THE LAW COMMISSION

TRANSFER OF LAND
REPORT ON RESTRICTIVE COVENANTS

Laid before Parliament by the Lord High Chancellor pursuant to section 3 (2) of the Law Commissions Act 1965

LONDON
HER MAJESTY'S STATIONERY OFFICE
THREE SHILLINGS NET
LAW COM. No. 11

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

The Honourable Mr. Justice Scarman, O.B.E., *Chairman.*
Mr. L. C. B. Gower, M.B.E.
Mr. Neil Lawson, Q.C.
Mr. N. S. Marsh.
Mr. Andrew Martin, Q.C.

Mr. Arthur Stapleton Cotton is a special consultant to the Commission. The Secretary of the Commission is Mr. H. Boggis-Rolfe, C.B.E., and its offices are at Lacon House, Theobald's Road, London, W.C.1.

This Report is the eleventh Law Commission publication to be presented to, or laid before, Parliament by the Lord Chancellor under section 3 of the Law Commissions Act. For ease of reference it has been decided that such publications should bear an identifying number. This Report is, therefore, numbered LAW COM. NO. 11 and future publications will be numbered accordingly. The Commission's previous publications, in the order in which they appeared, are:—

	Date of publication
1. First Programme of the Law Commission	28th October, 1965
2. Law Commission's First Programme on Consolidation and Statute Law Revision	25th January, 1966
3. Proposals to Abolish Certain Ancient Criminal Offences	22nd June, 1966
4. First Annual Report, 1965-66	14th July, 1966
5. Landlord and Tenant: Interim Report on Distress for Rent	6th October, 1966
6. Reform of the Grounds of Divorce: The Field of Choice	9th November, 1966
7. Proposals for Reform of the Law Relating to Maintenance and Champerty	22nd November, 1966
8. Report on the Powers of Appeal Courts to Sit in Private and The Restrictions upon Publicity in Domestic Proceedings	23rd November, 1966
9. Transfer of Land: Interim Report on Root of Title to Freehold Land	14th February, 1967
10. Imputed Criminal Intent (Director of Public Prosecutions v. Smith)	28th February, 1967

CONTENTS

LAW COMMISSION

Item IX of First Programme

TRANSFER OF LAND
REPORT ON RESTRICTIVE COVENANTS

To the Right Honourable Lord Gardiner,
the Lord High Chancellor of Great Britain

A. BACKGROUND

At an early stage of our study of the law relating to the transfer of land we decided that restrictive covenants must go high on the list of subjects for consideration with a view to reform. Information received from well-qualified sources had convinced us that in numerous cases the conveyancing process was being complicated, and the position of the parties left uncertain, by the presence on the title of restrictive covenants of which, under the technicalities of the existing law, the enforceability was doubtful. We further had reason to think that the procedure for obtaining, in appropriate cases, the modification or discharge of such as were enforceable was unduly restricted.

2. Against this background we studied the Report of the Committee which had been appointed in 1963, under the chairmanship of Lord Wilberforce, to consider—

> " whether and to what extent it is desirable to amend the law relating to the enforcement and assignability of positive covenants affecting land ".

Although that Committee (hereafter referred to as " the Wilberforce Committee ") had been concerned with the law relating to positive covenants, it was suggested in paragraph 17 of its Report (1965 Cmnd. 2719) that certain of its principal recommendations should be applied also to restrictive covenants: and the Report covered a number of other matters in respect of which it would be convenient that the law relating to positive and restrictive covenants should be assimilated. In considering the possibilities of assimilation we read with interest the Memorandum presented to the Wilberforce Committee by the Council of the Law Society which, after stating the problems relating to positive and restrictive covenants respectively, suggested that the solution for the future lay in abolishing the distinction between the two and making them subject to a common set of rules. We were also shown a Report to the Bar Council by the Chancery Bar Association, which suggested that the time was ripe for a searching inquiry into the whole position of the imposition, enforcement, modification and discharge of restrictive covenants and drew attention to the recommendations of the Wilberforce Committee as showing the way towards reform of the whole of the law relating to covenants.

3. On 25th February 1966 we were told that your Lordship was seeking to introduce legislation to implement the Wilberforce Report and that it would be welcomed if, in their examination of the law relating to land transfer, the Law Commission could give special priority to those aspects of the law on negative covenants which ought to be dealt with at the same time, if anomalies were to be avoided. We were subsequently told that the programme for this legislation would require the Law Commission's proposals to be formulated in outline by the autumn of that year.

4. To enable us to comply with this request within the time allotted to us we decided that the best course would be to form a consultative group from persons with special knowledge of, and interest in, the law relating to restrictive covenants who could be asked to give their views on proposals which we would put forward after preliminary study. We realised that it might also be necessary to consult other persons and organisations on certain special aspects of the subject. After discussions with the Bar Council, the Law Society, the Society of Public Teachers of Law and the Government departments concerned, the consultative group was formed of the following persons, in addition to our own Item IX team:—

Mr. G. H. Newsom, Q.C. Mr. V. G. H. Hallett	of the Chancery Bar
Mr. E. G. Nugee	Bar Council Law Reform Committee
Mr. J. R. Bonham Mr. L. D. Bonsall Mr. R. A. Donell Mr. C. M. R. Peecock Mr. C. G. Prestige	Law Society's Working Party on Conveyancing
Professor F. R. Crane Professor H. W. R. Wade	Society of Public Teachers of Law
Mr. E. A. K. Ridley, C.B.	Treasury Solicitor's Office
Mr. T. I. Casswell, C.B.E.	H.M. Land Registry
Mr. K. M. Newman	Lord Chancellor's Office

5. On particular problems we have consulted the President and members of the Lands Tribunal, the Ministry of Housing and Local Government and a number of solicitors with special experience of acting for estate developers.

6. The conclusions at which we have arrived as a result of these consultations are stated in the form of Propositions which were sent to your Lordship in August 1966. They are set out, with explanatory notes and commentary, later in this Report. We stress that these Propositions represent the views of the Law Commission, reached after discussion with the members of the consultative group, to whom we are extremely grateful for the amount of time which they have been willing to devote to this study and for the helpful and expert advice which they have given us.

B. THE PRESENT LAW

History

7. In the context of this Report the term " restrictive covenant " describes an agreement made between neighbouring landowners which enables one of them to impose a specific restriction on the use of the other's land and is intended to remain in force between subsequent owners of the relevant land after the parties to the agreement have ceased to own their respective interests in it. For example, a person who owns five acres of land may sell three of those acres to a builder subject to a covenant that he will not permit the land to be used otherwise than for residential purposes and that no more than a specified number of dwellinghouses will be built on it. The vendor may accept a similar restriction on the use of the land which he retains.

8. Such covenants can be framed, by the use of suitable words, so as to be enforceable under the law of contract between the original parties even after they have parted with their interests in the land. Since he might be sued on the covenant the original purchaser would probably take from his purchaser a covenant to observe the original covenant and to indemnify him against breach of it: and the second purchaser would do the same when he came to sell. Thus a chain of indemnity covenants can be created which will, at any rate, discourage breaches of the original covenant by the owner who is in control of the land for the time being.

9. As a means of bringing covenants to the notice of successive owners, chains of indemnity have served a useful purpose, especially before covenants became registrable. As a method of enforcing the original covenant, however, they are cumbersome, and moreover unsatisfactory, since the chain is always likely to be broken. A system of law which acknowledges the need for enduring covenants of this nature must inevitably devise a means whereby they can be enforced directly between the parties' successors in title. And once this has been achieved there seems to be little reason why the contracting parties should continue to be concerned with a covenant affecting land in which they no longer possess any relevant interest.

10. The common law of England has recognized from early times that the benefit of a covenant can " run with the land " of the person who imposes it provided that it " touches and concerns the land " (by which is meant that it affects the enjoyment of the land in question or its value) and provided that the benefit has become annexed to that land. These requirements are satisfied, for example, if the creating instrument expressly imposes for the benefit of the land coloured pink on a plan a restriction that a neighbouring piece of land, coloured green, shall not be used for commercial or industrial purposes. Annexation may also be achieved where the benefit, having originally been taken less specifically but nevertheless in a manner which makes the benefited land ascertainable, is assigned expressly to a purchaser at the time of the next conveyance and is similarly passed on to subsequent purchasers. The benefit of a covenant which has thus been properly annexed to land is enforceable by the current owner, provided that there is someone against whom he can enforce it.

11. As regards the burden of a covenant, the common law rule was that the covenant could not be enforced against anyone unless there was privity of contract or privity of estate between him and the person seeking to enforce the covenant. This meant that only the original covenantor was liable unless there was a relationship of landlord and tenant. A landlord, whether the original lessor or his successors, could enforce covenants in the lease against the tenant, whether the original tenant or his successors, but the burden of covenants could not be made to run with freehold land. Covenants affecting freehold land were, therefore, enforceable only against the original covenantor until it was established, as a result of the decision in *Tulk* v. *Moxhay* (1848) 2 Ph. 774, that the courts of equity would enable a restrictive or negative covenant to be enforced against a person into whose hands the restricted land had passed, unless he had purchased the land for value without notice of the covenant. The basis of this decision seems to have been that equity, taking an objective view, could properly use the equitable remedy of injunction to compel a subsequent owner not to alter the condition of land which he had taken with notice of a restriction. On the other hand, equity will not compel a person who has not contracted to do so to spend money or carry out work. The burden of a positive covenant (e.g. to maintain a fence) cannot at present be made to run with a freehold interest in land: it can be given a certain limited endurance by the devices mentioned in paragraph 8 of the Wilberforce Committee's Report, for example by the grant of a lease or the creation of a chain of indemnity covenants of the kind described in paragraph 8 above.

12. Although the original basis of the *Tulk* v. *Moxhay* rule was that anyone who purchased with notice of a restrictive covenant would be restrained from breaking it, later decisions have established that this applies only where the covenant is imposed for the benefit of other specific land so that an equitable obligation is imposed on one piece of land for the benefit of another. Restrictive covenants, therefore, have become closely analogous to easements and profits-à-prendre, being obligations imposed on a servient tenement for the benefit of a dominant tenement.

13. In the course of the nineteenth century the courts evolved another doctrine which enables the purchasers of plots in a scheme of development to enforce against each other restrictions imposed for their mutual benefit by the common vendor from whom they have each bought their plots. This is known as the rule in *Elliston* v. *Reacher* [1908] 2 Ch. 374, for it was in that case that the requirements of such a scheme of development, or " building scheme ", were finally stated.

14. By the beginning of this century the courts were thus able to uphold the validity and enforce the observance of restrictive covenants arising both from private contracts between individuals and from large schemes of estate development. Nor did they show any reluctance to do so ; for, until the comparatively recent advent of planning control exercisable in the public interest by the local authority, this was the only method of controlling undesirable development and preserving the character of a neighbourhood in the interests of its inhabitants.

The place of Restrictive Covenants in the modern law

15. The Property Legislation of 1925 introduced two important provisions into the law relating to restrictive covenants. First, they were included in the category of land charges registrable under section 10 of the Land Charges Act 1925 in the case of unregistered land, and were made subject to protection by notice on the register of title in the case of registered land. As regards covenants made after 31st December 1925 the equitable doctrine of notice no longer applies. Registration under the Land Charges Act, or, in the case of registered land, noting on the register of title, operates as statutory notice to all persons dealing with the burdened land: and failure by the person entitled to the benefit to register them or have them noted, as the case may be, makes them void against a purchaser. Secondly, section 84 of the Law of Property Act 1925 made two new forms of proceeding available to a person interested in freehold land which may be affected by restrictive covenants. Under subsection (1) he may ask the Authority (now replaced by the Lands Tribunal) to discharge or modify a covenant on the grounds, broadly speaking, that with the passage of time it has become obsolete, or useless to those whom it was intended to benefit. Under subsection (2), if he is in doubt whether his land is adversely affected by a restriction he may ask the High Court to declare whether it is so affected and whether an apparent restriction is enforceable and if so by whom.

16. The fact that restrictive covenants are registrable has enabled us to obtain some information as to the amount of use which is now made of them and has helped us to assess the importance of the subject which we have set out to examine: for it is clear that the role of restrictive covenants has, to some extent, been taken over by the planning control which Parliament has entrusted to local authorities. It is, therefore, instructive to note that, despite this, the number of registrations has been increasing in recent years and that in the period of 10 years to the end of 1965 more than 600,000 new sets of restrictive covenants were entered in the Land Charges Registry alone. In addition to these, substantial numbers of new sets were noted against registered land.

17. These new registrations include many arising from small transactions in which, for example, a house-owner sells part of his garden for the building of one or two houses: but the majority are imposed in the laying out of new building estates for residential or industrial use. It is the invariable practice of estate developers to impose by means of restrictive covenants quite elaborate restrictions designed to give the estate a particular character which will attract purchasers and maintain the value of their unsold plots. The result is to create what has been judicially described as a kind of " local law " for each estate. Many development companies use their own standard forms of covenant, which may vary in content according to the locality of the estate.

18. In principle we can seen no objection to the creation of " local law " in that way, nor have we found evidence that the practice is regarded either as oppressive to the purchasers of the plots (although particular restrictions can be irksome) or as inconvenient to the planning authorities. From the individual's point of view control by private covenant has obvious advantages

over planning control, in that it can cover matters of important detail with which a planning authority would not be concerned and the procedure of enforcement is available to a person who is entitled to the benefit of the covenant and is aggrieved by a breach, instead of depending upon the planning authority's decision to act.

19. We conclude that, notwithstanding the broad control now exercised by planning authorities in matters such as density of building and use of land, privately imposed restrictions will continue to have a useful part to play, complementary to that of planning controls. We therefore turn to consideration of the deficiencies in the existing law.

Defects in the law

20. As we have indicated in the first paragraph of this Report the principal defects in the present law to which our attention has been drawn are, first, that although a covenant may have been referred to in every conveyance of the burdened land since it was imposed there may be real doubt as to whether it can be enforced: and, secondly, that the procedure for discharge or modification of outdated covenants is, at present, inadequate.

21. To be enforceable the benefit of a covenant must have been annexed to ascertainable land which is " touched and concerned " by it. No difficulty arises where it is annexed at the outset to a specific piece of land of reasonable size: but in many cases the protected land is only loosely described (e.g. the land which the vendor retains in a certain parish) and evidence is admissible to indicate the particular land which the parties intended to be protected. This creates uncertainty even if, as was generally thought to be the case, evidence is limited to supplementing the intention shown in the deed. In *Newton Abbot Co-operative Society Ltd.* v. *Williamson and Treadgold Ltd.* [1952] Ch. 286 it was held that intention to benefit land can be deduced from the attendant circumstances in which the deed was executed, although the deed contains nothing to show that any particular land is to be benefited.

22. That decision, which has since been referred to with approval in *Marten* v. *Flight Refuelling Ltd.* [1962] Ch. 115 at p. 133, considerably increases the difficulty of ascertaining whether a covenant can be enforced, particularly where the plaintiff's claim is based upon an assignment of the benefit. Indeed the rule whereby the benefit of a covenant, not sufficiently annexed to land at the time of its creation, can run with a particular piece of land by a series of assignments is regarded by some critics as an unnecessary complication. It would have no place in a system which aimed at certainty in the creation of obligations.

23. Nor has certainty been achieved in respect of building schemes, in spite of the four " conditions " laid down in *Elliston* v. *Reacher* (supra) for their validity. In *Baxter* v. *Four Oaks Properties Ltd.* [1965] Ch. 816, for example, it was decided that the second of those conditions—that before selling the land to which the plaintiff and defendant are respectively entitled the common vendor laid out his estate for sale in lots—need not strictly be complied with provided the Court is satisfied that each purchaser knew he was

buying his land subject to a mutually enforceable "common law". To this extent, therefore, the objective character of the test has been replaced by the understanding of the parties and certainty has been lost.

24. From these and other considerations which have been put to us, we think that there is an urgent need for the formulation of a clear code of law governing the creation and enforcement of covenants.

25. It is, in our opinion, an essential requirement of such a code that there should be equal clarity as to the circumstances in which a covenant, validly created, can be removed when it has ceased to serve a useful purpose. The provisions of section 84 of the Law of Property Act 1925, though apparently designed for that purpose, have proved to be of very limited value, for the grounds on which modification or discharge can be ordered are extremely narrow: and any tendency to adopt a liberal interpretation of them has been discouraged by the Courts.

26. It has been suggested to us that the problem of restrictive covenants which have outlasted their usefulness could best be dealt with by an entirely different approach. If registration were effective initially for a limited period of, say, 25 years, so that the registration then lapsed unless it were renewed, there would be comparatively few cases in which it would be necessary for the covenantor's successors in title to apply to the Lands Tribunal for modification or discharge. In theory we see considerable merit in this proposal, but we do not regard it as practicable. In the majority of cases the need to re-register would be overlooked by the person entitled to the benefit of the covenant and the result would be the lapse of many reasonable and useful covenants. Moreover, this approach would not affect the large number of restrictive covenants created before 1926 which are still not subject to any form of registration unless their existence is disclosed when the land comes on to the register of title at the Land Registry. In our opinion the proper course is to enlarge the powers of the Lands Tribunal, in relation both to existing restrictive covenants and to restrictions imposed in accordance with our Propositions for the future, so as to enable it to order modification or discharge where it is appropriate in the circumstances. In Proposition 9, below, we suggest the lines on which this should be done.

C. OUTLINE AND SCOPE OF THE PROPOSITIONS

27. Briefly stated, these Propositions recommend the creation of a new interest in land called a Land Obligation, which will be available to regulate matters now dealt with by covenants as to user. Land Obligations will be capable of creation in respect of freehold or leasehold interests in land, but will not apply to rights between lessor and lessee in respect of the demised land. They will be imposed on specified land for the benefit of other specified land so that the burden and benefit will run automatically with the land until released, modified, discharged, or, for example, in the case of an obligation affecting a leasehold interest, brought to an end by effluxion of time: and they will be enforceable only by and against the persons currently concerned with the land as owners of interests in it or occupiers of it. They will thus in nature and attributes be more akin to easements than to covenants.

28. Insofar as these Propositions require that land obligations shall be imposed only for the benefit of other land, they will not be wholly applicable to those special classes of covenants affecting the user of land which may be enforced by certain public bodies as if the benefit were annexed to land belonging to those bodies, notwithstanding that they own no land which is capable of being benefited. These covenants include—

(i) those arising by use of special statutory provisions such as the National Trust Act 1937 section 8, the Green Belt (London and Home Counties) Act 1938 section 3, the Forestry Act 1947 section 1, the National Parks and Access to the Countryside Act 1949 section 16, and the Water Act 1945 section 15:

(ii) covenants entered into with local authorities under the Housing Act 1957, the Town and Country Planning Act 1962 section 37, or under Local or Private Acts incorporating clause 17 of the 1963 Edition of Model Clauses published by H.M. Stationery Office and variants thereof, (*see* Wilberforce Report footnote to page 7).

29. It seems to us desirable that, so far as possible, such covenants should be assimilated to land obligations and that any legislation implementing our proposals should so provide. Those referred to in head (i) above are registrable centrally as Class D Land Charges and, subject to consultation with those bodies who are concerned with them in practice, it seems possible that they could be brought into the category of land obligations, with the exclusion of any provisions which are inapplicable. For example, section 84 of the Law of Property Act 1925 (which contains provisions governing the modification and discharge of restrictive covenants) is at present excluded in relation to forestry dedication covenants, under the Forestry Act 1947, and to restrictive agreements made under the Green Belt (London and Home Counties) Act 1938; and these exclusions would no doubt be continued. There would be more difficulty in fitting in to these Propositions the agreements referred to in head (ii) above, which mostly relate to matters of local administration and are registered at present against the land in the registers of local land charges.

D. INTRODUCTION TO THE PROPOSITIONS

30. In accordance with the scope of the study which the Law Commission was asked to undertake the Propositions set out below have been framed in respect of, and are in terms limited to, obligations of a restrictive character. The substance of our proposals is applicable in principle, however, to positive as well as to restrictive obligations, subject to any necessary modifications, and we consider that a common code could and should be devised from the Wilberforce recommendations and these Propositions. At present the two sets of proposals differ on one point of major importance in relation to registration of obligations affecting unregistered land, but we refer to this more fully in the notes to Proposition 7 and explain that we expect this difference to be resolved.

31. The possibility of such a code has, to some extent, influenced the choice of the name " land obligations ", for this is a term apt to describe both positive and negative stipulations. It is preferred also because it avoids both

the contractual connotation of the word "covenant" and the latinity and archaism involved in phrases such as "in rem", "real" and similar expressions.

32. Creation of a new interest in land raises the question whether it should be classified as legal or equitable. The Law Society's Memorandum referred to in paragraph 2 above suggested unequivocally the creation of a new legal interest, with a consequential amendment to section 1 of the Law of Property Act 1925; and we understand the Wilberforce Committee to have adopted that suggestion when it said in paragraph 18 of its Report that "The covenants would constitute legal interests passing with the land."

33. We have not included a similar recommendation in our Propositions because, once it has been decided that an interest in land shall be registrable and void against a purchaser for value if not registered, the importance of the classification is much reduced. Land obligations created in accordance with these Propositions could take effect either as legal or as equitable interests in land and we consider that this point can best be determined when a decision is taken on the recommendations of the Wilberforce Committee.

34. These Propositions are intended to apply only to obligations entered into after a day to be appointed for the purposes of the new legislation. It is intended that, after that day, the creation of new restrictions (other than those of the kind referred to in paragraph 28 above) will take effect as follows—

(i) those restrictions which have the attributes of, and are created as, land obligations will run with the land benefited and burdened in accordance with these Propositions:

(ii) restrictions which are not created as valid land obligations in accordance with Propositions 1 and 2 will not run with the land but may take effect as personal covenants under the law of contract.

35. We have considered whether it would be practicable to convert existing valid restrictive covenants into new land obligations. In principle we think that this might be possible; but we are conscious that there would be practical problems and we doubt whether the advantages would justify the difficulties which can be foreseen. We therefore recommend that "pre-appointed day" restrictive covenants should be left to take effect in accordance with the existing law.

E. PROPOSITIONS AND COMMENTARY

Proposition 1—Nature of Restrictive Land Obligations

Restrictive land obligations will be obligations—

(a) of a negative character;

(b) relating to the use of land on which they are imposed;

(c) of a character intended to benefit and capable of benefiting other land in that they impose a restriction upon the use of the land which increases or maintains the value or preserves the amenities or conduces to the more convenient and beneficial user of the other land.

NOTE

Provided that the obligation affects the value of the land it will be valid under this Proposition as a land obligation notwithstanding that it may also benefit the landowner in his profession or business.

Proposition 2—Creation of Land Obligations

(a) A valid land obligation will be created only by the use in the creating instrument of a formula which will—

(i) specify, by reference to a plan or by other adequate description, both the land to be benefited and the land to be burdened;

(ii) state that the obligation is imposed as a land obligation;

(iii) where appropriate—i.e. where it is desired to create what is now called a "building scheme" or a similar scheme under which the benefit and burden of a common set of land obligations will affect all parts of an estate and be mutually enforceable by and against owners of the plots irrespective of the dates of acquisition—state that the transaction forms part of an "Estate Obligation Scheme".

(b) The specific stipulations and restrictions comprised in the obligations will be set out in the creating instrument, if the parties choose to draw up their own list, or incorporated into it by reference to the prescribed sets of standard stipulations and restrictions (see Proposition 3) if any of the standard sets are appropriate.

(c) Notwithstanding the use of the proper formula of creation a restrictive obligation will take effect as a land obligation only if it satisfies the requirements of Proposition 1. If one or more of the restrictions fails to satisfy those requirements this will not necessarily affect the validity of the other restrictions in the same list.

NOTES

1. It is not intended that any specific form of words should be made obligatory for the creation of land obligations provided that the requirements of paragraph (a) are satisfied. It is thought desirable, however, that the Act should contain a specimen form which, in non-scheme cases, might be on the following lines—

   "For the benefit of the land [hatched] on the plan annexed hereto [for the benefit of the vendor's Dale Estate] the land hereby transferred shall be subject to the land obligations set out in the schedule hereto [the land obligations set out in Part I of the Land Obligations Order S.I. 19 No.]".

2. The expression Estate Obligation Scheme is intended to achieve the objects now obtained by "building schemes" and similar schemes of development which satisfy the requirements laid down in *Elliston* v. *Reacher* [1908] 2 Ch. 374, i.e. that the obligations are enforceable by the plot-owners amongst themselves. Use of this expression will avoid the doubts which have arisen in many cases as to whether such a scheme was contemplated at the outset. The consequences as regards modification, release, etc. are referred to in Proposition 5 (c) below.

3. A land obligation will create an interest in land analogous to an easement and, like a legal easement, it will give a present interest in the land, provided that it binds the land from its inception. In that event it will not be obnoxious to the rule against perpetuities and will be enforceable at any time.

Proposition 3—Standard Sets of Stipulations and Restrictions

Standard sets of stipulations and restrictions will be available for incorporation into creating instruments either in whole or in part and subject to such modifications as the parties may agree.

A number of sets will be available for use according to the type of property involved in the transaction (e.g. houses, flats, buildings other than dwellings, etc.). So far as dwellings are concerned there will be at least three sets, suitable respectively for—

A—Sales of dwellings, or of land for the election of dwellings, otherwise than under schemes for the general development of an estate.

B—Sales of dwellings, or of land for the erection of dwellings, under a general development scheme.

C—Sales of flats contained in a block (which will be similar to those contained in paragraphs 5 and 6 of Appendix C to the Wilberforce Report subject to any further thought which may be needed, in the light of *Phipps* v. *Pears* [1965] 1 Q.B. 76, to ensure that an obligation to give shelter is validly included).

Each set will contain both positive and negative obligations.

NOTES

1. In order to give flexibility to the contents of the standard sets it is proposed that they should be contained in a statutory instrument which can be amended as occasion requires. To facilitate ascertainment of the terms of the obligations which were incorporated into any instrument the relevant set (so far as adopted) must be attached to the creating instrument and, in the case of registered land, subsequently bound up in the Land Certificate or Charge Certificate.
2. The contents of the standard sets must be kept under review. If the Conveyancing Rule Committee proposed in the Report of the Non-Contentious Business Committee of the Law Society dated June 1965 were set up, it would be an appropriate body to consider and advise on these sets.

Proposition 4—Land to be Benefited and Burdened

(a) The benefit of a land obligation may, to the extent specified in the instrument, be annexed to land not at the time of its imposition in the ownership of a party to the creating instrument, provided that the requirements of Propositions 1 and 2 are satisfied (section 56 of the Law of Property Act 1925), as, for example, when a vendor wishes to impose burdens in a subsequent sale for the benefit of land which he has previously sold.

(b) The benefit will be annexed to each and every part of the benefited land, unless the contrary is expressed in the creating instrument, and will run with it until released, discharged, or, on a subsequent transfer, excluded by the person for the time being entitled to the benefit, in respect of the whole or any given part of the land.

(c) The obligation will be enforceable by the owners of interests in, and occupiers for the time being of, the land to which the benefit is

attached and by no-one else. On the subsequent sale of part of the land the benefit will pass unless and except in so far as the contrary is expressly provided in the instrument of transfer.

(d) The burden of a land obligation, until released or discharged, will bind and run with the burdened land and each part of it. It will, therefore, be enforceable by injunction against anyone who seeks to infringe it but not, for example, against persons who originally incurred, or subsequently became affected by, the obligation once they have parted with all their interests in the burdened land.

NOTES

1. Being annexed to the land the obligation must, it is thought, when registered be enforceable against any occupier, whether or not he knows of its existence. Propositions 7 and 8 are designed, *inter alia*, to improve his means of knowledge. The rights against his landlord of a tenant who has had to comply with a land obligation, at inconvenience or expense to himself, are being considered in the current study on codification of landlord and tenant law.
2. Equally it seems that the benefit must be enforceable by the owner of any interest and by the occupier, who may be the person most affected. Admittedly this raises, though less acutely in respect of restrictive than of positive obligations, the problem of the short-term occupier who takes proceedings without the support of the owners of superior interests. The Wilberforce Committee's Report (paragraphs 18 and 29) suggested that the Court or Tribunal should have a general power to refuse relief if the claim seemed unreasonable by reason, e.g. of the nature of the plaintiff's interest. The solution must be on those lines.
3. Generally it seems desirable that rules of procedure should be devised to prevent those burdened with land obligations being exposed to a succession of actions by different persons entitled to the benefit of an obligation, and to prevent interested parties being prejudiced by the settlement of proceedings of which they are unaware. This point is related to that made by the Wilberforce Committee in paragraph 18 of its Report, where, for the purposes of enforcing the obligations, it is suggested that a representative body or individual should be empowered to act for all the owners and to obtain contributions towards costs.

Proposition 5—Modification, Release and Discharge

(a) The owner for the time being of an interest in the benefited land may, to the extent of his interest, modify the terms of a land obligation or release the burdened land or any part of it from the obligation. Thereafter the obligation will be permanently varied or extinguished to that extent.

(b) A Court or Tribunal in the exercise of any relevant jurisdiction may also modify or discharge an obligation, with the same effect.

(c) Where the obligations are stated to be imposed for the purpose of an "Estate Obligation Scheme", the following provisions will apply in the absence of express agreement to the contrary in the Scheme—

(i) Subject to (iii) below, the estate developer need not impose identical obligations on the sales of all plots (for example variations may be needed because some plots may be intended for shops rather than dwellinghouses, and minor variations may be appropriate as between one house plot and another). Moreover,

again subject to (iii), so long as the estate developer retains any land subject to the Scheme, he may release or reduce the burden of obligations already imposed on the sale of any plot.

(ii) Subject to (iii) below, the owner of land purchased under the Scheme may to the extent of his interest, modify, vary or release the burden imposed on other land.

(iii) Any variation, modification or release which will substantially affect the character of the estate can be effected only with the consent of all owners and of the estate developer, so long as he retains an interest in land subject to the Scheme.

(d) Land obligations may be extinguished by the exercise of powers of compulsory purchase on payment of compensation, as is the case with restrictive covenants under the existing law.

NOTE

As to the jurisdiction of the Court or Tribunal, see Propositions 9 and 10, below, which deal with the conferment of such jurisdiction and the conditions for its exercise.

Proposition 6—Transfer of Benefit and Burden

(a) A person who acquires an interest in, or goes into occupation of, any land will automatically be subject to the burden of any subsisting land obligations affecting that land and, subject to Proposition 4 (b) and (c), will take the benefit of any subsisting land obligation.

(b) When the owner of an interest in or occupier of land has parted with his interest or gone out of occupation he will cease to be able to enforce the obligation and will not be liable for any breach which his successors may commit.

(c) Specific assignment of the benefit of land obligations will be unnecessary in a conveyance of the benefited land, and will be ineffective if not accompanied by a conveyance of land to which the benefit is annexed.

(d) Since the benefit and burden will be attached to the land, joint owners of interests in and joint occupiers of land will jointly and severally be able to enforce and liable to observe the obligations.

NOTES

1. The intention is that a land obligation validly created and registered will run with the land automatically as to benefit and burden (subject to Proposition 4 (b) and (c)) so that a purported assignment will not pass to the assignee any right which he would not automatically acquire by the transfer of the interest in the land to himself.

2. Since land obligations will take on wholly different characteristics from restrictive covenants as now recognised, the provisions of sections 78, 79 and 80 (2), (3) and (4) of the Law of Property Act 1925 will not apply to them.

Proposition 7—Registration of Land Obligations

The burden of a land obligation created after the " appointed day " will not bind a purchaser for value unless registered in the appropriate manner. The position in relation to registered and unregistered land respectively will be—

(a) Registered land

(i) When a land obligation is created on the occasion of a transfer of the whole or part of the land comprised in a registered title, the obligation will be entered on the register in the course of registration of the transfer.

(ii) In the case where a land obligation is created otherwise than on the occasion of a transfer, the person entitled to the benefit will apply for a notice to be entered on the register of title to the burdened land.

(iii) The modification, variation, release or discharge of a land obligation will also be entered in the register, as is the present practice in regard to restrictive covenants (see section 40 (3) of the Land Registration Act 1925 and Rule 212 of the Land Registration Rules 1925).

(iv) The burden of land obligations will be entered in a separate part of the register of title to the burdened land.

(b) Unregistered land

The burden of a land obligation will be registered as a new class of land charge in the Land Charges Register, against the name of the estate owner at the time of its imposition and in respect of the burdened land. On any modification affecting the burden, further registration will be required and the Land Charges Rules should so provide. On a discharge those entitled to the land formerly burdened will have the right to cancellation of the registration in accordance with Rule 10 of the Land Charges Rules 1925. When the title comes to be registered under the Land Registration Act the burden of the land obligation will be noted in the register of title to the burdened land.

NOTES

1. In paragraph (b) of this Proposition we differ from the recommendation in paragraph 53 (vii) of the Wilberforce Report that positive covenants *in rem* affecting unregistered land should not be registrable at all unless it should prove possible to set up a new register containing entries against land. We share the views of the Wilberforce Committee as to the shortcomings of the system of registration in the Land Charges Register ; but it is clearer now than it was when that Committee was deliberating that problems of this nature relating to unregistered land will become of reduced importance with the acceleration of the programme for extending compulsory registration of title. To revert for a limited period to the pre-1926 doctrine of notice would, in our opinion, cause confusion which should be avoided. Reluctantly, therefore, we recommend registration of land obligations in the Land Charges Register and we are hopeful that, for the reasons we have mentioned, the same view will be taken in framing legislation based on the Wilberforce Report.
2. We propose the creation of a new class of land charge because we consider this preferable to the inclusion of land obligations in Class D (ii) which contains existing restrictive covenants, since land obligations will possess characteristics quite different from those of restrictive covenants.

3. Registration in the Land Charges Register is intended to apply to land obligations affecting all unregistered land, including that situated in Yorkshire. We do not favour registration of land obligations in the Yorkshire Deeds Registries because the future of those registries is uncertain. We can foresee that, with the gradual extension of title registration, the local registries may have to be closed for economic reasons while substantial parts of the Ridings are still outside the compulsory registration areas. A purchaser of unregistered land in Yorkshire already searches at Kidbrooke for certain charges (e.g. writs and orders affecting the land) and the same search application will cover land obligations.

4. We have considered the provisions which now apply in respect of errors in a register or in an official certificate of search, and we make the following observations relating to registered and unregistered land respectively—

(i) *Registered land*

If owing to an error in the registry the burden of a land obligation were not properly registered, the legal position would depend upon the joint effect of sections 82 and 83 of the Land Registration Act 1925. If the register were rectified under section 82 by registering the land obligation, the purchaser would be entitled under section 83 (1) to compensation out of the Indemnity Fund. Normally, however, the register would not be rectified if the proprietor was in possession: section 82 (3). In that event those entitled to the benefit of the land obligation would be entitled to compensation under section 83 (2). Where the land obligation was properly registered but not disclosed by reason of an error in any official search, the purchaser would be bound by the obligation, but would be entitled to compensation for any loss he might suffer: section 83 (3). No change appears to be required in these respects.

(ii) *Unregistered land*

A certificate of search in the Alphabetical Index of the Land Charges Register is conclusive, affirmatively or negatively as the case may be, in favour of a purchaser or intending purchaser who has required a search to be made—section 17 (3) of the Land Charges Act 1925—provided that he has furnished "sufficient particulars" in his application for search (section 17 (4))[1]. The purchaser thus takes the land free of any registrable land charge which, through error, has not been entered on the register or, although entered, has not been disclosed on the certificate of search. There is no provision in the Act for payment of compensation to a person who suffers loss through an error in the Registry, but such a person would presumably have a remedy at law if he could prove actionable negligence. We understand that, although there is no statutory provision for compensation in these circumstances, the Land Registry accepts liability for errors arising from negligence; but that claims are extremely rare.

In principle we consider that it would be regrettable, and contrary to the tenor of these Propositions, if a land obligation validly created, and correctly notified to the Registry by the person entitled to the benefit, should become ineffective through an error in the Registry. We have

[1] The prescribed forms of application for an official search require, where there have been changes of parish name or in the description of the land, that the former name and description MUST be given; and also carry a **WARNING** in the following terms: "This certificate refers to the description of the land, if any, given in the Alphabetical Index. Alterations of description subsequent to the date of registration cannot be made in the register and may not have been made in the Alphabetical Index".

We understand that, as a result of representations which we have made, an additional warning is being inserted to emphasise the necessity of referring to any previous description of the land, particularly where it was formerly part of a larger estate.

come to the conclusion, however, that it would not be desirable to recommend a change in the law so that a purchaser would be bound by a registered land obligation which had not been disclosed on the official certificate of search. We think that such a change might have unfortunate repercussions on conveyancing practice since a purchaser's solicitor would no longer be able to proceed with confidence on receipt of a clear certificate.

We appreciate that the number of errors in the issue of official certificates of search in the Land Charges Register is extremely small.[1] The system of recording and disclosing land charges under the Land Charges Act 1925 is, however, a somewhat haphazard one, based, as it is, upon a register comprised of forms submitted by applicants from which officials of the Land Charges Department compile an alphabetical index of names. There are bound to be instances where it does not operate effectively because those who apply for registration and those who apply for an official search do not always furnish identical particulars relating to the land.[2] It is also not uncommon for applicants to omit to give former names and descriptions of land and the places wherein it is situate. This is particularly the case where the search relates to a house built on land which formed part of a larger estate when registration was effected. The system in force under the Land Charges Act may not, therefore, lend itself so readily to the procedure for rectification of the register and payment of indemnity to any person who suffers loss thereby which is provided by sections 82 and 83 of the Land Registration Act 1925 in respect of registered land. We understand that consideration is now being given to a review of the methods of registering land charges and of the forms of application for official search. Whilst we hope that some improvements may be effected as a result of this review we think that the defects of the system of Land Charge Registration (which are well known) cannot be overcome within the framework of the legislation which Parliament has enacted.

5. We make no recommendation as to the registration of the benefit of land obligations because we are told that to introduce a statutory requirement for such registration in all cases would cast an impossible burden on the Land Registry. We are strongly of opinion, however, that, whenever practicable, the benefit of a land obligation annexed to registered land should be noted in the title to that land.

Proposition 8—Publicity and Related Matters

(a) Any member of the public will be able to inspect that separate part of a register of title which will contain land obligations, and to obtain office copies thereof. Where the title to land is registered, therefore, the existence of land obligations will be readily ascertainable by persons who propose to acquire an interest in the land and who, in accordance with Proposition 4 (d), will be bound by them.

(b) As regards unregistered land, the public can already search the Land Charges Register provided that the names of the estate owners are known. At present prospective lessees (including sub-lessees) and assignees of leases are not, as a rule, entitled to information affecting a superior title. To assist them in discovering the terms of binding

[1] In 1965 there were 2,779,074 official searches no less than 86·15 per cent of which produced a negative result. 80 mistakes were made by the staff at the Land Charges Registry in giving the result of searches. (See the Chief Land Registrar's Report to the Lord Chancellor on H.M. Land Registry for the year 1965, at p.9).

[2] For an example of this see the facts in *Du Sautoy* v. *Symes* [1967] 2. W.L.R. 342.

land obligations it will be provided that, notwithstanding the provisions of section 44 of the Law of Property Act 1925 or of any purported agreement to the contrary, on the grant or assignment of any lease the prospective lessee or assignee shall be entitled to receive particulars of instruments creating land obligations, and the terms thereof, and all information necessary for making a full and proper search for land obligations in the Land Charges Register. The required information will consist of the names and addresses of previous owners since the " appointed day " and the description of the property in any documents executed since the " appointed day ".

NOTES

1. Paragraph (a) solves the problem, in relation to registered land, of discovering the new land obligations, with which these Propositions are concerned. Where both the freehold and leasehold titles to a piece of land are registered, a person proposing to acquire an interest in the land from the leaseholder may need to inspect the appropriate part of the register of each title, since he may be affected by land obligations noted on the freehold title in addition to those noted on the leasehold title.

2. In the case of unregistered land, paragraph (b) gives to prospective lessees and assignees certain specific rights which are necessary in view of the binding nature of land obligations, notwithstanding the general principles of section 44 of the Law of Property Act 1925. This Proposition does not raise the wider question of whether a right to investigate the title to the freehold or the leasehold reversion should be introduced.

3. Exercise of the rights conferred by this Proposition will not only involve changes in conveyancing practice but will also increase, to some extent, the legal expenses of transactions to which they relate.

Proposition 9—Modification or Discharge by the Court or Tribunal

(a) Section 84 (1) of the Law of Property Act 1925 should be re-written to give the Lands Tribunal powers of modifying or discharging land obligations wider than those which it has at the present time in respect of restrictive covenants. Under paragraph (a) of the subsection the Tribunal should be able to order modification or discharge where two requirements are satisfied ; first, that the restriction is, or unless modified or discharged would be, detrimental to the public interest by impeding the reasonable user of land for public or private purposes ; secondly, that the persons entitled to the benefit of the restriction can be adequately compensated in money for any disadvantage which they will suffer as a result of the order, so far as that disadvantage cannot be alleviated by the imposition of conditions in the order.

The Tribunal should be directed to consider all the existing circumstances including the age of the restriction, the circumstances in which it was imposed, the planning position and the development policy for the area. So far as policy matters are concerned, however, the Tribunal, being a judicial body, should have regard only to settled policy and should not be involved at all in the formulation of future policy.

Under section 84 (3) the Tribunal has power to direct enquiries to be made of Local Authorities, and in practice it gives directions for the parties to make such enquiries in appropriate cases. This power should be extended to enable the Tribunal to direct enquiries to be made also of Government Departments.

All these wider powers should in future be available in respect of existing restrictive covenants as well as of the new land obligations.

(b) Under section 165 of the Housing Act 1957 the County Court has a limited jurisdiction in a particular class of case, where the conversion of a single house into two or more tenements or separate dwellinghouses is prohibited or restricted by " the provisions of the lease of or any restrictive covenant affecting the house, or otherwise ", to vary the terms of the instrument imposing the restriction. This jurisdiction should be made available also where the restriction is imposed by a land obligation.

NOTES

1. The circumstances in which the Lands Tribunal has power wholly or partially to discharge or modify a restriction under section 84 (1) are—

(i) *Paragraph (a), first limb*—" that by reason of changes in the character of the property or neighbourhood or other circumstances of the case which the [Tribunal] may deem material, the restriction ought to be deemed obsolete ".

In *Re Truman, Hanbury, Buxton & Co. Ltd's Application* [1956] 1 Q.B. 261 the Court of Appeal explained that a covenant was obsolete only if the original object could no longer be achieved, as for example if an area intended to be residential had in fact become substantially commercial. Cases are likely to be few in which so drastic a change can be shown.

(ii) *Paragraph (a), second limb*—" that the continued existence thereof would impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons . . ."

This limb requires evidence " that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it " (per Farwell J. in *Re Henderson's Conveyance* [1940] Ch. 835 at p. 846) and that the user proposed by the applicant for discharge or modification is the only reasonable user available (*Re Leeds Road, Wakefield* (1953) 103 L.J. 188: and see *Re Ghey and Galton's Application* [1957] 2 Q.B. 650). In other words the Tribunal must be satisfied not only that the permitted user is no longer a reasonable one but also that the applicant's proposed user is the only reasonable one. These tests are most difficult to satisfy.

(iii) *Paragraph (b)*—" that the persons of full age and capacity for the time being entitled to the benefit of the restriction . . . have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified ".

Cases of express consent require no comment. The provision as to implied consent would seem to cover cases in which the persons entitled to the benefit had shown so little interest in enforcing the covenant against previous breaches that their consent to its discharge might be presumed ; but such cases would probably fall within one of the other paragraphs as well.

(iv) *Paragraph (c)*—" that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction ".

Where an applicant is seeking a comparatively slight modification, e.g. to use a dwellinghouse as a guest house, to divide a house into flats or to exceed the density of building allowed under the covenant without seriously affecting the character of the area protected by the restriction, use has been made of the Tribunal's powers under this paragraph. Even in such cases, however, an applicant must be prepared to meet the argument that his proposal, though itself unobjectionable, would encourage similar applications and so threaten the whole basis of the restriction. Recently this paragraph has been described as being " so to speak, a long stop against vexatious objections to extended user ", and as possibly being " designed to cover the case of the, proprietorially speaking, frivolous objector ", (see the judgment of Russell L.J. in *Ridley* v. *Taylor* [1965] 2 All E.R. 51 at p. 58.). The usefulness of the Tribunal's powers under this paragraph is therefore extremely restricted.

2. In view of the stringent requirements of those three paragraphs it is not surprising that, although the Tribunal has power to award compensation when it discharges or modifies a restriction, it has very seldom done so. There can be no justification for such an award where a restriction has become obsolete or the discharge or modification causes no injury to anybody. In recent years compensation is known to have been awarded in only two cases, in each of which the facts were rather special.

3. This Proposition is designed to contain a restatement of the powers of the Lands Tribunal in such terms as to enable it to take a broader view of whether the use of land is being unreasonably impeded ; and to make clear provision for an award of monetary compensation where the Tribunal thinks that the injury which an objector would suffer by a modification or discharge can properly be compensated in that way.

Proposition 10—Enforcement Jurisdiction of the Courts

(a) In the exercise of its enforcement jurisdiction in the case of restrictive land obligations, the Court should award damages in lieu of granting an injunction notwithstanding that there would be no oppression upon the defendant by such grant, where it is satisfied that the plaintiff entitled to the benefit of the obligation can be adequately compensated in money in respect of the harm done to his interests by the actual or contemplated breach complained of.

(b) The Court should have jurisdiction to grant declaratory relief in proceedings instituted by a person intending to carry out specific development which may contravene a restrictive land obligation. In the exercise of such jurisdiction the Court should be empowered, in appropriate cases, where a legally enforceable land obligation would be contravened, to award damages to any objecting party if the Court considers that he can thereby adequately be compensated in money in respect of the harm which will be done to his interests if such development proceeds.

NOTES

1. Paragraph (a) of this Proposition reflects recent tendencies in the Courts in restrictive covenant cases to depart from the somewhat inflexible principles formerly applied to the exercise of the jurisdiction conferred upon the Chancery Courts by the Chancery Amendment Act 1858 (Lord Cairns' Act) to grant damages in lieu of an injunction in appropriate cases. These principles are best

stated in the " working rule " propounded by A.L. Smith L.J. in *Shelfer* v. *City of London Electric Light Company* [1895] 1 Ch. 287 at pp. 322-3 that—

" (1) If the injury to the plaintiff's legal rights is small,

(2) And is one which is capable of being estimated in money,

(3) And is one which can be adequately compensated by a small money payment,

(4) And the case is one in which it would be oppressive to the defendant to grant an injunction:—

then damages in substitution for an injunction may be given."

The reason for the application of this working rule to restrictive covenant cases is thought to have been that, before the advent of planning controls, the judicial enforcement of covenants was the only means by which undesirable development of land could be prevented. Study of the reported cases shows how the development of the law upon restrictive covenants and of the powers of the Courts regarding their enforceability is the ancester of modern planning law, particularly in " scheme " cases. Recent decisions (for example, *Baxter* v. *Four Oaks Properties Limited* [1965] Ch. 816, where damages of £500, £100 and £150 respectively were awarded to three plaintiffs and an injunction to enforce a covenant, of the terms of which the defendant was aware at the time of his purchase of the burdened land, was refused) illustrate a more flexible attitude on the part of the Courts. We consider this to be a welcome tendency. We do not think, at the present time, that in these cases the Court would adhere to the " working rule's " requirements that only a *small* sum should be entertained when damages are to be contemplated or that the element of " oppression to the defendant " should necessarily have to be shown. Whilst the introduction of planning control by local authorities has not replaced the need for and the usefulness of privately imposed restrictions upon land development, these processes of controlling land use should be regarded as complementary. Paragraph (a) is directed at facilitating this approach to the problems of the control of land use.

2. Paragraph (b) contemplates a variety of cases. For example, a developer may have bought, or may propose to buy, land which appears to be affected by a restrictive land obligation. He may be in doubt whether the obligation is enforceable or, if so, whether his proposed development would contravene it, and he may want the Court's ruling on either of those points. Alternatively, he may admit both those matters but consider that the contravention would be slight. In any of those cases he may think that the persons who will be truly affected by the development can be adequately compensated and may wish to ascertain the Court's view on this aspect of the matter. This is a new jurisdiction but it is one which we think that the Court should have. The result would not be dissimilar to that which was reached in the case of *Baxter* v. *Four Oaks Properties Limited* (supra) and we would regard it as both a clarification and a logical extension of the jurisdiction, exercised in *Re Gadd's Land Transfer* [1966] 1 Ch. 56. by Buckley J. under R.S.C. Order 5 Rule 4, to decide whether restrictive covenants would be enforceable against an intended purchaser of the burdened land.

Proposition 11—Determination of Legal Issues

(a) Jurisdiction to determine issues of law as to the basic validity of a land obligation, in substance and form, (e.g. whether it complies with Propositions 1 and 2) will be vested exclusively in the Court under section 84 (2) of the Law of Property Act 1925 or an equivalent section in the new Act.

(b) An application to the Lands Tribunal for modification or discharge will pre-suppose that the basic validity is accepted by the applicant. The Tribunal will, however, have to ascertain who are the proper

parties to be heard in opposition to, or support of, the application: and this may involve issues of law as to annexation to or imposition on particular land and enforceability by or against particular owners or occupiers. To enable those matters to be determined before the Tribunal considers the issue of modification or discharge, a procedure must be devised whereby—

(i) Notice of the application is served on all persons who appear to the Tribunal to be interested.

(ii) All persons who receive such notice and wish to be heard on the application are required to state in writing the grounds on which they assert that they are entitled to the benefit or subject to the burden of the obligation.

(iii) Discovery of all relevant documents may be ordered at the instance of any interested person.

(iv) The Tribunal will then decide, having regard to the written statements of grounds which have been furnished and on consideration of any relevant documents, who is entitled to be heard on the substantive application.

(v) Unless appealed against under (c) below, the Tribunal's decision under (iv) above will be conclusive and binding on all interested persons in respect of the particular application to which it relates.

(c) If any interested person does not accept the Tribunal's decision he will be able to require the Tribunal to state a case for the opinion of the High Court on a point of law, and the proceedings before the Tribunal will be suspended until that issue has been determined by the Court, or by the final Court of Appellate Jurisdiction to which it is taken.

(d) This procedure should be available in respect of existing restrictive covenants as well as the new land obligations.

NOTES

1. The decision *In re Purkiss's Application* [1962] 1 W.L.R. 902 has revealed an unsatisfactory situation in that the Lands Tribunal must either assume the covenant to be valid and enforceable and give a determination as to modification or discharge which may turn out to be a nullity or, if the validity or enforceability of the covenant is in doubt, adjourn the proceedings until the Court has decided this matter on an application under section 84 (2). The procedure suggested in paragraph (b) of this Proposition is designed to ensure that all questions of law are raised and conclusively determined in the simplest way before the issue of modification or discharge is considered. One advantage of this method is that when all the facts are known, some objectors may withdraw, or alternatively the applicant may decide to accept the titles of some objectors which he was at first inclined to dispute. The procedure is thought to be applicable both to restrictive covenants and to the new land obligations and it is desirable that it should be available in both cases.

2. Paragraph (b) introduces a procedure for ascertaining who are the interested persons entitled to be heard on applications for modification or discharge. Subparagraphs (i) to (v) indicate only the essential points which should be covered by rules of procedure. The detailed drafting of such rules is left to be undertaken by those who have devised the successful procedure for dealing with the interlocutory matters in the various branches of the Lands Tribunal's existing jurisdiction.

3. The procedure in paragraph (b) is not intended to replace any applications which can now be made under section 84 (2). If a clear issue as to title arises, and there is no doubt as to who are the parties interested, it may still be simpler for the matter to be taken direct to the Court, under that sub-section or its successor.

4. The procedure of case stated, (for which appropriate Rules of Court would have to be laid down) is thought to be the most expeditious way of getting the issue of law clearly before the High Court. The facts will all have been produced to the Tribunal and there seems no reason why the settlement of the case should not be completed in a short time and without any interlocutory proceedings.

5. The general rule as to costs should be that the costs of the preliminary enquiry to establish who is entitled to object to the application and on what grounds, should be borne in any event by the applicant, because he has set the proceedings in motion in order to clear the title for his purposes. Costs in proceedings to determine the legal issues which have arisen should be in the discretion of the Court or Tribunal. *Prima facie,* an objector whose title is not upheld should not be entitled to recover his costs but there may be cases where it would be unfair to order that he bears the applicant's costs.

Proposition 12—Procedure and Costs

(a) Implementation of these Propositions and of the Wilberforce recommendations would involve certain additions and alterations to the rules of procedure in the Lands Tribunal. Consideration might also be given to the desirability of ensuring generally that the parties before the Tribunal are more fully informed of the case which they have to meet, e.g. by discovery of documents, more detailed pleadings, etc.

(b) Discussions should be initiated on the possibility of agreeing uniform general principles as to awards of costs by the Courts and the Tribunal in these cases—see for example, the Practice Direction issued by the President of the Lands Tribunal on 27th May 1954 [Preston and Newsom on Restrictive Covenants, 3rd Edition page 263] and the decision of Stamp J. *In re Jeff's Transfer* (*No.* 2) [1966] 2 W.L.R. 841.

F. CONCLUSION

When submitting proposals for the reform of the law it is our usual practice to append to our Report a draft of the legislative provisions which would be appropriate to give effect to our proposals. We have not done so in this case because we are convinced that a new code should be prepared to deal, at the same time, with the implementation of this Report and of the substance of the Wilberforce Committee's recommendations.

LESLIE SCARMAN, *Chairman.*
L. C. B. GOWER.
NEIL LAWSON.
NORMAN S. MARSH.
ANDREW MARTIN.

HUME BOGGIS-ROLFE, *Secretary.*
31*st January* 1967.

55195 Dd. 135201 K18 3/67 St.S.

Printed and published by
HER MAJESTY'S STATIONERY OFFICE

To be purchased from
49 High Holborn, London W.C.1
423 Oxford Street, London W.1
13A Castle Street, Edinburgh 2
109 St. Mary Street, Cardiff
Brazennose Street, Manchester 2
50 Fairfax Street, Bristol 1
35 Smallbrook, Ringway, Birmingham 5
7–11 Linenhall Street, Belfast 2
or through any bookseller

Printed in England

S.O. Code No. 39–96