably the prohibition on making wills of land, and the payments which became due on the death of a tenant. The second is that equity in certain circumstances would recognize a property right as having come into existence when, because of a failure to use the correct formalities, the common law would not. The third is that equity recognized a longer list of property rights than did the common

<sup>13</sup> One reason for this may have been the prohibition by chapter 24 of the Statute of Westminster II in 1285 of the issuing of new common law writs except in similar cases (*in consimili casu*).

<sup>14</sup> *Gee v. Prichard* (1818) 2 Swan 402, 414. The reference to the chancellor's foot comes from a criticism of John Selden in the seventeenth century. He said that if the measure of equity was the chancellor's own conscience, then we might as well make the standard measure of one foot the chancellor's foot: F. Pollock (ed.), *The Table Talk of John Selden*, London, Quaritch, 1927, p. 43.

<sup>15</sup> *Re National Funds Assurance Co* (1878) 10 Ch D 118, 128.

law. To take one example, the common law does not recognize a covenant restrictive of the user of land as capable of binding successors in title of the original covenantor. Equity, by contrast, does. It is this final area that has the most relevance to our enquiry, for we will not treat trusts as 'land burdens.'

### 1.3. *A Numerus Clausus of Property Rights over Land*

English law, like all mature systems of law, operates on the basis of a *numerus clausus* of property rights.<sup>16</sup> By *numerus clausus* is meant a limited list of property rights in land. A right which falls outside that list is only a personal right, one which is incapable of binding third parties. Illustrative of this principle are the decisions in *Keppel v. Bailey*<sup>17</sup> and *Hill v. Tupper*.<sup>18</sup> In the former, a leaseholder who ran an ironworks entered into a covenant with a neighbouring proprietor of a limestone quarry by which he undertook that both he and his successors in title would buy all the limestone to be used in the ironworks from that particular quarry. Did the covenant bind a later purchaser of the lease who bought with actual knowledge of the covenant? The court held that it did not, for it was not a property right. In *Hill v. Tupper*, the Basingstoke Canal Co, holders of a fee simple title to a canal and its banks, granted to the plaintiff a lease of some premises on the canal bank and gave him 'the sole and exclusive right or liberty to put or use pleasure boats on the said canal, and let the same for hire for the purpose of pleasure only.' The defendant, the landlord of an inn adjoining the canal, also let out pleasure boats for hire, and the plaintiff claimed damages from him for an infringement of his 'exclusive right.' The action failed. According to Pollock CB:

This grant merely operates as a licence or covenant on the part of the lessors, the canal company, and is binding on them as between themselves and their lessee, but gives no right of action to the lessee ... against a stranger for an infringement of the alleged exclusive right.<sup>19</sup>

But why was it that these rights did not bind strangers to their creation? The answer given by Lord Brougham LC in *Keppel v. Bailey* was that the list of property rights was closed, and that particular right was not in the list:

... 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. There can be no harm in allowing the fullest latitude to men in binding themselves ... to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise and much confusion of

<sup>16</sup> B. Rudden, 'Economic Theory v Property Law: the Numerus Clausus Problem,' in J. Eekelaar and J. Bell (eds), *Oxford Essays in Jurisprudence*, Oxford, Clarendon Press, 3<sup>rd</sup> ed., 1987, p. 238-263.

<sup>17</sup> (1834) 2 My & K 517.

<sup>18</sup> (1863) 2 H & C 121.

<sup>19</sup> (1863) 2 H & C 121, 127.

rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote.<sup>20</sup>

Likewise, in *Hill v. Tupper*, Pollock CB said:

[Counsel for the plaintiff] asks why the owner of an estate should not be able to grant such a right as that now claimed by the plaintiff. The answer is, because the law does not recognise such rights. It is an old and well-established principle of our law that new estates cannot be created. ... New rights or incidents of property cannot be created, nor can a new species of burden be imposed upon land at the pleasure of the owners ... It has been contended that this is a sort of estate, but the owner of an estate must be content to take it with the rights and incidents known to and allowed by law. A grantor may bind himself by covenant to allow what rights he pleases over his property, but the law will not permit him to carve out his property so as to enable the grantee of such a limited right to sue a stranger in the way here contended for.<sup>21</sup>

What, then, does the list of property rights over land look like? Broadly speaking, it comprises the following:

1. fees simple absolute in possession;
2. conditional fees;
3. determinable fees;
4. life estates;
5. entails;<sup>22</sup>
6. remainder interests;
7. leases;
8. easements;
9. profit a prendres;
10. rentcharges;
11. restrictive covenants;
12. estate contracts;
13. options to purchase;
14. equities of redemption;
15. legal and equitable charges.

Provided the interest has been created using the correct formalities and has been registered or protected on the register of title if needed, the right concerned will bind a third party.

<sup>20</sup> (1834) 2 My & K 517, 535-536.

<sup>21</sup> (1863) 2 H & C 121, 127-128.

<sup>22</sup> The entail was abolished by the Trusts of Land and Appointment of Trustees Act 1996.

#### 1.4. *Land Burdens in English Law*

In a sense, all the rights in the list, even the fee simple, could be termed land burdens, for all have the effect of limiting in some way another's right to use land. But on that basis, this essay would have to discuss the whole of English land law. The strategy instead is to discuss only those rights which civil lawyers would call servitudes, by which is meant those which restrict the physical use a person can make of land or force him to pay a sum of money but which fall short of giving a right to possession of the land itself. Those 'servitudes' in English law would then be easements, profits, rent charges, and restrictive covenants. For the sake of completeness, a word will also be said about estate contracts and options to purchase, though these, although property rights in land, are difficult to see as servitudes. They are instead rights which will eventually crystallize into rights to possession.

#### 1.5. *Burdens Arising by Operation of Law*

It should be stressed that the list of property rights adumbrated above is a list of those rights which are capable of being granted by a right-holder in favour of another. But in the absence of any grant, the basic rule is that no burdens will arise. Thus, there is no right in either common law or equity for one title-holder over land to be allowed access to neighboring land to effect repairs to buildings on his own land.<sup>23</sup> There are, however, a limited class of rights, confusingly called 'natural rights,' which do not depend on a grant. These are twofold: the right that one 'landowner' has to so much support from his neighbor's land as will support his own land, unencumbered by buildings, at its natural level;<sup>24</sup> and the right of a riparian 'owner' that other riparian owners do not divert the natural course of the stream.<sup>25</sup> These rights apart, all burdens over land must be found in some grant by a possessor of the burdened land. The only exception is the easement, which, as we will see, can also be acquired by prescription.

## 2. Easements

Common easements are rights of way over another's land, right to run drains under another's land, rights of light, rights of storage, and the use of chimney flues. Though it is sometimes said that the list of easements is not closed,<sup>26</sup> this statement must be read in the context of the *numerus clausus* rule outlined above. Although new types of easement can be brought into being, they must at least conform to the standard model. The requirements of this model are as follows. First, there must be

<sup>23</sup> Such a right has now been given by various statutes: Access to Neighbouring Land Act 1992; Party Walls Act 1996.

<sup>24</sup> *Backhouse v. Bonomi* (1861) 9 HL C 503; *Dalton v. Angus & Co* (1881) 6 App Cas 740.

<sup>25</sup> *Swindon Waterworks Co Ltd v. Wilts & Berks Canal Navigation Co* (1875) LR 7 HL 697.

<sup>26</sup> In *Dyce v. Lady Hay* (1852) 1 Macq 305, Lord St Leonards said: 'The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind.'

a dominant and a servient tenement. Second, the easement must ‘accommodate’ the dominant tenement. Third, the rights to possession of the dominant and servient tenements must be in different people. Fourth, the content of the right must be certain.<sup>27</sup> Fifth, no positive obligation may be imposed on the possessor of servient tenement. And sixth, though subject to limited exceptions, the right must not be negative in nature, but must instead entitle the holder of the easement to do something on the servient tenement.

### 2.1. *Dominant and Servient Tenement*

An easement is essentially a right of one title-holder over land in the possession of another. For that reason, there must be a both land which is benefited and land which is burdened. This is illustrated by the decision of the House of Lords in *King v. David Allen (Billposting) Ltd.*<sup>28</sup> The holder of a fee simple title contracted to allow an advertising company exclusive rights to affix advertisements to the side of an as yet unbuilt cinema for a period of four years. The cinema was built and leased to a third party who, though he knew about the existence of contract when he took his lease, refused to allow the signposting to continue. The advertising company sued the fee simple holder for breach of contract in granting the lease and thereby disabling itself from performing its contract. The fee simple holder argued that the right it had granted was an easement, which therefore bound the lessee, with the result that the fee simple holder had not acted in breach of contract in letting out the land. The argument was rejected by the House of Lords. The right given to the advertising company could not be an easement because it did not relate to any land in the possession of the advertising company. It created mere personal rights, which could not bind the lessee. The fee simple holder had therefore acted in breach of contract when letting the land to the lessee and thereby putting it beyond its powers to perform its contract.

### 2.2. *Benefit to Dominant Tenement*

But not only must there be a dominant tenement, that dominant tenement must be benefited by the easement. The easement, it is said, must ‘accommodate the dominant tenement.’ The test is whether the right makes the land a better or more convenient property. Thus, a right of way over neighbouring land will generally accommodate the dominant tenement by making access to the dominant tenement more convenient. And a right to run drains under a neighbouring property will clearly have a similar effect. But it is not enough that the right granted increases the value of the right to possession of the dominant tenement. It must make the use of the dominant tenement more commodious. Thus, a perpetual right of free entry to Lord’s cricket ground might make the fee simple title to which it was attached more

<sup>27</sup> This condition is not, of course, peculiar to easements.

<sup>28</sup> [1916] AC 54.



valuable, but it would not qualify as an easement, for it would not do anything for the land *qua* land.

The cricketing example was given by the Court of Appeal in one of the leading cases on easements, *re Ellenbrough Park*.<sup>29</sup> In 1855, the White Cross Estate, which included Ellenborough Park, was being developed for building purposes. The purchasers of title to several plots surrounding the park were each given in their conveyances certain rights of user over it, including ‘the full enjoyment ... at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground set out in front of the said plot of land ... in the centre of the square called Ellenborough Park ....’ The reason this was done was that the houses built on the plots being sold off did not have gardens of their own. During the Second World War, the park was requisitioned by the Crown, and the entitlement of the surrounding title holders to compensation depended on whether they had been deprived of a property right. The right-holders claimed that they had, in that they had been deprived of an easement. The Court of Appeal held that the right of enjoyment was indeed an easement appurtenant to the plots bought by the original purchasers and that the plaintiffs were therefore entitled to compensation. Although admitting that the case was a borderline one, the Court of Appeal held that the use of a garden is closely connected with the use and enjoyment of the land and the right was calculated to afford all the amenities which it was the purpose of the garden of a house to provide.<sup>30</sup> It is difficult, however, to see how it could have made the use of plot on which the house stood any more commodious. The same problem exists with respect to the grant of rights to park cars. The fact that a titleholder has a right to park his car on neighbouring land can hardly be said to make the use of his own land more commodious. Yet car-parking rights have been held to be capable of amounting to easements in a number of recent cases.<sup>31</sup>

It was the failure of the right to accommodate the dominant tenement which prevented it qualifying as an easement in *Hill v. Tupper*.<sup>32</sup> Although in that case there was both a dominant and a servient tenement, the ‘exclusive right to put pleasure boats on the canal’ did not make the occupation of the dominant tenement more convenient. As Sir Raymond Evershed MR pointed out in *re Ellenbrough Park*, it was ‘clear that what the plaintiff was trying to do was to set up, under the guise of an easement, a monopoly which had no normal connection with the ordinary use of his land, but which was merely an independent business enterprise. So far from the right claimed sub-serving or accommodating the land, the land was but a convenient incident to the exercise of the right.’<sup>33</sup>

Somewhat anomalously, it seems to be no objection that the right claimed as an easement benefits a business being conducted on the land. Thus, in *Moody v.*

<sup>29</sup> [1956] Ch. 131, 174 (Sir Raymond Evershed MR).

<sup>30</sup> [1956] Ch. 131, 174-175.

<sup>31</sup> *Newman v. Jones* [1982] March 22, unreported; *Patel v. W H Smith (Eziot) Ltd* [1987] 1 WLR 1278; *London & Blenheim Estates Ltd v. Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278.

<sup>32</sup> (1863) 2 H & C 121, discussed above, text to nn 17-20.

<sup>33</sup> [1956] Ch. 131, 175.

*Steggles*,<sup>34</sup> the right to affix a sign indicating the existence of a public house was upheld as an easement, Fry J reasoning that ‘the house can only be used by an occupant, and ... the occupant only uses the house for the business which he pursues, and therefore in some manner (direct or indirect) an easement is more or less connected with the mode in which the occupant of the house uses it.’<sup>35</sup> On the other side of the line is of course *Hill v. Tupper*. Although at first sight it is difficult to see the difference between the two cases, two possible factors are said to explain the different results.<sup>36</sup> First, the whole point of the easement in *Hill v. Tupper* was to set up a business, rather than to benefit an existing business; in other words, the easement was the business. It might be different, for example, in the case of a right granted to a hotel owner to put boats on a canal as part of his hotel business. Second, the right was in effect a commercial monopoly, having no connection with the use of land.

### 2.3. *Rights to Possession Vested in Different People*

An easement is a right over land in the possession of another. It is therefore not possible for a right which excludes that other from possession to be classified as an easement, for such a right would be tantamount to the grant of a lease or some freehold estate. It was for this reason that the right claimed in *Copeland v. Greenhalf*<sup>37</sup> was held not to amount to an easement. In that case, the plaintiff had a title to an orchard and an adjoining house. Access to the orchard from the road was provided by a strip of land, of varying width, about 150 feet long. The defendant was a wheelwright whose premises were across the road from the plaintiff's land. The defendant proved that for 50 years he and his father before him had, to the plaintiff's knowledge, used one side of the plaintiff's strip of land to store and repair vehicles in connection with his business as a wheelwright, always leaving room for the plaintiff to have access to the orchard. The plaintiff sought an order for possession of the land, but the defendant counter-claimed that he had a prescriptive right to an easement. Upjohn J said that such a right could not be an easement. The right claimed went wholly outside any normal head of an easement, and really amounted to a claim of joint user, and could not therefore be acquired by prescription.<sup>38</sup>

<sup>34</sup> (1879) 12 Ch. D 261.

<sup>35</sup> *Ibidem*, at p. 266.

<sup>36</sup> K.S. Gray and S.F. Gray, *Elements of Land Law*, Oxford, Oxford University Press, 4<sup>th</sup> ed., 2005, p. 625-626.

<sup>37</sup> [1952] Ch. 488.

<sup>38</sup> Easements (and profits) are unique in English law in that they can be acquired by prescriptive acquisition. No such possibility exists in respect of other property rights.

#### 2.4. *Content of Right Must be Certain*

As with all property rights, indeed all rights whatsoever, the content of the right must be certain for it to qualify as an easement. It is for this reason that it is said that there can be no easement to a view,<sup>39</sup> to the natural flow of air,<sup>40</sup> or to privacy.<sup>41</sup>

The reasoning, however, is unconvincing, for, as we will see below, it is perfectly possible to obtain a right to a view by the use of restrictive covenant. The true reason would seem to be that, as we have just seen, easements, unlike restrictive covenants, can be acquired by prescription. The details of prescription are extremely complex,<sup>42</sup> but it essentially allows rights to arise after a continuous period of long-user. The obvious dangers with prescription are twofold. First, the right can be acquired without those who would be burdened by it knowing that time was running against them. And second, even if they did know, it is not always practicable or even possible to take action to, as it were, stop the clock. Evidence for the notion that it is the availability of prescription in fact which lies behind these rules is provided by the fact that a right to the flow of air is capable of forming the subject-matter of an easement when it relates to a defined aperture,<sup>43</sup> and that a right to light can amount to an easement if it exists in relation to a building which receives it through a window.<sup>44</sup> In both these cases, it is at least possible, though inherently wasteful, to stop the right arising. And as we have just seen, more extensive rights can be acquired as restrictive covenants.

#### 2.5. *No Positive Obligation on Possessor of Servient Tenement*

A further condition is that the right claimed as an easement must not place any positive burden on the possessor of the burdened land.<sup>45</sup> Thus, there can be no easement to maintain a supply of hot water to a house.<sup>46</sup> For the same reason, the possessor of land subject to a right of way in favour of his neighbour comes under no obligation to keep that right of way in good repair.<sup>47</sup> The only thing he must do is to allow the right-holder entry to effect his own repairs. The requirement that there be no positive burden is perfectly orthodox, and is fact a pre-condition of many

<sup>39</sup> *William Aldred's Case* (1610) 9 Co Rep 57b, 58b: 'for prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof ... the law does not give an action for such things of delight.' (Wray CJ).

<sup>40</sup> *Webb v. Bird* (1863) 13 CBNS 841.

<sup>41</sup> *Browne v. Flower* [1911] 1 Ch. 219.

<sup>42</sup> Details in C. Harpum (ed.), *Megarry and Wade, The Law of Real Property*, London, Sweet & Maxwell, 6<sup>th</sup> ed., 2000, paras 18-121-18-170.

<sup>43</sup> *Bass v. Gregory* (1890) 25 QBD 481.

<sup>44</sup> *Levet v. Gas Light & Coke Co* [1919] 1 Ch. 24.

<sup>45</sup> The one exception is the right of a possessor of land that his neighbour fence his own land so as to keep out cattle. It has been described as a 'spurious easement': *Lawrence v. Jenkins* (1873) LR 8 QB 274, 279 (Archibald J).

<sup>46</sup> *Regis Property Co Ltd v. Redman* [1956] QB 612.

<sup>47</sup> *Jones v. Pritchard* [1908] 1 Ch. 630.

modern-day property rights. Anything else would amount to too great an interference with personal liberty.

### 2.6. *Right of Possessor of Dominant Tenement Must be Positive*

The final requirement of an easement is that the right conferred on the possessor of the dominant land is a right to do something on the servient land rather than a right to restrain the possessor of the servient land from doing something on that land. Thus, in *Phipps v. Pears*,<sup>48</sup> the Court of Appeal held that there could be no easement to restrain a neighbor from pulling down a building which was giving protection from the weather to a building on land in the possession of the claimant. Two ancient exceptions to this rule are the right to light and the right to support of a building. Such rights are only explicable as having been recognized by the courts before the advent of the restrictive covenant in the middle of the nineteenth century.<sup>49</sup>

## 3. Profits a Prendre

A profit is different from an easement in that whereas an easement is a right to do something on the land of another, a profit a prendre, as the name implies, is a right to take something from the land of another. And it must be literally 'from' the land. The right must be to take either part of the land itself, e.g., minerals or crops, or the wild animals existing on it. Profits are quite ancient rights, and their content reflects an agrarian rather than an industrial economy. Typical profits are the right to graze animals on the land of another (pasture), to fish (piscary), to take game, to cut turf (turbary), to take timber (estovers), or to take minerals. Although they are generally appurtenant to land, unlike easements, they can exist in gross. There is, in other words, no need for a dominant tenement.

## 4. Rentcharges<sup>50</sup>

A rentcharge is an annual sum of money (rent) issuing and payable out of land, the due payment of which is secured (charged) by a right of distress. A common usage of rentcharges was for the financing of sales of titles to land. However, with the advent of modern secured financing, this need has fallen away, and rentcharges are nowadays something of an anachronism. For that reason, a statutory reform in 1977<sup>51</sup> swept most of them away. They can, however, still be created in limited circumstances, the most important of which is in connection with schemes of development and are necessary to get around the rule that easements cannot impose positive burdens on the servient tenement.

<sup>48</sup> [1965] 1 QB 76.

<sup>49</sup> I. Dawson and A. Dunn, 'Negative Easements – A Crumb of Analysis,' (1998) 18 LS 510, 517-8.

<sup>50</sup> Details in C. Harpum, *supra* note 42, § 18-014-18-039.

<sup>51</sup> By the Rentcharges Act 1977, implementing the recommendations of the Law Commission: (1975) Law Com No. 68.

## 5. Restrictive Covenants

At common law, the burden of a covenant could not run unless it was a lease, an easement, a profit, or a rentcharge. And it was because the right granted in *Hill v. Tupper*<sup>52</sup> did not fall into any of these categories that its burden was held not to bind anyone other than its grantor. The courts of equity, however, took a more relaxed view, and allowed certain rights to bind strangers to their creation even though they did not fit within the list. One was the restrictive covenant, though, as we shall see, the equity courts did not stop there.

The genesis of the restrictive covenant is the decision in *Tulk v. Moxhay*.<sup>53</sup> In 1808, the plaintiff sold title to a plot of land, Leicester Square in London, to one Elms. Elms covenanted to 'maintain the land as a garden and pleasure ground in an open state uncovered with any buildings and to allow residents, on payment of a reasonable rent, to use the gardens.' Elms's title was sold on, and eventually came into the hands of the defendant, who bought with knowledge of the covenant. He proposed to build on the land and the plaintiff, who still retained title to several houses in the square, sought an injunction (an equitable remedy) to prevent him from so doing. Despite the fact that the defendant was a stranger to the original covenant, the injunction was granted. Lord Cottenham LC said that if the court had no power to interfere on the plaintiff's behalf to restrain such action, it would be impossible for an owner of land to sell part of it without incurring the risk of what he retained proving worthless. The question was not, said the Lord Chancellor, whether the covenant ran with the land, but whether a party should be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, with notice of which he purchased. The price that the original purchaser paid would, he said, have been reduced because of the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price because a purchaser from him would not be bound. He said:

If an equity is attached to the property by the owner, no-one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.<sup>54</sup>

The decision in *Tulk v. Moxhay* was given in very wide terms and potentially turned all rights over land into property rights, at least in equity. This, however, conflicts with the *numerus clausus* principle. It is not surprising, therefore, to find that later cases, while not overruling *Tulk v. Moxhay* completely, sought to narrow its impact. These cases placed three limits on the operation of the doctrine. All are borrowed from the law of easements, which has led to restrictive covenants being described as

<sup>52</sup> (1863) 2 H & C 121.

<sup>53</sup> (1848) 2 Ph 774. See generally, D.J. Hayton, 'Restrictive Covenants as Property Interests,' (1971) 87 L&R 539.

<sup>54</sup> (1848) 2 Ph 774, 778.

‘negative easements.’<sup>55</sup> But this is not entirely accurate, for, unlike easements, they cannot be acquired by prescription.

The first limit to the *Tulk v. Moxhay* doctrine, and one clearly borrowed from easements, was that it was held to apply only to negative rather than positive covenants. It could not be used to impose positive burdens on a successor in title of the original covenantee. Thus, in *Haywood v. Brunswick Permanent Building Society*<sup>56</sup> title to a parcel of land was conveyed by Charles Jackson to Edward Jackson, the latter promising the former to keep the buildings on it in repair. Both parties assigned their various interests, and the question arose whether an assignee from Edward, who had bought with knowledge of the covenant, was liable under the doctrine for failure to perform it. The Court of Appeal held that he was not. Brett LJ said that the plaintiff could not rely on *Tulk v. Moxhay*. All that that case, and cases which had later followed it, had decided was that covenants which restricted the mode of user could be enforced against purchasers of the land who bought with notice of them. This, however, was a case of a positive covenant and if the relief contended for was given, the court would be ‘making a new equity,’ which it could not do.<sup>57</sup>

The second restriction was that there must be both a dominant and servient tenement, the source of which is again the law of easements. In *London County Council v. Allen*<sup>58</sup> the titleholder to a plot of land covenanted with the London County Council (LCC) that neither he nor his successors in title would build on the plot. The reason this was done was to afford facilities for the continuation of a street which the LCC proposed to build at a later date. A purchaser from the covenantor with notice of the covenant proceeded to build on it and the LCC, relying on *Tulk v. Moxhay*, sought an injunction to restrain him from so doing. The LCC, however, never had any land which was protected by the covenant in question. The Court of Appeal looked to the justification for the grant of the original injunction in *Tulk v. Moxhay*, which was that otherwise ‘it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless.’<sup>59</sup> That justification was not present here, said the court, and they accordingly held that the covenant could not bind the purchaser. According to Buckley LJ, ‘The doctrine ceases to be applicable when the person seeking to enforce the covenant against the derivative owner has no land to be protected by the negative covenant.’<sup>60</sup>

The third restriction was that the covenant should ‘accommodate’ the dominant tenement. In other words, the covenant must confer a benefit on the covenantee in his capacity of holder of a title to land. But unlike easements, the fact that the

<sup>55</sup> *London & South Western Railway v. Gomm* (1882) 20 Ch. D 562, 583 (per Jessel MR).

<sup>56</sup> (1881) 8 QBD 403.

<sup>57</sup> (1881) 8 QBD 403, 408. This rule was reaffirmed by the House of Lords in *Rhone v. Stephens* [1994] 2 AC 310.

<sup>58</sup> [1914] 3 KB 642.

<sup>59</sup> (1848) 2 Ph 774, 777.

<sup>60</sup> [1914] 3 KB 642, 655.

benefit was to a business carried out on the land rather than to the land itself has never been seen to be problematic.<sup>61</sup>

A final point which should be noted is that restrictive covenants, alone among servitudes, can be extinguished or amended via statutory machinery<sup>62</sup> which provides for their discharge or modification where the covenant is either obsolete, where reasonable user of the land is being impeded, where those with the benefit have either expressly or impliedly agreed, or where those with the benefit will not be harmed.

## 6. Estate Contracts

A further right recognised as proprietary by equity, though not the common law, is the benefit of a contract to purchase a title to land, a right known compendiously as an 'estate contract.' The reasoning by which this right is transformed from a right to performance enforceable only against the vendor to one enforceable against his successors in title is complicated and controversial.<sup>63</sup> In outline, the position is this. The general response of an English court to a breach of contract is to award the victim of that breach a right to damages against the other contracting party. Only rarely will a court order 'specific performance' of the contractual obligation itself.<sup>64</sup> One of the rare instances where it will is where the subject-matter of the contract is unique, and titles to land are considered to fall under that heading. Thus, a contract for the sale of land is a contract of which a court of equity will order specific performance, i.e., the conveyance of the title to the purchaser. That then triggers an equitable rule, that 'equity considers as done that which ought to be done.' By a fiction, a court of equity sees the conveyance as having taken place at the moment of contract, even though the common law still awaits the conveyance itself. It is this difference of opinion which triggers a trust. As Sir George Jessel MR stated in *Lysaght v. Edwards*:

The moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser ...<sup>65</sup>

And like all interests under a trust, the purchaser's right is capable of binding third parties.

<sup>61</sup> *Wilkes v. Spooner* [1911] 2 KB 473 (covenant not to use the premises as a general butcher); *Newton Abbott Co-operative Society Ltd v. Williamson & Treadgold Ltd* [1952] Ch. 286 (covenant not to use premises as an ironmonger).

<sup>62</sup> Contained in s 84 of the Law of Property Act 1925, as amended by the Law of Property Act 1969. Details in C. Harpum (ed.), *supra* note 42, § 16-085-16-093.

<sup>63</sup> Details in W. Swadling, 'The Vendor-Purchaser Constructive Trust,' in S. Degeling and J. Edelman, *Equity in Commercial Law*, Sydney, Lawbook Co (LBC), 2005, p. 463-488.

<sup>64</sup> See generally, A.S. Burrows, *Remedies for Torts and Breach of Contract*, Oxford, Oxford University Press, 3<sup>rd</sup> ed., 2004, p. 456-509.

<sup>65</sup> (1876) 2 Ch. D 499, 506.

## 7. Options to Purchase

An option to purchase a right in land, though one stage removed from a contract to purchase the right itself, is also recognised by courts of equity as a property right. Its recognition as such also turns on the fact that options to purchase, again because rights in land are unique, are specifically enforceable. Thus, as Sir George Jessel MR explained in *London and South Western Railway v. Gomm*:

[The promisor's] estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give [the promisee] an interest in the land.<sup>66</sup>

By contrast, a right of pre-emption (a right of first refusal) does not create a property right in the promisee, for the promisee has no right to force a sale.<sup>67</sup>

## 8. Defects

Compared to the position in the United States, a detailed treatment of which can be found elsewhere in this book,<sup>68</sup> the English law of land burdens is fairly conservative. There are often said to be a number of defects in the present law, and there have over the years been calls for a liberalization of the rules. This section will set out some of the major criticisms, and the next will discuss the extent to which reform has either been proposed or implemented. Discussion will focus on easements and restrictive covenants, for it is these which have generated the most controversy.

### 8.1. Easements

The two major areas of criticism of the current law of easements concern the need for a dominant tenement, and the fact that easements (and profits), unlike any other property right over land, can be acquired by prescription.

So far as the former is concerned, it has been argued by Sturley<sup>69</sup> that the requirement is not supported by authority and that it prevents the legitimate exploitation of the value locked up in land. He gives the example of a company which wants the right to use a plot of land as a place to land its helicopter. At present, the only property right available to them would be a lease, but, as Sturley points out, that would be economically wasteful, as the company may only wish to land their helicopter at infrequent intervals.

On the topic of prescription, a law reform committee reporting in 1966<sup>70</sup> attacked the rules as being unsatisfactory, uncertain, anachronistic, and in need of ex-

<sup>66</sup> (1882) 20 Ch. D 562, 581.

<sup>67</sup> *Pritchard v. Briggs* [1980] Ch. 338.

<sup>68</sup> See the chapter by Susan French in this volume.

<sup>69</sup> M.F. Sturley, 'Easements in Gross,' (1980) 96 L&R 557.

<sup>70</sup> Law Reform Committee, *Fourteenth Report on Acquisition of Easements and Profits by Prescription* (1966) Cmnd 3100.



tensive reform. Indeed, a majority of the committee recommended the complete abolition of prescription as a mode of acquisition. There was no moral justification for the grant of a property right for free, and it in some cases penalized landowners who had extended acts of kindness to their neighbours. And of course, the abolition of prescription as a method of acquisition would have a positive effect on the range of rights which the law might then recognize as easements.

## 8.2. Restrictive Covenants

In the area of restrictive covenants, dissatisfaction has been voiced over a number of issues, the main one being that positive burdens cannot run under the *Tulk v. Moxhay* doctrine. This has led to difficulties with apartment living, for it is not possible to use the doctrine to ensure that those having a freehold title to an apartment<sup>71</sup> are obliged to contribute to the upkeep of the common parts, for example, the maintenance of a lift. And though, as we have seen, it is possible to impose such obligations by the use of rentcharges, the dominant practice is to utilize the device of a lease, under which both positive and negative burdens can be transmitted. This, however, is not entirely satisfactory, and, as we will see below, has led to the introduction of a new form of landholding called 'commonhold.' A less pressing difficulty, but one which nevertheless causes problems, is that it is sometimes difficult to identify the dominant tenement, so making it difficult for the holder of a title to the servient tenement to know to whom he should turn to negotiate a release.

## 9. Reform

The area of land burdens has been subject to a number of reform proposals over the years. So far as easements are concerned, the English Law Commission is currently in the process of undertaking a systematic review of the whole subject, and though a final report is not expected for some years, a consultation paper is promised for 2006. It is expected that it will deal with the issues of dissatisfaction identified above, *viz* the availability of prescription as a method of acquisition, and the rule that there can be no easements in gross. A comprehensive review of the law of restrictive covenants was undertaken by the Law Commission as long ago as 1984.<sup>72</sup>

The Law Commission recommended the complete abolition of the *Tulk v. Moxhay* doctrine and its replacement with a system of 'Land Obligations.' The present law was thought to be too complex and too uncertain. Under a system of 'land obligations,' there would be two types of land obligation: neighbour obligations and development obligations. The idea of 'development obligations' has now been rendered otiose by the introduction of a system of commonhold, the English version of

<sup>71</sup> The common law has no difficulty in recognising a freehold title in a slice of air: 'A man may have an inheritance in an upper chamber though the lower buildings and soil be in another' Co Litt 48b. Such titles are known as 'flying freeholds.' They are, however, extremely rare.

<sup>72</sup> Law Commission of England and Wales, *Transfer of Land: The Law of Positive and Restrictive Covenants* (1984, Law Com No. 127). A previous report had been published in 1965 on positive covenants. Its recommendations were not implemented.

what in the United States would be called ‘condominium law.’ It will be discussed below. We will concentrate for now on neighbour obligations. So far as these are concerned, four types of neighbour obligation would be allowed:

- i. those imposing restrictions which benefited the whole or part of the dominant tenement on the doing of some act on the servient land;
- ii. those obliging covenantors to carry out on either the servient or dominant land works which would benefit the whole or any part of the dominant land;
- iii. those by which covenantors promised to provide services for the benefit of the whole or any part of the dominant land; and
- iv. those by which covenantors promised to pay for expenditure that is incurred in performing one of these obligations.

The thing to notice about this proposal is that, whilst retaining the present law of restrictive covenants, a limited number of positive covenants would be allowed to run with the land. This was by far the most radical part of the report, but it was never adopted by the legislature.

The other major point addressed by the Law Commission was the extinction of restrictive covenants. Potentially, these burdens can last forever, even though they may have ceased many years ago to serve any useful purpose, and only form a barrier to useful development. As we have seen, a system by which redundant restrictive covenants could be discharged by application to a judicial body, the Lands Tribunal, was introduced in 1925, but that was thought to be inadequate. Although the 1984 Report recommended certain improvements to that procedure, a far more radical reform was suggested in 1991. Under this proposal, a restrictive covenant would be automatically discharged 80 years after its creation. An application for its survival could, however, be made to the Lands Tribunal by a party who considered that the covenant was not obsolete. However, none of these proposals, either in relation to the running of positive burdens between neighbours or the extinction of obsolete restrictive covenants, has been enacted in legislation.

We said that the Law Commission in 1984 also suggested the introduction of ‘development obligations’ as another species of land obligations. These were designed to allow the imposition of positive burdens on those occupying land set aside as part of a development scheme. Although never enacted, the legislature has instead introduced a scheme to effect the same result, under the heading of ‘commonhold.’<sup>73</sup> The subject is complex, and whole books have been written about it.<sup>74</sup> Very briefly, this is a scheme under which an area of land or a building is divided into units. Each unit-holder has a freehold title to his or her unit, but a corporation is formed (the Commonhold Association), in which is vested title to the common parts. All unit-holders are members of the Commonhold Association. Something

<sup>73</sup> By the Commonhold and Leasehold Reform Act 2002. For details, see D. Clarke, *Commonhold: The New Law*, Bristol, Jordans, 2002; T. Arlidge, *Commonhold Law*, London, Sweet & Maxwell, 2002.

<sup>74</sup> Principally, D. Clarke, *supra* note 73; T. Arlidge, *supra* note 73. For a good outline, see R.J. Smith, *Property Law*, Harlow, Pearson Longman, 5<sup>th</sup> ed., 2006, p. 529-534.

known as a Commonhold Community Statement determines the rights and obligations of both the Commonhold Association and the individual unit-holders. Crucially, that Commonhold Community Statement can include both restrictive covenants and positive covenants in the form of obligations to insure, repair, and maintain or to pay sums of money to the Commonhold Association to carry out these tasks. It is, however, too early to say whether the scheme will prove attractive to developers.

## 10. Conclusion

There is no doubt that the English law of land burdens is fairly unadventurous; a perusal of the chapter by Professor French shows how far more radical the law in the United States has become, even though arising from the same stock. But that is not to say that English lawyers are content with the current position. As we have noted, a major review of the law of easements is currently in train, and the rule against positive covenants is constantly in the spotlight, with the commonhold system recently being enacted in order to introduce something equivalent to the condominium system which exists in the United States. But whether English law will ever get to the point of removing altogether the need for a dominant tenement for both easements and restrictive covenants is something about which we can only speculate. For most English lawyers, it would probably be seen as a bridge too far.



## LAND BURDENS IN THE SERVICE OF CONSERVATION

### 1. Introduction

In this Article, we demonstrate how legal policymakers can use negative easements appurtenant to promote preservation of parks and public space. We argue that the private conservation regime we propose may be superior to the current legal regime which entrusts conservation duties to the government. Government officials often mismanage parks and public spaces, collaborating with private developers to dispose of government property at sub-market prices, and encouraging inefficient development on conservation property.

The reasons for potential government mismanagement of conservation lands should be familiar to public choice theorists. First, government decisionmakers are often influenced by the desire to extract rents. Thus, decisionmakers may dispose of government properties at sub-market prices, in order to obtain benefits for themselves in their private capacities, such as promises of future employment in the private sector.<sup>1</sup> Conservation lands are particularly vulnerable to this phenomenon when they produce widely dispersed public benefits, but, if developed, would produce smaller, but highly localized benefits. Second, decisionmakers often fall prey to fiscal illusion, leading them to fail to take account of public benefits or costs that fail to appear directly in the government budget.<sup>2</sup> Together, these factors lead to a high likelihood that conservation properties will be mismanaged, even in government hands.

Our turn to private property as a means of conversation, may at first glance, seem surprising. After all, private property is characteristically perceived as inimi-

\* Professor, University of Pennsylvania Law School. We presented this Article at a conference on land Burdens at Maastricht University. We are extremely grateful for Sjeff van Erp for the opportunity to do so and thank the other participants for invaluable comments and criticisms. For an earlier and extended version of this work, see A. Bell and G. Parchomovsky, 'Of Property and Anti-Property,' 102 2004, *Michigan Law Review*, p. 1.

\*\* Lecturer, Bar Ilan University, Faculty of Law; Visiting Professor, Fordham University School of Law.

<sup>1</sup> See *infra* part 2.

<sup>2</sup> See *infra* notes 44-45 and corresponding text.

cal to conservation interests. Yet, we show that the proper use of easements and land burdens can change this common perception.

Our project in this Article is to present a new private property regime capable of providing optimal preservation incentives to both market participants and political representatives. We begin with the observation that, notwithstanding the pressures to develop conservation land, not every park or open space on valuable land succumbs to such political pressures.<sup>3</sup> Central Park in Manhattan, for example, occupies some of the most valuable acreage in the world.<sup>4</sup> Yet, despite the enormous potential for commercial gains to politically influential developers, there is very little chance that the park will be converted into luxury property. How has Central Park fended off its potential predators, while other greenbelts so frequently fall prey to the predations of urban development?<sup>5</sup>

The answer to this question, we posit, lies in a potent hybrid of *de facto* public and *de jure* property rights. Central Park is surrounded by luxury properties whose owners enjoy the amenities and views of the adjacent park.<sup>6</sup> Formally, the park is

<sup>3</sup> While in the article we focus on preservation of green space, the analysis and policy recommendations apply with equal force to preservation of historic districts and other landmarks. Historic districts do differ from the prototypical case described in this article, insofar as there may be persons with private property interests within the zone of the protected space. That is, while ordinarily there will be no private property interests in a city park, for example, there will be numerous private property owners with stakes in a neighborhood with historically significant architecture. However, this fact does not ultimately alter our analysis or conclusions.

<sup>4</sup> In addition to Central Park, many other parks – such as Grant Park in Chicago, Fairmount Park in Philadelphia, and Golden Gate Park in San Francisco – have evaded undesired development. We do not suggest, of course, that all development is undesirable.

<sup>5</sup> The most famous historic example of undesirable development is the case of New York City's Penn's Station. The majestic station was destroyed to make room for the Madison Square Garden and the office building that sits atop the sports arena. In addition to the structure itself, the razing of the station also destroyed the architectonic symmetry that existed prior to the act between the train station and the Post Office building across the street – a symmetry that may still be seen in Philadelphia. The destruction of Pennsylvania Station prompted a massive public outcry and was directly responsible for the enactment of the city's Preservation Ordinance. See J. Nivala, 'The Future for Our Past: Preserving Landmark Preservation,' 5 1996, *New York University Environmental Law Journal*, p. 83, p. 89 ('New York City enacted its landmark preservation ordinance in direct response to a single incident: the razing of Penn Station to permit construction of a new Madison Square Garden.').

<sup>6</sup> See A. Beard, 'Global Investing: New York's Wealthy Apartment Hunters Are Spoilt for Choice,' 29<sup>th</sup> August 2002, *Financial Times*, p. 27, at 2002 WL 23847024. After reviewing approximately 30 empirical studies, a recent article suggested that for policy analysis, it should be assumed as a 'point of departure' that parks have a positive impact of 20 % on property values abutting or fronting a passive park.' See J. Crompton, 'The Impact of Parks on Property Values: A Review of the Empirical Evidence,' 33 2001, *Journal of Leisure Research*, p. 131. The Trust for Public Land, a non-profit organization dedicated to conservation, estimated that Golden Gate Park in San Francisco 'increases the value of nearby property by an estimated \$ 500 million to \$ 1 billion, in the process generating \$ 5 - \$ 10 million in annual property taxes.' See *The Economic Benefits of Open Space*, available at <<http://www.openspace1.org/OpenSpace/ISSUES/economicbenefitopenspace.htm>> (last visited 19<sup>th</sup> September 2002).

owned by the public as open-access commons, and private owners have no formal property interests in the park. Nevertheless, owners of real estate abutting the park benefit in ways different than the general public. For abutting owners, the park is a valuable and beautiful front yard, affording a panoramic view, an air freshener, and a source of quiet in the urban jungle. Adjacent property owners thus possess a *de facto* quasi-property interest of considerable value. This unique interest can transform the owners of property in close proximity to the park into the park's 'public guardians.'

Owners of properties abutting conservation areas have a political – though not legal – nonpossessory interest in the maintenance and continuous existence of parks and open spaces. This interest provides an incentive for property owners to protect the open space, and also parlays into a political force in favor of conservation.<sup>7</sup> While this *de facto* easement is not absolute – abutting owners do not have veto power over non-green uses – in some cases it suffices to block harmful development.<sup>8</sup>

Yet, at present, the *de facto* property interest can only be enforced through politics and does not give rise to an independent legal claim. Although this *de facto* interest displays the salient features of an easement appurtenant – it is a nonpossessory interest that attaches to particular parcels and runs with the land – the property owners have no formal legal claim.<sup>9</sup> Aggrieved adjacent property owners may use their *de facto* rights only as a source of political influence. Yet, if their political influence falls short of blocking undesired development, as is often the case, the owners cannot assert any cognizable *de jure* property interest in the park's preservation in court.<sup>10</sup> Developers, as repeat players in the political process without significant coordination costs, generally have a leg up in the political arena.

A formal anti-property mechanism remedies this political disparity by transforming the neighbors' *de facto* interests into full fledge property interests. Formalizing the neighbors' interests into legally cognizable negative easements creates a new element into conservation of the threatened park: a network of *anti-property* rights

<sup>7</sup> Indeed, the *de facto* interest produces a strong incentive for abutting homeowners to invest in the upkeep of the park. See *infra* note 81.

<sup>8</sup> See, *infra*, notes 53-56 and corresponding text.

<sup>9</sup> Indeed, absent legislation formally recognizing such interests, courts might not recognize them as valid easements. Under the traditional English rule, there are only four valid types of negative easements: 'the right to stop your neighbor from (1) blocking your windows, (2) interfering with air flowing to your land in a defined channel, (3) removing the support of your building (usually by excavating or removing a supporting wall), and (4) interfering with the flow of water in an artificial stream.' J. Dukeminier and J.E. Krier, *Property*, New York, Aspen Law & Business, 5<sup>th</sup> ed., 2002, p. 855-58 (footnotes omitted). In the main, this position has been adopted in the United States, although 'now and then a new type of negative easement is recognized.' *Id.* at 857.

<sup>10</sup> See, *infra*, notes 59-70 and corresponding text. The importance – and relative fragility – of *de facto* political rights in promoting environmental protection has been noted previously. See, e.g., J.S. Johnston, 'On the Market for Ecosystem Control,' 21 2002, *Virginia Environmental Law Journal*, p. 129, p. 139-141.

that legal recognizes the neighbors' interests and enables them to press their anti-development claims in court.

Anti-property rights are veto rights over the use of an asset that are granted to a large number of private actors – so large a number, in fact, that due to holdout problems and transaction costs, it is highly unlikely that they will ever voluntarily aggregate to alter use of the asset. In our case, formalized negative easements (which we refer to as anti-property easements) in the hands of the neighbors are likely to produce a regime in which it is practically impossible for unwanted development to threaten conservation of the defended property.

An analysis of anti-property easements yields some interesting theoretical insights. First, and counter-intuitively, an anti-property mechanism shows that increased transaction costs can be a valuable policy response to market failures. The accepted lore among law and economics scholars has been that when transaction costs are positive, 'the preferred legal rule is the rule that minimizes the effect of transaction costs.'<sup>11</sup> This article stresses a corollary: when legal rules are unlikely to minimize transaction costs, the solution may be to consciously create additional transaction costs. Where transaction costs systematically bias the market in favor of one outcome, and it is too costly to eliminate the transaction costs, the best option for decisionmakers may be to create countervailing transaction costs.<sup>12</sup>

A second theoretical insight relates to the literature on private property and commons. Existing theory recognizes three cardinal prototypes of property regimes: public, commons and private property.<sup>13</sup> Public property, as we have discussed, may be prone to mismanagement due to political failure. However, theorists have also identified a paradigmatic shortcoming that plagues each of the latter two regimes: the tragedy of the commons<sup>14</sup> and the tragedy of the anticommons.<sup>15</sup> The former plagues commons property, leading to overexploitation of commons resources. No one owner fully internalizes all of the costs associated with the commons, so all users have an incentive to overuse. The tragedy of the anticommons, conversely, is emblematic of private property regimes. In an anticommons, 'multi-

<sup>11</sup> A.M. Polinsky, *An Introduction to Law and Economics*, Boston, Little, Brown, 2<sup>nd</sup> ed., 1989, p. 12. But see D.M. Driesen and S. Ghosh, 'The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction,' 47 2005, *Arizona Law Review*, p. 61.

<sup>12</sup> Our proposal here may be seen as a proposal for a second-best outcome, in which economics seeks the optimal result given the constraints of irresolvable market distortions, as well as resource constraints. On second-best theory, see R.G. Lipsey and K. Lancaster, 'The General Theory of the Second-Best,' 24 1956, *Review of Economic Studies*, p. 11; K. Hoff, 'The Second Theorem of the Second Best,' 25 1994, *Journal of Public Economics*, p. 25.

<sup>13</sup> See J. Waldron, *The Right to Private Property*, Oxford, Clarendon Press, 1988, p. 37-42. But see M.A. Heller, 'The Dynamic Analytics of Property Law,' 2 2001, *Theoretical Inquiries in Law*, p. 79 (arguing for distinction between private and anticommons property and for inclusion of anticommons as fourth type). Cf. D.H. Cole, 'Clearing the Air: Four Propositions About Property Rights and Environmental Protection,' 10 2000, *The Duke Environmental Law and Policy Forum*, p. 103 (arguing that all environmental problems must be solved within the framework of the traditional property trilogy).

<sup>14</sup> G. Hardin, 'The Tragedy of the Commons,' 162 1968, *Science*, p. 1243.

<sup>15</sup> See M. Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets,' 111 1998, *Harvard Law Review*, p. 621.



ple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use.<sup>16</sup> The result is that resources are underexploited. In this article, we herald the existence of a fourth prototype that avoids the problems of mismanagement, overuse, and underexploitation: a hybrid conservation commons that incorporates aspects of the three pure regimes. An anti-property analysis demonstrates that the existence of a group of property owners that receives positive externalities from an asset often eviscerates the ordinary concept of commons, creating in its place a hybrid commons with elements of private property.<sup>17</sup>

More concretely, our analysis reveals a surprising symbiotic dynamic between private development on the fringes of green space and environmental conservation. Specifically, it shows that public parks enhance the value of private properties abutting them, which, in turn, creates an abutting owners' stake in parks' preservation.<sup>18</sup> We harness this insight to provide a new blueprint for conserving open spaces in areas expecting aggressive and undesired development.

Additionally, we submit that formalizing anti-property easements adds a legal dimension to the already-present political right, and creates the dynamic of Yes In My Back Yard (YIMBY).<sup>19</sup> The anti-property easement provides the inverse of a nuisance suit; where nuisance permits proximate property owners to counteract negative externalities affecting the enjoyment of their property, enforcement actions based in anti-property easement can preserve positive externalities benefiting their property.<sup>20</sup> The anti-property easement thus permits the correction of inefficiencies created by externalities. Formalizing the easement allows the courts to become an additional arena (in addition to legislative, executive and administrative bodies) in which abutting owners can fight to preserve the positive externalities produced by green space.

The Article proceeds in three parts. In part 2, we describe conventional theories that predict underprovision and overexploitation of parks and green spaces, and urge government intervention to resolve these difficulties. We then show how these conventional theories overlook the corollary problem of conserving parks and

<sup>16</sup> *Id.*

<sup>17</sup> Ellickson was the first to note that anticommons may be a useful policy tool when the goal is non-use. R.C. Ellickson, 'Property in Land,' 102 1993, *Yale Law Journal*, p. 1315, p. 1322, No. 22. Yet, he concluded that 'because anticommons yield no profits, they are typically owned by either governments or nonprofit organizations.' *Id.* this conclusion ignores the positive externalities that anticommons regimes can generate for private property owners. We show that insofar as parks and open space are concerned, a properly tailored anticommons regime yields real benefits to adjacent property owners, as well as the public at large, and is thus perfectly suitable for private ownership.

<sup>18</sup> See, *infra*, parts 3 and 4.

<sup>19</sup> YIMBY is the opposite of the more famous NIMBY (Not In My Back Yard). For a discussion of NIMBY, see W.A. Fischel, 'Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's "Privatizing the Neighborhood",' 7 1999, *George Mason Law Review*, p. 881; B.D. Richman, 'Mandating Negotiations to Solve the NIMBY Problem: A Creative Regulatory Response,' 20 2001/2002, *UCLA Journal of Environmental Law and Policy*, p. 223.

<sup>20</sup> See more precise definitions in part 3, *infra*.

green spaces consequent to government intervention. Lobbying by developers may in many cases prompt the government to succumb to political pressure and permit development of previously designated green areas, even when development is undesirable.

In part 3, we discuss the empirical evidence of the existence of *de facto* anti-property easements and their importance in preserving open space. We then establish the details of our proposal for *de jure* formalization of such easements, and employ public choice theory to demonstrate the desirability of our proposal.

Finally, in part 4, we discuss potential extensions of our proposal, examine the alternatives to anti-property regimes, and illuminate the interplay between our proposal and other proposals in property and environmental law. We conclude that anti-property regimes would often outperform regulation, judicial enforcement of the public trust doctrine and conservation easements in ensuring conservation.

## 2. The Special Challenge of Parks and Open Spaces

Parks, green spaces and public squares are unique goods within the world of property theory. They are, on the one hand, impure public goods, thought to be subject to underprovision by the market.<sup>21</sup> The traditional remedy for this problem is government provision.<sup>22</sup> On the other hand, parks are commons property, typically open to the public at large, and, thus, susceptible to the problem of overexploitation.<sup>23</sup> The standard response to such tragedies of the commons is privatization.<sup>24</sup> This tension between the two demanded solutions – government provision, on the one hand, and private ownership, on the other – should not obscure the source of both underprovision and overexploitation. Both underprovision and overexploitation stem from a collective action problem.<sup>25</sup> In both cases, the allocation of marginal costs and benefits leads individual users and producers to make decisions that de-

<sup>21</sup> See J.M. Buchanan, *The Demand and Supply of Public Goods*, Chicago, Rand McNally, 1968, p. 49-74; R.A. Musgrave and P.B. Musgrave, *Public Finance in Theory and Practice*, New York, McGraw-Hill, 5<sup>th</sup> ed., 1989, p. 49-85; B.H. Thompson, Jr., 'Conservation Options: Toward a Greater Private Role,' 21 2002, *Virginia Environmental Law Journal*, p. 245, p. 252.

<sup>22</sup> See, e.g., W.H. Oakland, 'Public Goods, Perfect Competition and Underproduction,' 82 1974, *Journal of Political Economy*, p. 927.

<sup>23</sup> See F.I. Michelman, 'Ethics, Economics, and the Law of Property,' in *Nomos XXIV: Ethics, Economics, and the Law* 3, 5 (J. Roland Pennock & John W. Chapman, eds., 1982) ('A commons property is one in which "there are never any exclusionary rights. All is privilege. People are legally free to do as they wish, and are able to do, with whatever objects (conceivably including persons) are in the [commons]".'). Elinor Ostrom defined a 'common-pool resource' as 'a natural or man-made resource system that is sufficiently large as to make it costly (but not impossible) to exclude potential beneficiaries from obtaining benefits from its use'. E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge, Cambridge University Press, 1990, p. 30.

<sup>24</sup> See G. Hardin, *supra* note 14. See also, e.g., C.M. Rose, 'The Comedy of the Commons: Custom, Commerce, and Inherently Public Property,' 53 1986, *University of Chicago Law Review*, p. 711, p. 748 (discussing the privatization of shoreline to prevent the overexploitation of fish).

<sup>25</sup> The classic work on collective action problems is M. Olson, Jr., *The Logic of Collective Action and the Theory of Groups*, Cambridge, Mass., 1965.

tract from net social welfare, while a collective decision-making apparatus would lead to optimal provision and preservation. In the remainder of this part, we discuss the trio of collective action problems to which parks and green space give rise: under-provision, over-exploitation and mismanagement.

### 2.1. *Under-Provision*

Economists offer a number of different definitions of public goods, but generally pure public goods are thought to display two characteristics: lack of rivalry in consumption, and non-excludability of benefits.<sup>26</sup> Non-rivalry implies the inexhaustibility of the good. Non-excludability refers to the inability of public good owners to limit use of the good. These two characteristics result in the underprovision of public goods.<sup>27</sup>

The importance of non-excludability lies in producers' inability to exclude nonpaying consumers. This prevents producers from capturing the full marginal benefit of providing a product, even though they bear the full marginal cost. Moreover, non-rivalry reduces marginal costs of provision to zero, meaning that in a competitive market, producers will be reduced to production at zero marginal revenue.

The traditional solution to the problem of underproduction of public goods has been government intervention.<sup>28</sup> Indeed, for economists, the provision of public goods is so closely connected with government that one definition of public goods is 'all those effects which a government has on the members of society.'<sup>29</sup> Generally, government has either subsidized or provided public goods, in order to make up for underproduction. The costs of these measures are borne by the public at large, through taxation.<sup>30</sup>

<sup>26</sup> The precise definition of public good is a matter of some controversy. Harold Demsetz has argued that a good is a public good solely on the grounds of non-rivalrous consumption. To Demsetz, a public good which satisfies the additional condition of non-excludability is a 'collective good': H. Demsetz, 'The Private Production of Public Goods,' 13 1970 *Journal of Law and Economics*, p. 293. See also R. Cornes and T. Sandler, *The Theory of Externalities, Public Goods, and Club Goods*, Cambridge, Cambridge University Press, 1986, p. 6-7.

<sup>27</sup> Importantly, the characterization of goods as public depends in large part on technology. New technologies allow for exclusion from goods that were previously deemed 'public.' The most famous example of this phenomenon is the invention of barbed wire. R.C. Ellickson, *supra* note 17.

<sup>28</sup> See *supra* note 22.

<sup>29</sup> W. Nicholson, *Microeconomic Theory: Basic Principles and Extensions*, Hinsdale, Dryden Press, 1972, p. 484.

<sup>30</sup> Since it is often infeasible to measure accurately individual use of public goods, the government cannot calibrate tax payments to actual use of public goods, and thus, cross-subsidization results. See e.g., S. Ghosh, 'Pills, Patents, and Power: State Creation of Gray Markets As A Limit On Patent Rights,' 14 2002, *Florida Journal of International Law*, p. 217, p. 226-27 (noting that when a public good is provided by the government and financed through taxes 'some will pay some will pay more and some less than their valuation of the public good.').

## 2.2. *Over-Exploitation*

Alongside the traditional problem of underproduction of public goods, lies a different, but no less acute, dilemma of overexploitation of publicly-owned goods. This problem was famously unveiled in Garrett Hardin's 'The Tragedy of the Commons.'<sup>31</sup> Hardin illustrated the phenomenon with the example of an open rural pasture. He posited that shepherds would allow their herds to overgraze the pasture since each shepherd only bears a small fraction of the marginal cost of each use, while enjoying the full marginal benefit. The result is the tragedy of the commons: property held in common is overexploited.<sup>32</sup> Hardin's oft-cited conclusion was that '[f]reedom in a commons brings ruin to all.'<sup>33</sup>

With regard to overexploitation, public parks are generally considered public goods that may acquire characteristics of private goods.<sup>34</sup> A common example is the imposition of fees on users of a park.<sup>35</sup> The requirement of a payment of a fee eliminates the strict nonexcludability of the park. Only paying users may enter the park and enjoy its facilities. However, other aspects of the park remain non-excludable. For instance, even for non-payers, the park produces clean air and a pleasant view from the outside. This led the renowned economist James Buchanan to posit that 'the elements of demand for any good whether this be classified as wholly, partially, or not at all 'public' by the standard criteria, may be factored down into private and collective aspects.'<sup>36</sup>

## 2.3. *Mismanagement*

As public goods, parks are impure in two respects. First, fences may exclude many nonpaying users from using the park. Admittedly, for some parks, exclusion is not cost-effective. Especially with respect to large parks, the cost of erecting and maintaining fences would likely outweigh the benefits.<sup>37</sup> Moreover, many would oppose a limited access regime for parks on distributive and ideological grounds.<sup>38</sup> The distributive concern is that limited access to parks would invariably exclude the least well-off members of society, depriving them of recreational opportunities and na-

<sup>31</sup> G. Hardin, *supra* note 14.

<sup>32</sup> But see C.M. Rose, *supra* note 24.

<sup>33</sup> G. Hardin, *supra* note 14.

<sup>34</sup> For an analysis of parks and open spaces as public goods, see e.g., M.E. Mansfield, 'When "Private" Rights Meet "Public" Rights: The Problem of Labeling and Regulatory Takings,' 65 1994, *University of Colorado Law Review*, p. 193, p. 203 (extending 'public goods' analysis to sound ecological management). Cf. B.H. Thompson, *supra* note 21, at 253 (stating that '[a]lthough no empirical study has been conducted, the bulk of the benefits from most land conservation may not constitute public goods.').

<sup>35</sup> See J.M. Buchanan, *The Collected Works of James M. Buchanan: Public Finance in Democratic Process: Financial Institutions and Individual Choice*, Indianapolis, Liberty Fund, 1999, p. 21.

<sup>36</sup> *Id.*

<sup>37</sup> See R.C. Ellickson, *supra* note 17.

<sup>38</sup> We remain agnostic with respect to the cogency of the two concerns.

ture. The ideological opposition is that nature must remain accessible to all, free of the restraints of private property.<sup>39</sup>

Second, uses of parks are non-rivalrous only to a certain point. Some uses, such as bird watching or other low-intensity activities are non-rivalrous, so long as they are carried out in moderation. However, uses beyond a certain intensity or frequency are incompatible. For example, public music performances are not likely to be compatible with quiet bird-watching a confined area. Indeed, conservation – if defined as preserving nature in its pristine state without human interference – is likely to rival every other use.<sup>40</sup>

Conventional wisdom suggests that since the government provides parks and open-space, it should also be responsible for their conservation. But this view is problematic. While one would like to believe that government can always be trusted as the guardian of public goods, public choice teaches that government no less than any other institution is an arena in which participants seek to maximize their welfare. Accordingly, the decisions made by government are driven by rent-seeking, and they often fail to coincide with the collective good.<sup>41</sup>

There are various views as to which rent-seekers dominate the political process – agents (the politicians), interest groups or majorities. Parks produce widely diffused benefits, where most beneficiaries enjoy a relatively small gain. As Mancur Olsen’s traditional minoritarian model of politics shows, small interest groups with low coordination costs have an inherent advantage over larger, yet more diffuse groups.<sup>42</sup> The competing development interest produces a concentrated benefit, with each beneficiary enjoys a large gain. Given the existence of organization costs, conservation interests operate under a substantial disadvantage.

Some public choice scholars have rejected the interest group model of political decisionmaking, and developed an alternative model under which the outcome of the political process is shaped by two countervailing forces: the minoritarian force, and the majoritarian force.<sup>43</sup> The minoritarian force represents the influence interest groups exert over the political process through superior organization and funding. The majoritarian force embodies the ability of the majority to affect political decisionmaking through voting. After all, votes also matter, and democratic elections favor majorities. Yet, even this broader view of political decisionmaking recognizes the likely suboptimal provision of such goods as parks.

The incorporation of the majoritarian force does not guarantee optimal decisionmaking. The majoritarian force mitigates to some extent the ability of interest

<sup>39</sup> See C.M. Rose, ‘The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems,’ 83 1998, *Minnesota Law Review*, p. 129, p. 163.

<sup>40</sup> In this definition of conservation, we do not mean to exclude no-impact and low-impact uses.

<sup>41</sup> See, e.g., W.N. Eskridge, Jr., ‘Politics Without Romance: Implications of Public Theory for Statutory Interpretation,’ 74 1988, *Virginia Law Review*, p. 275, p. 294-5 (describing the social costs of rent-seeking statutes); D.A. Farber and P.P. Frickey, *Law and Public Choice: A Critical Introduction*, Chicago, University of Chicago Press, 1991.

<sup>42</sup> See M. Olsen, *supra* note 25.

<sup>43</sup> See N.K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy*, Chicago, University of Chicago Press, 1994, p. 53-97, and authorities cited therein.

groups to capture the political process but it does not eliminate the inherent advantage of organized groups. When the gains from development are substantial, the group pursuing development can increase campaign contributions to offset the potential loss in popularity. Moreover, the organized group can pass some of the gains to members of the majority – either in the form of cash or in kind benefits – to ameliorate their opposition to the project.

Furthermore, whether subject to minoritarian or majoritarian domination, distortions in government decisionmaking, such as fiscal illusion are likely to make parks vulnerable. The standard account of fiscal illusion predicts that government decisionmakers will ignore all social costs and benefits that do not specifically appear in the governmental budget.<sup>44</sup> Accordingly, when considering parks, municipal decisionmakers are disposed to look at revenues from taxes, fines and other sources, on the one hand, and operational costs, on the other.<sup>45</sup>

This limited prism disadvantages public parks in two complementary ways. The first is the high maintenance cost of parks. The second is the perceived negative effect of parks on municipal tax base. Public parks and green space do not contribute to the pool of taxable resources. On the contrary, they occupy valuable property whose development into residential and commercial projects could substantially increase the municipal tax bases. Thus, the development of parks not only eliminates a budgetary liability but also carries a promise for more revenues in property taxes.<sup>46</sup>

Finally, the possibility that the agents – government decisionmakers – may make decisions based on illicit rents cannot be ignored. Sadly, government corruption may make public assets vulnerable, as decisionmakers sell off public assets for private gain.

### 3. The Solution of Anti-Property Easements

Given the expected failings of the political process outlined in the previous part, one might wonder how any parks or open access green spaces survive in urban areas. After all, development interests have low coordination costs and a clear incentive to draw the public spaces into their private realms. Indeed, one would expect development interests to benefit from particularly low transaction costs in the domain of politics, as they are well-organized repeat players who are intimately familiar with

<sup>44</sup> See, e.g., L. Blume and D.L. Rubinfeld, 'Compensation for Takings: An Economic Analysis,' 72 1984, *California Law Review*, p. 569, p. 621.

<sup>45</sup> See J. Crompton, *supra* note 6 ('In contrast to the enhanced tax revenues accruing from development, contemporary conventional wisdom among many elected officials and decision makers is that open space and park land is a costly investment from which a community receives no economic return. The social merit of such investment is widely accepted, but social merit amenities frequently are regarded as being of secondary importance when budget priorities are established.')

<sup>46</sup> See *id.* ('Government officials often seek to enhance the tax bases of their communities by encouraging development. There is a widespread belief that this strategy raises additional revenues from property taxes, which then can be used to improve community services without increasing the taxes of existing residents.')

the political process. Yet, the empirical results fail to bear out the theory. In many American cities, notwithstanding the obvious pecuniary benefits of development, large public green spaces have thrived, despite being open access.<sup>47</sup> What explains this seemingly anomalous result?

We posit that the explanation for green space preservation lies in the existence of another commonly overlooked interest group: proximate property owners. Unlike the public at large for whom the benefits from parks are relatively small and coordination costs are often prohibitive, proximate property owners receive sufficiently substantial benefit from green space to overcome inertia. Open spaces benefit adjacent homeowners in ways distinct from the public at large. We examine this phenomenon by exploring, first, the evidence for enhanced value of neighboring properties (known as ‘proximate property value’), and, then, the political results of that value. We then show the shortcomings of the current *de facto* system of conservation protection, and demonstrate that they can be resolved by formalizing a system of anti-property rights.

### 3.1. Proximate Property Owners

Proximate property owners because of their location derive unique benefits not available to the public at large. They may enjoy park services more easily and more frequently. The park’s aesthetic beauty is particularly beneficial to those who enjoy it every day by reason of their proximity. Moreover, the park provides proximate property owners with publicly-provided substitutes for private yards and acoustic barriers. Naturally, as we noted, these advantages are reflected in property values.

Numerous empirical studies show that parks and open space contribute to the value of surrounding real estate. Although parks and open space are not private goods that are supplied by markets, they represent a ‘capitalization’ for proximate landowners, and thus, their economic effect is reflected, to some degree, in the value of neighboring properties. The added value of abutting parks, while not independently marketable, may be measured by a comparison of properties that abut parks with those that do not. In economic parlance, this valuation method is called ‘hedonic pricing.’<sup>48</sup>

<sup>47</sup> To be sure, in some areas, green space has not fared as well. See examples cited *infra* in Section 3.2.

<sup>48</sup> See J. Crompton, *supra* note 6. This means, of course, that the negative effect of parks and open space on municipalities’ tax base is smaller than commonly thought. The increased value of properties nearby parks implies higher property taxes. Indeed, Fredrick Law Olmstead used this argument to persuade the city of New York to construct Central Park. In a letter from 1856, the New York City Comptroller wrote ‘the increase in taxes by reason of the enhancements of value attributable to the park would afford more than sufficient means for the interest incurred for its purchase and improvement without any increase in the general rate of taxation.’ Metropolitan Conference of City and State Park Authorities, 12 (1926) cited in J. Crompton, *supra* note 6. The success of central park and proximate property principle championed by Olmstead were responsible for establishment of many parks at the turn of  
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In a comprehensive review of the extant empirical literature, Crompton reported that 20 out of the 25 studies he reviewed were supportive of the proximate property principle.<sup>49</sup> Crompton further noted that ‘in four of those cases [that weren’t supportive, the] ambivalent findings may be attributable to methodological limitations.’<sup>50</sup> In summarizing the empirical findings, Crompton wrote:

[I]t is suggested that a positive impact of 20% on property values abutting or fronting a passive park area is a reasonable starting point guideline. If the park is large (say over 25 acres), well maintained, attractive, and its use is mainly passive, then this figure is likely to be low. If it is small and embraces some active use, then this guideline is likely to be high. If it is a heavily used park incorporating such recreation facilities as athletic fields or a swimming pool, then the proximate value increment may be minimal on abutting properties but may reach 10% on properties two or three blocks away.<sup>51</sup>

As we show, this proximate property value that accrues to nearby neighbors has a substantial effect on the continued existence of the park. The special stake of a particular group in the park creates a set of private owners who may play a special role in conservation.<sup>52</sup>

### 3.2. *The De Facto Rights of Neighbors*

The phenomenon of a small group of proximate property owners blocking inefficient development may also be illustrated by some real world examples. Recently, in south Florida, neighborhood residents successfully thwarted an effort to convert a planned park expansion into a commercial development.<sup>53</sup> In Glastonbury, Connecticut, residents came together to oppose the construction of a large shopping center on nearby property, demanding that the property be used as a park or open space.<sup>54</sup> Motivated by a concern that the proposed development would affect, inter alia, ‘extremely fragile wetlands,’ some residents ‘are waging a campaign to kill the proposal, which is before the conservation commission.’<sup>55</sup> Likewise, a group of

the 20<sup>th</sup> century. *Id.* thus, the change in property values created by public spaces partially offsets the fiscal illusion that undermines the creation of parks. Cf. *supra* notes 44-45.

<sup>49</sup> J. Crompton, *supra* note 6.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> There may be rare cases in which there is an inherent clash between the interests of proximate property owners and those of the public at large. For example, there may be instances in which the proximate property owners all despise a certain historical site (such as a sports stadium which produces noise and crowds), while the more distant public enjoys and supports the continued existence of the site. In such cases, obviously, proximate property owners do not serve as good proxies of the public interest, and anti-property easements, as we shall describe them, will not be useful policy tools.

<sup>53</sup> See J. Milarsky, ‘Building Near Park Rejected,’ 6<sup>th</sup> February 2002, *South Florida Sun-Sentinel*, WL 2945260.

<sup>54</sup> E.R. Danton, ‘Neighbors Fight Shopping Center; Developer Addresses Concerns with Plan to Protect Wetland,’ 22<sup>nd</sup> May 2002, *Hartford Courant*, at B2.

<sup>55</sup> *Id.*



neighbors and business owners from Grand Rapids, Michigan, formed a united front to oppose the development of John Ball Park and Zoo,<sup>56</sup> and were ultimately successful in defeating the plan. In sum, it is clear that owners of property adjoining parks and green space have an inherent economic interest in their preservation, and often play an important role in pro-conservation campaigns aimed at preventing development of such spaces.

### 3.3. *The Shortcomings of De Facto Rights*

Unfortunately, the *de facto* interest of neighboring property owners may often not suffice to block inefficient development. The efforts of neighboring property owners may often fall short due to a collective action problem. While all neighbors stand to benefit from the success of the anti-development campaign, none of them would want to bear the cost of spearheading it. Instead, each neighbor would prefer to let someone else bear the cost of the campaign, and free-ride on their efforts. As a result of the special burdens and costs confronting preservationists, pro-development interest groups will often prevail in their effort to push forward inefficient projects, notwithstanding the opposition of proximate property owners. Accordingly, the *de facto* interest of neighbors in preserving green space will frequently fall short of achieving the optimal equilibrium between development and preservation.

The shortcomings of the status quo, in which proximate property owners lack formal legal protection for their interest in preservation, may be summarized under two headings. First, preservationists rather than developers bear the lion's share of transaction and coordination costs. The preservation interest consists of widely scattered stakes, often unsophisticated, each of relatively small value, while the development interest is generally unitary, politically savvy, and of relatively large value.<sup>57</sup>

Second, the benefits of development generally find full expression in the political arena, while many of the benefits of preservation are not fully accounted for. The unitary developer fully internalizes all of the benefits of its project and will invest up to the full value of the benefits, in order to reap a profit. Many preservationists, however, enjoy too small a benefit to warrant participation in the political process. They will sit on the sidelines, and the political process will ignore the benefits they could potentially enjoy.<sup>58</sup>

Unfortunately, our analysis of the political decisionmaking process is not merely theoretical; it is borne out by reality. Examples are legion and they span nationwide.

<sup>56</sup> K. King, 'Group Forms to Oppose Zoo Plan: The West Side Neighbors and Business Owners Want to Present a "United Front" Against the Proposal to Expand the Facility,' 12<sup>th</sup> December 2001, *Grand Rapids Press*, at A20.

<sup>57</sup> For a contrary view of the impact of strategic factors on political organization, see G.S. Becker, 'A Theory of Competition Among Pressure Groups for Political Influence,' 98 1983, *Quarterly Journal of Economics*, p. 371.

<sup>58</sup> See also B.H. Thompson, *supra* note 21, at p. 258-262 (discussing risk that government action will 'crowd out' altruistic environmentalism.)

Three recent examples demonstrate the influence of fiscal illusion in undermining conservation, and the potential weakness of proximate property owners. In 2001, the city of La Cruces, New Mexico, agreed to sell 3.2 acres of undeveloped city-owned land – one of the last remaining such parcels in the area – to a commercial corporation for a reported amount of \$694,000, despite the protests of proximate property owners.<sup>59</sup> In explaining the decision, city manager Jim Erickson said that the only consideration weighed by the city was ‘to look at the highest and best use.’<sup>60</sup> He added that ‘leaving the land vacant would cost the city to maintain the land, cleaning weeds and trash.’<sup>61</sup> In a similar vein, leaders at Daytona Beach, Florida ‘are discussing a plan that could put the city’s last swath of undisturbed green space on the Halifax River on the auction block.’<sup>62</sup> Residents who oppose the plan describe the proposal as ‘a sellout of public property to private development,’ claiming ‘that this time Daytona Beach is putting a price tag on its character.’ Yet, for the local politicians the logic is simple: ‘[m]ore marinas, more restaurants and more condominiums on the river mean a more vibrant downtown and new tax money to shore up finances.’ Finally, perhaps taking its cue from Simon and Garfunkel’s famous song, the city of Novi, Michigan, realized that there must be more than one way to appease a developer. Facing a \$70 million judgement against it, the city decided to settle the case by offering the plaintiff-developer, Sandstone Associates, 95 acres (!) of park land.<sup>63</sup> Responding to criticism from local conservationists, city officials explained that this extreme measure was necessary to ‘save the city from big tax increases and cuts in services.’<sup>64</sup>

Fittingly, however, the ‘gold medal’ for allowing political failures to trump conservation interests goes to the Golden State, California, thanks to the ‘ingenuity’ of the city of Palm Springs. In 1986, the city of Palm Springs ‘eagerly accepted’<sup>65</sup> 30 acres of undeveloped land on the express condition that the property be used in perpetuity as a desert wildlife preserve and an equestrian center.<sup>66</sup> The grant explicitly stated that should the condition be breached the land shall pass to ‘the Living Desert Reserve... and grantee shall forfeit all rights thereto.’<sup>67</sup> Less than three years later, the city decided that it would be better served if the land were developed into golf course.<sup>68</sup> To effect this plan, the city exercised its eminent domain power to condemn the reversionary interest in Living Desert Reserve. Amazingly, the city re-

<sup>59</sup> C. Schurtz, *New Mexico Councilors Question Why Las Cruces, N.M., Is In Land-Sale Business*, Knight-Ridder Trib. Bus. News, 27<sup>th</sup> June 2001.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> M. Donnelly, ‘Downtown Daytona: What Next? Many Angry over Talk of Land Sale; Protestors Try to Save Riverfront Property,’ 3<sup>rd</sup> February 2002, *Orlando Sentinel*, at K1.

<sup>63</sup> See M. Helms, ‘Planners to Decide on Park Giveaway; Public Hearing, Vote, Set Wednesday in Novi,’ 7<sup>th</sup> January 2002, *Detroit Free Press*, at 4B.

<sup>64</sup> *Id.*

<sup>65</sup> *City of Palm Springs v. Living Desert Reserve*, 70 Cal. App. 4th 613, 629 (1999).

<sup>66</sup> *Id.* at 618.

<sup>67</sup> *Id.* at 618.

<sup>68</sup> *Id.* at 618. The California Court of Appeals attributed the city’s inconsistent behavior either to a ‘promissory fraud or a subsequent change of heart.’ *Id.* at 630.

fused to pay just compensation, arguing that the possibility of breach of condition by the city was too remote and speculative, and thus the future interest was valueless for the purpose of condemnation compensation.<sup>69</sup>

These and other examples<sup>70</sup> illustrate the systematic disadvantage of conservation interests in the political arena.

### 3.4. Formalizing Neighbors' Anti-Property Rights

Having demonstrated both the benefits and the shortcomings of the *de facto* rights of nearby neighbors in green space, we now show how formalizing those rights in *de jure anti-property easements* preserves the benefits of the *de facto* rights, while drastically reducing the shortcomings.

An anti-property mechanism would grant to each of the proximate property owners a formal legal entitlement to the preservation of green space. Specifically, each property owner situated within a certain distance of the designated green space – say, 200 yards – will be granted a negative easement appurtenant in the park, which we call an ‘anti-property easement.’ This would vest in each of the property owners the right to veto any development or destruction of the green space. Thus, under the proposed regime, a developer seeking to build on the green space would have to obtain permission, or acquire the right, from the neighboring owners. As with all other easements, anti-property easements would be formal legal rights enforceable in a court of law. However, anti-property easement holders would have no right to possess the land, nor to use it in certain privileged ways, but they would be entitled to injunctive relief against building without consent.

Ordinarily, easements appurtenant seek to optimize land use between two property owners: the dominant parcel owner (the beneficiary) and the subservient parcel owner (the benefactor). Moreover, standard easements, like other known property rights, may be transferred voluntarily at the sole discretion of the easement holder.<sup>71</sup>

The anti-property easements we discuss are quite different. They are aimed primarily at ensuring benefits for third parties, and are designed to be practically (albeit not formally) inalienable. In economic parlance, the point and purpose of anti-property easements is to create a positive externality of a unique type.<sup>72</sup> The

<sup>69</sup> In response to this argument, the California Court of Appeals had this to say: ‘the decision to assert that position did not display the high degree of fairness, justice, and virtue that should characterize public entities. Such inequitable behavior must not be rewarded.’ *Id.* at 630.

<sup>70</sup> It turns out that, on occasion, even the court system poses a threat to parks. Consider the case of Hardy Park in Fort Lauderdale, Florida. Despite opposition from neighbors, the park might be destroyed to make room for a new \$ 100 million court house. See Judge Regains Favored Court Site: Federal Plans Upset Residents, *Fla. Sentinel*, 5<sup>th</sup> September 2002.

<sup>71</sup> See J. Dukeminier and J.E. Krier, *supra* note 9, at p. 830; Restatement (Third) of Property, Servitudes, §§ 4.6(1), 5.8 (2000).

<sup>72</sup> See J.E. Cohen, ‘Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management”,’ 97 1998, *Michigan Law Review*, p. 462, p. 542 (defining positive externalities as ‘the presence of an intrinsically valued institutional structure even where that structure is not necessary to optimize social welfare’).

formalization of anti-property easements will ensure the continuous existence of parks and green space, which will benefit not only the easement holders but also the public at large. And, by dispersing rights among multiple owners, anti-property easements create a regime that makes it exceedingly unlikely that property owners could ever aggregate to alter or annul the negative easements.

Although the objective total value of the anti-property easements only represents the share of the abutting homeowners' interest in the continued existence of undeveloped parks, as a practical matter the cost of acquiring the anti-property easements will be considerably higher. Indeed, the cost will generally be prohibitive. The holdout dynamic created by the dispersed easements effectively protects the interest of the public at large in conservation, even though the public's interest isn't, technically speaking, represented.

The irony implicit in the anti-property may be described in another way. Conventional wisdom suggests that environmental goods are underproduced due to widely dispersed positive and negative externalities.<sup>73</sup> Overproduction of pollution, for example, is often ascribed to the ability of polluters to externalize many of the costs of their activities to the public.<sup>74</sup> The standard policy prescription, therefore, calls for forcing the polluters to internalize these costs, by means of fines, for example.<sup>75</sup> The policy prescription relies upon the assumption that transaction costs are too high to allow internalization through private bargaining between pollution victims and producers.<sup>76</sup> On this view, transaction costs are the culprit for the market's failure to curb suboptimal pollution. And, if transaction costs could only be lowered sufficiently, presumably, the market failures would dissipate.<sup>77</sup> Indeed, it is for this reason that law and economics scholars generally call for policymakers to craft market mechanisms that reduce transaction costs, in order to pave the way for unimpeded bargaining among market participants.<sup>78</sup>

The counter-intuitive goal of anti-property easements is to create transaction costs, which in this case are produced by a strategic holdout. Here, we rely upon two common observations that are rarely applied together to the pollution dilemma.

<sup>73</sup> See R.H. McAdams, 'Relative Preferences,' 102 1992, *Yale Law Journal*, 1, p. 60 (exposing the problem of free-riding with regard to public goods, which in turn leads to underproduction).

<sup>74</sup> See M.J. Gergen, 'Note, The Failed Promise of the "Polluter Pays" Principle: an Economic Analysis of Landowner Liability for Hazardous Waste,' 69 1994, *New York University Law Review*, p. 624, p. 626 (theorizing that the polluter should reimburse society for costs imposed on others).

<sup>75</sup> See *id.* (arguing that polluters should compensate society for the true cost of actions).

<sup>76</sup> See R.H. Coase, 'The Problem of Social Cost,' 3 1960, *Journal of Law and Economics*, p. 1 (assuming high transaction costs preclude socially optimal results); D.C. Esty, 'Toward Optimal Environmental Governance,' 74 *New York University Law Review*, p. 1495, p. 1545 (acknowledging that high transaction costs may lead to suboptimal resource allocations).

<sup>77</sup> See R.H. Coase, *supra* note 76.

<sup>78</sup> See E.L. Talley, 'Note, Contract Renegotiation, Mechanism Design, and the Liquidated Damages Rule,' 46 1994, *Stanford Law Review*, p. 1195, p. 1198, No. 14; see A.M. Polinsky *supra* note 11, p. 12 (positing that when transaction costs are positive 'the preferred legal rule is the rule that minimizes the effect of transaction costs.');

A.T. Kronman and R. Posner, *The Economics of Contract Law*, Boston, Little, Brown, 1979, p. 254; R. Cooter and T. Ulen, *Law and Economics*, S.I., Harper/Collins, 1<sup>st</sup> ed., 1988, p. 102.

First, the problem of transaction costs may be assuaged completely by allocating resources, *ex ante*, to the party who would have gotten them through the market if transaction costs were low.<sup>79</sup> Second, when transaction costs are insurmountably high (so as to make bargaining impossible), the initial allocation is dispositive.<sup>80</sup> Once allocated, the asset never moves. Combined, these two phenomena produce the perverse outcome of anti-property easements. To overcome high transaction costs among victims of suboptimal, or inefficient development, anti-property easements allocate the right to block such inefficient development to nearby neighbors. However, to ensure that nearby neighbors adequately represent the unaccounted for social benefit of undeveloped green-space, anti-property easement are scattered, creating transaction costs, thereby defending the initial allocation.

It important to note that the mechanism of anti-property easements does not lead to a first best solution. Transaction costs do not go away – on the contrary, new transaction costs are created. Also, anti-property easements do not lead to a full internalization of unaccounted for benefits of undeveloped green-space. Instead, the mechanism of anti-property easements institutes transaction costs as a rough counter-balance to the unaccounted for benefits of conservation. Specifically, these new rights we propose force developers to add substantial transaction costs to their balance sheet as a proxy for the currently unaccounted for component of public benefits from conservation. Anti-property easements are not capable – in themselves – of creating one to one correlation with the accurate benefits of conservation. Rather, decisionmakers must employ anti-property easements where they assume that the often disregarded interest of the public in conservation warrants creating large transaction costs to protect the status *quo ante* created by the initial entitlement.

In our case, the benefits from preservation are often so small and dispersed that the cost of coordinating preservation campaigns is prohibitive. Put differently, the high transaction costs created by the widespread scattering of benefits produce a situation in which it is often impossible for beneficiaries to ensure that their inter-

<sup>79</sup> See R. Cooter and T. Ulen, *Law & Economics*, Reading, Mass. Addison-Wesley, 2<sup>nd</sup> ed., 1996, p. 90 (stating that when transactions costs prevent bargaining, '[t]he law should allocate property rights to the party who values them the most.'). Peter Schlag summarizes the law and economics analysis of entitlements as follows: '1. Assign entitlements to the party who most values them. 2. If it is not clear who most values the entitlement, grant the entitlement to the party who can most cheaply initiate an exchange. 3. Where transaction costs are low, grant absolute entitlements. 4. Where transaction costs are high, structure the legal regime to approximate the outcomes that the parties would have reached in a zero transaction cost world. 5. Where transaction costs are high, restructure legal entitlements so as to reduce transaction costs.' P. Schlag, 'The Problem of Transaction Costs,' 62 1989, *Southern California Law Review*, p. 1661, p. 1663.

<sup>80</sup> See T.W. Merrill, 'Free Speech and Economic Power: a Symposium: The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising,' 93 1993, *Northwestern University Law Review*, p. 1143, p. 1151 (pointing out that when transaction costs are high 'the entitlement will stay where it is initially allocated no matter what transaction rule we select.');

T.W. Joo, 'Symposium: Corporations Theory and Corporate Governance Law: Contract, Property, and the Role of Metaphor in Corporations Law,' 35, *UC Davis Law Review*, p. 779, p. 813 (noting that when the 'initial allocation of an entitlement is inefficient, transaction costs can inhibit or prevent the transfer of the entitlement.').

ests in park preservation are taken into account by the political and economic process. This means that, as we pointed out earlier, without legal intervention, inefficient development is a likely outcome. Practically, however there is no way to lower sufficiently transaction costs (in this case, primarily the cost of coordination) on the beneficiaries' side in order to produce an efficient market. Our proposal, therefore, employs the next best option: shifting the transaction costs to the other side by engendering a holdout problem.

Anti-property easements thus simultaneously aim at goals that are considered the basis of property, and those that are ordinarily thought of as antithetical to the property system. On the one hand, anti-property easements, like ordinary property, curb over-exploitation by leading to internalization of costs. On the other hand, anti-property easements achieve this goal by deliberately creating a holdout problem – a strategic problem that is often seen as the bane of the property system.

#### **4. Extensions**

In this part, we discuss some extensions and implications of our basic model. We begin by examining the likely social outcomes of introducing an anti-property regime, focusing on whether granting anti-property rights should be seen as objectionable on distributive grounds. We then examine the circumstances in which anti-property regimes are superior to their potential competitors. After comparing the various alternatives, we specify the conditions under which each policy tool should be used, thereby providing a comprehensive menu for land use policy which takes account of conservation goals.

##### **4.1. *Social Impacts of Anti-Property Regimes***

###### **4.1.1. Distributional Effects**

On the surface, the distribution of anti-property easements would seem to raise concerns about distributive justice since the proposal involves the transfer of rights over public property to private hands that already gain unusual benefit from that property. Yet, on a closer look, it can be seen that our proposal has quite desirable distributive effects. While it focuses on certain property owners and enhances the value of their properties, it also bestows direct benefits on the public at large. This result is enabled by the fact that anti-property easements do not diminish the access and use rights of third parties; they only serve to impede development. Thus, the recipients of anti-property easements also become the 'trustees' for the public at large that otherwise lacks a dependable way to protect its share in a public good.

Simultaneously, formalizing anti-property easements places the cost of conservation on those who receive particular benefits. In the case of Central Park, for example, the affluent owners of luxury housing bear the burden of preserving open space for all citizens. Perversely, perhaps, our analysis enhances the wealth of general public by recognizing property rights in the most affluent members of our society. Owners of luxury housing near open spaces contribute to conservation in three

different ways. First, because the value of their property depends on the continuous existence of the park, the owners of realty abutting parks will do everything in their power to arrest harmful development. Second, the higher value of the property near parks translates into higher tax payments that are used, in part, to maintain the parks. Third, and finally, studies reveal that owners of luxury housing near parks donate disproportionately to the maintenance of the parks.<sup>81</sup> Thus, we submit that the development of luxury housing on the fringes of parks and open spaces is an important key for stable conservation with desirable distributive effects.

As we show below, private conservation mechanisms clearly outperform public schemes in ensuring conservation cost-effectively. Our proposal not only reduces enforcement and monitoring costs that would otherwise be borne by the public at large; it also makes the beneficiaries of anti-property easements responsible for those reduced costs. The recipients of the public largesse are thus also the bearers of the public responsibility. All segments of the public (other than inefficient developers) can therefore expect to gain.<sup>82</sup>

#### 4.1.2. Dynamic Effects

By stabilizing green spaces, anti-property mechanisms can enhance the positive dynamics that lead homeowners to seek the efficient conservation of parks and nature preserves. Generally, property owners seek to discourage the nearby location of properties that produce negative externalities, while encouraging the location of properties that produce positive externalities. This natural tendency is responsible for the much remarked-upon NIMBY (Not In My Back Yard) phenomenon, in which homeowners acknowledge the social utility of a particular land use but combat its nearby location due to localized negative externalities.<sup>83</sup> The positive externalities created by green spaces can create the opposite YIMBY (Yes In My Back Yard) phenomenon, in which property owners will seek the nearby location of the socially beneficial land uses. Anti-property easements enhance this trend by providing the inverse of a nuisance suit. Nuisance permits proximate property owners to counteract negative externalities affecting the enjoyment of their property. Anti-property easements, on the other hand, permit nearby neighbors to bring enforcement actions to preserve positive externalities benefiting their property. The enhanced YIMBY effect promoted by anti-property easements should, in turn, increase the *ex ante* incentive to seek local development of parks and green spaces.

<sup>81</sup> In 2000, for example, wealthy nearby neighbors donated \$ 19 million to Central Park. See B. Stewart, 'Central Park-Like Rebirth Is Sought for Other Parks,' 27<sup>th</sup> January 2001, *New York Times*. This may be explained by the special 'endowment effect' such property owners share with respect to the park. See D. Kahneman, J.L. Knetsch and R.H. Thaler, 'The Endowment Effect, Loss Aversion, and Status Quo Bias,' 5 1991, *Journal of Economic Perspectives*, p. 193.

<sup>82</sup> Flexibility can be added anti-property mechanisms to reduce the burden on developers as well.

<sup>83</sup> See *supra* note 19. NIMBY, it turns out, belongs to the family of property acronyms known as LULU (Locally Undesirable Land Use). See J. Dukeminier and J.E. Krier, *supra* note 9, at 1063 and No. 32. Cf. V. Been, 'What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses,' 78 1993, *Cornell Law Review*, p. 1001.

## 4.2. Policy Alternatives

In this section, we examine the possible policy alternatives to an anti-property regime, focusing on the public trust doctrine, expanded environmental standing doctrines and the use of conservation easements. While we determine that each tool has its use in a scheme of conservation, none provides a complete alternative to the use of anti-property.<sup>84</sup>

### 4.2.1. Public Trust

The public trust doctrine holds that ‘some resources, particularly lands beneath navigable waters or washed by the tides, are either inherently the property of the public at large, or are at least subject to a kind of inherent easement for certain public purposes.’<sup>85</sup> In an influential article in 1970, Joseph Sax argued for the expansion of the public trust doctrine in order to more effectively protect natural resources.<sup>86</sup> Sax argued both for a revival of the largely dormant doctrine, and for the inclusion of a wide array of environmental goods (in addition to the traditional water-related resources) in the scope of the doctrine.<sup>87</sup> Sax hoped that the public trust doctrine would thus become a tool for courts to engage in more probing judicial review of state actions that adversely impacted upon publicly and privately owned environmental resources.<sup>88</sup> In Sax’s formulation, a court should ‘look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restrictive uses or to subject public use to the self-interest of private parties.’<sup>89</sup>

Sax intended the public trust doctrine to produce a trust dynamic similar to that sought by anti-property easements. Faced with distortions in the market and political arena inimical to conservation, Sax sought to appoint a set of guardians to watch over the underprotected environmental concerns.

Yet, notwithstanding that the public trust doctrine has sporadically been used by the courts to strike down measures perceived as environmentally unfriendly, Sax’s efforts fell short of his stated goal.<sup>90</sup> Courts have proved reluctant to accept the

<sup>84</sup> For other comparisons between anti-property and other conservation mechanisms, see C. N. Brown, ‘A Time to Preserve: A Call for Formal Private-Party Rights in Perpetual Conservation Easements,’ 40 2005, *Georgia Law Review*, p. 85.

<sup>85</sup> C.M. Rose, ‘Joseph Sax and the Idea of the Public Trust,’ 25 1998, *Ecology Law Quarterly*, p. 351.

<sup>86</sup> J.L. Sax, ‘The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention,’ 68 1970, *Michigan Law Review*, p. 471.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 490.

<sup>90</sup> See J.L. Sax, *supra* note 86, p. 471 (citing cases using the public trust doctrine for environmental issues); S.M. Kelly, ‘Note, The Public Trust and the Constitution: Routes to Judicial Overview of Resource Management Decisions in Virginia,’ 75 1989, *Virginia Law Review*, p. 895, p. 912 (describing courts’ ability to use the public trust doctrine to require environmental impact studies).



mantle Sax wished to bestow upon them, and, even where they have, they have not necessarily reached the judgments that Sax would prefer.<sup>91</sup> In our analysis, the chief failing of Sax's proposal is its failure to take into account the incentives of the chosen trustees and the vices of the institutional actors on whom his proposal so critically depends.

In the public trust doctrine, the government is expected to see itself as a trustee of certain natural resources for the benefit of the public, and the courts are expected to enforce the fiduciary relationship. Yet, it is precisely the failings in governmental decisionmaking that led to Sax's proposal, and one could hardly expect the political process to change because of the invocation of the magic words 'public trust.' The courts, therefore, must play a crucial role in forcing the government to fulfill its duties, but the courts have very little incentive to do so. Determining the efficient use of natural resources is a time-consuming and information-intensive endeavor of the kind that courts are ill-equipped to conduct.<sup>92</sup> Moreover, even were courts equipped to handle the task, it cannot be taken for granted that they would arrive at the conclusions desired by Sax. Judges of different backgrounds and viewpoints value natural resources differently, and one would expect that some jurisdictions would block too much development, while others would block too little.<sup>93</sup> Instead of ensuring optimal development, the public trust doctrine could bring about too much and too little conservation, depending on the jurisdiction.

By contrast, our anti-property mechanism avoids this central pitfall. Our trustees, the anti-property easement holders, have a pecuniary incentive in conservation since the values of their properties depend on the continued existence of parks and green spaces. Additionally, due to their immediate proximity to the conserved area, the nearby neighbors are uniquely positioned to monitor use of the park and acquire information cheaply. Yet, in our system, the trustees' role is mostly passive. Conservation commons can be preserved (or disbanded in the case of takings) without any significant action on the part of the easement holders. Indeed, the hold-out dynamic generated by the easements locks the easement holders into their roles as trustees.

An even more important virtue of our proposal is its reliance on a predominantly private market mechanism for achieving conservation. The reduced public role in enforcement of conservation lowers costs and eliminates the agency problem

<sup>91</sup> See R.J. Lazarus, 'Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine,' 71 1986, *Iowa Law Review*, p. 631 (reviewing successes and failures). See also, R. Delgado, 'Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform,' 44 1991, *Vanderbilt Law Review*, p. 1209.

<sup>92</sup> See R.B. Stewart and C.R. Sunstein, 'Public Programs and Private Rights,' 95 1982, *Harvard Law Review*, p. 1193, p. 1306 ('[C]ourts lack the capacity to gather and analyze data that are needed to gauge the economic benefits of increased regulatory protection').

<sup>93</sup> See, e.g., R.L. Revesz, 'Environmental Regulation, Ideology, and the D.C. Circuit,' 83 1997, *Virginia Law Review*, p. 1717 (empirical study finding that ideology plays an important role in judicial decisionmaking in the D.C. Circuit Court of Appeals); F.B. Cross and E.H. Tiller, 'Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Court of Appeals,' 107 1998, *Yale Law Journal*, p. 2155.

that plagues public enforcement schemes. The ideological disposition of the easement holders is irrelevant, as is that of the developers. Moreover, no bribes or other financial incentives are likely to undermine the conservation commons regime. Finally, absent naked trespass (a highly unlikely occurrence), there is virtually no need for enforcement, greatly reducing the cost of oversight.

#### 4.2.2. Environmental Standing

Similar observations may be made concerning proposals for special standing doctrines in environmental litigation. Periodically, proposals have been made to relax the requirement of standing in order to allow more litigants into court to plead for environmental protection, notwithstanding their lack of a traditional connection to the legal claim.<sup>94</sup> The most extreme and intriguing of these suggestions was made by Christopher Stone, who proposed granting standing to inanimate natural objects in order to defend themselves in court.<sup>95</sup> The efforts to relax standing should be seen as the procedural counterparts to Sax's suggestions regarding the public trust doctrine. Both sets of claims aim at expanding the courts' role in overseeing environmental protection: the public trust doctrine by adding to the menu of substantive claims that can be brought by environmentalist litigants, and environmental standing doctrines by eliminating procedural barriers. Nominally, each targets a different set of trustees – judges or environmentalists – but, in fact, both require both sets of trustees in order to achieve their goals.

Unfortunately, expanded environmental standing, if granted, would not likely overcome the shortcomings of the public trust doctrine. Environmentalists' increased access to court would not guarantee the solicitousness of the judges or their ability to oversee the complex information-gathering process that would have to accompany their work. Nor would environmental standing doctrines bring preservation of conservation commons out of the public arena. Unlike Sax, who called for the creation a new substantive cause of action, champions of expanded environmental standing only seek to clear a procedural hurdle, while relying on traditional claims under administrative law for substance. Yet, absent a new substantive cause of action, such as Sax's public trust doctrine, it is unclear that environmental litigants would fare well in court.

While we do not doubt the genuine commitment of environmental groups to conservation, budget constraints, high monitoring costs, and the reliance on litiga-

<sup>94</sup> See, e.g., J.L. Sax, 'Standing to Sue – A Critical Review of the Mineral King Decision,' 13 1973, *Natural Resources Journal*, p. 76; *Sierra Club v. Morton*, 405 U.S. 727, 742-56 (1972) (Douglas, J., dissenting); Cass R. Sunstein, 'What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III,' 91 1992, *Michigan Law Review*, p. 163, p. 165-66 (arguing for creating a bounty for environmental claimants, in order to provide the injury-in-fact necessary to establish standing). Cf. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) (allowing students to have an attenuated standing for an environmental claim).

<sup>95</sup> C. Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects,' 45 1972, *Southern California Law Review*, p. 450.

tion as an enforcement mechanism may combine to prevent these groups from achieving their professed goals.

#### 4.2.3. Conservation Easements

A conservation easement is ‘a negative restriction on land which prohibits a landowner from using her land in a manner that will change the ecological, scenic, open or natural state of the land.’<sup>96</sup> Conservation easements are widely recognized in state law,<sup>97</sup> and are generally created by private agreement between owners of the green space and government agencies or private conservation organizations that purchase the conservation easements. Conservation easements protect the designated property in perpetuity, though they usually may be discharged by circumstances that make it impossible to continue to meet their intended purposes.

Conceptually, our anti-property easements differ in three important respects from ordinary conservation easements. First, in conservation easements, a private property owner generally cedes a non-possessory right in a privately owned green space to a public (e.g., government agency) or quasi-public (e.g., an environmental group) organizations. Our anti-property easements move in the other direction: the government grants the easement to private property owners, thereby divesting itself from one of the sticks in its bundle of property rights. Second, and relatedly, usually there is but one conservation easement per green space. Numerous anti-property easements are created for each space and ownership in them is widely dispersed. As we explained earlier, the dispersal of easements is critical to creating an anti-

<sup>96</sup> K.K. Winter, ‘Comment, The Endangered Species Act Under Attack: Could Conservation Easements Help Save the Sea?’, 13 1993, *Northern Illinois University Law Review*, p. 371, p. 385.

<sup>97</sup> See Alaska Stat. §§ 34.17.010-34.17.060 (1992); Ariz. Rev. Stat. Ann. §§ 33-271 – 33-276 (1990); Ark. Code Ann. §§ 15-20-401 – 15-20-410 (Michie 1987); Cal. Civ. CODE §§ 815-816 (West 1982); Colo. Rev. Stat. §§ 38-30.5-101 – 38-30.5-111 (1973); Conn. Gen. Stat. §§ 7-131b - 7-131d (1989); D.C.Code Ann. §§ 45-2601 – 45-2605 (1990); Fla. Stat. Ann. § 704.06 (West 1988); Ga. Code Ann. §§ 44-10-1 – 44-10-8 (Michie 1982); Haw. Rev. Stat. Ann. §§ 198-1 – 198-6 (Michie 1988); Idaho Code §§ 55-2101 – 55-2109 (1988); Ill. Ann. Stat. ch. 5, paras. 2401-1 – 2401-3 (Smith-Hurd 1992); Ind. Code Ann. §§ 32-5-2.6-1 – 32-5-2.6-7 (West 1992); Iowa Code Ann. §§ 111D.1 – 111D.8 (West 1983); Kan. Stat. Ann. §§ 58-3803 – 58-3809 (1991); Ky. Rev. Stat. Ann. §§ 382.800-382.990 (Michie/Bobbs-Merrill); La. Rev. Stat. Ann. §§ 9:1271 – 9:1276 (West 1991); Me. Rev. Stat. Ann. tit. 33, §§ 476 – 479-B (West 1988); Md. Real Prop. Code Ann. § 2-118 (1988); Mass. Gen. Laws Ann. ch. 184, §§ 31-33 (West 1991); Mich. Comp. Laws Ann. §§ 399.251-399.257 (West 1988); Minn. Stat. Ann. §§ 84C.01-84C.05 (West 1993); Miss. Code Ann. §§ 89-19-1 – 89-19-15 (1991); Mo. Ann. Stat. §§ 67.870-67.910 (Vernon 1989); Mont. Code Ann. §§ 76-6- 201 – 76-6-211 (1991); Nev. Rev. Stat. Ann. §§ 111.390 -111.440 (Michie 1986); N.H. Rev. Stat. Ann. §§ 477:45-477:47 (1992); N.J. Stat. Ann. §§ 13:8B-1 – 13:8B-9 (West 1991); N.M. Stat. Ann. §§ 47-12-1 – 47-12-6 (Michie.1992); N.Y. Env’tl. Conserv. Law §§ 49-0301 – 49-0311 (McKinney 1984); Ohio Rev. Code Ann. §§ 5301.67-5301.99 (Anderson 1989); Or. Rev. Stat. §§ 271.715 – 271.795 (1989); Pa. Stat. Ann. tit. 3, §§ 914.1-914.2 (1992); R.I. Gen. Laws §§ 34-39-1 – 34-39-5 (1984); S.C. Code Ann. §§ 27-8-10 – 27-8-80 (Law.Co-op.Supp.1992); Tenn. Code Ann. §§ 11-13-101 – 11-13-117, 66-9-301 – 66-9-309 (1992); Tex. Nat. Res. Code Ann. §§ 183.001-183.005 (West Supp.1993); Utah Code Ann. §§ 57-18-1 – 57-18-7 (1990); Va. Code Ann. §§ 10.1-1009 – 10.1-1016 (Michie 1989); Wash. Rev. Code Ann. § 64.04.130 (West 1992); Wis. Stat. Ann. §§ 61.34(3m), 700.40 (West 1988).

property regime that enhances conservation. Third, conservation easements are generally thought to be immutable and perpetual. Absent the most extraordinary circumstances, conservation easements are expected not to be transferred, and protect the property in its pristine state forever. Anti-property easements, however, when combined with takings regimes, or when protected by pliable protection, may be dissolved in order to permit efficient development.

These differences notwithstanding, conservation easements and anti-property easements may share certain characteristics. To the extent that conservation easements are granted to environmental groups (as opposed to the government), both mechanisms shift enforcement of conservation from public to private entities.<sup>98</sup> Even then, however, conservation easements suffer from two disadvantages. First, since the grantees of the easement do not have immediate access to the protected resource, monitoring is substantially more costly. Second, conservation easements are much less appealing politically. Anti-property easements should appeal to politicians because they benefit voters who are likely to be among their constituents. The beneficiaries of anti-property schemes are all local voters, who are likely to repay politicians who bestow benefits on them. Conservation easements, on the other hand, do not offer a similar *quid pro quo*. The beneficiaries of conservation easements are often non-local actors, and benefiting them is unlikely to yield meaningful returns to local politicians who determine land use policy. Thus, from a pragmatic standpoint, anti-property easements are a preferable policy tool.

This does not mean, however, that conservation easements are without merit. On the contrary, they are a necessary complement to anti-property easements. Insofar as conservation of wilderness is concerned, conservation easements are the better policy tool. In such cases, there are often no neighbors in whom anti-property easements can vest, and decisions about conservation of such resources are made at the national level.<sup>99</sup> Additionally, conservation easements may be an important component of a combined anti-property-takings regime. Conservation easements may be used to account for the value of public use of a park not captured in the value of the anti-property easements.

#### 4.2.4. Summary

We summarize our discussion of the policy tools for conservation in the following table.

Table Public-Private Methods of Conservation

<sup>98</sup> See also B.H. Thompson, *supra* note 21.

<sup>99</sup> See B.C. Karkkainen, 'Biodiversity and Land,' 83 1997, *Cornell Law Review*, p. 1, p. 41 (describing the federal wilderness system as an 'important conservation asset'). But see J.G. Sprankling, 'The Antiwilderness Bias in American Law,' 63 1996, *University of Chicago Law Review*, p. 519, p. 566-7 (calculating that thirty-three million wilderness acres are protected by preservationist owners).

	'Trustees'	Incentives	Monitoring Costs	Enforcement Costs	Who Bears Costs	Potential Drawbacks
Public Trust	Courts (Environmental Litigants)	None (Strong Ideological)	High	High	Public	Reluctant courts, expensive and incomplete monitoring, lack of ready litigants
Environmental Standing	Environmental Litigants (Courts)	Strong Ideological (None)	High	High	Public	Reluctant courts, expensive and incomplete monitoring, lack of ready litigants
Conservation Easements (Government)	Government	Variable	High	Low	Public	Political pressure, expensive monitoring
Conservation Easements (NGO's)	Organizations	Strong Ideological	High	Low	Private	Expensive monitoring
Anti-Property Easements	Nearby Neighbors	Strong Pecuniary	Low	Low	Private	Lack of nearby neighbors for certain resources

Two factors strongly emerge from the tabular comparison of the policy alternatives.

First, the anti-property easement mechanism possesses a clear cost advantage over its competitors, especially those based upon encouraging environmental litigation. Anti-property easements create a structure that preserves green space with low monitoring and enforcement expenses, due primarily to the employment of 'trustees' who are positioned to oversee the condition of the protected space and are also highly motivated to do so. While some of the participants in mechanisms employing public trust or expanded environmental standing have a strong ideological mo-

tivation for protecting the natural asset, others (i.e., the courts) may lack that commitment; in any event neither the courts nor the litigants enjoy the easy monitoring of nearby neighbors in possession of anti-property easements. Where conservation easements are vested in conservation organizations, the 'trustees' will possess a strong motivation to carry out their duties, but they too will not be as well positioned as nearby neighbors.

Second, the cost advantages of anti-property easements will not be present in those cases where there is not a ready group of nearby neighbors, as in the case of a large and remote wilderness area. In such cases, conservation easements may be a preferred option.

## 5. Conclusion

In this article, we discuss the virtues of anti-property easements—a private conservation mechanism that allows only socially desirable development. En route to this mechanism, we surveyed the political and market institutions affecting conservation, and drew on the salient strengths and weaknesses of both institutions to ensure the preservation of conservation commons. We also compared our anti-property mechanism to other solutions to the conservation challenge and elucidated the conditions under which our mechanism is superior to the alternatives. The Article has important implications in both theory and practice.

Theoretically, an anti-property analysis demonstrates that when transaction costs systematically bias the market in favor of a particular interest, the best policy response may be to balance the transaction costs by creating transaction costs that bias the other way. This is accomplished by granting the initial entitlement to the interest harmed by the initial transaction cost bias. The result is that the entitlement becomes effectively inalienable. An intriguing implication of this counter-intuitive insight is that anticommons regimes – currently viewed as 'tragic' – are actually beneficial when conservation is the social goal. Furthermore, the interplay between market and political institutions may engender a superior equilibrium to those created by each institution alone. While the political process would lead to too little conservation, and the market to too much conservation, the combination of private anti-property easements with a carefully-designed takings law may lead to the optimal balance between conservation and development.

## THE NEW DUTCH CIVIL CODE: THE BORDERLINE BETWEEN PROPERTY AND CONTRACT

'Consequential reasoning might be nice for teachers and students, but their interest is not decisive. The law is there for the people dealing with the law, not for theoretic professors. Dogma should not rule, but serve. Where dogma opposes proper justice, it should give way.'<sup>1</sup>

### 1. Introduction

On 1 January 1992 the new codification on property, contract and tort entered into force in the Netherlands. This new codification is a major part in the completion of the new codification of private law, the *Burgerlijk Wetboek* (BW) which has been in preparation since 1947.<sup>2</sup> The structure of the civil code was drafted by prof. E.M. Meijers who died before the first version was completed. Nevertheless, prof. Meijers introduced a new approach, partly based on comparisons with German law, French law and other legal systems. The old civil code had been primarily based on French

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<sup>1</sup> Translation from S.N. van Opstall, 'Zakelijke rechten en kwalitatieve verbintentissen,' *Weekblad voor Privaatrecht, Notariaat en Registratie*, 4919-4926 1966, p. 383-473, p. 398; 'Konsekwentheid is misschien aardig voor docent en student, doch hun belang is hier niet beslissend. Het recht is er voor justitiabelen, niet voor theoretiserende professorabelen. De dogmatiek moet niet heersen, docht heeft slechts te dienen. Waar zij aan een goede rechtsbedeling in de weg zou staan, heeft zij te wijken.'

<sup>2</sup> KB 25 April 1947, see C.J. van Zeven, W.G. Belinfante and O.W. van Ewijk, *Algemeen deel – Voorgescheidenis en algemene inleiding*, Deventer-Antwerpen, Æ. E. Kluwer, 1961, p. 6. The BW is still not finished today. Further work is still conducted on book 9 on intellectual property and book 10 on private international law.

law, but Meijers introduced concepts from German law and other legal systems as well.<sup>3</sup>

One of the results of this new approach is that the codification breaks with traditional distinctions, both in structure and in contents. The Dutch civil code has a layered structure, in which general rules are dealt with before specific rules. In the area of property law the consequence of this approach is that there is no longer one book of property law, but several books in which rules of property law are dealt with. This also applies for the areas of contract and tort.

Also in content the Dutch civil code does not follow a traditional approach. Like in most civil law systems, the code is founded on the distinction between personal rights and property rights and the connected separation between the law of obligations and the law of property. However, this separation is less strong than in other civil law systems. There are several concepts in Dutch law which deviate from this principal separation, specifically in the area of contract law. Nevertheless, at the outset the system remains to adhere to the strict separation between personal and property rights.

One of the basic characteristics of a property right in civil law systems is that it takes effect against the world.<sup>4</sup> In other words, a property right has third party effect by its nature. Because of this effect there is a limitation imposed on the amount and content of these rights, known as the *numerus clausus*. Dutch law recognises a *numerus clausus* of property rights which makes it impossible for parties to create other property rights than those which are recognised. However, the law of contract, where party autonomy is the starting point, allows parties to create any relation they desire as long as it is not contrary to law, public order or public morality.<sup>5</sup> Parties may do so because a contract creates personal rights and claims, which only take effect against those who agreed to them. This rule is known as the doctrine of privity of contract. Also contract law allows deviations from this rule, but at the outset parties are only bound by agreement.

It is the intention of this contribution to explore several situations in which the doctrine of privity of contract is broken in order to achieve a quasi-property relation. These contractual relations will take effect not only against the parties to the contract, but also against certain third parties. I will first deal with the separation between the law of obligations and the law of property, after which I will deal with four specific examples of land burdens in Dutch law that operate in the grey area between the law of obligations and the law of property. In this overview, the principle of *numerus clausus* will take a central position.

<sup>3</sup> German law belongs to another legal family and is therefore based on different concepts than French law. On legal families see K. Zweigert and H. Kötz, *Introduction to Comparative Law*, Oxford, Clarendon Press, 1998, p. 63 *et seq.*

<sup>4</sup> Other characteristics include the right to follow, the *droit de suite*, and the right of preference, or *droit de préférence*, see B. Pierre, 'Classification of Property and Conceptions of Ownership in Civil Law and Common Law,' vol. 2, *Revue Générale de Droit*, 28 1997, p. 235-274, p. 263 *et seq.*

<sup>5</sup> Art. 3:40 BW.



## 2. The Separation between the Law of Obligations and the Law of Property

The separation between the law of obligations and the law of property was introduced in most civil law systems after the French Revolution. Before the French Revolution rights and claims with third party effect had been connected to persons in their personal capacity, often placing enormous burdens on them.<sup>6</sup> The system in which people were bound personally caused a deviation from the separation between personal and property rights that had existed already in Roman law.<sup>7</sup> The French Revolution abolished feudal duties and reinstated the separation which was expressed in the creation of a separate book on obligations and a separate book on property. The major European civil law systems followed this separation.<sup>8</sup>

Even more, the separation between personal rights and property rights became a fundamental principle of private law. This principle formed the foundations on which most civil law systems constructed their private law codifications. It forced the legislators to consider what the essential elements of property rights were. One of these essential elements was the third party effect. Because of this third party effect of property rights the German legislator stated that property law should be completely separated from the law of obligations and should provide its own rules on property relations. The property relations would then be governed by their own set of rules, in which different concepts applied than in the area of contract law. This opinion was influenced by the works of learned authors such as Thibaut and Von Savigny.<sup>9</sup> German scholarship, specifically Thibaut and Von Savigny, considered any interference by the law of obligations in the law of property a dangerous development not based on historical arguments. In the same line of reasoning the *Motive* of the BGB state:

‘Das Sachenrecht muss, um seine Selbständigkeit zu wahren, die Erwerbung der dinglichen Rechte nach Gesichtspunkte ordnen, die auf seinem Gebiete liegen. (...) Den Be-theiligten kann es daher nicht freistehen, jedem beliebigen Rechte, welches sich auf eine Sache bezieht, den Charakter des dinglichen zu verleihen. Der Grundsatz der Vertragsfreiheit, welcher das Obligationenrecht beherrscht, hat für das Sachenrecht keine

<sup>6</sup> Such burdens could include an obligation to pay service to the lord several occasions a year, but also the duty to accept the spouse the feudal lord selected, on the latter see A.J. Oakley, *Parker and Mellows, The Modern Law of trusts*, London, Sweet & Maxwell, 1998, p. 4.

<sup>7</sup> G. Inst. IV.1, J. Inst. IV.6.1; V. Sagaert, ‘Kwalitatieve verbintenissen in het Belgische en Nederlandse recht,’ in J.M. Smits and S. Stijns (eds), *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht*, Antwerpen-Groningen, Intersentia, 2005, p. 341.

<sup>8</sup> In France, Book 2 CC on Property Law and book 3 CC on the law obligations. In Germany, Book 2 BGB on the law of obligations, Book 3 BGB on Property law. However, this was different in e.g. the Prussian Allgemeine Landrecht which entered into force in 1794, under a different influence from the French Revolution than the French or German civil code were. See J.H.A. Lokin and W.J. Zwalve, *Hoofdstukken uit de Europese Codificatiegeschiedenis*, Deventer, Kluwer, 2001, p. 198, 206.

<sup>9</sup> See A.F.J. Thibaut, ‘Ueber dingliches und persönliches Recht,’ *Versuche über einzelne Teile der Theorie des Rechts*, (Neudruck Scientia Verlag Aalen 1970), Alen, Jena, 1817, p. 23 *et seq.*; F.K. von Savigny, *System des heutigen römischen Rechts*, Aalen, Scientia Verlag, 1 1981, § 56, p. 373-374.

Geltung. Hier gilt der umgekehrte Grundfuss: die Beteiligten können nur solche Rechten begründen, deren Begründung das Gesetz zulässt.<sup>10</sup>

It was this German reasoning that greatly influenced other civil law systems, including the Netherlands. Until 1992 the Netherlands used a civil code which was strongly based on the French *Code Civil*. This code, the Old BW, did not explicitly state that there was a strong separation. However, on 3 May 1905 the Dutch *Hoge Raad* (Supreme Court) rendered its landmark decision of *Blaauwboer v. Berlips*.<sup>11</sup> In this case the *Hoge Raad* states:

'O. verder, dat, waar de verbintenis zoude rusten op elken eigenaar als zoodanig het recht op de vervulling dier verbintenis een zakelijk karakter bekomt, hoewel voort-spruitende uit een overeenkomst, iets, dat zonder eene wetsbepaling, dit bepaaldelijk voor een geval als het besprokene veroorloevende, niet kan worden aangenomen, omdat daarmede de in onze burgerlijke wetgeving bestaande scherpe onderscheiding tus-schen zakenrecht en verbintenissenrecht, wordt uitgewischt.'<sup>12</sup>

This fundamental case has not lost its meaning today.<sup>13</sup> In his *Algemene Begrippen* Meijers also followed a division in personal rights and property rights.<sup>14</sup> It was this case and the fundamental reasoning behind it that was also followed by Meijers in his draft of the civil code.<sup>15</sup> Therefore the general system of the civil code remains based on this separation.<sup>16</sup> However, in the area of land burdens the Dutch civil code allows several exceptions to this principle of separation, both in the law of property and in the law of obligations.

<sup>10</sup> *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich – Sachenrecht, III*, Berlin, Verlag von J. Guttentag, 1888, p. 3; 'Property Law must, to safeguard its independence, deal with the creation of property rights itself. (...) A person can therefore not be free to create any right in relation to an object with a property effect. Party autonomy as it is used in the law of obligations is therefore not applicable in property law. Here the opposite is the case: persons can only create those rights that are recognised by the law. The number of property rights is consequently limited.'

<sup>11</sup> *Hoge Raad* (Supreme Court) 3 March 1905, W 8191 (*Blaauboer/Berlips*).

<sup>12</sup> 'Considering that when every owner would be under an obligation and that the performance of this obligation would have a property effect, although created by a contract, without a specific legal basis, especially in these circumstances, cannot be accepted, because with that the existing sharp distinction in our Civil legislation between property law and the law of obligations would be erased.'

<sup>13</sup> See *inter alia* H.W. Heyman, 'Blaauboer/Berlips (HR 3-3-1905),' in E. Hondius and G.E. van Maanen (eds), *Civiele klassiekers revisited. Van Blaauboer/Berlips tot Breda/Antonius – Zestien standaardarresten opnieuw geannoteerd*, Deventer, Kluwer, 2003, p. 22 *et seq.*

<sup>14</sup> E.M. Meijers, *Algemene leer van het burgerlijk recht – deel I – De Algemene Begrippen van het Burgerlijk Recht*, Leiden, Universitaire Pers, 1948, p. 266.

<sup>15</sup> C.J. van Zeven and J.W. Du Pon, *Boek 5 – Zakelijke Rechten*, Deventer, Kluwer, 1981, p. 3.

<sup>16</sup> Although there are general rules on patrimonial law in book 3, book 5 exclusively deals with property law and book 6 with the law of obligations.

### 3. Land Burdens in Dutch Law

Land burdens are agreements granting limited use of someone else's immovable property. These can be either personal or property burdens, both negative and positive. Most legal systems restrict the workings of property rights because of the effect they have against third parties. Furthermore, most positive duties in property law are still associated with personal feudal duties and other undesired relations that existed before the French Revolution.<sup>17</sup> The general starting point of the main property right which is used to burden land, a right of servitude, is therefore that it can only comprise a negative duty.<sup>18</sup> Furthermore, a right of servitude is technically only established between two pieces of land, or better between two persons in their capacity as holders of a property right in these two pieces of land, in Dutch law not necessarily geographically close to each other. These persons can be owner, but can also be persons who have a power to establish a right of servitude based on another property right which they are holding, such as an *emphyteusis* or usufruct. This structure is designed to avoid persons to be bound in their personal capacity. The rights and claims arising from the servitude will transfer with the ownership of the pieces of land. However, in order to provide for an efficient use of servitudes Dutch law allows some serious exceptions to this restriction to negative duties.<sup>19</sup> These include the duty to erect buildings, constructions or plants and duties to maintain any of these.<sup>20</sup>

Nevertheless, practice demands the possibility to impose positive duties. E.g. municipalities want to use private law to regulate construction, and contractors want to impose duties on persons acquiring parts of their developed property, not only resting on the first acquirers, but also on their successors in title.<sup>21</sup> However, the *numerus clausus* of property rights does not allow the creation of such a duty in the form of a property right, since both number and content of property rights are limited by law. The strict consequence of the *Blaauboer v. Berlips* decision is that parties are left with the law of obligations, specifically contract law, to deal with their affairs. The Dutch civil code underlines this doctrine with article 3:42 BW which al-

<sup>17</sup> V. Sagaert, *supra* note 7, p. 351-352; V. Sagaert, 'Real rights and real obligations in Belgian and French law,' in S.E. Bartels and J.M. Milo (eds), *Contents of Real Rights*, Nijmegen, Wolf Legal Publishers, 2004, n. 12, p. 55; M.J. de Waal, 'Servitudes,' in R. Feenstra and R. Zimmermann (eds), *Das römisch holländische Recht; Fortschritte des Zivilrechts im 17. und 18. Jahrhundert*, Berlin, Duncker & Humblot, 1992, p. 583-586; H.W. Heyman, *supra* note 13, p. 23.

<sup>18</sup> C.J. van Zeven and J.W. Du Pon, *supra* note 15, p. 258; Art. 5:71(1) BW, this prohibition in principle includes a positive duty phrased in a negative structure, see W.J.M. Davids, *Mandelijkheid en erfdiensbaarheid*, Deventer, Kluwer, 1994, p. 27-28; C.E. du Perron, *Overeenkomst en derden; Een analyse van de relativiteit van de contractswerking*, Deventer, Kluwer, 1999, p. 246-247.

<sup>19</sup> Art. 5:71 BW; C. Asser *et al.*, *Goederenrecht 3 – II Zakelijke rechten*, Deventer, Kluwer, 2002, n. 175, p. 201.

<sup>20</sup> However such positive duty can never be the principal duty of a servitude. See note 36.

<sup>21</sup> H.W. Heyman, *supra* note 13, p. 23; A.A. van Velten, 'Privaatrechtelijke aspecten van stedelijke erfpacht,' in A.A. van Velten, G.M.F. Snijders and W.G. Huijgen, *Erfpacht (Preadvoies)*, Lelystad, Koninklijke Vermande B.V., 1995, p. 17-36.

lows for a conversion of the relation by operation of the law.<sup>22</sup> If parties create a right of servitude with a content that cannot be imposed by a servitude this article, if reasonable, converts this relation into personal rights and duties.

However, in contract law it is also possible to impose duties, not only negative but also positive. The principle of party autonomy allows the parties to create any relation they desire within the limits of the law.<sup>23</sup> The doctrine of privity of contract resists against third party effect of such an agreement. However, parties can agree to impose the same rights and duties on subsequent parties upon occurrence of a set event. For example a shopping centre agrees with a restaurant owner that his business will be the only restaurant in the shopping centre, and subsequently includes a contractual clause in all agreements with other businesses that contains a duty not to establish a restaurant plus an obligation to impose the same duty on subsequent acquirers of their businesses. The agreement is concluded under a penalty clause to pay damages per day of violation to the original restaurant owner.<sup>24</sup> These clauses are widely used and are known as chain clauses.

The result of the use of a chain clause is the creation of a third party effect. However, this effect is relative because the original agreement will only take effect against those third parties that agree to the chain clause. In other words the duty transfers *ex contractu* and not by operation of law.<sup>25</sup> The penalty clause allows the original party to take action in case of violation. However, only contractual remedies will be available, so the original party can only sue for performance and damages.<sup>26</sup> Only in very limited circumstances can the original party claim for a reinstatement of the clause by way of specific remedy in a tort situation.<sup>27</sup> Because of the necessity of an act in order to transfer the chain clause and the very limited possibilities to claim performance of the clause once it has been broken, this solution is usually considered as undesirable and complicated in practice.<sup>28</sup> Nevertheless, the *numerus clausus* of property rights does not allow the creation of a relation with third party effect outside what is allowed within the scope of existing property rights. Any creation of a new property right is therefore strictly forbidden.<sup>29</sup>

<sup>22</sup> Although conversion is not always easy to establish, see e.g. HR 14 February 1997, NJ 1997/542 (Bruggeman/Vlasroterij Sint Andries), under 3.5.2, Asser *et al.*, *supra* note 19, n. 177, p. 202.

<sup>23</sup> Art. 3:40 BW.

<sup>24</sup> Hoge Raad 10 May 1996, NJ 1996/537 (Coscun/Van Sommeren).

<sup>25</sup> See art. 6:155 BW; W. Wijting, 'Kwalitatieve rechten en verplichtingen in de bouw,' *Bouwrecht*, 11 2001, p. 927-942, p. 937 *et seq.*

<sup>26</sup> Art. 6:74 *et seq.* BW.

<sup>27</sup> Hoge Raad 17 May 1985, NJ 1986/760 (Curaçao/Boyé); C. Asser and A. Hartkamp, *Verbintenissenrecht 4 – II Algemene leer der overeenkomsten*, Deventer, W.E.J. Tjeenk Willink, 2001, n. 413, p. 432; E.B. Rank-Berenschot, *Over de scheidslijn tussen goederen- en verbintenissenrecht*, Deventer, Kluwer, 1992, p. 83-84.

<sup>28</sup> See *inter alia* S.N. van Opstall, *supra* note 1, p. 471; H.W. Heyman, *supra* note 13, p. 10; W. Wijting, *supra* note 25, p. 938 *et seq.*

<sup>29</sup> This approach was taken by the Hoge Raad in *inter alia* its Sogelease judgment where it prohibits a transfer of ownership for security purposes because this would create a new property right, HR 19 May 1995, NJ 1996/119. This approach has recently been affirmed by →

However, within the *numerus clausus* of property rights there is also some manoeuvrability. A right of servitude can be determined by the parties to a large extent, with the limit that it cannot impose a positive duty. Article 5:71 BW states:

'-1 The burden that a servitude imposes on the servient tenement, consists of a duty to allow or refrain from something on, up or under one of the tenements. In addition, the deed of establishment can contain an agreement that the burden includes a duty to construct buildings, works or plants that are required for the exercise of the servitude, under the condition that these buildings, works or plants are entirely or partly on the servient tenement.'<sup>30</sup>

The Dutch legislator deliberately left the definition of servitudes as open as possible.<sup>31</sup> There are as few restrictions as possible and parties are left as free as possible to decide on the contents of the right.<sup>32</sup> These agreements, as far as they are included in the deed of establishment, become part of the property right.<sup>33</sup> The agreement will then be an inherent part of the property right and will have effect against everyone. However, not all agreements can be qualified as such.<sup>34</sup> Furthermore, in case of servitudes these agreements cannot impose a positive duty unless they are secondary to the primary negative duty the servitude comprises.<sup>35</sup> Such a secondary positive duty could be the duty to maintain the road that the servitude gives access to. Also a financial compensation, known as retribution, can be part of the servitude. Consequently, these burdens will transfer with the right of servitude to any successive acquirers.<sup>36</sup> Any other non-relating duty will be treated as a personal

the Minister of Justice in his explanation to the proposed introduction a law implementing of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, Kamerstukken 2004-2005, 28874, No. E, Eerste Kamer, p. 4-5.

<sup>30</sup> Art. 5:71 '-1 De last die een erfdiensbaarheid op het dienende erf legt, bestaat in een verplichting om op, boven of onder een der beide erven iets te dulden of niet te doen. In de akte van vestiging kan worden bepaald dat de last bovendien een verplichting inhoudt tot het aanbrengen van gebouwen, werken of beplantingen die voor de uitoefening van die erfdiensbaarheid nodig zijn, mits deze gebouwen, werken of beplantingen zich geheel of gedeeltelijk op het dienende erf zullen bevinden.'

<sup>31</sup> C.J. van Zeben and J.W. Du Pon, *supra* note 15, p. 253.

<sup>32</sup> Art. 5:73 BW.

<sup>33</sup> The interesting suggestion that a burden could both comprise a personal obligation as well as a property obligation was put forward by Eggens, see J. Eggens, 'Over de verhouding van eigendom en verbintenis,' *Mededelingen der Koninklijke Nederlandse Akademie van Wetenschappen*, afd. Letterkunde, Nieuwe reeks, deel 23/No. 7, 1960, p. 3-20, p. 4 *et seq.* However, this suggestion was generally rejected, see S.N. van Opstall, *supra* note 1, p. 398; C. Asser *et al.*, *supra* note 19, n. 176, p. 202.

<sup>34</sup> For the criteria see *supra* note 39.

<sup>35</sup> However, by exception, a duty to maintain objects in relation to the servitude can constitute a primary positive duty, see art. 5:71(2) BW; Davids, *supra* note 18, p. 27.

<sup>36</sup> C. Asser *et al.*, *supra* note 19, n. 174 *et seq.*, p. 200 *et seq.*; W.J.M. Davids, *Burenrecht, mandeligheid en erfdiensbaarheden*, Deventer, Kluwer, 1988, n. 71 *et seq.*, p. 193 *et seq.*; different see V. Sagaert, *supra* note 7, p. 352 who considers these positive duties as accessory rights to the property right, not as part of the property right itself.

right. Consequently, these rights will not automatically transfer to the acquirer of the servitude.

Another property land burden which allows for a large influence of the law of obligations is the right of *emphyteusis*. The powers that this right, known in Dutch law as the right of *erfpacht*, awards most closely resemble those of the right of ownership. The scope of the right is established by title 7 of book 5 of the BW and by the agreement between parties contained in the deed of establishment.<sup>37</sup> Such agreements are known as conditions (*voorwaarden*) and, in principle, are part of the property right itself. These conditions can contain additional agreements governing the relationship between the owner and the holder of the right of *emphyteusis*. The articles in title 7 of book 5 are formulated in such a way that they can be often be deviated from by the conditions. Because of the broad criteria in this title, the possibilities for the parties are much more extended than with a right of servitude.<sup>38</sup>

These conditions, although in essence an agreement between parties are treated as part of the property right. However, this will only be the case in so far as they have a *sufficient connection* to the *emphyteusis* and are not contrary to the *nature* of the right.<sup>39</sup> These open criteria of sufficient connection and nature of the right, make it difficult to establish which agreements are included in the property right and which are not. According to leading opinion these agreements can be both negative and positive.<sup>40</sup> The possibilities for parties to impose positive burdens in relation to the right of *emphyteusis* are more extended than the possibilities for parties to impose positive duties in relation to servitudes. An *emphyteusis* can include a duty to erect a building as a principal duty, whereas in case of a servitude such a duty can only be imposed in as far as the erection of a building is necessary for the performance of the principal duty.<sup>41</sup> However, because of the broad criteria to establish which agreements are inherent parts of a property right the inclusion of such duties remains the subject for debate.

The possibility to include various duties is one of the reasons that the scope of the right of *emphyteusis* is almost as large as the right of ownership. The powers of the holder of the right of *emphyteusis* can be so extensive that the owner is left with nothing than complete empty ownership, except for the expectation that, when the right of *emphyteusis* eventually ends, his ownership will be full and complete again. Dutch law, contrary to German law, follows the principle of *démembrement* to explain the relation between ownership and property rights.<sup>42</sup> In strict application this approach considers property rights as temporarily separated parts of the right of

<sup>37</sup> J. de Jong, *Erfpacht en opstal*, Deventer, Kluwer, 1995, p. 1; Asser *et al.*, *supra* note 19, n. 215 *et seq.*, p. 236 *et seq.*

<sup>38</sup> Art. 5:71 BW restricts the servitude to a negative duty. Any additional agreement should be considered respect to this article, which severely limits the freedom of the parties. Such a restricting article does not exist for rights of *emphyteusis*.

<sup>39</sup> HR 16 March 1977, NJ 1977, 399; W.B. Plantenga and W.C. Treurniet, *Erfpacht en Erfpachtsvoorwaarden*, 1957, p. 177; A.A. van Velten, *supra* note 21, p. 47; J. de Jong, *supra* note 37, p. 17; E.B. Rank-Berenschot, *supra* note 27, p. 110-111.

<sup>40</sup> C. Asser *et al.*, *supra* note 19, n. 217, p. 241; J. de Jong, *supra* note 37, p. 17-19.

<sup>41</sup> C. Asser *et al.*, *supra* note 19, n. 217, p. 241; see note 36.

<sup>42</sup> This is *inter alia* expressed by art. 3:8 BW.

ownership. The principle, in Dutch law also known as the principle of deduction or *aftrekprincipe* was defended by *inter alia* Suijling and Van Opstall.<sup>43</sup> These authors argued that because a property right consists of parts of the right of ownership, it can never comprise more than the right of ownership itself. The owner cannot be under a duty to erect a building; ownership cannot easily be burdened, so the holder of a right of *emphyteusis* cannot either.

This strict approach was not followed by the Dutch legislator, in modern Dutch law a property right can consist of more than just parts of the powers of the owner.<sup>44</sup> However, the principle of *démembrement* does still exist; once a property right and ownership come into the same hands, the property right ceases to exist. Nevertheless, some of Suijling's and Van Opstall's arguments can still be found. Van Velten has argued that a positive duty imposed by conditions in an *emphyteusis* can only exist if there is a specific legal basis.<sup>45</sup> Van Velten also extends this argumentation to agreements included in deeds of establishment of property rights in general.<sup>46</sup> In this approach any agreements made by the parties, which cannot be classified as parts of ownership, and which do not find an explicit legal basis, are separate contracts. Any rights and claims created by these contracts are personal.

In other words, there are two approaches. Some agreements are an inherent part of property rights itself whereas other agreements are strictly personal since property rights can only comprise elements from the right of ownership. However, besides these two approaches, there is a third approach. When the separation between the law of obligations and the law of property is less strictly applied, the possibility of a separate, though connected, agreement with third party effect could be accepted. Such agreement, if it is made in relation to a recognised property right, would bind the parties in their capacity of holder of the involved property rights.<sup>47</sup> Consequently the agreement would transfer with the persons in their capacity as right holders. In other words the agreement would be accessory to the property right. Such obligations are known as qualitative *obligations*.

This theory of qualitative obligations was also proposed by Van Opstall as a solution to solve his problems with the strict application of the principle of deduc-

<sup>43</sup> See S.N. van Opstall, *supra* note 1, p. 383 *et seq.*; J.P. Suijling, *Inleiding tot het burgerlijk recht – 5 – Zakenrecht*, Haarlem, De erven F. Bohn N.V., 1940, n. 345, p. 363.

<sup>44</sup> Art. 3:8 BW; C.J. van Zeven and J.W. Du Pon, *supra* note 15, p. 3, 257; C. Asser, F.H.J. Mijnsen and P. de Haan, *Goederenrecht 3 – I Algemeen Goederenrecht*, Deventer, W.E.J. Tjeenk Willink, 2001, n. 44-45, p. 35-38.

<sup>45</sup> A.A. van Velten, *supra* note 21, p. 49; see also G.M.F. Snijders, 'Agrarische erfpacht,' in A.A. van Velten, G.M.F. Snijders and W.G. Huijgen, *Erfpacht (Preadvies)*, Lelystad, Koninklijke Vermande B.V., 1995, p. 155; *contra* see J. de Jong, 'Erfpacht. Bespreking van het preadvies 'Erfpacht' van mr W.G. Huijgen, prof. mr G.M.F. Snijders en prof. mr A.A. van Velten uitgebracht voor de Algemene Ledenvergadering van de Koninklijke Notariële Broederschap op 22 september 1995,' *Weekblad voor Privaatrecht, Notariaat en Registratie*, 6190 1995, p. 523-527, p. 525; Asser *et al.*, *supra* note 19, n. 217, p. 241.

<sup>46</sup> This would include rights of servitude, superficies, usufruct and apartment, A.A. van Velten, *supra* note 21, p. 49.

<sup>47</sup> In case of the establishment of a servitude on a right of ownership this would be an agreement between the holder of the right of servitude and the owner.

tion.<sup>48</sup> He considered that any other rights and claims than those contained in ownership could be transferred by an accessory qualitative obligation. This is also the approach which is chosen by some Belgian authors.<sup>49</sup> The recognition of a separate qualitative obligations existing next to a property right raises a very essential question: which area of the law is applicable to these obligations, the law of obligations, the law of property or both? The law of obligations would seem a natural choice since the qualitative obligation is an agreement, but this would bring party autonomy to a right that in most respects resembles a property right. The law of property would be impossible, since the regulation of such agreements in property law would effectively create a new property right, which is what the concept of qualitative obligations attempts to avoid.

A third possibility would be a combination of the two. However, dogma would force serious restrictions on the content of these relations. An obligation outside of the carefully framed system of property rights would also deviate from the *numerus clausus*. By analogy to the approach of agreements that are part of property rights, the possibility to create qualitative obligations could be limited to the extent that the obligation should not be contrary to the nature of the property right to which it is accessory.<sup>50</sup> E.g. such a qualitative obligation could include a duty to maintain a road to which the servitude to which the obligation is accessory gives access. The consequence would be that parties have to stay within the boundaries set by the articles dealing with the property right, e.g. a servitude could not contain a positive duty unless there is a specific legal basis.

Finally, qualitative obligations could also be allowed to exist outside the scope of recognised property rights as well. This last option was followed in the New Dutch civil code, although the application of such agreements is heavily restricted. In book 6, dealing with the law of obligations, the possibility to establish qualitative rights and also qualitative *duties* arises. This latter category can also be considered a land burden, but requires extra explanation. Therefore these qualitative duties will be dealt with in a separate paragraph.

#### 4. A Pragmatic Solution: Qualitative Duties

A company *Veegers* owned two furniture stores in the Dutch city of *Heerlen*. *Veegers* intended to move the companies to the local furniture strip, a concentration of furniture stores on the outskirts of the city. The company *Veegers* needed permission from the local government to move the stores. The local government agreed on the condition that the company would contract that within five years after the sale no furniture stores would be established in the old buildings. The contract was framed within the requirements set by article 6:252 BW (qualitative duties) and was complemented with a penalty clause of € 45.000. The parties expressed their intention to

<sup>48</sup> S.N. van Opstall, *supra* note 1, p. 383-384.

<sup>49</sup> Although the leading majority seems to follow the approach of treating such agreements as an integral part of property rights, see V. Sagaert, *supra* note 17, n. 18, note 56.

<sup>50</sup> See note 39.



bind successors in title and the contract was passed by a notary and subsequently registered.

In the next year the company *Veegers* sold one of the properties to another company which, in its turn, sold the property another year later to a furniture store chain called *Kwantum*. However, *Kwantum* did establish a furniture store in one of the buildings and was subsequently sued by the local government for the payment of € 45.000. In both deeds of transfer the qualitative duty was mentioned.<sup>51</sup>

The court of appeal ruled that *Kwantum* knew or could have known there was a qualitative duty imposed on the building they acquired. The qualitative duty consisted of a negative duty, i.e. not to have a furniture store in it for a certain period, and was upheld by the court. The nature of penalty clause was not considered, but, as a general aspect of Dutch law, is recognised as part of the qualitative duty and transfers by operation of the law with the building.<sup>52</sup> Therefore, *Kwantum* could not establish a furniture store in the building on which the qualitative duty rested.

It is with the approach of qualitative obligations that the Dutch legislator has introduced another intermediate solution: the qualitative *duty* of article 6:252 BW. The qualitative duty allows the creation of a negative burden on registered property which transfers to successive acquirers. In effect the qualitative duty creates a quasi-property right outside the *numerus clausus*. After all, it will not only bind the parties but also acquirers of the land on which the qualitative duty is established, not by contract but by operation of the law, in other words with a *droit de suite* effect. It was exactly with this argument that many authors opposed the introduction of the qualitative duty into Dutch law.<sup>53</sup> Nevertheless, the qualitative duty was included in the civil code and forms an intermediate category between the law of obligations and the law of property.<sup>54</sup>

<sup>51</sup> Court of appeal of 's-Hertogenbosch 10 January 2002, NJ 2002/633 (*Kwantum/Heerlen*). The achievement of the same result with a servitude would have been very difficult because of the lack of a dominant tenement. It is not the city of Heerlen which benefits in its capacity of an owner of the dominant tenement (if existing at all in this case), but the city in its personal capacity.

<sup>52</sup> Art. 6:157 sub 4 BW; C. Asser and A. Hartkamp, *supra* note 27, n. 407; C.E. du Perron, *supra* note 18, p. 249; 'Rechtsvragenrubriek, Kwalitatieve verbintenis en boete,' *Weekblad voor Privaatrecht, Notariaat en Registratie*, 6079 1993, p. 97.

<sup>53</sup> See *inter alia* S.N. van Opstall, *supra* note 1, p. 471; A. Pitlo, 'Na 3 maart 1905,' in P.A.N. Houwing (ed.), *Onroerend goed: opstellen geschreven ter gelegenheid van het 125-jarig bestaan van de Broederschap der Notarissen in Nederland*, Deventer, Kluwer, 1968, p. 231 *et seq.*; J.M.M. Maeijer, *Erfdienstbaarheden en kwalitatieve verbintenissen (huidig en wordend recht)*, Den Haag, KNB, 1966, p. 80; H.J. Rijtma, 'Kwalitatieve rechten,' in H.L. Bakels *et al.*, *Op de grenzen van komend recht. Opstellen aangeboden aan prof. mr. J.H. Beekhuis*, Deventer-Zwolle, Kluwer-Tjeenk Willink, 1969, p. 229; P.A. Stein, 'Van kettingbeding naar kwalitatieve verbintenis,' *Weekblad voor Privaatrecht, Notariaat en Registratie*, 5365 1976, p. 644-650, p. 650; in favour see J.T. Smalbraak, *Erfdienstbaarheden en kwalitatieve verbintenissen (huidig en wordend recht)*, Den Haag, KNB, 1966, p. 110; C. Asser and A. Hartkamp, *supra* note 27, n. 411, p. 430.

<sup>54</sup> See V. Sagaert, *supra* note 7, p. 343; C. Asser and A. Hartkamp, *supra* note 27, n. 411, p. 430; N. van Oostrom-Streep, 'De kwalitatieve verplichting als twee-eenheid?,' *Weekblad voor Privaatrecht, Notariaat en Registratie*, 6638 2005, p. 786-788, p. 786.

A qualitative duty is an agreement between two parties, one of which is owner or holder of a property right on a registered object, i.e. immovables, ships and aircrafts.<sup>55</sup> The other party will be bound by the terms of the agreement in his personal capacity. The qualitative duty will transfer with the property right on the registered object over which the duty is established. Subsequent acquirers of the object will then be bound by the terms of the agreement.<sup>56</sup> Because of this third party effect there are several requirements for the duty to exist.

First, the contents of the duty are limited to a negative burden.<sup>57</sup> However, contrary to the requirements in case of servitudes, the parties can include a prohibition to take legal acts as well. In Dutch law a right of servitude can only comprise factual acts, e.g. a duty to tolerate the holder of the right to walk over the owner's land.<sup>58</sup> A qualitative duty can also contain a prohibition to lease the property.<sup>59</sup> Hartkamp considers that this broader scope of applicability of qualitative duties is compensated by the smaller amount of possibilities to impose positive duties.<sup>60</sup> However, secondary positive duties to ensure the exercise of the principal (negative) duty can exist as well.<sup>61</sup> These could include a penalty clause as mentioned in the case of *Kwantum v. Heerlen*.<sup>62</sup>

Second, the agreement will only have effect against third parties when it is made by notarial deed and registered in the public registry.<sup>63</sup> This requirement shows another difference in comparison to servitudes. A servitude will only come into existence upon registration of the notarial deed of establishment, whereas a qualitative duty will exist from the moment of agreement. However, until the moment of registration of the notarial deed the qualitative duty will only have effect between parties.<sup>64</sup> The nature of the qualitative duty is therefore contractual.<sup>65</sup> A failure to comply with the duty will result in a breach of contract and contractual remedies should be used.<sup>66</sup>

Nevertheless, the qualitative duty fulfils the main criteria for a property right: it has effect against third parties upon registration and transfers to subsequent acquirers of the object on which it is established. Also in situations of insolvency the qualitative duty remains in force. If it has been registered before the holder of the

<sup>55</sup> Art. 3:10 BW; J.L.P. Cahen, *Overeenkomst en derden*, Deventer, Kluwer, 2004, p. 34-35.

<sup>56</sup> This *droit de suite* effect is not applicable in case of transfer under so-called general title (algemene titel). This would include the acquisition through an inheritance. See A. Pitlo *et al.*, *Goederenrecht*, Deventer, Gouda Quint, 2001, n. 382, p. 305.

<sup>57</sup> Art. 6:252(1) BW.

<sup>58</sup> J.L.P. Cahen, *supra* note 55, p. 34; C. Asser and A. Hartkamp, *supra* note 2727, n. 407, p. 427.

<sup>59</sup> J.L.P. Cahen, *supra* note 55, p. 33-34.

<sup>60</sup> C. Asser and A. Hartkamp, *supra* note 27, n. 407.

<sup>61</sup> *Ibidem*, n. 407; C.E. du Perron, *supra* note 18, p. 246 *et seq.*

<sup>62</sup> See note 52.

<sup>63</sup> Art. 6:252(2) BW; Van Oostrom-Streep recognises two different obligations, one between the parties with respect to the content of the duty and one between the parties with respect to the duty to register and thus give the agreement effect against third parties, see N. van Oostrom-Streep, *supra* note 54, p. 786 *et seq.*

<sup>64</sup> C. Asser and A. Hartkamp, *supra* note 27, n. 411, p. 430; J.L.P. Cahen, *supra* note 55, p. 39.

<sup>65</sup> C. Asser and A. Hartkamp, *supra* note 27, n. 412, p. 431.

<sup>66</sup> Art. 6:74 BW; J.L.P. Cahen, *supra* note 55, p. 35.

object became insolvent, the *Faillissementswet* or Bankruptcy Act stipulates that the duty will remain to exist. The object will then have to be sold burdened with the duty.<sup>67</sup>

In effect the Dutch legislator has created a relation which takes effect against third parties and remains in existence in case of insolvency. Although, it fulfils the main criteria for a property right, the relation is contractual in nature. The duty itself is personal and only takes effect against third parties upon registration. Furthermore, the question on the nature of this qualitative duty remains a point of academic debate, since the legislator has decided that the answer lies in the law of obligations.<sup>68</sup> However, from a systematic point of view there is a problem.

## 5. A Short Comparative Overview of Land Burdens

Before I deal with a possible solution for the problems arising in Dutch law, a short comparative overview will show that the Dutch approach takes a special position. In German law there are two special property rights which can be established to burden immovable property, the *Reallast* (real burden) and the *beschränkte persönliche Dienstbarkeit* (limited personal servitude).<sup>69</sup> The *Reallast* is a burden which usually creates a positive duty to payment of services or money.<sup>70</sup> The *Reallast* can be established between a party and the owner of certain immovable property but also between a party and a specific person.<sup>71</sup> In the latter case it is specifically prohibited to connect the burden to the ownership of the property on which it is established, since the parties will be bound in their personal capacity.

The *Reallast* creates a property right and not a personal right. The holder of the right can use the same remedies as the holder of a right of hypothec.<sup>72</sup> The relation to the payment of services or money against the burden is the same as the relation of the payment of instalments against the hypothec. The owner of the burdened property is not only liable with the immovable property but also with his general assets.

The application of the *Reallast* is limited because the paragraphs on the *Reallast* in the BGB only have a supplementary function. The result of this is that the different *Länder* can set different rules and requirements.<sup>73</sup> However, in practice the *Reallast* is mostly used in very specific circumstances. These include situations as

<sup>67</sup> Art. 35a FW.

<sup>68</sup> C.J. van Zeven and J.W. Du Pon, *Boek 6 – Algemeen gedeelte van het verbintenissenrecht*, Deventer, Kluwer, 1981, p. 942 *et seq.*; C.E. du Perron, *supra* note 18, p. 250.

<sup>69</sup> H.W. Heyman, *supra* note 1313, p. 25.

<sup>70</sup> Or wiederkehrende Leistungen, § 1105 BGB; M. Wolf, *Sachenrecht*, München, C.H. Beck'sche Verlagsbuchhandlung, 2001, Rn. 902, p. 379.

<sup>71</sup> Subjectiv-dingliche Reallast § 1110 BGB and Subjectiv-persönliche Reallast § 1111 BGB; *ibidem* Rn. 904, p. 379.

<sup>72</sup> § 1107 BGB; *ibidem*, Rn. 902, p. 379.

<sup>73</sup> EG BGB § 113-115; H.W. Heyman, *supra* note 13, p. 25.

security for a personal loan and arrangements in building practice like the providing of heat, water and electricity.<sup>74</sup>

The second special property right closely resembles the Dutch qualitative duty. The *beschränkte persönliche Dienstbarkeit* is based on a normal servitude (*Grunddienstbarkeit*) but is established between a party and a person in his personal capacity, *i.e.* not having regard whether this person is owner of a certain immovable property or not.<sup>75</sup> The result of this is that the right is strictly personal. In order to circumvent the possibility of extinction of the right it is possible to establish a *beschränkte persönliche Dienstbarkeit* on behalf of a legal person.<sup>76</sup> Furthermore the *beschränkte persönliche Dienstbarkeit* cannot be transferred unless it is established on another immovable property for the construction of *inter alia* electricity cables, gas, water or a sewer system.<sup>77</sup>

It has been stated that the *beschränkte persönliche Dienstbarkeit* is nothing more than a servitude without a dominant tenement. A good example of this statement is provided by § 1093 BGB which states:

‘A limited personal servitude (*beschränkte persönliche Dienstbarkeit*) can also include a right to use, to the exclusion of the owner, a building or part of a building as housing accommodation (...).’<sup>78</sup>

Swiss law offers a third option with the *Realobligation*. This is a burden that contains a positive duty which can be connected to a property right.<sup>79</sup> The nature of these specific burdens is very close to a property right. The *Realobligation* is valid against any person having a property right on the object on which the burden is established.<sup>80</sup> Furthermore, the *Realobligation* is treated as if it was a property right and can take position amongst other property rights.<sup>81</sup>

<sup>74</sup> W. Schön, ‘Zur Analogiefähigkeit des § 571 BGB,’ *Juristen Zeitung*, 2001, p. 119-127; M. Wolf, *supra* note 70, Rn. 903, p. 379; H.W. Heyman, *supra* note 13, p. 25.

<sup>75</sup> Or a subjective-persönliches recht, M. Wolf, *supra* note 70, Rn. 1010, p. 423.

<sup>76</sup> § 1092 II BGB.

<sup>77</sup> § 1092 III BGB states ‘(...)Steht einer juristischen Person oder einer rechtsfähigen Personengesellschaft eine beschränkte persönliche Dienstbarkeit zu, die dazu berechtigt, ein Grundstück für Anlagen zur Fortleitung von Elektrizität, Gas, Fernwärme, Wasser, Abwasser, Öl oder Rohstoffen einschließlich aller dazugehörigen Anlagen, die der Fortleitung unmittelbar dienen, für Telekommunikationsanlagen, für Anlagen zum Transport von Produkten zwischen Betriebsstätten eines oder mehrerer privater oder öffentlicher Unternehmen oder für Straßenbahn- oder Eisenbahnanlagen zu benutzen, so ist die Dienstbarkeit übertragbar.’

<sup>78</sup> § 1093, ‘Als beschränkte persönliche Dienstbarkeit kann auch das Recht bestellt werden, ein Gebäude oder einen Teil eines Gebäudes unter Ausschluss des Eigentümers als Wohnung zu benutzen (...).’ This specific usage of the *beschränkte persönliche Dienstbarkeit* resembles the Roman personal servitude of *habitatio*, D. 7.8.1 *et seq.*; M. Kaser, *Das römische Privatrecht*, 1. Abschnitt, München, C.H. Beck’sche Verlagsbuchhandlung, 1971, p. 454.

<sup>79</sup> H. Rey, *Die Grundlagen des Sachenrechts und das Eigentum*, Bern, Verlag Stämpfli & Cie AG, 1991, Rn. 240, p. 247.

<sup>80</sup> *Ibidem*, Rn. 243.

<sup>81</sup> The latter situation would include the possibility that a *Realobligation* would be of a higher rank than a property right, *ibidem*, Rn. 244-245.

Combinations of *Realobligationen* with servitudes are widely used in practice. This combination enables the establishment of both positive and negative duties on the property of another.<sup>82</sup> *Realobligationen* can come into existence by operation of the law, but also by agreement.<sup>83</sup> An example of the former is the duty of an owner to create and maintain an emergency route over his land for a neighbouring land.<sup>84</sup>

In as far as is necessary the *Realobligation* will have to be registered before it can take effect. It exists from the moment of temporary registration (*Vormerkung*) or final registration.<sup>85</sup> However, a *Realobligation* can only be created in situations which are recognised by law. In other words there is a *numerus clausus* of *Realobligationen*.<sup>86</sup> Within this system there is some freedom for parties since it allows personal rights to be temporarily registered (*vorgemerkt*) in the *Grundbuch* under article 959 ZGB. However, the list of personal rights capable for temporary registration is limited by law as well.<sup>87</sup>

French law takes a different approach. The *obligation réelle* exists but only when it is accessory to an existing property right.<sup>88</sup> Specifically in the case of servitudes, with regard to which the applicable rules confer upon the parties a relative freedom, it is possible to create certain obligations that are not part of the servitude but which are still given third party effect.<sup>89</sup> These agreements are specifically used to create a positive obligation, since, like in Dutch, German and Swiss law, servitudes can only contain negative burdens.<sup>90</sup> However, the *obligation réelle* will only work as part of the property right, and therefore transfer with the main property right itself, if it is accessory to the property right. In order to be treated as an accessory agreement, the obligation has to be complementary to the principal content of the property right.<sup>91</sup> In case of a servitude this would include a duty to maintain a road or a canal, but could also include a duty to build a wall or to provide electricity.<sup>92</sup> Only in these circumstances the *obligation réelle* will transfer with the property right.

<sup>82</sup> *Ibidem*, Rn. 250.

<sup>83</sup> I.e. it is also possible to have a *Realobligation* imposed by *Innominatkontrakt*, *ibidem*, Rn. 257.

<sup>84</sup> Art. 694 ZGB, *ibidem*, Rn. 251.

<sup>85</sup> Art. 972 I ZGB, *ibidem*, Rn. 257.

<sup>86</sup> *Ibidem*, Rn. 258.

<sup>87</sup> Art 959 ZGB states 'Persönliche Rechte können im Grundbuche vorgemerkt werden, wenn deren Vormerkung durch das Gesetz ausdrücklich vorgesehen ist, wie bei Vor- und Rückkauf, Kaufsrecht, Pacht und Miete,' *ibidem*, Rn. 260.

<sup>88</sup> H.W. Heyman, *supra* note 13, p. 24; V. Sagaert, *supra* note 17, n. 25, p. 63. For an overview of French and Belgian law see the contribution of Prof. dr. Vincent Sagaert in this book.

<sup>89</sup> V. Sagaert, *supra* note 17, n. 25, p. 63.

<sup>90</sup> The acceptance of a positive burden as an *obligation réelle* in Belgian law is more controversial than in French law. For Dutch law see art. 5:71 BW, for German law see § 1018 BGB; H.W. Heyman, *supra* note 13, p. 24; V. Sagaert, *supra* note 17, n. 20, p. 59.

<sup>91</sup> V. Sagaert, *supra* note 17, n. 17-18, p. 56-57; V. Sagaert, 'Les interferences entre le droit des biens et le droit des obligations: une analyse de l'évolution depuis le code civil,' in P. Wery (ed.), *Le droit des obligations contractuelles et le Bicentenaire du Code civil*, Brugge, die Keure, 2004, n. 24.

<sup>92</sup> V. Sagaert, *supra* note 17, n. 18, p. 57-58, specifically note 54.

The application of the *numerus clausus* of property rights in French law does not allow parties to create a new property right.<sup>93</sup> Only in case an agreement can be made accessory to a recognised property right can it have proprietary effect. In all other situations the right will be personal. In this respect the situation in French law is comparable to the situation in the Netherlands after the *Blaauboer/Berlips* decision: parties are forced to use a contract to manage their property. The use of chain clauses in French law should therefore not be underestimated.<sup>94</sup> Chain clauses are used for non-competition purposes in case of a sale of a business, and like in Dutch law, can include a stipulation for the benefit of the seller. The French courts are strict in the application of chain clauses and specifically the stipulations for the benefit of the seller. The result of this can be that the original seller loses his remedy against subsequent acquirers who do not uphold the chain clause.<sup>95</sup>

In English law, an agreement between parties, usually named a covenant, is dealt with both in law and in equity. At Common Law only those covenants which are part of a lease, easement, *profit à prendre*, or rentcharge will be recognised as property right.<sup>96</sup> Within these categories parties can agree on rights and duties, e.g. a lease could include duties to repair, maintain and insure.<sup>97</sup> These covenants will transfer when the lessor transfers or the lessee assigns the lease to another party.<sup>98</sup> Any property rights at Common law are also recognised by Equity, but more property rights exist in Equity.<sup>99</sup>

In Equity covenants can be created which fall outside the set of Common law property rights. These covenants can burden 'freehold' ownership, but only if they are negative in nature.<sup>100</sup> Other requirements are a dominant tenement and the in-

<sup>93</sup> Although there is a famous case from 1832 in which the Cour de Cassation held that the ownership of trees on a river bank could be separated from the ownership of the land based on customary law from Normandy. Based on this case it is often argued that the French system of property rights is not as close as it seems, since the court in this case has effectively recognised a new property right. See Cour de Cassation 13 February 1934, *Caquelard c. Lemoine* D.P 34, 1. 218, S. 34, 1. 205, on this case and its consequences for French law see also W.J. Zwolve, *Hoofdstukken uit de Geschiedenis van het Europese Privaatrecht*, Deventer, Kluwer, 2003, p. 153-154.

<sup>94</sup> V. Sagaert, *supra* note 91, n. 36.

<sup>95</sup> V. Sagaert, *supra* note 17, n. 32, p. 69. There is a general discussion in French and Belgian law on the negative nature of servitudes, specifically on the debate whether a servitude should also contain a positive duty. On this see V. Sagaert, *supra* note 17, n. 27 *et seq.*, p. 65 *et seq.*

<sup>96</sup> W. Swadling, 'Property: General Principles,' in P. Birks (ed.), *English Private Law*, Oxford, Oxford University Press, 2000, n. 4.156, p. 254.

<sup>97</sup> All sorts of arrangements to benefit the lessor's remainder can be imposed. F.H. Lawson and B. Rudden, *The Law of Property*, New York, Oxford University Press, 2002, p. 120-122.

<sup>98</sup> H.W. Heyman, *supra* note 13, p. 26; F.H. Lawson and B. Rudden, *supra* note 97, p. 119.

<sup>99</sup> W. Swadling, *supra* note 96, n. 4.156, p. 254.

<sup>100</sup> The original case of *Tulk v. Moxhay* [1848] 2 Ph 774, 41 ER 1143 allowed a wide variety of personal rights to be equitable property rights. Later restrictions were imposed by case law, see *ibidem*, n. 4.158-4.162, p. 254-256.

tention of the parties that the covenant would run with the land.<sup>101</sup> On the negative content of covenants in Equity Lord Templeman stated in *Rhone v. Stephens*:

‘Enforcement of a positive covenant lies in contract; a positive covenant compels an owner to exercise his rights. Enforcement of a negative covenant lies in property; a negative covenant deprives the owner of a right over property. As Lord Cottenham L.C. said in *Tulk v. Moxhay*, at p. 778: “if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.”’<sup>102</sup>

Because of the restriction to negative duties these covenants are known as restrictive covenants. In order to give notice the covenant is registered in the Land Registry.<sup>103</sup> The restrictive covenant fulfils many of the specific negative functions of a servitude. Positive covenants are rejected and parties are forced to impose positive duties on each other by contract.

Finally some words about Scots law. On 28 November 2004 Scotland has abandoned the feudal system of landholding.<sup>104</sup> Under the Title Conditions Act 2003 it is possible for parties to create a real burden which contains ‘an obligation to do something (...).’<sup>105</sup> These affirmative burdens have to be registered and can only be enforced against the owner of the property on which it is established.<sup>106</sup>

## 6. Towards a Unified System of Land Burdens?

In the new civil code, Dutch law adheres to the strict separation between the law of obligations and the law of property.<sup>107</sup> Consequently land burdens are divided among these two areas. In property law there are rights of servitude and *emphyteusis*. In the law of obligations there are chain clauses and qualitative duties. The latter can be considered as some intermediate form between a proprietary duty and a personal duty. The amount of freedom that parties have to establish their relation will depend on the duty in question. In case of property rights parties can create additional agreements which are an inherent part of the property right itself as long as there is a sufficient connection between these agreements and the right. In case of chain clauses party autonomy is allowed to the limit of the law.<sup>108</sup>

<sup>101</sup> *London County Council v. Allen* [1914] 3 KB 642, CA and Law of Property Act 1925, s 79(1). *Ibidem*, n. 4.161-4.162, p. 255-256.

<sup>102</sup> *Rhone v. Stephens* [1994] 2 AC, 310, HL per Lord Templeman; see also K.G.C. Reid, ‘Real Rights and Real Obligations,’ in S.E. Bartels and J.M. Milo (eds), *Contents of Real Rights*, Nijmegen, Wolf Legal Publishers, 2004, p. 31-32.

<sup>103</sup> F.H. Lawson and B. Rudden, *supra* note 97, p. 156.

<sup>104</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000, s. 1.

<sup>105</sup> Title Conditions (Scotland) Act 2003 s. 2(1); K.G.C. Reid, *supra* note 102, p. 39.

<sup>106</sup> Title Conditions (Scotland) Act 2003 s. 9, *ibidem*, p. 39.

<sup>107</sup> See also E.B. Rank-Berenschot, *supra* note 27, p. 334-335; in comment H.C.F. Schoordijk, ‘Recensie; Over de scheidslijn tussen goederen- en verbintenissenrecht,’ *Nederlands Juristen-Blad*, 37/22 October 1992, p. 1202-1206, p. 1202 *et seq.*

<sup>108</sup> Art. 3:40 BW.

Specifically the limitations with respect to land burdens impose difficulties. Three approaches exist to provide room for additional agreements. (1) Agreements can be fully part of the property right itself in as far as the law allows this, such inclusion will make the agreement inherent to the property right. (2) There can be agreements which are fully personal in nature and only work between parties and, (3) finally, the doctrine of qualitative obligations allows for separate agreements, but with a property effect. The latter category can be divided. First there could be qualitative obligations accessory to recognised property rights. Second there could be freedom to establish qualitative obligations as separate rights.

This last freedom is, with various criteria, recognised in German, Swiss, English and Scots law and has, although in a limited form, been introduced by the Dutch civil code. In essence Dutch property law follows the first approach in which agreements become a full and integrated part of property rights.<sup>109</sup> The recognition of a qualitative duty opens the door to a less dogmatic and a more pragmatic approach. Such an approach makes the legal system more flexible without effectively abandoning the separation between the law of obligations and the law of property. The separation loses its importance when the decision is made which legal relations have third party effect. Such a flexible system requires the elaboration of clear criteria to determine which relations have third party effect and which have not. The American solution reached in the Restatement Third of Property (Servitudes) 2000, introducing the concept of *servitude* as a general term for all land burdens could provide a solution.<sup>110</sup>

Such a solution could result in the law providing general criteria to decide in an agreement may have third party effect. These criteria could be the same as the current Dutch criteria for qualitative duties: a negative content and publication of an official document containing the agreement. Any such agreement would be known as a servitude and have third party effect, as well as survive in insolvency. Using the existing criteria for servitude or *emphyteusis* will not alter the possible rights and claims which can, until now, be created using these property rights. These property rights would merge into the new general type of servitude. The loss of focus on the dogmatic distinction between the law of obligations and the law of property would put a stop to the dogmatic difficulties surrounding land burdens in the Netherlands. Furthermore, in this approach positive burdens would remain without third party effect.

<sup>109</sup> C.J. van Zeben and J.W. Du Pon, *supra* note 15, p. 3, 257; C. Asser, F.H.J. Mijnsen and P. de Haan, *supra* note 44, n. 44, p. 35 *et seq.*; C. Asser and A. Hartkamp, *supra* note 27, n. 412, p. 431.

<sup>110</sup> See *inter alia* S.F. French, 'The Touch and Concern Doctrine and the Restatement (Third) of Servitudes: A Tribute to Lawrence E. Berger,' *Nebraska Law Review*, 77 1998, p. 653-666, p. 659 *et seq.*; S.F. French, 'Symposium issue: article: Toward a Modern Law of Servitudes: Reweaving the Ancient Strands,' *Southern California Law Review*, 55 1982, p. 1261-1319, p. 1264 *et seq.*; S.F. French, 'Gallivan Conference: Tradition and Innovation in the New Restatement of Servitudes. A Report from Midpoint,' *Connecticut Law Review*, 27 1994, p. 119-129, p. 124; S.F. French, 'Highlights of the New Restatement (Third) of Property: Servitudes,' *Real Property, Probate and Trust Journal*, 25 2000, p. 225.



However, I would like to argue for the inclusion of positive burdens as well. The Dutch legislator has stated as a principal argument that positive burdens with third party effect should be avoided since they would reinstate duties which, as did feudal duties, place an unacceptable burden on the right of ownership.<sup>111</sup> I agree with Heyman that this argument is not very convincing. Why would the law allow certain positive duties to be created within e.g. the right of *emphyteusis* and specifically also in case of chain clauses but not in general?<sup>112</sup> Heyman offers the possibilities of limitation in time, limitation to a specific purpose or the possibility of judicial intervention to solve any remaining objections. These solutions would allow for a re-examination of the duty after a certain period of time. When the burden would become unreasonable it could be lifted by a declaratory judgment.

Another often used argument is that positive duties impose an unwanted burden on the right of ownership. The right of ownership, as the most absolute right a person can have, includes the full enjoyment of the property. Restrictions to these powers should be as limited as possible. Furthermore, other parties might lose track and be unable to identify the burdens on a certain object. Potential buyers, but also holders of security rights such as hypothecs, would be uncertain which burdens exist and what the consequences are for their rights.<sup>113</sup> A solution for this problem could be offered by a sufficient registration system. Any interested party could inquire such a register and see which rights are established. The principle of precedence of older rights over new rights would continue to apply.<sup>114</sup>

Of course the consequence of this approach would be that the number of rights with third party effect would no longer be closed. However, there would still be criteria limiting the content, which could severely restrict the number of rights as well. Furthermore, several American authors have argued that an open system will lead to a standardisation of property rights creating a closed system in effect.<sup>115</sup> Also South African law shows that working with open criteria could offer a very workable solution. A test, known as the subtraction from *dominium* test, has been imposed to decide on those legal relations with regard to land that may be registered and therefore have effect against other parties.<sup>116</sup> Although there is criticism on the con-

<sup>111</sup> C.J. van Zeben and J.W. Du Pon, *supra* note 68, p. 936 and 944; C. Asser and A. Hartkamp, *supra* note 2727, n. 407, p. 427; H.W. Heyman, *supra* note 13, p. 23.

<sup>112</sup> H.W. Heyman, *supra* note 13, p. 23.

<sup>113</sup> H.J. Rijtma, *supra* note 53, p. 227 *et seq.*

<sup>114</sup> This rule is also known as *prior tempore, potior iure*.

<sup>115</sup> See T.W. Merrill and H.E. Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle,' *Yale Law Journal*, 110 2000, p. 1 *et seq.*; H. Hansmann and R. Kraakman, 'Property, Contract and Verification: The Numerus Clausus Problem and the Divisibility of Rights,' *Journal of Legal Studies*, 31/2 (June) 2002, p. 373-420. Furthermore, the introduction of the Restatement Third of Property (Servitudes) does not seem to have included new property rights as well, the core remains 'traditional,' see S.F. French, 'Gallivan Conference: Tradition and Innovation in the New Restatement of Servitudes,' *supra* note 110110, p. 123-124.

<sup>116</sup> M.J. de Waal, 'Identifying Real Rights in South African Law: the 'Subtraction from the Dominium' Test and its Application,' in S.E. Bartels and J.M. Milo (eds), *Contents of Real Rights*, Nijmegen, Wolf Legal Publishers, 2004, p. 85 *et seq.*

tent of the test, the workability of the system in general is not questioned.<sup>117</sup> This test requires intention of the parties to bind not only themselves, but also their successors in title and that the nature of their relation should result in a 'subtraction from the *dominium*' of the land against which it is registered.<sup>118</sup> New relations that fulfil the criteria are recognised and registered.

Finally, not only South African law, but also English law shows that it possible to have a fully functional system without the rigidity of a *numerus clausus*. Also in English law there are several restrictions to the number of property rights.<sup>119</sup> The Law of Property Act 1925, part of the major reform of property law in the 1920s, limits the number of property rights that can exist at common law and pushes all other property rights into equity.<sup>120</sup> The question therefore remains whether the list of property rights in equity is closed as well. Following the House of Lords in their *National Provincial Bank v. Ainsworth* judgment the courts could allow new property rights if such a right is definable, identifiable by third parties, capable in its nature of assumption by third parties, and has some degree of permanence or stability.<sup>121</sup> However, other cases suggest a closed system.<sup>122</sup>

In short, there are legal systems which recognise separate positive obligations with a proprietary character. These include Germany, Switzerland and Scotland. Other legal systems, the Netherlands, France, Belgium and England, only recognise separate negative duties with a property character. In legal systems where only negative duties can have some proprietary effect, parties can only use contract law to create positive duties. In these legal systems the use of chain clauses to give a contract a perpetual character is commonly used. The major disadvantage of using contract law remains the impossibility to restore the chain once it has been broken.

Would it not be time to leave the dogmatic foundations of our system and move towards a pragmatic solution? Dutch law, with the introduction of qualitative duties has created possibilities. However, the result, a system in which the strict dogmatic separation between contract and property is maintained and at the same time, in effect, deviated from, creates more problems than it solves. The Dutch solution of the qualitative duty, although qualified as a personal duty by the legislator, resembles so many property characteristics that in this respect the distinction between property rights and personal rights becomes obsolete. One thing is certain: pragmatic systems in which relations that fulfil established criteria have third party effect upon registration provide more legal certainty than systems serving piece-

<sup>117</sup> C.G. van der Merwe and M.J. de Waal, *The law of things and servitudes*, Durban, Butterworths, 1993, p. 41.

<sup>118</sup> *Ibidem*, p. 41, and the cases mentioned there.

<sup>119</sup> See W. Swadling, *supra* note 96, p. 206 *et seq.*, who even states there is a *numerus clausus* in English law.

<sup>120</sup> *Ibidem*, p. 229 *et seq.*

<sup>121</sup> However, other cases suggest otherwise. *Ibidem*, p. 206-208, *National Provincial Bank v. Ainsworth* [1965] AC 1175, 1247-8, HL per Lord Wilberforce.

<sup>122</sup> *Hill v. Tupper* [1863] 2 H & C 121, 159 ER 51, *King v. David Allen (Billposting) Ltd* [1916] 2 AC 54, HL, *ibidem*, p. 206-207; B. Rudden, 'Economic Theory v. Property Law: The Numerus Clausus Problem,' in J. Eekelaar and J. Bell (eds), *Oxford Essays on Jurisprudence*, Oxford, Clarendon Press, 1987, p. 245 *et seq.*

meal solutions as the qualitative duty.<sup>123</sup> A pragmatic system will avoid qualification problems and will enable third parties to inquire which relations with third party effect are established on a certain object regardless of status as a personal right or a property right.

<sup>123</sup> Unfortunately the actual achievement of such a pragmatic system will require more research and much more space than was allowed for this contribution.



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