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What is chancel repair liability?

An analysis of the classification of chancel repair liability and connected practical issues

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Thesis in submission for the degree of Ph.D.

Durham Law School

Durham University

2020

What is chancel repair liability?

An analysis of the classification of chancel repair liability and connected practical issues

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Abstract

Chancel repair liability is an ancient legal concept which, when found to exist, may require a property owner to cover the cost of repairing a local parish church chancel.[1] This cost can run into tens of thousands of pounds.[2] The nature of chancel repair liability is elusive and not neatly classified within the framework of our modern legal system.

This thesis seeks to explain the nature and scope of the concept and classify it within a modern legal system by characterising it as an established legal concept. The methodology used is to identify the cornerstones of the established proprietary and non-proprietary rights and determine whether these are analogous with the key principles of chancel repair liability. In doing this, a comprehensive analysis of the nature and scope of chancel repair liability has been performed and a determination regarding whether chancel repair liability is a proprietary right, within the parameters of this thesis, has been reached. In short, this thesis seeks to make chancel repair liability less elusive and uncertain.

[1] Simon Best, 'Chancel Repair Liability: Still a Problem' *Holme Valley Review (*Huddersfield, 2013).
[2] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546.

Introduction to and Scope of the Thesis

As stated by Lord Hope of Craighead, in the House of Lords, in the leading case on chancel repair liability, *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*,[3] the law relating to the liability for chancel repair is open to criticism for a number of reasons. As referred to by his lordship, the liability has been described by the Law Commission as 'anachronistic' and 'capricious' in its application as well as 'highly anomalous'[4] as the existence of the liability can be difficult to discover, as land affected has 'become fragmented over the years as a result of the division and separate disposals of land'.[5] Further, the fact that chancel repair liability is several in nature means that 'it may operate unfairly'. In particular, in cases where there is more than one person responsible for chancel repairs 'and the person who is found liable is unable to recover a contribution from others who ought to have been found liable' as well.[6]

In short, chancel repair liability is elusive, uncertain and problematic. The purpose of this thesis is to classify chancel repair liability as a property or non-property right and, in doing so, make this phenomenon more understandable and less uncertain.

The driving factors and motivation for this thesis, together with the intended aims and outcomes, are discussed in detail in this chapter. The chapter is divided into the following sections:

[3] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [73].
[4] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [73]; Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985) para 3.1; Law Commission, *Land Registration for the Twenty-First Century*: *A Consultative Document* (Law Com No 254, 1998) para 5.37.
[5] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, [73]; Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) para 2.30.
[6] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [73].

(i) Introduction

(ii) Thesis Methodology

(iii) Characterising chancel repair liability as which legal concepts?

(iv) Choice of Methodology?

(v) Aims and objectives

i) Introduction

Mr and Mrs Wallbank were the freehold owners of Glebe Farm in Warwickshire. In 1994, they received notice that the church chancel of St John the Baptist in Aston Cantlow had fallen into disrepair and they were called upon to meet the cost of the repair of the same.[7]

Mr and Mrs Wallbank, by virtue of their ownership of their property Glebe Farm, were a lay rector[8] of the parish church (the Church of St John the Baptist in Aston Cantlow) and, as such, liable to pay for the cost of repairing the church chancel. The Parochial Church Council ('the PCC') requested payment for the cost of the repair from Mr and Mrs Wallbank. Mr and Mrs Wallbank disputed the liability. Notice was served on Mr and Mrs Wallbank under section 2(1) of the Chancel Repairs Act 1932, calling on them to repair the chancel. The notice was served by the Parochial Church Council as the responsible authority.[9] Mr and Mrs Wallbank refused to pay and the Parochial Church Council began proceedings under section 2(2) of the Chancel Repairs Act 1932 to recover the estimated cost of the repairs, a sum in excess of over £95,000.

[7] Chancel Repairs Act 1932, s 2(1).
[8] A lay rector is a non-ecclesiastical rector. Rectors holds rectorial property including tithes and rectorial glebe.
[9] Chancel repair liability may be enforced by a 'responsible authority', usually the parish Parochial Church Council (PCC) under the Chancel Repairs Act 1932. If there is none then this would be the church warden.

The Wallbanks, as the joint freeholders of Glebe Farm, were held personally liable for the repair of the chancel of the Church of St John the Baptist in Aston Cantlow as a lay rector.[10] The decision was controversial, hitting the headlines at the time[11] and gave rise to public outcry.[12] Further, the decision was reached despite chancel repair liability being described as 'anachronistic',[13] 'one of the more unsightly blots in the history of English Jurisprudence'[14] and 'capricious'.[15]

Chancel repair liability is elusive in that there exists uncertainty regarding its status regarding whether it is a property or non-proprietary right and this is reflected in dicta in the decision in the Wallbank case. Ferris J, in the Divisional court in *Aston Cantlow*, stated that it was an unusual incident because it did not amount to a charge on the land, and imposed a personal liability on the owner of the land, but added 'in principle I do not find it possible to distinguish it from the liability which would attach to the owner of land which is purchased subject to a mortgage, restrictive covenant or other incumbrance created by a predecessor in title'.[16] Moreover, in the House of Lords, Lord Roger of Earlsferry stated in dicta that he agreed with Ferris on this point.[17]

Further vast areas of land are potentially affected by chancel repair liability. Over a third of all parishes are affected and as much as four million acres of land.[18] This thesis analyses the

[10] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546.
[11] Editorial, '£350,000 blow for church couple' (BBC News, 26 June 2003) <http://news.bbc.co.uk/1/hi/wales/mid/3023276.stm> accessed 1 January 2016.
[12] Including letters in the press complaining that it was unfair. See Edward Nudge QC, 'The Consequences of Aston Cantlow' <www.peterboroughdiocesanregistry.co.uk/nugee.pdf> accessed 1 January 2016.
[13] Lord Nicholls of Birkenhead in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546; Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985) para 3.1.
[14] J Baker, 'Lay rectors and chancel repairs' (1984) 100 LQR 181.
[15] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [73]. See also Law Society, 'Insurance Companies Exploiting Right' *LNB News* (19 December 2006).
[16] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* (2000) 81 P & CR 165, [2000] 2 EGLR 149, 152.
[17] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [171].
[18] Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985) para 1.2.

ancient and elusive concept that is chancel repair liability.[19] The research question that this thesis seeks to answer is: what is chancel repair liability? Is it a proprietary or non-proprietary right? The thesis seeks to answer this question by exploring theoretical questions about the concept of a property right and the normative justifications for imposing obligations attaching to property interests. Specifically, this thesis focuses on the nature of chancel repair liability and its position in a contemporary property system to explore fundamental questions about the nature and obligation of chancel repair liability. This thesis seeks to determine what chancel repair liability is as a legal concept, specifically whether chancel repair liability is a proprietary or non-proprietary right, and in doing so make the concept less uncertain. In particular, this is done by way of analogy to other existing 'target' rights and addresses three questions: What is the nature of the target right and is this analogous with the nature of chancel repair liability? In what circumstances is the target right enforceable and is this analogous with chancel repair liability? Finally, is the target right binding on third parties and is this analogous with chancel repair liability? By addressing these questions, the characteristics of chancel repair liability will be analysed to develop a clearer understanding regarding whether it is a proprietary or non-proprietary right and make chancel repair liability less elusive.[20]

Property rights are a cornerstone of land law. The classification of chancel repair liability as either a proprietary or non-proprietary right is fundamental in understanding chancel repair liability in our legal system. Land law is about property rights in land and property rights are the cornerstone of our property law system. In understanding chancel repair liability therefore, the central and most fundamental question to ask is whether chancel repair liability

[19] Simon Best, 'Chancel Repair Liability: Still a Problem' *Holme Valley Review* (Huddersfield, 2013). Further as analysed in Chapter 1 of this thesis it is striking the link between the burden of chancel repair liability and benefit of rectorial glebe and tithes. The basic principle of the doctrine is that the claim to a benefit of a grant must also be accompanied with the burden associated with the covenant. This connection is explored and analysed later in this thesis.

is a property right or not? Answering such a question is challenging. There is a lively academic debate concerning the exact definition of a property right. It is therefore important, as part of the analysis provided in this thesis, to explain what a property right is understood to be; in other words, to identify what theory of a property right is being adhered to.

At this stage, it is sufficient to state that there is significant acknowledgment that the concept of a property right is a right to assert ownership of 'a thing' against the whole world.[21] There is a unity about the effect of property rights; specifically, every property right, on the face of it, places a duty on the rest of the world not to interfere with that property right.[22] In contrast non-property rights, in other words personal rights, do not, but are enforceable only against the person who has created them. The difficulty is that there is no conceptual unity regarding the content of property rights.[23] It is impossible to derive from first principles whether or not something counts as a property right.[24] It has long been the case that the list of permitted property rights in land has been a closed list, a numerus clausus, with the total number of such rights amounting to no more than just over a dozen.[25] It is argued in this thesis that the way to decide whether something is a property right or not is to look at a closed list of established property rights. If it is on the list, it is a proprietary right and, if not, then it is not a proprietary right. Adopting this approach, in this thesis, a comparison was made with established property concepts, falling within numerus clausus, to analyse whether chancel repair liability is a proprietary right or not. This was undertaken in order to determine whether chancel repair liability is analogous to such concepts.

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[21] William Blackstone described property rights as comprising 'that sole or despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe'. See 2 Bl Comm 2.
[22] Ben McFarlane, *The Structure of Property Law* (1st Edition, Hart Publishing 2008) 139.
[23] Ben McFarlane states in *The Structure of Property Law* (1st Edition, Hart Publishing 2008) para 1.2.3 'We cannot work out from first principles whether or not it counts as a property right – instead we simply have to see if it is on the list of property rights'.
[24] Ben McFarlane, *The Structure of Property Law* (1st Edition, Hart Publishing 2008) para 1.2.3.
[25] Bernard Rudden, 'Economic Theory v Property Law: The Numerus Clausus Problem' in J Eekelaar and JS Bell (eds), *Oxford Essays in Jurisprudence (Third Series)* (Clarendon 1987) 241-2.

This thesis is divided into six chapters. Chapter 1 provides an analysis of the current understanding of chancel repair liability. This is followed in Chapter 2 by an analysis of the relevant real property law. The questions to be addressed in this thesis and how they seek to answer the research question are also explained in these two chapters. Chancel repair liability has then been analysed by analogy to specific proprietary and non-proprietary rights in Chapters 3 to 5. The fundamental characteristics which these proprietary and non-proprietary rights[26] share or can be used to distinguish them from chancel repair liability have been identified. An analysis of chancel repair liability, characterised as a customary right is provided in Chapter 3, as an easement in Chapter 4 and as a covenant in Chapter 5. The disclosure and discovery obligations surrounding chancel repair liability are analysed in Chapter 6. Conclusions are drawn and a determination made regarding whether chancel repair liability is a proprietary right in Chapter 7, based on the analysis in the proceeding chapters.

This thesis is driven by a lack of clarity regarding what chancel repair liability means in terms both of its classification as a legal concept and its nature and scope.[27] The anomalous, elusive and problematic nature of the concept causes practical problems for property owners, buyers and sellers as well as conveyancers and the judiciary.[28] Lord Nicholls of Birkenhead referred to chancel repair liability[29] as 'one of the more arcane and unsatisfactory areas of property law' and noted that the Law Commission had previously recognised the anachronistic, and capricious, nature of chancel repair liability in their report, Liability for Chancel Repairs, which stated that 'this relic of the past is … no longer acceptable'.[30] Accordingly, an answer to the research question regarding the nature of chancel repair liability is of both scholarly and practical value and significance.

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[26] A hallmark of a proprietary right is traditionally one which is binding on successors in title.
[27] Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985).
[28] See Chapter 1 for a discussion of the practical problems connected with chancel repair liability.
[29] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [2].
[30] Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985) para 3.1; Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Com No 254, 1998) para 5.37.

Chancel repair liability's place in a modern legal system and how it should be classified are unclear,[31] which results in a lack of clarity regarding its scope and nature. It is particularly important that property owners are aware of potential chancel repair liability exposure given the size of the potential liability[32] and uncertainty as to when it arises. This is relevant, as discussed in the following chapters, because chancel repair liability is uncertain; for example, its nature changed in 2013 when it became no longer classified as an overriding interest and, further, its binding nature on successors in title is affected by whether the land in question is registered at Land Registry or not.[33] However, despite a number of attempts to reform chancel repair liability,[34] the concept has stood the test of time and still affects parties today, despite its ancient origin and an arguably devoid historical justification.[35] The concept is worthy of research due not only to its uncertain nature and classification but also to the social and practical issues connected with chancel repair liability.

Chancel repair liability is of interest and importance to legal practitioners and subject to lively academic commentary; for example, commentators and practitioners note the difficulties created as a result of the lack of a single register which can be searched to identify properties subject to chancel repair liability[36] and the potential uncertain third party impact of chancel repair liability.[37] Further, practitioners have expressed concern about advising on chancel repair liability and the risk of potential negligence claims if they fail to advise clients about the risk of chancel repair liability affecting a transaction with which they are dealing and the extent

[31] Law Society 'Chancel Repair Liability - A Law Society Submission' (Law Society, London 2006) 3. See also Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985) where the Law Commission identified chancel repair liability as suitable for reform.
[32] In *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 chancel repair liability was in the region of £100,000.
[33] See discussion below.
[34] The recommendations made by The Law Commission in Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985) were not enacted.
[35] See later for the effect of the Land Registration Act 2002 on chancel repair liability.
[36] S Cherry, 'The end is nigh?' (2012) 162 *New Law Journal* 1206.
[37] J Naylor, 'The Law is an apse' (2007) 157 *New Law Journal* 7294.

to which they need to go to determine whether or not a property is affected.[38] An additional issue is the fact that the standard practice of taking out insurance products as a matter of routine to protect against potential chancel repair liability is dissatisfactory. As one commentator notes, taking out an insurance product as a matter of routine is in tension with the Council of Mortgage Lenders (CML) guidelines of advising clients of potential risks and undertaking 'all usual and necessary searches'.[39] This is because, arguably, taking out insurance as a matter of routine does not satisfy the lenders' requirement of performing 'all necessary searches'. Commentators argue that, with increasing house prices and a move towards electronic conveyancing, there should be greater certainty regarding which properties are affected by chancel repair liability.[40] This problem is compounded further by the vast extent of land that is potentially affected by chancel repair liability. The Law Commission and commentators estimate that as much as 10% of the land in England in Wales may be affected and one third of all parish churches.[41] This has led lawyers to consider alternative options for dealing with chancel repair liability, including buying out the liability in order to release property from chancel repair liability, which may not necessarily be agreed by the Church and may prove a very expensive option.[42]

Understanding the complexities of chancel repair liability is not an easy task. Nevertheless, it is an important one because, by analysing chancel repair liability, it can be determined whether chancel repair liability is a proprietary or non-property right and, in doing so, help to clarify the concept more fully in order to make it less anomalous and uncertain. Classifying

[38] S Cherry, 'The end is nigh?' (2012) 162 *New Law Journal* 1206. See also J Naylor, 'The Law is an apse' (2007) 157 *New Law Journal* 7294.
[39] M Le Breton, 'Property/Insurance: A cautionary tale' (2009) 159 *New Law Journal* 7386.
[40] J Naylor, 'The Law is an apse' (2007) 157 *New Law Journal* 7294.
[41] The Law Commission state 'We do not know exactly how many churches currently have the benefit of the right but recent researches carried out by the Church Commissioners suggest that the total number probably lies between four and six thousand: broadly, that is to say, one-third of all parish churches'. The Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP 86, 1983) para 1.3. See also J Naylor, 'The Law is an apse' (2007) 157 *New Law Journal* 7294.
[42] M Le Breton, 'Soul Searches' (2007) 157 *New Law Journal* 7277.

chancel repair liability will help to elucidate this concept and address identified problems with it.

Furthermore, over 85% of the land and property in England and Wales is now registered by the Land Registry. This indicates that over 5 million acres of unregistered land still exists in England and Wales.[43] Given that a large amount of land remains unregistered by the Land Registry, it is important to delineate the unregistered and registered land principles clearly throughout this thesis and ensure that a clear demarcation is made between the two systems accordingly because, as will be explained in further detail below, the effect that chancel repair liability has on landowners and their successors depends on whether the land is registered at the land registry or not.

ii) Thesis Methodology

As indicated above, in order to answer the research question, chancel repair liability has been considered by analogy to the existing legal concepts. A normative comparison has been made with these concepts in an attempt to explain the characteristics of chancel repair liability as an existing legal concept.

The concept of an easement, covenant and a customary right have been identified at the outset of this thesis as potential candidates for being analogous with chancel repair liability. This thesis assesses the degree to which these concepts are analogous with chancel repair liability in order to explain the same. This has been done through reference to how each concept is constituted and enforced. Conclusions have then been drawn from the research in

[43] As of April 2018, over 85% of the land mass of England and Wales is registered. Maggie Telfer, 'Buying and Selling Property - Why HM Land Registry wants to achieve comprehensive registration' (*HM Land Registry,* 27 April 2018) <https://hmlandregistry.blog.gov.uk/2018/04/27/why-hm-land-registry-wants-to-achieve-comprehensive-registration> accessed 20 May 2018.

this thesis in order to answer the research question: What is chancel repair liability? Doctrinal legal sources have been drawn upon to compare the nature of chancel repair liability with other proprietary and non-proprietary interests. The research sources and material which have been used include principally case law, statutes, journals, articles, texts and commentaries.

Despite the contemporary nature of many issues surrounding chancel repair liability, there is no existing text or comprehensive work dedicated specifically to discussing the nature and scope of chancel repair liability.[44] Principally, therefore, primary legal sources have been drawn upon in this thesis. In addition, relevant journals, articles, texts and commentaries have been used to identify and elucidate the topics in this thesis and reach reasoned conclusions, as appropriate.

iii) Characterising chancel repair liability as which legal concepts?

Initial support for the idea that an easement and covenant are suitable candidates to analyse, by way of analogy, with chancel repair liability, can be found in the dicta of Ferris J in the divisional court in *Aston Cantlow v Wallbank*. Specifically, Ferris J stated that 'in principle I do not find it possible to distinguish [chancel repair liability] from the liability which would attach to the owner of land which is purchased subject to a…restrictive covenant or other incumbrance created by a predecessor in title'.[45] Clearly, this makes the point that chancel repair liability, covenants and easements are, in some sense, functionally similar.

[44] It is for this reason that this thesis is of particular importance and value in understanding an ancient concept in a modern legal system. It should be noted that James Derriman's book *Chancel Repair Liability: How to research it?* Considers practical steps to researching chancel repair liability rather than focussing on its legal nature. See James Derriman, *Chancel Repair Liability: How to research it?* (Wildy, Simmonds & Hill Publishing 2006).

[45] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* (2000) 81 P & CR 165, [2000] 2 EGLR 149, 152 (Ferris J); *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [69], [171].

Further, support can be found from a general consideration of the ways in which covenants and easements are similar to or distinct from chancel repair liability (and each other). Easements, covenants and chancel repair liability share similar characteristics as, in some sense, they are all rights potentially concerning land, but they are limited rights, falling short of rights of ownership or possession.[46] Further easements and covenants are functionally similar to chancel repair liability since they (potentially) exercise control over land with the potential to bind successors in title (in particular circumstances). However, it is here that the similarity between chancel repair liability, easements and covenants becomes blurred.

The control that easements have over land is typically passive and does not place any positive duties on servient landowners, unlike chancel repair liability, which places a positive duty on an ostensible servient land owner to repair a church chancel (for example in the Wallbank case, Mr and Mrs Wallbank were required to meet the local church chancel repairs). Further, the burden of a positive covenant is not typically binding on a successor in title; however, the burden of chancel repair liability has been found to be binding on successors in title (although this will be shown below to be dependent on a number of factors including the date of the enforcement action and whether the property is registered or unregistered). It is these facts (that chancel repair liability is a positive rather than passive obligation and has been shown in certain circumstances, such as the Wallbank case, to bind successors in title) which are at odds with orthodox easements and covenants. It is, however, these said facets of easement and covenants which are key in constituting them as property rights,[47] without which they may fall below the required threshold. By examining whether chancel repair liability is proprietary in particular by focusing on the elements of easement and covenants which are key in them

[46] Whether chancel repair liability is a non-ownership interest is discussed further in Chapter 4.
[47] See Jonathan Gaunt and Paul Morgan, *Gale on Easements*, (16th edn, Sweet & Maxwell 1997) which states positive easement are 'spurious' and restrictive covenants are proprietary rights in that they fall within numerus clausus.

constituting a property right, this brings the analysis in this thesis closer to the question of whether chancel repair liability is a proprietary right or not.

Easements are 'incorporeal hereditaments'; that is, they belong to a defined list of rights recognised by the law of property as being, like land itself, a species of 'real property', to which the rules of land law apply. If created expressly, such rights should be granted by deed. Once created and registered, they are binding against the whole world. Further easements are appurtenant (that is to say, attached) to a dominant estate in land; that is, once created for the benefit of an estate in land, they attach to that estate for the benefit of all those who subsequently become entitled to it. As a result, if X buys land that has the benefit of an easement – such as a right of way over Z's neighbouring land – X will be automatically entitled to exercise that right of way without any need to negotiate further with Z. Z will be obliged, like everyone else, not to interfere with X's exercising of the right, even if Z is not the person who originally granted it. Easements are typically passive and do not place positive duties on servient land owners, except for a few rare occasions. Fencing easements are an example and are discussed below.

In contrast, covenants have their origin in the law of contract. Having been created expressly by agreement, the terms of that agreement define the nature and scope of the rights. In line with the doctrine of privity of contract, the starting point for these rights is that they will only affect the parties to the particular contract and no one else. There are exceptions to this principle in relation to covenants affecting land. The rule in *Tulk v Moxhay* holds that the burden of a restrictive covenant affecting land is sometimes capable of binding in equity third parties who subsequently acquire an interest in the land. This constitutes a rare exception to

the rule that the burden of an agreement can only bind the original parties.[48] In effect, it means that restrictive covenants to which the rule in *Tulk v Moxhay* applies can be enforced against third party purchasers, a characteristic normally associated solely with property rights.

In this sense, *Tulk v Moxhay* and the rare occasions easement place positive obligations on servient land owners (for example, potentially fencing easements) partially blur the distinction between easements on the one hand and restrictive covenants affecting land on the other.[49] It is the blurred distinction between covenants and easements where the nature of chancel repair liability is perhaps explained. This is because chancel repair liability manifests the characteristics of both covenants and easement, especially in the sense that chancel repair liability can be binding on third parties (in certain circumstances) and yet imposes a positive duty on an ostensible servient landowner. It is therefore appropriate to analyse chancel repair liability by analogy to covenants and easement in preference to other proprietary rights.[50]

It is important to clarify the definition of the term 'property right' in this thesis as there exist alternative competing theories of property.[51] As will be explained in further detail below, the analysis in this thesis adheres to the doctrine of numerus clausus. Only those rights which

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[48] Secondly it is a long-standing rule of law that the benefit of a covenant affecting land may, in some circumstances, be 'annexed' to an estate in that land. This means that, where the requirements are met, subsequent owners of that estate are automatically entitled to enforce the covenant. To this extent, a covenant may behave like an interest appurtenant to an estate in land.

[49] Unlike easements, covenants remain rights created only by contract and freely defined by the parties. Cases subsequent to *Tulk v Moxhay* (1848) 2 Ph 774, 18 LJ Ch 83 have reflected this tension between the contractual nature of covenants and their proprietary effect; they affirm the proprietary effect but subject it to a number of complex limitations the total effect of which is difficult to justify. It is arguable that some of these difficult rules spring from the discomfort of the courts with the apparent contradiction inherent in the concept of covenants that behave like property rights. This is visible in the fact that, for instance, the cases affirming the rule that *Tulk v Moxhay* does not apply to positive covenants have drawn on the language of privity of contract to justify the distinction.

[50] There of course many other rights which chancel repair liability could be analysed as analogous to in this thesis. However as has been explained below the theory of what a property right is, adopted in this thesis, is those rights falling within numerus clausus. Easement and covenants (restrictive covenants) are generally accepted as falling within numerus clausus. This thesis has focussed on analysing easements and covenants by way of analogy with chancel repair liability as the most suitable candidates to make an analogy with from those rights falling within numerus clausus.

[51] See Sukhninder Panesar *General Principles of Property Law* (Longman 2001) 8-20 for an analysis of the Legal Concept of Property. See also Louise Tee, *Land Law, Issues, Debates, Policy* (1st Edition, Willian Publishing 2002) 8-28 for an analysis of proprietary and non-proprietary rights in modern land law.

appear within the closed list of property rights are deemed proprietary rights.[52] Easements and restrictive covenants are commonly accepted as established proprietary rights. There are of course other rights which chancel repair could be characterised as; for example, manorial rights[53] share many similarities with chancel repair liability. However, they are not a suitable 'target' property right to analyse by way of analogy for the purpose of this thesis, as they do not fall within numerus clausus.[54] [55] [56]

Chancel repair liability will also be characterised as a customary right, a non-proprietary right. The reasoning for this arises due to express, direct reference being made to the fact that chancel repair liability is based on custom;[57] for example, Wynn-Parrry J stated, in *Chivers & Sons Ltd v Secretary of State for Air*,[58] that chancel repair liability is imposed for the benefit of the parishioners who 'by the custom of England have the liability to repair' the church chancel. This characterisation is addressed in detail in chapter 3.

iv) Choice of Methodology?

The next chapter considers whether it is possible to derive whether chancel repair liability is a property right from a definition of what a property right is, particularly by adopting what was said about a property right in *National Provincial Bank v Ainsworth*.[59] However, whilst

[52] S Gardner states that those rights which fall within numerus clausus include: freehold ownership; easements; restrictive covenants; leases; mortgages; rights under trusts; profit a prendre; rentcharges; rights of entry; estate contracts; options and pre-emption rights and home rights. See Gardner, *An Introduction to Land Law* (2nd Edition, Hart Publishing 2009) 9–13.

[53] Manorial rights share similarities with chancel repair liability. Historically, landowners with significant holdings often retained ownership of any mines or minerals, sporting rights and or other rights on the land even when it was sold on. They are valuable but also controversial rights. See Judith Bray, 'Feudal Law: The Case for Reform' in M. Dixon (eds), *Modern Studies in Property Law*, vol 5 (Oxford: Hart 2009).

[54] A characterisation as a rentcharge will not be considered. Rentcharges will fundamentally be extinguished automatically in 2037 pursuant to the Rent Act 1977.

[55] There are however problems with adopting a list of property rights/numerus clausus. See Martin Dixon, 'Proprietary and non-proprietary rights in modern land law' in Louise Tee (ed), *Land Law, Issues, Debates, Policy* (1st Edition, Willian Publishing 2002) 13.

[56] A characterisation as a rentcharge will not be considered. Rentcharges will fundamentally be extinguished automatically in 2037 pursuant to the Rent Act 1977.

[57] See Chapter 3.

[58] *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, [1955] 2 All ER 607 [609].

[59] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, [1965] 2 All ER 472.

the decision and academic analysis of the same highlight aspects of what a property right is there are shortcoming in the analysis and definition and it fails to provide a satisfactory methodology which can be adopted to identify a proprietary right. Accordingly, an alternative methodology must be adopted. The methodology adopted in this thesis is to analyse chancel repair by way of analogy to selected proprietary and non-proprietary rights by way of analogy.[60]

Analogy involves a process of reasoning from one specific case to another specific case. As, in many circumstances, it may be unclear whether a particular factual situation falls within the ambit of a rule, it can often be helpful to examine apparently similar cases which have previously come before the courts and the principles are well-established. If, upon examination, the facts of a second case are found to be sufficiently similar to a first case, then it may be concluded that the facts of the second case should be treated by the courts in the same way as was the first case. The decision regarding whether a case is sufficiently similar to another is ultimately a subjective one, as no two cases are ever identical.[61]

The technique has the advantage that it is the methodology adopted by the judiciary. Judges use information from previous cases to highlight the continuity between those past cases and the new one.[62] Judges' decisions are based on recognised patterns of reasoning employed within the legal community.[63] Lawyers and legal scholars are therefore often able to predict how a case will be decided by the judiciary by adopting the same patterns of reasoning that would be used by the judiciary.[64] The advantage of the methodology used in this case is that we seeking to predict the law where judicial authority is lacking.

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[60] See also Martin Dixon, 'Proprietary and non-proprietary rights in modern land law' in Louise Tee (ed), *Land Law, Issues, Debates, Policy* (1st Edition, Willian Publishing 2002) 8-28 for an analysis of proprietary and non-proprietary rights in modern land law.

[61] Paul Chynoweth, *Advanced Research Methods in the Built Environment* (1st edn, Blackwell Publishing Ltd 2008) 33.

[62] Richard A. Posner, 'Legal Reason: The Use of Analogy in Legal Argument' (2006) 91 *Cornell Law Review* 761, 773-774.

[63] Paul Chynoweth, *Advanced Research Methods in the Built Environment* (1st edn, Blackwell Publishing Ltd 2008) 33.

[64] ibid.

Legal research by analysis to existing law is an established research technique and an appropriate methodology to adopt in this thesis. Arguments by analogy form the basis of common law and provide 'deepening and sharpening'[65] levels of critical analysis and confidence in the decisions reached rather than being based on abstract theories of interpretation. The most powerful argument in support of reasoning by analogy is that it provides the opportunity for replication and for 'coherence in law'.[66] When the nature of the decision making is capable of providing differing decisions, due to the differing persons making the decisions, not all exercising the same outlook using legal materials of many forms (statues, case law, etc.), then there is scope for dissenting views when difficult or unusual questions arise.[67] The benefit of analysis and reasoning by analogy is that it provides support for the decisions and conclusions reached because a considerable amount of agreement can be found on the key principles.[68] Specifically, if a close analogy can be identified in two cases, then this can provide compelling evidence to decide a point in a second case, the same as the first case, because the second case can be seen in the same way as the first one. For cases to be seen as the same (despite there not being a uniform normative outlook), there must be a degree of agreement between the key elements of the cases and this rests on what is identified as the justification for the earlier decision being reached.[69] In other words, for the concept of chancel repair liability to be shown to be definable as another legal concept by analogy, this would require a degree of agreement between key elements of chancel repair liability; for

[65] G Lamond, 'Precedent and Analogy in Legal Reasoning', *The Stanford Encyclopaedia of Philosophy (Spring edn,* 2014) <http://plato.stanford.edu/archives/spr2014/entries/legal-reas-prec/> accessed 1 January 2016.
[66] ibid.
[67] An analogy can be described as 'a non-identical or non-literal similarity comparison between two things, with a resulting predictive or explanatory effect'. See Dan Hunter, 'Teaching and Using Analogy in Law' (*Journal of Association of Legal Writing Directors*, 2004) <www.alwd.org/wp-content/uploads/2013/.../jalwd-fall-2004-hunter> accessed 1 January 2016. The process involves identifying in a first case sufficiently similar features as appear in a second case to justify the same outcome in the second case.
[68] There is an incentive to do this because seeing cases in the same way makes the law more replicable and predictable. Identifying a distinction however can of course defeat an analogy.
[69] G Lamond, 'Precedent and Analogy in Legal Reasoning', *The Stanford Encyclopaedia of Philosophy (Spring edn,* 2014) <http://plato.stanford.edu/archives/spr2014/entries/legal-reas-prec/> accessed 1 January 2016. See also Dan Hunter, 'Teaching and Using Analogy in Law' (*Journal of Association of Legal Writing Directors*, 2004) <www.alwd.org/wp-content/uploads/2013/.../jalwd-fall-2004-hunter> accessed 1 January 2016.

example, in terms of its existence, enforceability and third party impact, as well as the legal concept with which it is ostensibly analogous. The key elements are the ones without which the concepts would be unrecognisable; in other words, they constitute their fundamental characteristics.[70] This thesis seeks to distil the key elements of the identified legal concepts. These legal concepts are then compared with the key elements of chancel repair liability to see whether there is any agreement or distinction between the two. The legal concepts discussed are the apparent potential candidates for being analogous with chancel repair liability.[71]

It may be argued that the nature of property is not static but fluid and dynamic.[72] However, in identifying the fundamental characteristics of the established legal concepts, anchors are provided from which a meaningful analogy can be made with chancel repair liability.[73] The narrative of this thesis involves explaining the legal landscape and identifying the issues and problems related to chancel repair liability. Chancel repair liability is then characterised as existing legal concepts to shed light on its true nature and scope by analogy before a determination is made regarding whether chancel repair liability is a proprietary or non-proprietary right so far as permitted by the analysis in the thesis.

v) Aims and objectives

Chancel repair liability is a concept devoid of legal certainty and has been described by the judiciary as capricious.[74] This thesis provides an original and significant contribution to

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[70] Factors which constitute the concept or enforce the concept on successors in title.
[71] Based on an assessment of numerus clausus however this is not to say characterisation in respect of other concepts may be argued.
[72] See Chapter 5 below. See also Nestor M. Davidson, 'Standardization and Pluralism in Property Law' [2008] *The Fordham Law Archive of Scholarship and History*. See also J H Dalhuise, 'European Private Law: Moving from a closed system to an Open system of Proprietary Rights (2001) 5 Edinburgh L Rev 273.
[73] See the discussion at Chapter 2.
[74] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [73].

knowledge by elucidating chancel repair liability by way of analogy to existing property rights. In doing this, chancel repair liability is made more understandable and less anomalous, elusive and problematic. As chancel repair liability has powerful practical implications (including, for example, exposing parties to high chancel repair bills and increasing the cost of conveyancing by way of insurance products),[75] understanding the nature of the chancel repair liability as a legal concept has important practical consequences and is of immediate and important significance. This thesis provides an original and significant contribution to knowledge because, despite the murky nature of chancel repair liability, little has been written about this phenomenon in order to define it as a legal concept. This thesis seeks to explain whether chancel repair liability is a proprietary right or not by characterising it as an easement, a covenant and a customary right and, in doing so, make chancel repair liability less anomalous, elusive and problematic.[76]

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[75] See Chapter 1 below for a discussion of these issues.
[76] Leading land law texts of Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade: The Law of Real Property* (8th edn, Sweet & Maxwell & Thomson Reuters 2012) and Kevin Gray and Susan Francis Gray, *Elements of Land Law*, (5th edn, OUP 2009) and Martin Dixon, *Modern Land Law* (8th edn, Routledge 2012) have been useful in identifying and discussing key elements of established legal concepts and formulating ideas. Key Law Commission reports include Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985); Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP 86, 1983) and Law Commission, *Land Registration for the Twenty-First Century*: *A Consultative Document* (Law Com No 254, 1998) have been used in understanding many of the issues with chancel repair liability. Further the leading case of *Aston Cantlow v Wallbank* provides impetus for research on chancel repair liability given this high-level decision enforcing the concept. Many cases, articles and journal publications have been used in the analysis and reaching the conclusion of this thesis.

Chapter 1

Chancel repair liability background and nature

The problems and modern issues surrounding chancel repair liability are laid out in this chapter in order to establish a sense of the problem linked to this phenomenon. This is done to clarify that the analysis in this thesis is responding to these issues. In particular, how the proprietary and non-proprietary status of chancel repair liability remains in dispute has been addressed in this chapter.

This chapter discusses the existing law surrounding chancel repair liability. The chapter commences with a historical account of chancel repair liability and the way in which it can arise today before proceeding to discuss some of the key characteristics of chancel repair liability which have been established by the common law. This background provides a foundation upon which to then explain the key problems and modern issues with chancel repair liability, particularly the problems which conveyancers and members of the public face when dealing with chancel repair liability and the proprietary versus non-proprietary debate.

There is direct reference to the case law throughout the chapter, in particular to *Aston Cantlow v Wallbank*,[77] to demonstrate how the proprietary and non-proprietary status of chancel repair liability remains in dispute and to precisely explain the evidential basis for the proprietary versus non-proprietary debate. Further, there is analysis of the dicta in the relevant case law, with connections being made to the Law Commission review in this area in

[77] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546.

order to provide a better sense of the problem and modern issues related to chancel repair liability.

The problem addressed in this thesis is the question of whether chancel repair liability is a proprietary or non-proprietary right, and there are connected issues relating to the fact that chancel repair liability is 'highly anomalous', to quote Lord Nicholls of Birkenhead when referring to the Law Commission's description of chancel repair liability.[78] One of the problems related to chancel repair liability, which makes it anomalous, is that it is difficult to discover property affected by the liability and the potential hazards that may follow from this. The discoverability of chancel repair liability is discussed in detail in chapter 6 below. However, it is also considered in this chapter to allow for a sense of the problems and modern issues with chancel repair liability to be demonstrated to give the reader a better sense of the problem to which this thesis is responding.

The chapter is divided into the following sections:

i) Background
ii) Status of chancel repair liability - Proprietary and non-proprietary debate
iii) Further evidential basis for the proprietary versus non-proprietary debate
iv) Personal or limited to the amount of his receipts from the tithe?
v) Further evidential basis for the proprietary versus non-proprietary debate from case law
vi) Incident of Ownership
vii) Problems with chancel repair liability

[78] Lord Nicholls of Birkenhead in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [73]; Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985) para 3.1.

viii) Protection and Registration of Chancel Repair Liability

ix) Unanswered questions relating to chancel repair liability

x) Chapter Conclusion

(i) Background

Whilst chancel repair liability is a concept affecting millions of acres of land,[79] little has been written about its fundamental nature and uncertainty exists regarding its classification as a legal concept, specifically its proprietary or non-proprietary nature.

The origin of chancel repair liability is ancient. For a meaningful discussion of chancel repair liability as a legal concept, it is necessary to consider the law and early cases concerning chancel repair liability. Burns' 'Ecclesiastical Law'[80] and Phillimore's 'Ecclesiastical Law of the Church of England'[81] provide a useful resource for this purpose accompanied by the ancient decisions of the courts of the time. A more up-to-date picture of chancel repair has been provided by the Law Commission, including in its report 'Liability for Chancel Repairs'.[82] Further case law, in particular, *Aston Cantlow v Wallbank*, demonstrates how the proprietary/non-proprietary status of chancel repair liability was or remains in dispute. Case law has also identified technical problems with chancel repair liability and the Law Commission has made recommendations for reform, over the years, which have not been adopted by Parliament. Despite the ancient origin of the concept, very little has been done to address the 'highly anomalous'[83] nature of chancel repair liability and explain what it is as

[79] The Law Commission state 'We do not know exactly how many churches currently have the benefit of the right but recent researches carried out by the Church Commissioners suggest that the total number probably lies between four and six thousand: broadly, that is to say, one-third of all parish churches'. Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP 86, 1983) para 1.3.
[80] Burn, *Ecclesiastical Law*, vol 1 (H Woodfall and W Straham 1763).
[81] Robert Phillimore, *The Ecclesiastical Law of the Church of England,* vol 2 (London: H Sweet 1873).
[82] Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985). See also Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP 86, 1983).
[83] As referred to by Lord Nicholls of Birkenhead in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [73]; Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985) para 3.1.

a legal concept (is proprietary or non-proprietary?) Whilst the effect of chancel repair liability has been changed indirectly by subsequent enactments by Parliament, in particular the Land Registration Act 2002, problems and uncertainty regarding its classification still exist. This creates practical problems for practitioners dealing with chancel repair liability, their clients and the judiciary. In a conveyancing context these problems have been the subject of lively commentary and are well documented.[84] The above sources have been used for the analysis of chancel repair liability in this chapter.

The following two sections briefly consider several initial key points: what is the church chancel and what is the process for enforcement? These issues are relevant for understanding the content of the later chapters of this thesis.

What is the church chancel?

At this stage, it is appropriate and important to note the extent of the church chancel. The Fourth Lateran Council of 1215 set forth the doctrine of transubstantiation (the process in the Christian church by which bread and wine become the body and blood of Jesus Christ).[85] Following the establishment of this doctrine the clergy were required to ensure that the consecrated bread and wine were protected from lay members of the congregation and parishioners. In order to facilitate this, the area of the church in which the congregation and parishioners stood or sat in a typical church (the nave) was partitioned off from that part of the church used by the clergy (the chancel).[86] This requirement was given legal effect pursuant to canon law, specifically that the construction and upkeep of the area partitioned off by the clergy was their responsibility and the part in which the congregation and parishioners gathered (the nave) was the parishioners' responsibility.[87]

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[84] For example see S Cherry, 'The end is nigh?' (2012) 162 *New Law Journal* 1206. See also J Naylor, 'The Law is an apse' (2007) 157 *New Law Journal* 7294. See also S Cherry 'Property: Beyond repair?' (2009) 159 *New Law Journal* 1614. See also M Le Breton, 'Property/Insurance: A cautionary tale' (2009) 159 *New Law Journal* 7386.

[85] Richard Nicolas, *The Eucharist as the centre of theology* (Peter Lang International Academic Publishers, 2005). See also Canon 1: The Creed Caput Firmiter, The Fourth Lateran Council (1215).

[86] Stephen Friar, *A Companion to the English Parish Church.* (Bramley Books Sutton Publishing Ltd, 1996).

[87] *Wickhambrook Parochial Church Council v Croxford* [1935] All ER Rep 95, 99 provides a description of a church chancel.

The partitions shielding the chancel from the nave became decorative but, following the reformation in the 16th century, the barriers were removed in favour of the congregation being able to watch the clergy. No barrier now exists except for an alter rail which was introduced post-reformation.[88] The alter rail however serves the useful function of marking the boundary between the nave and the chancel.

Prior to the Fourth Lateran Council of 1215, there was no requirement for the separation of the clergy from the parishioners nor was there as an important distinction between the nave and the chancel of the church.

Enforcement

Action to enforce chancel repair liability can be taken by the parochial church council[89] as the 'responsible authority'[90] which has power to enforce failure to pay chancel repair liability pursuant to section 2 of the Chancel Repairs Act 1932. The responsible authority is typically the parochial church council but, in their absence, the church wardens are the responsible authority.[91] Notice must be served on the person identified as having a chancel repair liability. After the expiry of a notice requiring repair work to be undertaken or payment to meet the chancel repair costs, court proceedings may be issued to enforce payment,[92] the ultimate

[88] Reformation was the process whereby the Church of England broke away from the Roman Catholic Church.
[89] It is a managing committee in a parish for the Church of England. It has legal responsibility for the financial affairs of the Church and its assets.
[90] Chancel Repairs Act 1932, s4.
[91] Chancel Repairs Act 1932, s4(1) defined the responsible authority.
[92] Chancel Repairs Act 1932, s2 states*:*
'(1) Where a chancel is in need of repair, the responsible authority may serve upon any person, who appears to them to be liable to repair the chancel, a notice in the prescribed form (hereafter in this Act referred to as a "notice to repair") stating in general terms the grounds on which that person is alleged to be liable as aforesaid, and the extent of the disrepair, and calling on him to put the chancel in proper repair.
(2) At any time after the expiration of a period of one month from the date when the notice to repair was served, the responsible authority may, if the chancel has not been put in proper repair, bring proceedings against the person on whom the notice was served to recover the sum required to put the chancel in proper repair:
Provided that, on the application of the responsible authority made at any time after the service of the notice to repair, the court may, if satisfied that the chancel is in urgent need of repair and that no sufficient measures are being taken to put it in proper repair,

sanction being the sale of the property to meet the repair costs (a point referred to below). Further, the parochial church council is arguably under a duty to repair the church chancel and required to take action to ensure that the church chancel does not fall into disrepair. A failure to take action on the part of a parochial church council in respect of repair arguably results in a breach of their duty.

The next section considers the historical development of chancel repair liability which provides a foundation upon which to explain the key problems and modern issues related to chancel repair liability.

Historical development of chancel repair liability

To understand the nature of chancel repair liability, it is necessary to consider its historical origin. For this purpose, reference to ancient times is required. During the 6th and 7th centuries A.D., bishops and clergy lived in the cathedral church.[93] They were maintained by the faithful[94] through tithe offerings and ecclesiastical profits, which monies belonged to the bishop and clergy and could be used for religious purposes.[95]

There was a wave of church building in the middle ages, with the expansion of Christianity throughout England. In the Middle Ages, over 8,000 new churches were built in England.[96] Often, travelling clergy found rural populated places where there was a need for a place of worship. They were encouraged to settle in the community and raise a church.[97] With the expansion of Christianity, the demand for a place of worship increased. It was often the local

give the responsible authority leave to bring such proceedings as aforesaid before the expiration of the said period and also leave to repair the chancel without prejudicing their claim in those proceedings'.

[93] The church at which an archbishop or metropolitan bishop resides.

[94] Those following the Christian faith.

[95] Richard Burn, *Ecclesiastical Law*, vol 1 (H Woodfall and W Straham 1763) 47.

[96] Graham White 'Discover our historic churches' (*English Historic Churches, Word Press*) <www.englishhistoricchurches.co.uk> accessed 1 March 2016.

[97] Richard Burn, *Ecclesiastical Law*, vol 1 (H Woodfall and W Straham 1763) 48.

Lord of the Manor,[98] keen to ensure swift accession to the nobility and provide a place of worship for his estate workers, who would provide an endowment for the building of a church, dedicating land within their manor for this purpose.[99] The lord of the manor would become a patron of the church[100] and would be in receipt of the valuable right of being able to appoint the rector[101] to be installed at the church.[102]

Historically, the bishops were in receipt of all tithe offerings[103] and ecclesiastical profits but, with the increase in the number of parochial churches, there was a justification for their income to be split into several parts. Appropriation was the process of annexing the benefice[104] to an ecclesiastical body or person. On appropriation, the priest was endowed with rectorial glebe (land) and the right to tithes (the produce of the labour of the land), while the bishops were released from their repair obligations in connection with the church.[105] This was a requirement before the church could be consecrated.[106] Pursuant to canon law, the person who received these valuable rights, specifically the right to tithes and rectorial glebe, was responsible for the repair of the church.[107]

Rectorial glebe was land endowed to the rector (other than the churchyard and parsonage). It could be used by the rector for his own purposes or rented out to provide the rector with

[98] The Lord of the Manor in medieval times was described in *Corpus Christi College, Oxford (President and Scholars) v Gloucestershire County Council* [1983] QB 360, [1982] 3 All ER 995, 365 as 'The nucleus of English rural life. It was an administrative unit of an extensive area of land. The whole of it was owned originally by the lord of the manor. He lived in the big house called the manor house. Attached to it were many acres of grassland and woodlands called the park. These were the "demesne lands" which were for the personal use of the lord of the manor. Dotted all round were the enclosed homes and land occupied by the "tenants of the manor"'. See also *Walker v Burton* [2014] P& CR 9, 119.
[99] Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985).
[100] Richard Burn, *Ecclesiastical Law*, vol 1 (H Woodfall and W Straham 1763) 234.
[101] An administrative leader in the Christian church.
[102] The advowson.
[103] Produce from the labour of the land from parishioners.
[104] The ecclesiastic revenues.
[105] Richard Burn, *Ecclesiastical Law*, vol 1 (H Woodfall and W Straham 1763) 247. Pursuant to the Council of Lyons of 566 rights to rectorial glebe and tithes were granted.
[106] Richard Burn, *Ecclesiastical Law*, vol 1 (H Woodfall and W Straham 1763) 247.
[107] ibid. See also Council of Lyons of 566.

an income. The extent of the land endowed could include farms or simply individual strips of land.[108]

The other main benefit with which the rector was endowed was the right to tithes, which constituted a tenth of the fruits of the labour of the land. This initially took the form of crops and stock from the land but, later, these tithes were converted in to a financial payment, a tithe rent charge.[109] These valuable rights to tithes and rectorial glebe constituted the rectory; however, with these rights came the responsibility for repairing the church.

The rule which had been established over time was that that the responsibility for the repair of the church was shared between the rector and parishioners, with the parishioners having responsibility for usually the west end of the church, the part they would sit in, in a traditional church layout and the responsibility for the chancel falling on the rector.[110] Accompanying the benefit of the rectory endowed to the rector came the liability for repairing the church chancel.[111]

It was the Lord of the Manor's right to determine the priest to be appointed in the newly-built church. The Lord of the Manor had the advowson, the right to appoint the priest.[112] This was a valuable, transferrable asset.[113] In the middle ages, it was not uncommon for the advowson to be acquired by religious houses and monasteries keen to ensure that they retained control over who was appointed rector in perpetuity.[114] Pursuant to the Act of Supremacy 1534, Henry VIII was appointed Supreme Head of the Church in England. Under the reign of Henry

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[108] M Hill, *Ecclesiastical Law* (Third Edition, OUP 2007). See also R Herbert 'Chancel Repair Liability' (2007) *Property Law Journal.*

[109] Pursuant to the Tithe Act 1836 and as descried succinctly in Derek Wellman 'Chancel Repair Liability' (*Peterborough Diocesan Registry*, April 2000) <http://www.peterboroughdiocesanregistry.co.uk/wellman.pdf> accessed 1 March 2016.

[110] Pense v Prouse (1695) 1 Ld. Raym. 59; 91 ER 934 (Holt C.J). See also Bishop of Ely v Gibbons and Goody (1833) 4 Hag. Ecc 156, 162 ER 1405.

[111] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983).

[112] ibid 5.

[113] ibid 5.

[114] ibid 6.

VIII, there occurred the dissolution of the monasteries, priories, convents and friaries in England. Their income was appropriated and their assets bestowed on institutions such as the Oxbridge colleges and lay individuals,[115] together with the benefit of the tithes and rectorial glebe, and the burden of chancel repair liability.[116] This clearly caused a problem in terms of chancel repair liability because any party who acquired rectorial property became a (lay) rector and thereby gained the benefit of the rectory. On acquiring part of the rectory however, no matter how small, they also became a (lay) rector responsible for chancel repair liability.[117] As noted by the Law Commission, 'the chancel repair liability follows the history of the rectorial property, because the owner of what is at any point of time rectorial property is the rector (or at least a rector)'.[118]

The problem was exacerbated in the 16th and 17th centuries pursuant to the enclosure awards in connection with common land. Common land was land enclosed pursuant to the Enclosure Awards. On enclosure, it could be transferred to the rector under the enclosure awards and released from tithes. However, the land, on its acquisition by the rector, would form part of the rectory and be subject to chancel repair liability.[119] Enclosure was the process of enclosing medieval common land to create larger farms and ending the open field system which had existed since the early middle ages and even earlier. Under the open field system, each manor or village typically had a handful of large fields of often hundreds of acres which were split into strips of land. This common land historically formed part of the Lord of the Manor's estate[120] which was subject to the rights of 'commoners' who were local workers who could occupy part of the common land, one or a number of individual strips, for farming purposes,

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[115] ibid 7. See also Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985) para 2.23.
[116] *Sereant Davies' Case* (1621) 2 Rolle 211.
[117] Law Commission (n 111) para 2.7.
[118] Law Commission (n 111) para 2.8.
[119] Law Commission (n 111) para 2.8.
[120] Pursuant to a feudal grant from the Crown.

such as grazing livestock.[121] The enclosures took place pursuant to local acts of Parliament, the Enclosure Acts. These enclosure acts gathered the narrow strips of land which had existed in the open fields system, enclosed them (by fencing them off) to create larger individual farms and transferred them into private ownership. Private ownership was determined to be a better system of farming and resolved the 'tragedy of the commons'.[122] Enclosure consisted of transferring the land into private ownership and extinguishing the common rights pursuant to an Enclosure Act. What enclosure land was allotted and to whom was determined by an Enclosure Commission based on what they considered fair.[123] One particular way in which the enclosed land could be acquired by a rector pursuant to an enclosure award was if a right to tithes were given up.[124] Consequently, because owning tithes was connected to chancel repair liability, chancel repair liability subsequently affected the land which was transferred to a rector for the release of tithes.[125]

Chivers and Sons Ltd v Air Ministry[126] provides a useful example of the effects of an Enclosure Award. The crux of the case was that both Chivers and the Air Ministry (the parties in the case) were held liable for chancel repairs in the parish of Oakington in Cambridgeshire, as they had bought land owned by Queens College Cambridge. Queens College Cambridge had previously acquired the land in lieu of tithes pursuant to an enclosure award. On the transfer of the land, Chivers and Air Ministry became lay rectors and liable for chancel repair. The significance of the case and other similar cases[127] is that it demonstrates that chancel repair

[121] W A Armstrong, 'The Influence of Demographic Factors on the Position of the Agricultural Labourer in England and Wales, c.1750–1914' (1981) 29 *Agricultural History Review*, *British Agricultural History Society,* 71–82.
[122] The Tragedy of the Commons was individuals focussing on short terms gains resulting in land being overgrazed causing long damage to land and long term problems.
[123] Greg Yurbury 'Chancel Repair Liability – Enclosure Award Liability' (*Chancel Repair Liability Blog Spot,* 2016) <http://chancelrepairliability.blogspot.co.uk/2012/11/enclosure-award-liability.html> accessed 1 May 2016.
[124] As noted by the Law Commission 'In making an award, it was possible to appropriate part of the common land to the rector as such, to the intent that the land so appropriated should stand in place of the rectorial tithes'. Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) para 2.11.
[125] See Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985).
[126] *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, [1955] 2 All ER 607.
[127] The same issue in connection with land in lieu of tithes arouse in connection with St Eadburgha's Church in Broadway however the parochial church council decided that it did not have to take enforcement action. See Editor 'Broadway church law need not be enforced on villagers' (*BBC Hereford & Worcester,* August 2012) < http://www.bbc.co.uk/news/uk-england-hereford-worcester-19335983> accessed 1 May 2016.

liability has never been repealed or significantly changed and is capable of exposing parties to liability today, despite it ancient and historical origins. Given that it is estimated that 1,100 Acts of Parliament created land in lieu of tithes, chancel repair liability arising due to enclosure awards, is a significant source of chancel repair liability.[128]

Tithes

Pursuant to the Tithe Act 1836, those tithes which were not brought to an end pursuant to the enclosure awards were extinguished pursuant to this act and converted into tithe rent charges.[129] The effect of this was that a financial liability was placed on parishioners in lieu of a requirement that they surrender a fraction of the produce resulting from their labour on the land.[130]

Tithe rent charge annuities, a form of government stock, was supplied to rectors in 1936 in lieu of tithes and tithe rent charges, which were abolished pursuant to the Tithe Act 1936, effectively by way of compensation. Chancel repair liability was however preserved. The tithe rent charges brought to an end were divided into four different classes, set out below, as a means of apportioning chancel repair liability and were recorded in a Recorded of Ascertainment.[131] Pursuant to the Tithe Act 1936:

> 'Where the Commission ascertain, in relation to any chancel or building, that the residue aforesaid comprises two or more rentcharges, they shall ascertain the amount of each of those rentcharges which—
> (a)was a rentcharge in respect of which stock is to be issued under this Act and which was not so vested as to fall within the next succeeding sub-paragraph;

[128] Greg Yurbury 'Chancel Repair Liability – Enclosure Award Liability' (*Chancel Repair Liability Blog Spot,* 2016) <http://chancelrepairliability.blogspot.co.uk/2012/11/enclosure-award-liability.html> accessed 1 May 2016.
[129] Tithe Act 1836.
[130] Hay, corn, wood (greater tithes) and the remainder (lesser tithes).
[131] Pursuant to Tithe Act 1936, sch 7, para 2. See also Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985). See also Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) para 2.16.

> (b)was a rentcharge in respect of which stock is to be issued under this Act and which was vested immediately before the appointed day for an interest in fee simple in possession in any of the corporations or bodies mentioned in the proviso to subsection (2) of section thirty-one of this Act;
> (c)was so vested between the twenty-sixth day of February, nineteen hundred and thirty-six, and the appointed day as to render the provisions of section twenty-one of this Act applicable thereto; or
> (d)was merged or extinguished under the Tithe Acts in land to which the provisions of section one of the Tithe Act, 1839, apply; and shall ascertain, as respects each of those rentcharges, the proportion (in this Part referred to in relation to that rentcharge as "the appropriate proportion") which the amount thereof bears to the apportionable amount of rentcharge liability'.

In each case, despite the tithe rent charge being extinguished, the individual whose tithes extinguished acquired a proportional chancel repair liability, the amount of which depended on the class of tithe rent charge.[132] The rent charges abolished were equated to a chancel repair liability payment and recorded in a Record of Ascertainment by 'The Tithe Redemption Commission'. The records held at the National Archives and are available for review and reveal a current source for identifying land affected by chancel repair liability.

To avoid, however, the inconvenience of each landowner paying his tithe in the form of a variety of products, in many cases an agreement (by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind) was made for the fulfilment of tithe by, for example, providing a quarter of the wood instead of all of the produce of the land or paying a sum of money (known as a modus decimandi or more commonly a modus). As noted by Blackstone, chancel repair liability is arguably a good modus because the thing given, in lieu of tithes is beneficial to the parson, and not for the emolument of third persons only.[133] A modus, to repair the church in lieu of tithes, is not good, because that is an advantage to

[132] In summary Class (a) are tithe rentcharges which do not fall within class (b). Pursuant to Ecclesiastical Dilapidation Measure 1923, s52(1) the relevant parochial church council took over the relevant chancel repair liability in connection with these tithe rentcharges. Class (b) tithe rentcharges are those which are received by a spiritual rectors and ecclesiastical corporations or education bodies (pursuant to the Universities and College Estates Act 1925) including Durham University. These rectors remain liable for chancel repair liability. Class (c) rentcharges which were received and payable by the same individual due to the land they owned merging pursuant Tithe Act 1936, s21. Chancel repair liability applies to all the land and payable by the lay rector. Class (d) are tithe rentcharges received pursuant to a declaration of merger, pursuant to the Tithe Act 1836. Chancel repair liability applies to all the land and payable by the lay rector.
[133] 2 Bl Comm 18.

the parish only but to repair the chancel is a good modus, for that is an advantage to the parson.[134]

Rectorial glebe

As noted above, rectorial glebe was endowed to a rector on the formation of a new church. There are, however, a number of different forms of rectorial glebe, which are noted below. It is important to draw a distinction between the different forms of rectorial glebe as this can, in turn, affect the liability for chancel repair. The different types of glebe are as follows:[135]

a) Rectorial glebe vested in a monastery prior to the Reformation

Rectorial glebe vested in a monastery prior to the Reformation will carry the burden of chancel repair liability which, on the dissolution of the monasteries, was appropriated into lay hands. Such land may be very difficult to identify as it may have been subdivided numerous times since it was first appropriated unless it has been transferred to an educational instruction such as an Oxbridge college and still lies in the hands of the original lay rector.[136] However church records are likely to show evidence of the land affected.

b) Rectorial glebe which remained in spiritual hands but was not transferred to a monastic rector

[134] Robert Maugham, *Nature of Real Property or Readings from Blackstone other Text Writers* (Spettigue 1842) 15.
[135] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) para 2.19.
[136] ibid.

Rectorial glebe which remained in spiritual hands[137] but was not transferred to a monastic rector[138] will still be identifiable from church records. Chancel repair liability was transferred to the parochial church council in 1923, up to which point the spiritual rector would have been liable for chancel repair.[139]

c) Land disposed of by a spiritual rector as referred to in the paragraph above

In the case of land disposed of by a rector, it should be noted that this was not permitted until after 1858, and even then only in specified circumstances. The proceeds of sale would not be for the spiritual rector to keep personally but would be added to the endowment of the benefice. In other words, the proceeds would be used for the continuation of the rectorial obligations. As nothing was taken out of the rectory (but simply a transfer of the form of the property was taking place, from tangible to intangible property), it is arguable that the land disposed of would not constitute part of the rectory and would therefore not be subject to chancel repair liability. If this is the case, then land transferred by a spiritual rector would not be subject to chancel repair liability because there would be no transfer of the part of the rectory. In any event, pursuant to the Ecclesiastical Dilapidations Measure 1923, the liability for chancel repairs was transferred to the parochial church council.[140]

Having considered the historical origins of chancel repair liability, the existing law in relation to chancel repair liability can be summarised as noted below.[141] Essentially, there are three

[137] In other words not lay hands.
[138] An ecclesiastical body.
[139] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) para 2.19.
[140] ibid.
[141] Recognised in Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985). See also Derek Wellman 'Chancel Repair Liability' (*Peterborough Diocesan Registry*, April 2000) <http://www.peterboroughdiocesanregistry.co.uk/wellman.pdf> accessed 1 March 2016.

ways in which chancel repair liability may arise today which have been recognised by the Law Commission:[142]

- Pursuant to the Tithe Act 1936 and as noted above, tithes and tithe rent charges were extinguished and a proportional chancel repair liability recorded against the land of the individuals who had had their tithes extinguished. The liability can be determined by searching the records held in the National Archives.

- Further land which was transferred to a rector in exchange for the release from tithes will have formed part of the rectorial property and be subject to chancel repair liability. The enclosure awards are available in parish records and at the National Achieves. The extent of the land affected can be ascertained from a review of the plans attached to the enclosure award.

- Finally, as noted above, if land is former rectorial glebe which fell into lay hands following the Reformation, then it is land which is subject to chancel repair liability. Identifying such land may be very difficult unless it is still in the original hands to which it was transferred during the Reformation (for example, an Oxbridge College).

Such above circumstances were also recognised by the Law Commission in their working paper, 'Transfer of Land Liability for Chancel Repairs'.[143]

Chancel repair liability is a concept of ancient original yet it has stood the test of time and still exists and remains enforceable today. Action may be taken by a responsible authority to

[142] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) para 2.29.
[143] ibid.

enforce chancel repair liability. It has been shown that an enforceable liability arises in at least three different forms. It may give rise to a liability as a consequence of a liability being recorded in a record of ascertainment, where land is former rectorial glebe or where the land has been exchanged for tithes pursuant to an enclosure award.[144] The differing circumstances in which chancel repair liability may arise demonstrate its 'anomalous' nature.

The above background provides a foundation upon which to then explain the key problems and modern issues associated with chancel repair liability, in particular problems which conveyancers and members of the public face when dealing with chancel repair liability and the proprietary versus non-proprietary debate. The proprietary versus non-proprietary debate is discussed in the next section. Land registration also has a significant impact on chancel repair liability are this is discussed further below.

(ii) Status of chancel repair liability – Proprietary and non-proprietary debate

This section explains precisely the evidential basis for the debate regarding whether chancel repair liability is a proprietary or a non-proprietary right.

It has been explained above how the liability to repair the chancel devolved from the parish rector to the persons who may now be subject to chancel repair liability, and in particular how, in many cases, it falls on private landowners. Arguably, however, the above analysis reveals that chancel repair liability arises due to persons acquiring rector status, rather than

[144] Key issues arising out of the above analysis are discussed later in this thesis. The above analysis reveals a potential link between the burden of chancel repair liability and benefit of rectorial glebe and tithes. The benefit and burden principle is discussed in this context in Chapter 2. Further the above analysis reveals that in the case of land disposed of by a spiritual rector a change in form of asset, from real property to money, abolishes chancel repair liability, in relation to that asset, when the money is used for spiritual purposes. In other words the change in the form of the asset affects the liability for chancel repairs.

chancel repair liability being attached to the land. The fact that chancel repair liability does not necessarily run with the land or is attached to land is supported by the Law Commission analysis. The Law Commission state in their working paper, Transfer of Land Liability for Chancel Repairs:

> 'the liability to repair the chancel has never run with the ownership of all the land now (or even formerly) within ancient parishes. As we shall see, the repairing obligations have in many cases been transferred to the parochial church councils themselves; and in other cases they fall on certain ecclesiastical and educational foundations in such a way that the obligations have not become attached to land at all. Where they have become so attached, the particular lands affected may constitute a small portion only of the lands within the ancient parish in question'[145]

Instead, the Law Commission note that chancel repair liability was always attached to the ownership of the rectory. They state:

> 'It will however be clear from what we have already said that the chancel repair liability was always attached to the ownership of the rectory (the rectorial glebe and tithes), and not to the right to appoint to the rectory, (or, in more recent times, vicarage). The chancel repair liability follows the history of the rectorial property, because the owner of what is at any point of time rectorial property is the rector (or at least a rector)'.[146]

The Law Commission state that the true position is that the acquisition of the rectorial property will usually be treated as the acquisition of the rectory (or a share in it) as well, thus giving the acquirer the status of rector and, because he is rector, he is liable for chancel repairs. The Law Commission note:

> 'As we have shown in our historical Part, the repair of the chancel was a personal responsibility of the rector, and it remains so. It is easy, but misleading, to think of the liability as something directly attached to the rectorial property, especially if that property (as a result of substitution or otherwise) takes the form of land. The true position is that the acquisition of the rectorial property will usually be treated as the acquisition of the rectory (or of a share in it) as well, thus giving the acquirer the status of rector; and because he is rector he is liable'.[147]

[145] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (n 142) para 1.4.
[146] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (n 142) para 2.9.
[147] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (n 142) para 3.3.

The Law Commission note that one consequence of this is that chancel repair liability is not an encumbrance on the land in the sense of a charge or mortgage. The Law Commission state:

> 'First, the liability is not an encumbrance on the rectorial property in the same sense as is, for example, a mortgage or charge. A purchaser of land constituting rectorial property will be liable even if he had no notice whatever of the liability's existence;' and he does not have the benefit of the implied indemnity covenant contained in Part I of the Second Schedule to the Law of Property Act 1925'.[148]

In short, the Law Commission note that the rector had 'proprietary rights', being the profits of the glebe, which was land belonging to him in the right of his office (as rector) and the tithes. It was out of these proprietary rights that the chancel repair liability was paid. On this analysis, chancel repair liability is the personal responsibility of the rector and it attaches to the ownership of the rectory (the rectorial glebe and tithes).

It should be noted, therefore, that if one requirement of a property right (and what constitutes a property right is analysed in detail below) is that the right 'attaches to ownership of land'[149] and or 'runs with the ownership of all the land'[150] which tradition has often considered to be characteristic of a property right (which is reflected, for example, by the definition of a property right provided by Lord Wilberforce in *National Provincial Bank v Ainsworth*, where he stated: 'before a right or interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties and have some degree of permanence or stability'), then, based on the Law Commission analysis, it cannot be said that chancel repair liability satisfies this criteria. On this basis, the Law Commission analysis provides evidence that chancel repair liability is not a proprietary right, or does not one fall within the traditional

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[148] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (n 142) para 3.4.
[149] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (n 142) para 1.4.
[150] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (n 142) para 1.4.

orthodox parameters. However, as noted above, there are alternative factors and analysis to take into account in addition to the points noted by the Law Commission, including the system of land registration, and recent case law and statutes.[151] Further, what the essential futures of a property right are and what a property right is, as has been eluded to in the Introduction to this thesis, have been analysed in this thesis below and extend the debate further than merely saying that a property right 'binds a third party' whereas personal rights do not. As referred to above, the definition of what property rights are, adopted in this thesis, is those rights that fall within numerus clausus and the rationale for adherence to numerus clausus is discussed further below.

Further, there are additional arguments to be considered in the chancel repair liability property and non-proprietary debate. In *Aston v Cantlow*, discussed in detail below, Lord Roger of Earlsferry goes one step further in analysing the property non-property status of chancel repair liability. Lord Roger of Earlsferry states that he agrees with the judgment of Ferris J in the divisional court, where Ferris J said referring to chancel repair liability:

> 'It is, of course, an unusual incident because it does not amount to a charge on the land, is not limited to the value of the land and imposes a personal liability on the owner of the land. But in principle I do not find it possible to distinguish it from the liability which would attach to the owner of land which is purchased subject to a mortgage, restrictive covenant or other in-cumbrance created by a predecessor in title'.[152]

Further, the position of the Law Commission is also not fully support by Lord Hobhouse of Woodborough in his dicta in *Aston Cantlow v Wallbank*. Rather than specifically referring to the fact that chancel repair liability is due to rector status, like the Law Commission, Lord

[151] Land registration and whether the land is registered or unregistered. In particular pursuant to the Land Registration Act 2002.
[152] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, [171]; *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2001] EWCA Civ 713, [2002] Ch 51, 23.

Hobhouse of Woodborough states that it is a liability which derives from the ownership of land and runs with the land. He states:

> 'The obligation to repair is one which derives from the ownership of land to which the obligation is attached. The obligation runs with the land'.[153]

It is useful to discuss the meaning of Lord Hobhouse of Woodborough's statement in the context of chancel repair liability by making reference to easements and covenants.

Typically, an easement, in contrast to a person obligation, is appurtenant to land rather than typically a personal right or obligation of the owner[154] and this remains the case despite the transfer of the ownership of the land.

Covenants, however, are personal arrangements (although a restrictive covenant has proprietary status, it falls within numerus clausus). The original covenantee can always enforce an express covenant against the original covenantor under the doctrine of privity of contract, provided that the covenantee has not expressly assigned the benefit of the covenant to a third party. Accordingly, it is possible for a covenant to be enforced against the original covenantor even after the covenantor has disposed of his interest in the land concerned.[155] However, in the case of chancel repair liability, once the land has been sold, the liability does not bind that owner (the ostensible covenantor in respect of chancel repair liability), in contrast to a breach of covenant/private contract arrangement. According to Lord Hophouse of Woodborough in respect of chancel repair liability, it binds only the owner of the land whilst they are the owner of the land, indicating that chancel repair liability has a proprietary nature. The position appears to be well summarised by Ferris J in the divisional court in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*, when he said:

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[153] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [77].

[154] 'Rights to light the assessment of damages in lieu of an injunction' (*Tanfield Chambers*, May 2016). <https://www.tanfieldchambers.co.uk/2016/05/31/rights-to-light-the-assessment-of-damages-in-lieu-of-an-injunction/> accessed 1 June 2016.

[155] Andrew Whittaker, 'Enforcement of Covenants Relating to Freehold Land – Original Parties', *Encyclopaedia of Forms and Precedents,* vol 35 (2019) para 574.

> 'It (…) imposes a personal liability on the owner of the land. But in principle I do not find it possible to distinguish it from the liability which would attach to the owner of land which is purchased subject to a mortgage, restrictive covenant or other incumbrance created by a predecessor in title'.[156]

In other words, whilst chancel repair liability is described as a personal right, it possesses characteristics of a property right. The proprietary/non-proprietary status of chancel repair liability was considered by Lord Hope of Craighead in Wallbank. He said, referring to chancel repair liability:

> 'This is a burden on the land, just like any other burden that runs with the lands. It is, and has been at all times, within the scope of the property right which she acquired and among the various factors to be taken into account in determining its value'.[157]

Lord Hope of Craighead is clear in his dicta that chancel repair liability is just like another burden that runs with the land (traditionally, as noted above, often considered a characteristic of a property right) and indicative of chancel repair liability being a property right.

Referring to Mrs Wallbank in the Wallbank case, Lord Hope of Craighead said that Mrs Wallbank could have divested herself of the liability by disposing of the land to which it was attached:

> 'She could have divested herself of it [chancel repair liability] at any time by disposing of the land to which it was attached. The enforcement of the liability under the general law is an incident of the property right which is now vested jointly in Mr and Mrs Wallbank'.[158]

It should be noted, therefore, that if one requirement of a property right (and see the analysis below on this point) is that the right attaches to ownership of land then, based on the dicta in the Wallbanks case, it could be said that chancel repair liability satisfies this criterion and so, on this basis, would be proprietary. Clearly, this analysis reveals uncertainty and dicta

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[156] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [171]; *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2001] EWCA Civ 713, [2002] Ch 51, 23.
[157] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [71]
[158] ibid [71].

conflicting with the Law Commissions position in respect of the nature of chancel repair liability.

However, there are alternative factors and analysis to take into account.[159] Further, what the essential futures of a property right are and what a property right is are key in answering the question of whether chancel repair liability is proprietary or non-proprietary. This has been analysed in this thesis below and extends the debate further than merely saying that a property right 'binds a third party' whereas personal rights do not. In particular, in the analysis below, the definition of what a property right is, that is adhered to in this thesis, is the doctrine of numerus clausus.

Further, there are other academic commentaries and cases which add to the debate regarding the nature of chancel repair liability which sets up the proprietary versus non-proprietary debate. These are considered in further detail below.

(iii) Further Evidential basis for the proprietary versus non-proprietary debate

Further evidence of the debate regarding the proprietary/non-proprietary nature of chancel repair liability is provided in the academic commentary. It is noteworthy that tithes and chancel repair liability are noted in Megarry and Wade as an incorporeal hereditament.[160] Incorporeal hereditaments are rights of property. An incorporeal hereditament, as noted by Blackstone, is a right in land. He states:

> 'An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same. It is not

[159] Land registration and whether the land is registered or unregistered. In particular pursuant to the Land Registration Act 2002.
[160] Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade The Law of Real Property* (8th edn, Sweet & Maxwell & Thomson Reuters, 2012) para 31-008.

> the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels'.[161]

Commentators note that incorporeal hereditaments are proprietary; for example, Martin Dixon states, in Land Law, issues, Debates and Policy, 'We know that incorporeal hereditaments are proprietary'.[162] Further commentators in respect of the Court of Appeal decision in *Aston v Cantlow* (later overturned by the House of Lords) note that the Human Rights Act 1998 can be used to 'remove the proprietary effect of the chancel repair liability right'.[163] In Land Law, issues, Debates and Policy the authors state in describing the effect of the Court of Appeal decision in *Aston v Cantlow* (before it was overturned by the House of Lords) that the 'emasculation of the ancient proprietary obligation of chancel repair liability' takes place.[164] The above academic commentary, although unclear, is indicative of chancel repair liability exhibiting proprietary quality.

(iv) Personal or limited to the amount of his receipts from the tithe?

There are a number of other relevant decisions as well as academic commentaries relevant to the debate regarding whether chancel repair liability is a proprietary or non-proprietary right. Earlier editions of McGarry and Wade state, referring to Chancel Repair liability, 'Although technically it was a personal liability rather than a charge on land, it was in effect an incumbrance affecting future owners'.[165] The editors' reference Wickhambrook[166] and the overriding nature of chancel repair liability (now the former overriding interest) under the Land Registration Act 1925 in support (now, of course, no longer overriding). In

[161] 2 Bl Comm 12.
[162] Martin Dixon, 'Proprietary and non-proprietary rights in modern land law' in Louise Tee (ed), *Land Law, Issues, Debates, Policy* (1st Edition, Willian Publishing 2002), 13 (fn22).
[163] ibid 13 (fn22).
[164] ibid 13 (fn22).
[165] Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade The Law of Real Property* (8th edn, Sweet & Maxwell & Thomson Reuters, 2012) 1252.
[166] *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, 104 LJKB 635.

Wickhambrook, the case of *Smallbones v Edney*[167] and the *Davies' Case*[168] are relied upon in addition to other cases.

In *Smallbones v Edney*,[169] Mellish LJ states says:

> 'Now a tithe owner is exempted from an ordinary church-rate for the repair of the body of a church because he is under a particular liability to repair the chancel. He is not less liable, but more liable, than the owners of other property in the parish to repair the church, being under a personal liability to repair a particular part of it'.

In this case, the chancel repair liability was due to the ownership of tithes and in the following case due to the impropriation of the rectory (in other words, the right to the income from the rectory comprises both rectorial glebe and tithes).

In the Davies' Case decided in 1620, it was stated that:

> 'A person who has the impropriation of the rectory ought to repair the chancel and in addition, if he has any land in the parish, he ought to contribute to the repair of the (nave of the) church as in this case the farmer and tenants of Mr Seycomb Davies have the impropriation and also a farm in the same parish. This was decided by the court without question'.[170]

In short, the cases add to the debate regarding whether chancel repair liability is proprietary or not. Clearly, chancel repair liability is linked to the ownership of the rectory and, insofar as the rectory includes land (i.e. a rectorial glebe rather than tithes), it is a burden on the land.

Further, there are a number of references to chancel repair liability being personal but this is in the context of the size of the liability.[171] It is not specifically in respect to the classification of chancel repair liability as a personal right instead of a proprietary right. Nevertheless, the debate regarding whether chancel repair liability is personal or limited to the amount of receipt from the rectory emphasises the 'highly anomalous' and elusive nature of chancel

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[167] *Smallbones v Edney* (1870) LR 3 PC 444, 35 JP 484.
[168] *Davies' Case* (1620) 2 Roll Rep 211; 81 ER 757; 19 Digest 264, 472.
[169] *Smallbones v Edney (*1870) LR 3 PC 444, 35 JP 484, 450
[170] *Davies' Case* (1620) 2 Roll Rep 211; 81 ER 757; 19 Digest 264, 472.
[171] In the alternative to being limited to the amount of the receipt of benefit from the rectory

repair liability. This point is relevant to the debate regarding whether chancel repair liability is proprietary or non-proprietary.

Relying on the Davies' Case, Lord Hanworth MR said in *Wickhambrook Parochial Church Council v Croxford*:[172]

> 'the liability of a lay impropriator is personal and is not limited to the amount of his receipts from the tithe'.

The above cases make the point clearly that chancel repair liability is a personal liability and not limited to the value of the rectorial profits. Doubts have, however, been expressed regarding whether the decision in *Wickhambrook Parochial Church Council v Croxford* was correct. In *Aston Cantlow*, Lord Scott expressed doubt whether the case had been correctly decided (although did not rule on the point) and pointed out that it was open to question in the House of Lords, but not a point decided on in the case.

Lord Scott refers to *Walwyn v Awberry* (1677),[173] where Atkins J said that:

> 'It was agreed by all, that an impropriator is chargeable with the repairs of the chancel; but the charge was not personal but in regard of the profits of the impropriation'

Lord Scott notes that this suggests that the liability is limited to the amount of profits. Lord Scott notes further that a similar suggestion appears in the Report of the Chancel Repairs Committee presented by the Lord Chancellor to Parliament in May 1930.[174] The chancel repair liability was described as 'an obligation imposed by the Common Law of England, which annexes to the ownership of the rectory the duty of the rector to maintain the chancel of the church out of the profits of the rectory' and, in the case where the rectorial property has been transferred to subsequent owners, the report states, 'every several owner is, to the extent of

[172] *Wickhambrook Parochial Church Council v Croxford* [1935] All ER Rep 95, 101.
[173] *Walwyn v Awberry* (1677) 2 Mod 254, 258.
[174] Chancel Repairs Committee, *Report of the Chancel Repairs Committee presented by the Lord Chancellor to Parliament* (Cmd 3571, May 1930).

the profits derived by him from his piece of the property , under the duty of maintaining the chancel'.[175]

However, Lord Hanworth MR, in *Wickhambrook Parochial Church Council v Croxford*,[176] considered the decision in *Walwyn v Awberry*[177] and held that there was unsatisfactory authority on which to found a limitation of a lay rector's chancel repair liability.[178] Instead, he found that:

> 'the liability of a lay impropriator is personal, and is not limited to the amount of the receipts from the tithe'.[179]

Property rights in land are often said to be rights that are enforceable against the land itself;[180] for example, a claimant to a right of way by easement need not take his or her remedy in money from the person who has denied the right but may obtain a remedy effectively authorising continued use of the right of way.[181] The right vindicated by the remedy fixes on the land rather than operating personally against the person denying the right. In the case of chancel repair liability, the above dicta are indicative of chancel repair liability not constituting a property right (based on the above definition). The liability is personal to the owner of the rectorial property and does not fix on land but takes the form of money without reference to or limitation by the size of the rectorial property. However, as noted above, chancel repair liability is elusive because it attaches to the owner of the land from time to time and so, in effect, operates as a property right.

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[175] ibid.
[176] *Wickhambrook Parochial Church Council v Croxford* [1935] All ER Rep 95.
[177] *Walwyn v Awberry* (1677) 2 Mod 254.
[178] *Wickhambrook* (n 176) 437.
[179] *Wickhambrook* (n 176).
[180] Martin Dixon, 'Proprietary and non-proprietary rights in modern land law' in Louise Tee (ed), *Land Law, Issues, Debates, Policy* (1st Edition, Willian Publishing 2002) 10.
[181] *Nicholls v Ely Beet Sugar Factory Ltd* [1936] ch 343.

For the concept of a property right to have meaning in this thesis, it is essential to clarify what is meant by a property right (which is addressed below), and this must go beyond the simple assertions and characteristics indicative of property rights noted above (e.g. a property right is a property right because it is binding on successors).

v) Further evidential basis for the proprietary versus non-proprietary debate from case law

There are further authorities indicating that chancel repair liability arises out of the common law and is of a non-proprietary nature, but there exists confusion and uncertainty surrounding this point. It was held in *Pense v Prouse*[182] that, by custom, in England, the rector 'shall repair the chancel'.[183] However, in the *Representative Body of the Church in Wales v Tithe Redemption Commissio*n,[184] their Lordships stated that the obligation on the rector to repair the chancel arose from the common law. Viscount Simon LC stated, in this case, that 'there is … ancient authority that the obligation of a rector to repair a chancel was an obligation imposed by common law'.[185] Further, in Wynn-Parry J's analysis of Chivers & Sons Ltd,[186] in his judgment, chancel repair liability was based on the maxim that he who had the benefit of the rectory must bear the burden. He stated further that chancel repair liability did not arise from a property right but was a personal duty on the owner of rectorial property.[187]

[182] *Pense v Prouse (*1695) 1 Ld. Raym. 59, 91 ER 934 (Holt CJ).
[183] ibid.
[184] *Representative Body of the Church in Wales v Tithe Redemption Commission* [1944] AC 228, 240. See also *Aston Cantlow Parochial Church Council v Wallbank* [2003] UKHL 37 [131].
[185] Viscount Simon LC cited Comyns' Digest, Esglise G. 2; Coke, 2 Inst. 489; Ayliffe's Parergon 455. See *Representative Body of the Church in Wales v Tithe Redemption Commission* [1944] AC 228, 240.
[186] *Chivers & Sons Ltd v Secretary of State for Air (Queens' College, Cambridge, Third Party)* [1955] 2 All ER 607, 592.
[187] ibid.

The nature of chancel repair liability was considered in greater detail in *Aston Cantlow v Wallbank*.[188] As noted above, in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*,[189] Mr and Mrs Wallbank were the owners of a 179 acre farm in Warwickshire. Part of the farm (known as the Clanacre fields) was rectorial property which resulted in the owners being lay rectors of the parish church of St John the Baptist in the parish of Aston Cantlow. Notice was served on Mr and Mrs Wallbank, requiring them to put the church chancel in proper repair by the parochial church council of Aston Cantlow, which had responsibility for supervising the preservation and maintenance of the church.[190] Mr and Mrs Wallbank disputed the liability and litigation ensued.

In the House of Lords, Lord Scott discussed the law on chancel repairs. Whilst, fundamentally, this is a human rights case, Lord Scott, in dicta, discussed the nature of chancel repair liability. He stated that 'the rector had, by virtue of his office, a number of valuable proprietary rights which, collectively, constituted his 'rectory'''.[191] He stated what these proprietary rights were, specifically he stated 'these rights included the profits of glebe land and tithes, usually one-tenth of the produce of land in the parish'.[192] Lord Scott said that the responsibility for the repair of the church was shared between the rector and the parishioners, with the rector 'responsible for repairing the chancel'.[193] He noted further that the:

> 'rector's glebe land and tithes, the "rectory", provided both for his maintenance and a fund from which he could pay for chancel repairs'.

It is clear from Lord Scott's analysis that he considered that the rector benefited from valuable proprietary rights, being '*glebe land and tithes'*, as these constituted the rectory. Lord Scott

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[188] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546
[189] ibid.
[190] Parochial Church Councils (Powers) Measure 1956, s4(1)(ii)(b). Pursuant to Chancel Repairs Act 1932, s2 notices were served on 12th September 1994 and 23rd January 1996.
[191] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [97].
[192] ibid.
[193] He stated further that the parishioners were 'responsible for repairing the part of the church where they sat, the western end of the church. *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [97].

did not declare chancel repair liability a proprietary right, but did state that rectorial glebe land and tithes (the proprietary rights he does identify) provide 'both for his maintenance [the rector] and a fund from which he [the rector] could pay for chancel repairs'. In other words his dicta are that chancel repair liability is a concomitant repairing obligation to these proprietary rights.[194] (This was a point also made in the court of Appeal, a decision that was overturned by the House of Lords. In the Court of Appeal, it was said that, 'A rectory also included the obligation to keep the chancel of the church in repair out of the same profits. It was these proprietary rights and concomitant repairing obligations which the word 'rectory' in its original usage connoted'.)[195]

The above analysis is supported later in Lord Scott's judgement where, after discussing the way in which the rectory came to fall into lay hands following the dissolution of the monasteries, he notes, 'the proprietary rights acquired by lay rectors would have included the rectorial glebe and the rectorial tithes'.

The point is that, based on the above analysis, rectorial glebe and rectorial tithes were identified in the dictate in *Aston Cantlow*[196] as proprietary rights whereas chancel repair liability itself was not, but it is in fact a concomitant repairing obligation to these proprietary rights. However, the judgment is concerned with the proprietary rights of the rector rather than the church, so the question regarding whether chancel repair liability is or is not a proprietary right is not addressed specifically.

This dicta of Lord Scott is also supported in the judgment of Lord Hobhouse of Woodborough.[197] In discussing the nature of chancel repair liability, Lord Hobhouse states, 'The liability is one which arises under private law and which is enforceable by the PCC'. Lord

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[194] As stated by Sir Andrew Morritt in the Court of Appeal in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2001] EWCA Civ 713, 9 (Sir Andrew Morritt V-C).
[195] ibid.
[196] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546.
[197] ibid [89].

Hobhouse describes chancel repair liability as a civil obligation. In return for financial and 'proprietary advantages', the rector accepted the obligation to repair the chancel as and when the need arose. The concomitant nature of chancel repair liability to the proprietary rights identified is a point identified in the Judgment. This provides a potential insight regarding its nature and is indicative of chancel repair liability not having proprietary status. It is described as an obligation on the rector in return for proprietary rights. The point is discussed further in chapter 5 below.[198]

In contrast, however, the characteristic of chancel repair liability which requires rectors to pay chancel repair costs despite changes in land ownership is indicative of the concept being, at least on the face of it, proprietary. This is because property rights may be understood as rights capable of binding third parties (something which is often seen as a hallmark of a property right).[199] As Harris states, in Property and Justice,[200] a hallmark of non-ownership proprietary interests is that 'the range of protection specifically includes successive owners'.[201] For a claim over a resource to count as a proprietary interest, it must be 'enforceable, against all who acquire ownership interests'.[202]

On this analysis, when applied to the case of Wallbank, chancel repair liability must be enforceable against successive owners of Glebe Farm. It is clear from the dicta in Wallbank that, in their Lordships' judgment, this was the case. Broadly, there was agreement that chancel repair liability was a burden which was attached to the land.

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[198] A striking similarity can be identified with the equitable doctrine of mutual benefit and burden, in short the principle of justice that 'He takes the benefit must bear the burden'. Such a principle is as noted by Megarry VC in *Tito v Waddell (No 2); Tito v A-G* [1977] Ch 106, [1977] 3 All ER 129, 289 he states 'The simple principle of ordinary fairness and consistency that from the earliest days most of us heard in the form "you can't have it both ways", or "you can't eat your cake and have it too", or "you cant blow hot and cold"'. The point is discussed in more detail below in specific contexts but the dicta of Scott in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 provides an insight into the nature of chancel repair liability but leaves open the question regarding whether it is proprietary or not.

[199] However, see the discussion of what constitutes a proprietary right below. It is important to establish what is a proprietary right as its significance is more subtle and has greater depth than simply being something which is binding on third parties.

[200] J W Harris, *Property and Justice* (OUP 1996).

[201] ibid 55.

[202] ibid 55.

Lord Nicholls of Birkenhead stated that it is: 'a burdensome incident attached to the ownership of certain pieces of land';[203] Lord Hope of Craighead said: 'The peaceful enjoyment of land involves the discharge of burdens which are attached to it as well as the enjoyment of its rights and privileges';[204] Lord Hobhouse of Woodborough said: 'The obligation to repair is one which derives from the ownership of land to which the obligation is attached. The obligation runs with the land';[205] Lord Scott of Foscote said: 'It is created by common law and is subject to the incidents attached to it by common law';[206] Lord Rodger of Earlsferry stated he agreed with what Ferris J said in the divisional court: 'I do not find it possible to distinguish it from the liability which would attach to the owner of land which is purchased subject to a mortgage, restrictive covenant or other incumbrance created by a predecessor in title'.[207]

On this basis, the dicta provides evidence in support of the fact that chancel repair liability has one of the hallmarks of a property right, albeit a non-ownership type. Clearly, the above analysis shows evidence of a debate regarding whether chancel repair liability is a proprietary or non-proprietary right.

The next section considers the meaning of their Lordships' description of chancel repair liability as an incident of ownership and the relevance and weight which may be given to this in establishing the proprietary nature of chancel repair liability.

<u>vi) Incident of Ownership</u>

The dicta of *Aston Cantlow v Wallbank*[208] states that chancel repair liability is an 'incident of ownership' and this point requires unpacking further to understand the status of chancel

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[203] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [16].
[204] ibid [72].
[205] ibid [77].
[206] ibid [134].
[207] ibid [171] and *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* (2000) 81 P & CR 165, [2000] 2 EGLR 149, 152 (Ferris J).
[208] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546.

repair liability. Lord Nicholls of Birkenhead describes chancel repair liability as: 'a burdensome incident attached to the ownership of certain pieces of land'.[209]

Further Lord Hope of Craighead said:

> '…The liability is simply an incident of the ownership of the land which gives rise to it… it is, of course, an unusual incident because it does not amount to a charge on the land, is not limited to the value of the land and imposes a personal liability on the owner of the land... The peaceful enjoyment of land involves the discharge of burdens which are attached to it as well as the enjoyment of its rights and privileges (…)'.[210]

Lord Hobhouse of Woodborough said:

> 'The obligation to repair is one which derives from the ownership of land ... thus he acquires it by a voluntary act - the acquisition of the title to the land of which the obligation is an incident… It is a personal obligation but only exists so long as the person in question is the owner of the land.' .[211] [212]

Lord Rodger of Earlsferry stated: 'the liability to repair the chancel can be regarded as one of the incidents of ownership of rectorial property'.[213]

Their Lordships are in agreement that chancel repair liability is a burdensome incident of ownership attached to the land. Further, their Lordships state that this imposes a personal liability on the owner of the land and only exists so long as the person in question is the owner of the land. The use of the term 'incident of ownership' is used frequently in their Lordships' dicta and requires unpacking to understand the proprietary/non-proprietary chancel repair liability debate further. This point is discussed in further detail in the next section.

[209] ibid [16].
[210] ibid [72].
[211] ibid [77].
[212] Lord Scott of Foscote said 'The chancel repair liability satisfies, in my opinion, the requirements of the article 1 exception: it is a liability created by the common law, it operates in the narrow public interest of the parishioners in the parish concerned and in the general public interest in the maintenance of churches. It is created by common law and is subject to the incidents attached to it by common law. And in the case of Mr and Mrs Wallbank they acquired the rectorial property and became lay rectors with full knowledge of the potential liability for chancel repair that that acquisition would carry with it. I can see no infringement of (or incompatibility with) article 1 produced by the actions of the PCC in enforcing that liability'. See *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [134].
[213] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [171].

The use of the term 'incident of ownership'

Their Lordships agree that chancel repair liability is an incident of ownership.[214] However, such a description requires unpacking, as one of the key features of the common law is the lack of any absolute concept of ownership. Nevertheless, it is referred to numerous times by their Lordships and provides potential insights into the nature of chancel repair liability.

As Kevin Gray notes, at the heart of medieval theory lay the proposition that there could be no ownership of land, as such, outside that of the crown.[215] Instead, ownership manifested itself as 'an artificial proprietary construct called an `estate''.[216] This notional entity was adopted with the consequence that a party owned (and still owns) not land itself but an estate land,[217] with each estate being graded with reference to its duration. Accordingly, proprietary relationships must be analysed within our existing abstract framework of estates and interest in land[218] rather than the ownership of a tangible thing (i.e. the land).

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[214] In its ordinary meaning the word incident means: 'A thing depending upon, appertaining to, or following another'. See 'Incident' (The Free Dictionary, 2018) <https://legal-dictionary.thefreedictionary.com/incident> accessed 1 November 2018.

[215] The orthodox theory that property is a bundle of rights and incidents, such as the right to exclude and the right to income appears to be endorsed (at least in part) by their Lordships in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546. However, one of the key features of the common law is the lack of any absolute concept of ownership. 'Within the common law tradition, title to an estate is founded upon the earthy reality of behavioural fact; and the potentially variable nature of behavioural fact ensures that all land titles are ultimately relative. The common law diverges from other systems of property law, which unambiguously acknowledge ownership as a between a person and a thing. Following Roman law, other legal systems speak in general terms of dominium; and on this view dominium becomes the most comprehensive right which a person may have with regard to a resource'. However, in contrast possession has meant that the common law recognises no absolute title to any estate in land. From the early medieval period onwards, however, the intermittent temptation towards abstraction in the definition of land found a new and significant form of expression. The introduction of a theory of notional estates in land was introduced. In effect, English law invented an entire intellectual apparatus of artificial constructs in order to explain various forms of entitlement to land. The device of the 'estate' in land articulated the jural relationship between the landholder (i.e. the (tenant') and his land, but it also did rather more. The inspired evolution of a system of 'estates' came eventually to provide a functional alternative to the holistic idea of dominium (or direct ownership of the land itself) which was part of the European heritage derived from Roman law. Indeed, perhaps the single most striking feature of English land law has been the absence, within its conceptual scheme, of any overarching notion of ownership'. See Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP, 2009) 56, 181.

[216] *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 277 (Latham CJ).

[217] See F H Lawson, *The Rational Strength of the English Law* (London, 1951) 66-7.

[218] Gray, `The Idea of Property in Land' in S Bright and JK Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press 1998) 27-9.

On the above analysis, the incident of ownership, interpreted through the intermediary of an estate, means simply an incident of the freehold estate. In Wallbank, the freehold estate was Glebe Farm. As noted by Harris, in Property and Justice, in the last few decades, property theorists have taken A. M. Honore's essay on ownership as the starting-point for their analysis of the same.[219] Honore unpacks ownership into the 'standard incidents' of 'the liberal concept of full individual' ownership'.[220] Honore gives an account of the standard incidents of ownership: i.e. those legal rights, duties and other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by a mature legal system.[221]

Honore's 11 incidents of ownership include the following. Not all incidents are advantageous to the right holder, nor are all individually necessary. However, a number may be collectively sufficient for a person to be designated the 'owner' of a particular thing in a given system where 'ownership is provisionally defined as the greatest possible interest in a thing which a mature system of law recognizes'.[222] These 11 incidents are the rights: (1) to possess; (2) to use; (3) to manage; (4) to the income of the thing; (5) to the capital; (6) to security (or immunity from expropriation); (7) the rights or incidents of transmissibility; (8) absence of term; (9) the prohibition of harmful use; (10) liability to execution; and (11) the incident of residuality.[223]

Honoré's lists may be regarded as necessary ingredients in the notion of ownership, in the sense that, if a system did not admit them, and did not provide for them to be united in a single person, then it would be concluded that it did not know the liberal concept of ownership

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[219] J W Harris, *Property and Justice*, (Oxford University Press 1996), 125.
[220] A M Honore, 'Ownership' originally published in A. G. Guest (ed.), *Oxford Essays in Jurisprudence* (OUP, 1961).
[221] The idea of Full Liberal Ownership gave property a detailed and comprehensive meaning: property includes the full gamut of rights to: (a) use the owned resource, (b) exclude others from entering it, and, (c)alienate it (that is, to sell it to someone else). See Hugh Breakey. 'Property', *Internet Encyclopaedia of Philosophy* (2017) < https://www.iep.utm.edu/prop-con/> accessed 1st May 2017.
[222] A M Honore, 'Ownership' originally published in A. G. Guest (ed.), *Oxford Essays in Jurisprudence* (OUP, 1961).
[223] ibid.

(the liberal concept of ownership conveyed by the incidents on the list).[224] In short, according to Honoré, for full ownership in a thing to be recognised, an individual must hold most (but not necessarily all) of the elements (noted below) regarding that thing.[225]

Of particular interest is the incident (10), liability to execution. Honoré deals separately with the liability for an owner's interest to be taken away from him for debt, without which 'the growth of credit would be impeded and ownership would be an instrument by which the owner could freely defraud creditors'.[226] Such an incident demonstrates the relationships between ownership interests and various kinds of 'exportation rules', as described by Harris, in Property and Justice.[227] 'Exportation rules' are the set of rules which presuppose ownership interests are those whereby part or all of the privileges and powers constituting a person's ownership of something may be stripped from him against his will.[228]

The incident of ownership (liability to execution) demonstrates the relationship between ownership interests and expropriation rules. As Harris notes, liability to execution is not a feature of an ownership interest as such. Harris states: 'If a person has an ownership interest in a thing it follows, analytically, that he has some prima facie privileges and powers over it. It does not follow, analytically, that he is liable to be expropriated by the State or in the process of civil execution'.[229] However, all modern property institutions, to some degree, contain some expropriation rules which Honoré 'brings to the fore by describing the impact of such rules as standard 'incidents' of ownership'.[230] As Honoré states:

[224] ibid 112.
[225] Muireann Quigley, 'Property and the body: Applying Honoré' (2007) 33(1) *Journal of Medical Ethics* 631–634.
[226] A M Honore, 'Ownership' (n 222) 112.
[227] J W Harris, Property and Justice, (Oxford University Press 1996), 37.
[228] As Harris states 'In the private law of most systems, what a person owns may be taken away from him as a means of enforcing payment of his debts in processes of civil execution or bankruptcy. Rules of criminal law invariably provide for sanctions by way of fines or confiscation'. J W Harris, Property and Justice, (Oxford University Press 1996) 37.
[229] J W Harris, *Property and Justice*, (Oxford University Press 1996) 127-128.
[230] ibid 128.

> 'No doubt the concentration in the same person of the right (liberty) of using as one wishes, the right to exclude others, the power of alienating and an immunity from expropriation is a cardinal feature of the institution…[however] it would be a distortion to speak as if this concentration of patiently garnered rights was the only legally or socially important characteristic of the owner's position. The present analysis, by emphasizing that the owner is subject to characteristic prohibitions and limitations, and that ownership comprises at least one important incident independent of the owner's choice, is an attempt to redress the balance'.[231]

Chancel repair liability is one of the 'legal rights, duties and other incidents' which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by a mature legal system conferred by our property institution to protect ownership interests. As Harris states: 'When we speak of "the rights of ownership" we may refer, compositely, to the privileges and powers intrinsic to ownership interests and also to particular sets of claim-rights, duties, liabilities and immunities conferred by a property institution to protect ownership interests'.[232]

When the Lordships speak of chancel repair liability as an incident of ownership, they are not referring to chancel repair liability as a privilege and power intrinsic to ownership interests but to chancel repair liability, as stated by Harris, as those rights 'conferred by the rules of a property institution to protect ownership interests'.[233]

We have noted above that there is no absolute concept of ownership in our legal system. Ownership is a reference in Wallbank to the freehold estate. Applying the above analysis, it can be said, on some level, that chancel repair liability is one of the legal rights, duties or other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by our legal system. Chancel repair liability, on some level, based on the above

[231] A M Honore, 'Ownership' (n 222) 112.

[232] J W Harris, *Property and Justice,* (Oxford University Press 1996) 128, 169.

[233] Whilst chancel repair liability is clearly not intrinsic to an ownership interest, as noted above, it may be characterised as a liability to execution. In the event that a chancel repair liability debt is not paid then it may be enforced, ultimately resulting in property being sold to meet the cost of the debt.

analysis, falls within one of the expropriation rules designed to protect property. It can be analysed as one of the 'characteristic prohibitions and limitations' referred to by Honoré.

The point of the above analysis is to seek to unpack what their Lordships mean when they describe chancel repair liability as an incident of ownership. They are describing chancel repair liability as an incident of ownership which is not intrinsic to ownership. It is not a 'cardinal feature' of an ownership interest. Such an analysis means that the characterisation of chancel repair liability as an easement and a covenant is compatible with this analysis as both are non-ownership interests.'[234]

Summary

On the Law Commission's analysis, chancel repair liability is a non-proprietary right which arises not from the ownership of land, *per se*, but from acquiring rector status. However, their Lordships, in dicta in *Aston Cantlow v Wallbank*, state that it is indistinguishable from the liability which would attach to the owner of land which is purchased subject to a mortgage, restrictive covenant or other incumbrance created by a predecessor in title and the obligation to repair is one which derives from the ownership of the land to which the obligation is attached. However, earlier case law and commentators analyse chancel repair liability as a personal obligation rather than a charge on the land. It is clear that there exists evidence of a debate regarding the legal status of chancel repair liability with regard to whether it is proprietary or non-proprietary. Their Lordships in *Wallbank* make it clear that chancel repair liability is an incident of ownership. Based on the above analysis, supported by that provided by Harris, it is a feature of a property institution that there exists right duties, liabilities, and

[234] For example, in English law, both covenants and easements 'do not involve that open ended set of possessory privileges and powers which is the hallmark of an estate'. See J W Harris, *Property and Justice*, (Oxford University Press 1996), 55. See also *Copeland v Greenhalf* [1952] Ch 488; *Grigsby v Melville* [1973] 1 All ER 385, affd. [1973] 3 All ER 455. However, both covenants and easements can prohibit use which would frustrate the limited rights entailed by the interest. J W Harris, *Property and Justice,* (Oxford University Press 1996) 55.

immunities conferred by a property institution to protect ownership interests. In our legal system, where there is no dominium, chancel repair liability can be analysed as one of the 'characteristic prohibitions and limitations' referred to by Honoré as having been designed to protect the freehold estate of the church. This does not however reveal the status of chancel repair liability as a proprietary or non-proprietary right, but does indicate that it is non-intrinsic to ownership, so it is a non-ownership right. It is appropriate therefore to characterise chancel repair liability as established proprietary rights that are non-ownership rights (which easements and covenants are).

The question regarding whether chancel repair liability is proprietary or non-proprietary has been set up and evidence put forward that there is a debate concerning its status. Ultimately, the question rests on what we classify as a proprietary or non-proprietary right. We have tentatively noted above that one hallmark of a property institution's recognition of non-ownership proprietary interests is that the range of protection specifically includes successive owners. However, in our legal system, the identification of a proprietary right is more complex. In identifying whether chancel repair liability is a proprietary right or not, it is important to clarify what we understand a proprietary right to be. This is considered in further detail in chapter 2 and the rationale for adherence to numerus clausus is submitted.

In short, the above decisions lack clarity regarding the nature of chancel repair liability, particularly regarding whether chancel repair liability is proprietary or non-proprietary and whether it is a customary right or one arising out of the common law. Little modern rationale has been provided by the court for the statements made. Reliance has been placed on ancient authorities whose origins lie in ecclesiastical law and who are, arguably, at odds with modern justification or capable of operating successfully in a modern legal system. The lack of clarity provides an incentive for researchers to formulate a clear analysis of the nature of chancel

repair liability. Accordingly, chancel repair liability will be characterised as target proprietary rights in this thesis to determine whether it is proprietary in nature and should be classified as a proprietary right. This, in turn, will address the research question outlined at the start of this thesis.

vii) Problems with chancel repair liability

As outlined at the start of this thesis, chancel repair liability is anomalous and unclear. Classifying chancel repair liability as proprietary or not-proprietary seeks to resolve the uncertainty, making the concept more understandable and, in turn, less anomalous and elusive. One of the problems with chancel repair liability which makes it uncertain is that it is difficult to discover property affected by the liability so potential hazards follow from this. The discoverability of chancel repair liability is discussed in detail in chapter 6 below. However, it is also considered partially below in this chapter to demonstrate the issues with chancel repair liability to which this thesis is responding in addition to other identified problems related to chancel repair liability.

There is evidence of a dislike for chancel repair liability among members of the public.[235] It has been criticised for the irregular way in which it ostensibly operates. It was described by the Law Commission[236] as working 'haphazardly' and the Law Society have declared it to be of 'random application'.[237] A private members bill introduced into the House of Lords in 2014, seeking to abolish chancel repair liability, described chancel repair liability as leading to a 'reduction in value and even an impairment of saleability'[238] of the property which it affects. Criticism has also been vented on the basis that the method of determining the liability takes

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[235] There are in the region of 4 thousand signatures on a petition to abolish chancel repair liability. See Petitioning Lord Chancellor and Secretary of State for Justice The Rt Hon Chris Grayling MP 'Abolish Chancel Repair Liability' (*Change.org* 2014) <https://www.change.org/p/the-rt-hon-chris-grayling-mp-abolish-chancel-repair-liability-2.> accessed 1 January 2016. Further in July 2014 a private members bill was introduced into the House of Lords seeking abolition of chancel repair liability.
[236] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) para 5.4.
[237] Law Society 'Chancel Repair Liability - A Law Society Submission' (Law Society, London 2006) 3.
[238] John Hyde 'Bill Introduced to Abolish Chancel Repair Liability' (*Law Society Gazette*, 17 July 2014) <http://www.lawgazette.co.uk/law/bill-looks-to-abolish-chancel-repair-law/5042287.fullarticle> accessed 1 January 2016.

no account of those chancels most in need of repair but is derived from the historical ownership of tithes[239] and rectorial glebe.[240]

From the perspective of the Church, there is often seen to be reluctance for a parochial church council to take action against parishioners in respect of chancels in disrepair for fear of sparking bad press and a public backlash. Claims, for such a reason, have been withdrawn.[241] This point may be even more pertinent if the parishioners are of a different faith and not members of the church's congregation.

This is clearly an issue for parochial church councils. As stated in 'Legal Advisory Commission of the General Synod- Registration and enforcement of chancel repair liability by Parochial Church Councils':[242]

> 'the enforcement of chancel repair liability could, in the circumstances of the particular PCC concerned, hamper the PCC's work, either by adversely affecting its ability to pursue its object of promoting in the parish the pastoral mission of the Church[243] or by alienating potential financial support ... And actually enforcing liability in those circumstances could give rise to considerable alienation'.[244]

The difficulty of the parochial church council face was recognised by Scott in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*.[245] He stated that

> 'The PCC could have decided not to enforce the repairing obligation. They could have so decided for a number of different reasons which, in particular situations, might have had weight … They might have taken into account excessive hardship to

[239] Tithes are a right to a share of the produce of the labour of the land.
[240] Rectorial glebe is land which was originally endowered to the church. Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) 5-7.
[241] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) para 5.4.
[242] Legal Advisory Commission of the General Synod 'Registration and Enforcement of Chancel Repair Liability by Parochial Church Councils' (October 2007) para 13.
[243] Under Parochial Church Councils (Powers) Measure 1956, s.2 the functions of a PCC include 'co-operation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical'.
[244] Legal Advisory Commission of the General Synod 'Registration and Enforcement of Chancel Repair Liability by Parochial Church Councils' (October 2007) para 13.
[245] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [591]. However, none of the other four Law Lords expressed support for Lord Scott's view.

> Mr and Mrs Wallbank in having to find £95,000. Trustees are not always obliged to be Scrooge'.

The dicta in the case law is analysed further below, with connections being made to the Law Commission review in this area to gain a better sense of the problem related to chancel repair liability in order that the analysis in the subsequent chapters in this thesis may be accepted and to ensure that the thesis is responding to these problems. Evidence from the following source has been discussed:

1. Law Commission, Practitioner Guides
2. Decisions and dicta in relevant case law.
3. Tempering the extent of the problems with chancel repair liability

1. Law Commission and Practitioner Guides

The question regarding whether chancel repair liability is a proprietary right or non-proprietary is important because, in answering this question, an insight into the legal nature of the concept will be gained.[246] This will in turn assist and be of value in resolving the problems associated with chancel repair liability. Problems with chancel repair liability exist[247] and, by establishing whether chancel repair liability is a proprietary right or not, the detrimental effect of these problems may be addressed and reduced.

There is evidence to be found in the Law Commission's working paper, Transfer of Land Liability for Chancel Repairs to show how the proprietary/non-proprietary status of CRL was or remains in dispute. As noted by the Law Commission in their working paper, 'Transfer of Land Liability for Chancel Repairs', the nature of chancel repair liability has hallmarks of a

[246] The essential futures of a property right are discussed below.
[247] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) para 3.2. See also *Hauxton Parochial Church Council v Stevens* (1929) P 240.

proprietary right since it is like a burden on land but, on the other hand, it is an anomalous liability because it is difficult or potentially impossible to discover whether it affects a property (and in this sense is more like a personal arrangement). The Law Commission note in their working paper, 'Transfer of Land Liability for Chancel Repairs':

> 'The chancel repair liability is in a special position in law because it is strictly a personal liability only; but where that liability runs with the ownership of particular land it is in practice *so* like a burden on the land that it is, we suggest, wrong that the general principles applying to burdens on land should not apply to it also. Now under the modern law a purchaser who follows normal conveyancing procedures should not be taken unawares by burdens on the land. He ought to have notice of them either from the title deeds or from physical inspection of the land in question or from the vendor's inability to produce the title deeds or from some readily accessible register. A liability to repair a chancel is not discoverable in any of those ways, and that makes it an anomalous liability'.[248]

The Law Commission, in the Law Commission's Working Paper No.86, identified the main problem with chancel repair liability as the fact that 'no purchaser of land can be sure that his is taking free from it'.[249] This is because there is no complete set of public records which reveals chancel repair liability, which means that a search failing to reveal a liability does not mean that one does not exist. Records of chancel pair liability are held at the National Archive which involves a personal search at the same, which can be time consuming and expensive. Further, as noted by the Law Commission, land affected by the liability can be difficult to identify from the public[250] records themselves. The position is complicated further due to the facts that chancel repair liability arises in different ways and that the position differs for registered and unregistered land.

Further, one of the main practical problems with chancel repair liability is discovering whether a liability exists. An individual may not know that a liability exists, and can then find himself bound by it, despite conducting careful checks and searches. The principles of Land

[248] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) para 5.17.
[249] ibid para 3.2.
[250] ibid para 3.2.

Registration, in theory, should ensure clarity and full information for potential purchasers of the property interests affecting the land, as this is the purpose of Land Registration.[251]

A particular problem with chancel repair liability is the 'Conveyancing Trap'. Despite a purchaser (or their conveyancer) arguably searching diligently for a property acquisition, they may unknowingly acquire a property that is subject to chancel repair liability. The problem is that chancel repair liability is arguably difficult to discover and, following the acquisition of a property and subsequent discovery of a chancel repair liability, the property becomes devalued and unmarketable.[252]

The trap was noted by the Law Commission in the Law Commission working paper entitled 'Transfer of Land Liability for Chancel Repairs.[253] It states: 'The trap for a purchaser lies in the combination of two facts, namely, that the existence of the liability may be very difficult to discover, and that the purchaser will nevertheless be liable whether he knew of its existence or not'.

The Commission note further aggravating factors which include:

> ' the extent of the liability, in money terms, is unquantifiable; the frequency of its recurrence is uncertain; the purchaser has no implied right of indemnity against his vendor; and if he was unaware of the liability when he bought the land carrying the liability he is most unlikely to have sought and acquired an express indemnity in his contract'.[254]

The registers of title should reveal all the proprietary interests affecting a property. Such interests should be 'ascertainable from the register alone', as was stated in *Abbey National*

[251] See *Registrar of Titles of Victoria v Paterson* (1876) 2 App Cas 110, 46 LJPC 21, 116-7.
[252] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) para 6.1.
[253] ibid para 5.16.
[254] ibid para 5.16.

Building Society v Cann.[255] However non-proprietary rights are not recorded in the registers of title. With this in mind, the next section discusses how chancel repair liability is registered at the Land Registry, as this is clearly relevant when analysing whether it has a proprietary or non-proprietary status.

As was noted in the Handbook of Conveyancing Searches, at the time of the Law Commissions above referred paper and in subsequent Conveyancing handbooks, a search of the public records for chancel repair liability is advisable during conveyancing transactions.[256] The failure of solicitors acting in a conveyancing transaction to perform the necessary searches for chancel repair liability may result in professional negligence.[257]

The 11th edition of the conveyancing handbook stated[258] that the search method for chancel repair liability was 'visiting the Public Records Office' and the information to be obtained was the 'potential liability to contribute to cost of repairs to chancel of a church'.[259] The handbook states further that 'it is not easy to define with certainty those properties which are affected by liability since the records held at the Public Records Office are incomplete. If it appears that liability may exist, a buyer should take out insurance to cover this liability'.[260]

The later, 25th edition of the Conveyancing handbook,[261] which was published after October 2013 following chancel repair liability losing its overriding status, states an amended position.

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[255] *Abbey National Building Society v Cann* [1991] 1 AC 56, [1990] 1 All ER 1085, 1089.
[256] In E O Bourne, *Handbook of Coveyancing Searches* (Sweet & Maxwell 1984) the author states 'The best advice must be to search in cases of doubt but the cost of doing so (in terms of time to be spent and possibly agents' fees) should first be ascertained and the clients specific instructions sought if the cost is likely to be significant'.
[257] *G & K Ladenbau (UK) Ltd v Crawley & De Reye* [1978] 1 WLR.
[258] France Silverman, *Conveyancers* Handbook (11th edn, Law Society, 2004) para 10.6.9.
[259] ibid para 10.6.9.
[260] ibid para 10.6.9.
[261] The Coveyancers Handbook is cited in support of this point however no judicial authority is provided. France Silverman, Conveyancers Handbook (25th edn, Law Society, Sept 2018) para B10.6.11.

The handbook states: 'Where the liability is, not recorded in the title deeds, consideration should be given regarding whether it is appropriate to make enquiries'.[262]

The handbook states 'Enquiries may be made using a screening service available from a commercial provider' and identifies a limitation with such a service. The handbook states 'The results will state whether, according to information in the possession of the provider, the property is located in an area where there remains a potential to enforce chancel repair liability. The results are therefore not specific to the property'.[263] The handbook states that 'For property specific enquiries then it is necessary to conduct a personal search or 'FOI paid for search' of relevant records (such as the Records of Ascertainment) held by the National Archives',[264] but notes further that these records may be incomplete.[265] The handbook states that insurance may be considered, either following the results of a search or as an alternative to searching.[266] Further, the handbook recognises that, at midnight on 12 October 2013, chancel repair liability ceased to be an interest capable of overriding first registration or a registered disposition. It states that the liability can be protected, in the case of registered land by entering a notice on the register or, in the case of unregistered land, by registering a caution against first registration.[267] Of particular significance is also the reference in the handbook to whether the chancel repair liability had not been protected by notice in the case of registered land or caution against first registration in the case of unregistered land at midnight on 12 October 2013, as it 'does not mean that it has ceased to exist'.[268] The handbook states that, for registered land where a notice has not been entered on the register before 13 October 2013, liability for chancel repair will continue until a registrable disposition made for valuable consideration is completed by registration (see s.29 Land Registration Act 2002). However, 'notwithstanding this, HM Land Registry will accept an application for the

[262] France Silverman, *Conveyancers Handbook* (25th edn, Law Society, Sept 2018) para B10.6.11.
[263] ibid para B10.6.11.
[264] ibid para B10.6.11.
[265] ibid para B10.6.11.
[266] ibid para B10.6.11.
[267] ibid para B10.6.11.
[268] ibid para B10.6.11.

entry on the register of a notice to protect a claim to chancel repair liability after a transfer for value has been registered'.[269] Further, in respect to unregistered land, on first registration after 12 October 2013, the estate owner will hold free from chancel repair liability unless notice of the liability is entered on the register at the time of first registration.[270] For both registered and unregistered land, 'The courts have yet to consider whether it may be possible for application to be made to alter the register to enter a notice where the proprietor has taken free of the interest on first registration or following the registration of a disposition for valuable consideration'. [271]

The point is that a search of public records may not provide a conclusive answer as to whether a property is affected by chancel repair liability. Further, there exists uncertainty regarding the effect of failing to register a chancel repair liability interest and subsequently seeking to register it. Specifically, in terms of if it is subsequently registered where the proprietor has taken free of the interest on first registration or following the registration of a disposition for valuable consideration. The burdensome effect of chancel repair liability will potentially not be destroyed but only postponed. This is obviously problematic.

There are additional arguments to be considered in the chancel repair liability property and non-proprietary debate. The Land Registry state, in their Practice Guide 66,[272] that arguments have been made that chancel repair liability is not an interest in land that can be protected by notice. However, HM Land Registry 'currently operates on the basis that it does [referring to chancel repair liability] constitute such an interest [in land]'.[273]

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[269] If the application is for an agreed notice, HM Land Registry will serve notice of the application on the proprietor giving him the opportunity to object if he so wishes. Where the application is for the entry of a unilateral notice, the proprietor will be notified that the notice has been entered in the register and it will remain open for the proprietor to apply to cancel the unilateral notice by lodging an application in Form UN4.7. See France Silverman, *Conveyancers Handbook* (25th edn, Law Society, Sept 2018) para G3.12.24.

[270] France Silverman, *Conveyancers Handbook* (25th edn, Law Society, Sept 2018) para B10.6.11.

[271] ibid para B10.6.11.

[272] Land Registry, 'Overriding interests that lost automatic protection in 2013' (Practice Guide 66, Land Registry April 2018).

[273] ibid para 3.6.

As has been referred to above a problem identified by the Law Commission is that 'in the case of many purchases of land or property expensive and time consuming searches are or should be carried out even though the result will be inconclusive and the purchasers may later find himself saddled with a liability of which he had no warning'.[274] This has been termed the 'conveyancing trap'.[275] The Law Commission state that the 'modern conveyancing system seeks to inform a purchase of land of the precise benefits and burdens which he is taking on' and 'there is no reliable source of information about it'. A further problem identified by the Law Commission which links in with this is in the consequential negative impact on a property value. The discovery of a chancel repair liability will require disclosure on the sale of a property. The disclosure obligations on the seller are discussed in more detail below; however, there will be an obligation on the Seller to disclose those matters affecting the property of which he knows about. The point the Law Commission are making is that the disclosure of chancel repair liability may affect the marketability and value of a property. The Law Commission note further, in their discussion of the problems with chancel repair liability: 'we have been told of cases in which negotiated sale have fallen though because the purchasers have felt unable to accept an uncertain and unlimited liability'.[276]

There have been changes in the legal landscape since the publication of the Law Commissions work in the early 1980s on chancel repair liability, yet this has not resolved the problems identified in this paper and report. Current guidance to legal parishioners still advises that searches are carried out at the National Archive to see whether or not chancel repair liability affects a property. Further, the disclosure requirements on sellers of property with knowledge of chancel repair liability are becoming ever more comprehensive[277] yet there is

[274] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) para 3.2.
[275] ibid para 3.2.
[276] ibid para 3.3.
[277] For example, see The Standard Conditions of Sale (Fourth Edition) (The Law Society, London 2003).

still no change in that there is no complete source of information which may be searched to discover a chancel repair liability.

In contrast, changes in the legal insurance legal searches market and the land registration framework have however had an impact on the problems related to chancel repair liability, as identified by the Law Commission. Readily available and cost-effective legal indemnity insurance and legal searches have resulted in buyer confidence in proceeding with transactions despite potentially being at risk of chancel repair liability revealed by legal searches. Further, chancel repair liability's loss of its overriding status in 2013 pursuant to the Land Registration Act 2002 has resulted in buyers potentially taking free from chancel repair liability where a relevant entry is not recorded on the Land Registry title.

It is clear that, whilst some of the problems with Chancel Repair Liability identified by the Law Commission have changed, problems still exist and are of concern in a modern legal system.

2. Decisions and dicta in relevant case law

The judgments in *Aston Cantlow* show that senior judges are keenly aware of the problems associated with chancel repair liability, of discoverability and uncertainty. The dicta in the case law, in particular in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*,[278] has been analysed, with connections being made to the Law Commission review in this area. In doing this, a strong sense of the problem with chancel repair liability has been identified.

[278] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546.

Lord Hope of Craighead said in *Wallbank* that: 'The law relating to the liability for chancel repairs is open to criticism on various grounds. The liability has been described by the Law Commission as anachronistic and capricious in its application and as highly anomalous'.[279]

Lord Hope of Craighead was referring to the Law Commission report: *Liability for Chancel Repairs report* Law Com No 152, 1985 which states:

> 'our main concern is examining this topic is its effect on the conveyancing system. While it is true that much of the law is anachronistic and capricious in its modern application, yet it is only in connection with dealings with land that it appears to create difficulty and injustice'.[280]

Further, in the Law Commission and Land Registry's consultative document, Land Registration for the Twenty-First Century: A Consultative Document (1998), chancel repair liability was described as:

> 'a highly anomalous liability that attached to certain properties and requires the owner (the "lay rector") to pay for the repair of the chancel of some pre-Reformation churches. It is still enforced on occasions even against landowners who purchased the land without knowing of the liability and its existence can be very difficult to discover. The obligation to pay is several so that where there is more than one lay rector one of them can be required to meet the whole amount due and has then to seek contribution from others'.[281]

Lord Hope of Craighead stated further: 'The existence of the liability can be difficult to discover, as most lay rectories have become fragmented over the years as a result of the division and separate disposals of land'.[282]

The same point has been made by the Law Commission in their working paper: *Transfer of Land, Liability for Chancel Repairs* (1983): 'the rectory was often fragmented after the

[279] ibid [73].
[280] Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985) para 3.1.
[281] Law Commission, *Land Registration for the Twenty-First Century*: *A Consultative Document* (Law Com No 254, 1998) para 5.37.
[282] See *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [73].

Reformation and in such cases each rector became liable for the whole (subject to rights of contribution from his co-rectors)'.[283]

Lord Hope of Craighead stated further: 'The fact that it is a several liability may operate unfairly in cases where there is more than one lay rector and the person who is found liable is unable to recover a contribution from others who ought to have been found liable'.[284]

Similar problems which chancel repair liability were identified by Lord Scott regarding the scope and nature of the same. He stated:

> 'But although it must now be regarded as settled law that an individual who becomes the owner of rectorial property of a parish becomes liable for chancel repair, there remain subsidiary issues which, in my opinion, are not settled. For example, the extent of the liability is not settled. Is the liability limited to the value of the rectorial profits the ownership of which has attracted the office of lay rector and the consequent chancel repair liability or is it unlimited in amount?'[285]

3. Tempering the extent of the problems with chancel repair liability

As noted above, one of the main practical problems with chancel repair liability is discovering whether a liability exists. Such interests should be 'ascertainable from the register alone', as was stated in *Abbey National Building Society v Cann*.[286] However non-proprietary rights are not recorded in the registers of title. With this in mind, the next section discusses how chancel repair liability is registered at the Land Registry, as this is clearly relevant in analysing whether it has a proprietary or non-proprietary status.

viii) Protection and Registration of Chancel Repair Liability

[283] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) para 3.6.
[284] See *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [73].
[285] See *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [105].
[286] *Abbey National Building Society v Cann* [1991] 1 AC 56, [1990] 1 All ER 1085, 78.

Out of the land registration legislation arises a requirement to register certain proprietary interests affecting property.[287] It is therefore necessary to consider the place of chancel repair liability within this framework. The Land Registration Act 2002 classifies proprietary interests. In effect, the registration process protects the priority of property interests and ensures that they bind successors in title. The classification of chancel repair liability in terms of how it is dealt with by the Land Registry is therefore relevant to a discussion of whether chancel repair liability is a proprietary or non-proprietary right.

The classification of chancel repair liability in a modern legal system is governed in part by statute. Chancel repair liability pursuant to the Land Registration Act 1925 was an overriding interest.[288] However, steps were taken by the Land Registration Act 2002 to reduce the number of overriding interests.[289] The consultation paper leading to the enactment of the Land Registration Act 2002 stated that overriding interests were incompatible with the purpose of the Land Registration Act 2002, which was that 'the register should be as complete a record of the title as it can be' and 'with the result that it should be possible for title to land to be investigated almost entirely on-line'.[290] Given that overriding interests would not appear in the Land Registry's registers of title for a property the Land Registration Act 2002 bill adopted a number of strategies to achieve its goals. Specifically in respect of chancel repair liability, the approach adopted was for 'phasing out the overriding status of the more obscure interests' including, in other words, chancel repair liability 'after 10 years and allowing for them to be entered on the appropriate register without charge in the interim'.[291] The overriding status of chancel repair liability changed, like many overriding interests, pursuant

[287] See Land Registration Act 2002.
[288] Overriding interests are 'interests to which a registered title is subject, even though they do not appear in the register'. See Land Registry, 'Overriding interests and their disclosure' (Practice Guide 15, Land Registry 2016).
[289] See the Land Registration Act 2002, Explanatory Notes.
[290] The Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No. 271, 2001) para 2.24.
[291] ibid para 2.25.

to the Land Registration Act 2002.[292] Chancel repair liability as an overriding interest was phased out over a ten-year period from the date when the Land Registration Act 2002 came into force and [293] the overriding status of chancel repair liability came to an end in October 2013.

Clearly, concern was expressed that the removal of the right in its entirety without a period of voluntary registration may risk human rights infringement.[294] Specifically, there was concern that there would be a breach of Article 1 of the first Protocol to the ECHR (European Convention of Human Rights): protection of property. There was concern in Parliament that removing the overriding status of chancel repair liability would result in depriving the possession of a proprietary right which perhaps explained the phasing out of the overriding status rather than its entire removal. Further, and perhaps more telling, is the fact that the phasing out of chancel repair liability over a ten-year period was indicative of chancel repair liability existing as a proprietary right. If chancel repair liability was not a proprietary right, its removal would not risk a breach of Article 1. In response, the church is able to protect the registered status of chancel repair liability. The way in which this is done depends on the way in which the property is registered with the Land Registry and it is also affected by when the property was last transferred. The following scenarios may arise.

Notice registered with the Land Registry

In order for the church to protect their claim to chancel repair liability, they need to register a notice in the title of the affected property if the property is registered. This is the standard

[292] Land Registration Act 2002, schs 1 and 3.
[293] The Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003 (S.I. 2003/2431), Art. 2(2).
[294] The Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No. 271, 2001) para 8.37 states 'In the Consultative Document we concluded that there was some risk (…) that to do so might contravene the European Convention on Human Rights'. See also Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Com No 254, 1998) paras 4.27-4.30.

way in which a chancel repair liability interest is protected. However, a benefit of a notice is limited, since it will only protect the priority of the interest but does ensures that it 'will not be automatically postponed on the registration of a subsequent registerable disposition for valuable consideration, if the interest is valid'.[295]

As noted in S32 of the Land Registration Act 2002, the effect of the notice is to record an interest or a burden affecting an estate in land. However, just because the notice is registered, this does not automatically mean that the interest is valid. It only protects the priority for the purpose of S29 and S30 of the Land Registry Act 2002. S29 of the Land Registration Act 2002 provides that 'if a registerable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration', the priority being protected by way of a notice. The point is that, although it has yet to be tested, when applied to chancel repair liability, losing its overriding status does not extinguish the interest but merely postpones it. Postponing the interest does not mean that it is void. As discussed below, the result of this is that chancel repair liability, despite losing its overriding status, is potentially still capable of being registered and binding successors in title. However, this may simply be a technical anomaly which if tested would not be upheld.

However, Jennifer Slade states in Chancel Repair Changes in the Legal Gazette,[296] since October 2013, the situation has been 'ambiguous and without precedent'. The issue is that 'chancel repair liability, if unregistered, does not simply become void. It may lose priority over

[295] Land Registry, 'Overriding interests that lost automatic protection in 2013' (Practice Guide 66, Land Registry April 2018).
[296] Slade J, 'Chancel Repair Changes' [2014] *Law Society Gazette*.

a new registered purchaser for value, but the effect that loss of priority has in practice, and to what extent, if any, has yet to be tested'.[297]

If, in a transaction for the sale of a property, contracts are exchanged and a parochial church council applies to register a notice protecting their claim under chancel repair liability before completion, it does so while the current owner retains the legal title, and before the operation of sections 29 or 11 of the LRA 2002. The consequence of this is both unclear and untested. For registered land, it is possible that an official search with priority was secured prior to exchange, to protect against this eventuality. However, it is unclear whether this will displace the parochial church council's claim. The potential scenarios which may arise from this are noted by Jennifer Slade in her article. If the parochial church council application is postponed due to the official search, with priority being secured in favour of the transferee (and potentially a lender), so that the chancel repair notice is not entered until after the expiry of the priority period, then three potential scenarios may arise:

> '1. The parochial church council has lost priority against the buyer (and lender), but not against a future owner, and therefore the notice is a valid entry on the title.
>
> 2. The parochial church council has not lost priority, because it made its application before the operation of section 29; the processing of its application was simply delayed due to the official search. The notice on the title is valid and binding on the buyer, lender and future owners.
>
> 3. The parochial church council has lost priority against the buyer (and lender). However, it is uncertain whether this cleans the title, and therefore prevents a parochial church council making a claim against a future owner or lender. It is also unclear whether it makes a difference if that future owner is a purchaser for valuable consideration or not. A notice is to be placed on the register until there is clarity regarding the legal position'.[298]

[297] ibid.
[298] ibid.

It should be noted that a notice on the register is not confirmation of validity or priority. In the event of a dispute, the matter can be referred to the Land Registration Division of the Property Chamber, First-Tier Tribunal, which has the jurisdiction to order the cancellation of a unilateral notice from a registered title.[299]

The analysis provided above however is not universally accepted. As stated by Laurence Target and Andrew Williams, in 'Chancel Repair Liability' in the Law Society Gazette, 'these comments seem not to give full weight either to the words used in section 29, or to the processes of Land Registry'. They note that, on expiry of a priority period, the PCC interest will have:

> 'During the priority period conferred by a search with priority, the registrar will have deferred dealing with the PCC's application, and on completion of the purchaser's application the PCC's interest will have been postponed to the interest under the disposition, the freehold free from this encumbrance'.[300]

They argue that, where completion of a sale take place after October 2013 and there is no notice in the registers of title, completion is free of chancel repair liability. An application to register a chancel repair liability notice after this time will not leave the estate subject to the liability after completion. To date, the position has not yet been tested. The Council of Mortgage Lenders does not issue clear guidance on the point, instead stating in its handbook that 'you may wish to refer to the Law Society's Handbook on the issue'. The position noted in the Law Society handbook is noted above.[301]

[299] *Nugent v Nugent* [2013] EWHC 4095 (Ch).
[300] The registrar has power to defer dealing with the application under the Land Registration Act 2002, s72(5).
[301] The courts have yet to consider whether it may be possible for application to be made to alter the register to enter a notice where the proprietor has taken free of the interest on first registration or following the registration of a disposition for valuable consideration.

Registered and Unregistered Land

If the land is unregistered, a claim for chancel repair liability can be protected by way of registering a caution. The effect of a caution allows for the cautioner to object to the first registration of an estate in land until the claim which the caution is seeking to protect has been considered.[302] This is facilitated by way of a notice of an application for first registration being served on the cautioner[303] who then may object to the application for first registration. There a number of possible scenarios which may arise, which are discussed below.

First Registration of Unregistered Land

If a caution is registered against the property then, on first registration, notice of the caution will be served on the cautioner and, if the claim stands up, the property will be subject to chancel repair liability on first registration.

If a caution is not registered to protect a claim for chancel repair liability, then, since chancel repair liability is no longer classified as an overriding interest, the interest will not be protected. The Church could still enforce their claim for chancel repair liability against the existing owner but failure to register the interest does not make the interest void on first registration (on the above analysis).

Registerable Disposition of Registered and Unregistered Land

If a registerable disposition of an estate in land is made out of an unregistered estate, then this may trigger the first registration of the unregistered estate. If the disposition was made

[302] See Land Registry, 'Cautions Against First Registration' (Practice Guide 3, Land Registry June 2015). See also Land Registration Act 2002.
[303] Land Registration Act 2002, s16.

after 13 October 2013, then chancel repair will not be overriding and will not be automatically binding on the new estate. Again, however, the church would be able to protect their interests against successors in title by registering a notice against the registered estate in order to bind a successor in title (or a caution against any unregistered estate) on the above analysis.[304] In respect of the registered estates, the point is dealt with by S28 of the Land Registration Act 2002. The basic rule is that 'the priority of an interest affecting a registered estate … is not affected by a disposition of the estate or charge … and it makes no difference….whether the interest or disposition is registered'.[305] However this provision is subject to S29, which makes a number of exceptions. If the church fails to protect their interest by way of a notice, then 'If a registerable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration'.[306] In other words, because chancel repair liability is an interest that 'falls within … Schedule 3' of the Land Registration Act 2002, if not protected by the Church it will lose its priority to a transferee on a registered disposition.[307]

The same also applies in connection with unregistered land. If a caution against first registration is not registered at the Land Registry (Land Registry Form CT1), the Church will lose its priority to a transferee of the land on a registered disposition. If a caution against first registration is registered, then, on first registration of a property at the Land Registry, notice will be provided to the Church in order that they may register a notice against the new Land Registry title.

[304] Land Registration Act 2002, s4(1)(a)(i).
[305] Land Registration Act 2002, s28.
[306] Land Registration Act 2002, s29.
[307] ibid.

What is clear from the above, however, is that, even if a purported chancel repair liability is not registered, the interest is not extinguished; it still exists and is capable of binding successors in title, however this argument is not tested. [308] The interest is only postponed, not destroyed; it is not void. A link can therefore be made at this point back to the certainty of chancel repair liability. Clearly, the land registry rules and the registration of titles may fail in their overall purpose to ensure that a purchaser can verify the nature of all interests affecting a property by viewing the registers of title because a postponed Land Registry interest will not be shown on the title. This point is discussed further in the next section.

In the Law Commission's 2018 report, Updating the Land Registration Act 2002,[309] they state that the discrete point of chancel repair liability is:

> 'the law is unsettled on the point of whether chancel repair liability is an adverse property right affecting the title to an estate or some other type of liability. The suggestion is that, despite section 117 of the LRA 2002 eliminating the overriding status of chancel repair liability (among other former overriding interests) in 2013, chancel repair liability may continue to be an overriding liability on property owners. As consultees noted, on this basis HM Land Registry continues to enter unilateral notices protecting chancel repair liability'.[310]

The report states further:

> 'the risk of chancel repair liability causes real concerns in practice. The Law Society explained that the practical result is that many purchasers continue to buy specific insurance to cover the risk. The Law Society therefore suggested that our provisional proposal should go further, offering that, in the case of chancel repair liability, the applicant should have to provide evidence that the liability affects the particular registered estate'.[311]

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[308] If there is no notice, then there is no priority protected but that does not prevent the right existing. See Darren Cavill, Sarah Wheeler, Martin Dixon, David Rees, Stephen Coveney, Patrick Timothy, *Ruoff & Roper, Registered Conveyancing* (Sweet & Maxwell, 2015) para 42.024.

[309] Law Commissions, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) para 8.64.

[310] ibid para 8.64.

[311] ibid para 8.65.

The report acknowledges that: ‘the legal status of chancel repair liability is unsettled, and uncertainty as to its status has cast doubt on whether the policy of the LRA 2002 has been achieved [if this was that chancel repair liability as to lose its overriding status]’.

To clarify its legal status, the Law Commission has agreed to conduct a distinct project on chancel repair liability as part of our Thirteenth Programme of Law Reform.[312] The expected project relates only to registered land. The stated aim of the project is to ‘close the loophole and so achieve with certainty what was intended to be achieved by the Land Registration Act 2002’.[313]

It is estimated that doing so would ‘eliminate the current standard practice of purchasers searching and/or insuring against the risk of liability, which costs an estimated £20 million each year’.[314]

ix) Unanswered questions relating to chancel repair liability

There a number of unanswered questions arising out of the case law in connection with chancel repair liability, which are discussed below.

1. Is chancel repair liability limited in value?

[312] ibid para 8.66.
[313] Law Commission, *The 13th Programme of Law Reform* (Law Com No 377, 2017) para 2.30.
[314] ibid para 2.31.

A point of judicial debate is whether chancel repair liability is limited in value. Should it, for instance, be limited to the value of the profits of the rectory? The case law on this point has swung one way and then another. The early authorities on the point found that chancel repair liability was limited. In 1677, Atkins J said, in *Walwyn v Awberry*,[315] that chancel repair liability was limited to the income from the rectorial profits; i.e. from the income from the rectorial glebe and tithes.

Further, in 1930, in the Report of the Chancel Repairs Committee presented to Parliament,[316] it was stated that chancel repair liability was to be paid 'out of the profits of the rectory'.[317] The position was however significantly changed in *Wickhambrook Parochial Church Council v Croxford* (1935).[318] Lord Hanworth MR, sitting in the Court of Appeal, in this case, held that the rector's liability 'is not limited to the amount of his receipts from the tithes'. The decision was reached following a review of the ancient authorities. Lord Hanworth MR determined that there is no evidence of a requirement limiting the liability of the lay rector. This decision has subsequently been criticised by the judiciary. It was criticised in Plymouth Estates Ltd (1944),[319] although it was not necessary for the decision to be considered in detail. Further, in *Wallbank*,[320] VC Morritt, sitting in The Court of Appeal, bound by the decision in *Wickhambrook Parochial Church Council v Croxford* (1935),[321] accepted that the only limit was the size of the cost of the necessary repairs. However, when the case came before the House of Lords, it is clear that they would have liked to have addressed the point critically but were not required to do so. Their Lordships did state, however, that they were unconvinced that

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[315] *Walwyn v Awberry* (1677) 2 Mod 254.
[316] Chancel Repairs Committee, *Report of the Chancel Repairs Committee presented by the Lord Chancellor to Parliament* (Cmd 3571, May 1930) para 4(a).
[317] ibid.
[318] *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, 104 LJKB 635, 101.
[319] *Representative Body of the Church in Wales v Tithe Redemption Commission, Plymouth Estates Ltd v Tithe Redemption Commission* [1944] AC 228 HL, 239.
[320] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2001] EWCA Civ 713, [2002] Ch 51 [15]. Before the appeal to the House of Lords.
[321] *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, 104 LJKB 635.

the decisions had been correctly decided in *Wickhambrook Parochial Church Council v Croxford* (1935).[322] However, such opinions were not unanimous and Lord Hobhouse noted that, even if there was a cap on the liability, it raises further question in relation to the size of the cap, how this is to be assessed and whether it applies to successive claims for repair.

The criticism does, however, need to be tempered with the findings of the Law Commission. They noted, in their report, 'Property Law, Liability for Chancel Repairs',[323] that the question regarding whether a limit should be placed on the size of the liability was not one which was likely to arise historically, given the comparatively small sums required to repair church chancels when compared to the figures today.[324] Perhaps a more compelling argument, however, that there should be no cap placed on chancel repair liability was the argument that, to place a limit on the liability for repair would place the chancel at risk of not being repaired and this was inconceivable to the church. Whilst the decision in Wickhambrook has been criticised, it has not been overruled.[325]

2. Joint and Several Liability

It was held in Chivers & Sons Ltd, by Wynn-Parry J, that, in respect of chancel repair liability, 'where there is more than one owner, each is severally liable'.[326] In Wickhambrook, this point was extended by Lord Hanworth MR, who also held that there was a right to a contribution to repair the church chancel from other lay rectors.[327] In other words, the liability is joint and severable. Originally, before the Reformation, the joint and several nature of chancel repair

[322] *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, 104 LJKB 635; *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [106], [109].
[323] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) para 3.5.
[324] ibid para 3.5.
[325] Subject to arguments the decision has been impliedly overruled.
[326] *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, [1955] 2 All ER 607. Further supported by Chancel Repairs Committee, *Report of the Chancel Repairs Committee presented by the Lord Chancellor to Parliament* (Cmd 3571, May 1930) which stated 'every severable owner was under the duty of maintaining the chancel'.
[327] *Chivers & Sons Ltd v Secretary of State for Air (Queens' College, Cambridge, Third Party),* [1955] 2 All ER 607, 594, 609.

liability was of limited consequence. However, on the dissolution of the monasteries and the efflux of time, rectories have become split and fragmented and the number of rectors and lay rectors is ever increasing. Again, the decision has been subject to criticism but has not been overruled. In *Wallbank*,[328] Lord Scott was critical of the decision in Chivers & Sons Ltd and questioned whether the decision was not relevant to the size of a disposition and/or its intended purpose.[329]

3. What is the extent of the required repair?

The extent of the repair required was determined in *Wise v Metcalf*.[330] The decision reached was that there was no obligation to put the chancel in a better state of repair but simply to preserve its form. The decision was, however, difficult to reconcile with the practical situation that the chancel would fall into disrepair, the key question being therefore what was the state of repair of the chancel? Further, if the parochial church council has enlarged or improved the chancel themselves, the rectors would be liable for the improved form.[331]

A more modern example can be found in the *Wallbank* case, where Lewison J, sitting in the Chancery Division of the High Court,[332] held that the obligation on the rector was to 'keep the chancel in repair'. The obligation to repair was greater than simply keeping the chancel wind and water tight.[333]

[328] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546.
[329] *Chivers & Sons Ltd v Secretary of State for Air (Queens' College, Cambridge, Third Party),* [1955] 2 All ER 607, 594, 609.
[330] *Wise v Metcalfe* (1829) 10 B & C 299, 8 LJOSKB 126, 316.
[331] ibid.
[332] *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley Warwickshire v Wallbank* (2007) Times, 21 February, [2007] All ER (D) 50 (Feb).
[333] It also included costs to restore and rebuild where necessary, according to the original form. See Jill Alexander, *Sweet & Maxwell's Conveyancing Practice* (Sweet & Maxwell 2016) para 3-055.

The above cases and analysis reveal that chancel repair liability does not appear to be limited in terms of the size of the liability; it is joint and several and the obligation to repair is to keep the chancel in repair. Further, it reveals that there exists uncertainty regarding whether chancel repair liability is a proprietary or non-proprietary right.

(x) Chapter Conclusion

The dicta in the case law, in particular in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*, has been analysed, with connections being made to the Law Commission review in this area. In doing this, a strong sense of the problem related to chancel repair liability has been identified.

The above narrative elucidates the need for clarity regarding the nature of chancel repair liability. This thesis seeks to elucidate the true nature of chancel repair liability by mapping its characteristics to established property concepts in an attempt to formulate a clearer understanding of chancel repair liability. In practical terms, this will achieve greater certainty regarding the classification of the concept in order that it may be dealt with more effectively pursuant to the land registration rules and, in turn, add certainty to the concept for the benefit of all property owners.

This chapter has analysed the existing law surrounding chancel repair liability. The historical account of chancel repair liability has identified the way in which chancel repair liability arises today. The chapter also provides an account of the key problems which conveyancers and members of the public face when dealing with chancel repair liability, providing motivation and further analysis of the concept.

The material presented in this chapter is of significant importance as it highlights the property non-proprietary debate regarding chancel repair liability.[334] In seeking to clarify this uncertainty regarding whether chancel repair liability is a proprietary or non-proprietary right, Chapter 2 considers the classification of the concept in our modern legal system.

[334] Some case law indicates that chancel repair liability is a non-proprietary right. However, the burdensome effect and fact that chancel repair liability is indicative of it being a proprietary right.

Chapter 2

The nature of real property

The indeterminate nature of chancel repair liability and related problems have been explained in Chapter 1. This chapter now extends the debate further and explores the conceptualisation of a property right by engaging in a broader academic discussion of what constitutes a property right. It is vital to be clear how this thesis defines a property or non-proprietary right when analysing whether chancel repair liability is a proprietary or non-proprietary right. In order to clarify the definition of a property right employed in this thesis, the key case of *National Provincial Bank v Ainsworth* has been analysed in this chapter as well as what academics have said about the decision and the hallmarks of a property right.[335] The essential features of a property right have been considered as well as the principle of numerus clausus (and other taxonomies of property rights) and how it is viewed by academics. A justification for adherence to the doctrine of numerus clausus in this thesis is provided in this chapter.

The chapter is subdivided into the following sections:

i. The nature of Real Property
ii. Theories of property rights
iii. Numerus Clausus and the justification for adherence
iv. Positivism and Conceptualisation
v. Hallmarks of a property right
vi. Mapping chancel repair liability to rights in numerus clausus
vii. Conclusion

[335] Especially the reference by Lord Wilberforce to 'permanence and stability' in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, [1965] 2 All ER 472, 1248.

What constitutes a property right is clearly fundamental to the analysis in this thesis and this is considered in further detail in the next section.[336]

(i) The nature of Real Property

The classic starting point for identifying a proprietary right is the definition provided by Lord Wilberforce in *National Provincial Bank v Ainsworth*.[337] He stated:

> 'before a right or interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties and have some degree of permanence or stability'.[338]

The convention understanding is that proprietary rights are ones which are capable of third part impact, which means that the burden of a proprietary right must be capable of binding successors in title on the transfer of land and the benefit must be capable of being transferred to a third party. This understanding is firmly rooted in the above classic statement of Lord Wilberforce and reinforced in later judgments.[339]

The decision has been subject to judicial and academic criticism.

Judicial critique

[336] As has been referred to in Chapter 1 it is important to classify chancel repair liability because it is the job of the law of real property to regulate claims to estates and interests in land by formulating a structure of the same. Classification of a right as either proprietary or non-proprietary is significant because property rights are often said to bind the whole world where as personal rights can only be asserted against a specific person. Further, not all rights connected to land are and can be proprietary rights and if new property rights could be created at the will of individuals this would risk harm to the structured order of the legal framework. The restriction on the creation of new proprietary rights also provides certainty as to what rights and obligation affecting a property exist. As Lord Brougham LC noted in *Keppell v Bailey*, 39 Eng. Rep. 1042 it would not be possible to know what rights the acquisition of any parcel of land conferred or what obligation it imposed if there were no restrictions on the creation of property rights.

[337] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, [1965] 2 All ER 472, 1233.

[338] ibid 1233.

[339] *Wily v St Geroge Partnership Banking Ltd* (1999) 161 ALR 1.

The decision has been subject to judicial criticism for being too broad and the fact that it 'does not suggest a mechanism by which a proprietary interest is to be distinguished from a personal right',[340] so the definition has been described as 'found wanting'.[341]

Further, the definition has been subject to academic criticism due to its circuitous nature.[342]

Academic critique

The criticism is that the definition of a property right is self-fulfilling. Whether an entitlement is proprietary and therefore binding on third parties cannot be determined robustly by way of a test which assesses the third-party impact of an entitlement to determine whether it is proprietary. To suppose that a proprietary right arises from 'permanence' or 'stability' is, in effect, saying the same phrase again using different words. When we ask what a proprietary right is, this question may often be asked to determine whether it is capable of binding purchasers of land and therefore exhibits the necessary qualities of 'permanence' and 'stability'. However, adopting a test which uses enforceability against third parties to determine whether or not it is proprietary is, therefore, futile. As Kevin Gray states 'There is an irreversible tautology in supposing that proprietary status emanates from some criteria of 'permanence' or stability''.[343] The circularity of reasoning is a clear limitation on the use of the definition in the *National Provincial Bank v Ainsworth* in determining a property right.[344]

Having identified both judicial and academic criticism of the decision in *National Provincial Bank v Ainsworth*,[345] there is validity regarding the critique in the decision and merit in proceeding with a methodology based on analogy to established criteria in numerus clausus.

[340] ibid 9 (Finkelstein J).
[341] *Mills v Ruthol* (2002) 10 BPR 19381, 125.
[342] Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP, 2009).
[343] Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP, 2009) 97.
[344] This 'apparent circularity of reasoning (…) may illustrate some of the limits to the use of "property" as an analytical tool'. *Yanner v Eaton* (1999) 201 CLR 351, 17.
[345] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, [1965] 2 All ER 472, 1233.

Whilst the definition of a proprietary right remains subject to lively academic debate, the doctrine of property rights adopted in this thesis is the doctrine of numerus clausus. That is, property rights comprise a closed list of estates and interests in the legal system of England and Wales. New rights cannot be formulated and must be constructed from the existing building blocks of estates and interests as 'attempts to create interests unknown to the law are ineffectual',[346] as are attempts to customise existing ones. The closed canon of property rights is known as numerus clausus. The risk in allowing new rights and interests to be created would be that new methods of holding property or enjoying real property could arise,[347] which would undoubtedly would cause a negative effect on the precision and structured order of land law, as these would run with the land and bind successors in title in perpetuity. Examples of specific rights which have sought proprietary status and which has been denied include licences and the right to wander over another's land for example.[348] The existing canon of proprietary rights is noted by commentators as generally understood to include, at least, the following, known as numerus clausus or closed list:

- freehold ownership
- easements
- restrictive covenants build
- leases
- mortgages
- Beneficial interests existing under a trust of land
- profit a prendre
- rent charges

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[346] *Charles v Barzey* [2002] UKPC 68, [2003] 1 WLR 437.
[347] *Clos Farming Estates Pty ltd v Easton* (2001) 10 BPR 18845, 40.
[348] *Re Ellenborough Park* [1956] Ch 131, [1955] 3 All ER 667, 176.

- estate contracts (including options)[349]

Based on this analysis, chancel repair liability must constitute one of these existing rights in order for it to be classified as a proprietary right. It is appropriate therefore to analyse whether chancel repair liability can be classified as a proprietary right by characterising it as one of the proprietary rights on the 'closed list'. The methodology adopted is legal reasoning by analogy.

In other words, to determine whether chancel repair liability falls within the existing cannon of property rights, an analogy has been created between its characteristics and those of other property rights within numerus clausus. If chancel repair liability manifests such that it is analogous (perhaps only in certain circumstances[350]) with a right that falls within numerus clausus, then this will allow an argument to be submitted that chancel repair liability is a proprietary right.

Such a methodology has been adopted in subsequent chapters. As noted above, this is the same methodology adopted by a court when deciding whether the content of a right is the same as the content of an existing property right. The task of the judge is to seek a close analogy to an admitted form of property right.[351] Such a methodology has allowed, in a credible way, the research question to be addressed.

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[349] S Gardner, *An Introduction to Land Law* (2009) 9–13. Others may appear on the list including: Life interests under the Settled Land Act 1925; Estate contracts (including options); Unpaid vendors liens; Purchases liens to secure deposit; Rights of entre. However chancel repair liability does not appear on the list specifically.

[350] As has been noted above the control that easements have over land is typically passive and doesn't place positive duties on servient land owners (unlike chancel repair liability which places a positive duty on an ostensible servient land owner (in the Wallbank case where Mr and Mrs Wallbank were required to meet the local church chancel repairs) however, as is discussed below, exception exist in the form of positive obligation easements. Further, the burden of a positive covenant, is not typically binding on a successor in title (unlike chancel repair liability which has been found to be binding on successors in title dependent on a number of factors including the date of enforcement action and whether the property is registered or unregistered) however exceptions exist in the form of positive covenants annexed to particular rights.

[351] For this approach in action see *Hill v Tupper* (1863) H & C 121, 159 ER 51.

It should be noted that there are particular difficulties in identifying a property right and other theories regarding what a property right is (other than the principle of numerus clausus). In order to assess the merits of this methodology and adherence to numerus clausus, this and other theories of property are discussed in more detail below.[352]

(ii) Theories of property rights

The above analysis in Chapter 1 shows that it is challenging to identify whether something is or is not a property right[353] yet, despite this, there is often little debate regarding whether a right is a property right in modern land law when considering any particular legal concept.[354] This is because modern land law places strict limits on what are considered proprietary rights by way of the same being limited to a closed list, a numerus clausus.[355] The idea of limited forms of property rights represents a relatively modern body of scholarship which has sought to 'recover the conceptual coherence of property'.[356] In a number of key articles, Thomas Merrill and Henry Smith sought to reintroduce some order to property law by focusing on the centrality of the numerus clausus principle, under which property rights 'must track a limited number of standard forms'.[357] Such a theory does not, however, explain another key theory

[352] A particular weakness in the numerus clausus analysis is that the rigid formality of numerus clausus appears to be softening with rights close to the interface of proprietary and non proprietary rights demonstrating characteristics unfamiliar with their classification. Accordingly trying to map characteristics of chancel repair liability to covenants and easement will therefore be difficult where the latter do not have sharp definitional boundaries.

[353] A key question is how do you distinguishes a property right? There are appears to be number of approaches one may adopt. One option could be to have a list of property rights which is accepted and enshrined in statute. An alternative could be to define a property right, to allow determination from first principles, whether something is a property right or not. The definition in Ainsworth is an example of this, however, this definition raises almost as many difficulties and points of uncertainty as it seeks to answer. A further alternative would be to identify a property right by considering their attributes, or what are considered to be their attributes and use these to reason whether other rights are property rights. However, one problem with this is that it requires certainty as to the known attributes of property rights. The point is that identification of a property right is not an easy task. These points are analysed further by Martin Dixon, 'Proprietary and non-proprietary rights in modern land law' in Louise Tee (ed), *Land Law, Issues, Debates, Policy* (1st Edition, Willian Publishing 2002) 8-28.

[354] As Kevin Gray states 'there is usually little doubt' between proprietary and personal rights 'except at extreme parameters of the field'. Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009) 137.

[355] Lord Hoffman stated 'attempts to create interest unknown to the law are ineffectual'. See *Charles v Barzey* [2003] 1 WLR 437, 11.

[356] A Bell, 'A Theory of Property' (2005) 90 *Cornell Law Review* 531, 515.

[357] ibid and Merrill and Smith observed that 'When property rights are created, third parties must expend time and resources to determine the attributes of these rights, both to avoid violating them and to acquire them from present holders. Consequently, the creation of idiosyncratic property rights increases the information costs property imposes on third parties. Standardization, on the other hand, reduces them'. See T Merrill and H Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 *Yale Law Journal* 1, 3.

of property which has found favour in the American scholarship, this being the 'Bundle of Sticks' view of property. It is arguable that property can arguably be 'better explained as constituting a bundle of rights and relations between subjects than simply a mere right to a thing'.[358] These two leading theories are discussed in more detail below and evidence submitted for adherence to numerus clausus in English land law and, accordingly, in this thesis.

(iii) Numerus Clausus and the justification for adherence

Numerus clausus is key to understanding the nature of property and it is submitted and will be shown that it can be used as a tool for understanding chancel repair liability.

The law of property differs from contract law. Contract rights can be freely customised yet property rights are confined to a closed list.[359] The law will only enforce those interests 'that conform to a limited number of standard forms'.[360] As stated in Keppell v Bailey, 'incidents of a novel kind' cannot 'be devised and attached to property at the fancy or caprice of any owner.'[361] The point is that, when parties are dealing with property, they need to be clear about the legal interest with which they are dealing, as the law generally 'insists on strict standardization'.[362] [363]

This is in stark contrast to the law of contract. In the case of the law of contract, a willing buyer and a willing seller can create an unlimited number of enforceable contracts for the

[358] Sukhninder Panesar, *General Principles of Property Law* (Longman 2001) 9.
[359] T Merrill and H Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 *Yale Law Journal* 1, 68.
[360] ibid 3.
[361] *Keppell v Bailey*, 39 Eng. Rep. 1042, 1049 (Ch. 1834).
[362] T Merrill and H Smith, 'Optimal Standardization in the Law of Property' (n 359) 3.
[363] The doctrine that property rights exist in a fixed number of forms is known as numerus clausus. See John Henry Merryman, *Policy, Autonomy, and the Numerus Clausus in Italian and American Property Law,* (1963) 12 *The American Journal of Comparative Law* 224-231. See also Bernard Rudden, 'Economic Theory v Property Law: The Numerus Clausus Problem' in J Eekelaar and JS Bell (eds*), Oxford Essays in Jurisprudence (Third Series)* (Clarendon 1987) 240.

transfer and exchange of property rights. However, the courts will not readily enforce or create new property rights.[364] This limitation was analysed in economic terms in Merrill and Smith's article, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle'.[365]

The commentators argue that allowing standardisation, or in other words allowing a limited number of different permitted forms of property but prohibiting judges from delivering or permitting new ones, 'strikes a balance between the proliferation of property forms, on the one hand, and excessive rigidity on the other'.[366] The commentators note that potential for property rights to increase rapidly, if not limited in number, would be a problem in the absence of standardisation. Based on Merrill and Smiths' analysis, it would 'impose significant external costs on third parties' in the form of ascertaining 'the legal dimensions of property rights'.[367] In contrast, a system for the standardisation of property rights, comprising just one type of property right, would be excessively limited, resulting in frustrating the parties' intentions, which can only be fulfilled by utilising a range of lesser property rights which fall short of full ownership. Numerus clausus occupies the middle ground, providing a system close to optimal standardisation.[368]

Another outcome of numerus clausus is that a legal change in the menu of property rights provided by numerus clausus is provided by the legislature and not the courts who must respect the existing standardisation. This is argued as advantageous by Merrill and Smith,

[364] T Merrill and H Smith, 'Optimal Standardization in the Law of Property' (n 359) 5.
[365] T Merrill and H Smith, 'Optimal Standardization in the Law of Property' (n 359).
[366] T Merrill and H Smith, 'Optimal Standardization in the Law of Property' (n 359) 69.
[367] T Merrill and H Smith, 'Optimal Standardization in the Law of Property' (n 359) 69.
[368] T Merrill and H Smith, 'Optimal Standardization in the Law of Property' (n 359) 69.

‘because legislated changes communicate information about the legal dimensions of property more effectively than judicially mandated changes’.[369]

The doctrine of numerus clausus is rarely directly referred to by judges. However, the case of *Hill v Tupper*[370] provides an example of the doctrine of numerus clausus in operation, and arguably evidence of adherence to the same, in England and Wales.[371] In this case, the Basingstoke Canal Company (‘the company’), who held an estate in the Basingstoke Canal, granted Hill a contractual promise giving him the exclusive right to put pleasure boats on the canal and to hire out these boats to paying customers. Tupper than set up a rival business, hiring out pleasure boats on the same canal. Hill claimed that Tupper had committed a wrong. Hill claimed that Tupper had ‘wrongfully and unjustly disturbed Hill in his possession, use and enjoyment’ of the ‘right and liberty’ granted to Hill by the company. The Exchequer chamber rejected the claim. Whilst the contract between the company and Hill gave Hill a right of action against the company, it gave ‘no right of action in his own name for any infringement of the supposed exclusive right’.[372] Tupper had interfered with the company’s right to exclusive possession of the canal and had therefore committed a wrong against the company, but Tupper had not committed a wrong against Hill. Numerus clausus can be seen in action in terms of it limiting the company’s power to create property rights and also limiting the power of the court.[373] As Ben McFarlane states: ‘while numerus clausus is a well-established feature of any civilian codes it might be thought that evidence for such a doctrine would be harder to find in a common law system…. The decision in *Hill v Tupper* does not explicitly refer to numerus clausus (…) nonetheless the structure of England land law can be deducted from the mass of cases and certain of those serve as landmarks.’[374] He states the decision in *Hill v*

[369] T Merrill and H Smith, ‘Optimal Standardization in the Law of Property’ (n 359) 69.
[370] *Hill v Tupper* (1863) H & C 121, 159 ER 51, 127.
[371] See Ben McFarlane, *Landmark Cases in Land Law* (Hart Publishing 2013) ch1 (The Numerus Clausus and the Common Law).
[372] *Hill v Tupper* (1863) H & C 121, 159 ER 51, 127.
[373] Ben McFarlane ‘The Numerus Clausus principle and covenants relating to land’ in Susan Bright (eds), *Modern Studies in Property Law* (Hart Publishing, 2011) 313.
[374] ibid 313.

Tupper represents the limits on the parties power 'to impose additional burdens on strangers interfering with that property'. Numerus clausus can be seen in action in terms of it limiting the company's power to create property rights.[375]

This is something also seen in the Law of Property Act in s1, which sets out the closed list of legal estate and interest in land. In other words, the task of the court when deciding whether the content of a right was the same as the content of an existing property right was to look for a close analogy to the right and the admitted form of property right.[376]

However, as noted above the court made no explicit reference to numerus clausus and it is, as noted above, rare for judges directly to invoke the principle. However, academic surveys reveal adherence to the principle; for example, Rudden's work in respect of a general comparative study and see Merrill and Smith in connection with the USA.[377] The justification for the principle appears to come down to a question of utility. For example, if a particular right claimed by a party, such as a right of way, over a second party's land, imposes a duty not only on the second party subject to the right of way but also on the rest of the world, then that said second party may have the power to grant the first party a property right but, if not, then, irrespective of the intention of the parties, the second party's duty to the first party will not be shared by the rest of the world.[378] It is the task of judges to 'reason analogically and to ask for example if an easement of parking is sufficiently analogous to existing forms of easements'.[379]

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[375] See Ben McFarlane *Landmark Cases in Land Law* (Hart Publishing 2013) 31.
[376] Ben McFarlane 'The Numerus Clausus principle and covenants relating to land' in Susan Bright (eds), *Modern Studies in Property Law* (Hart Publishing, 2011) 313. Ben McFarlane's analysis in his chapter supports this analysis.
[377] Bernard Rudden, 'Economic Theory v Property Law: The Numerus Clausus Problem' in J Eekelaar and JS Bell (eds), *Oxford Essays in Jurisprudence (Third Series)* (Clarendon 1987) 241-2. See also T Merrill and H Smith, 'Optimal Standardization in the Law of Property' (n 359).
[378] Ben McFarlane 'The Numerus Clausus principle and covenants relating to land' in Susan Bright (eds), *Modern Studies in Property Law* (Hart Publishing, 2011) 318.
[379] ibid 318; *London and Belnheim Estates v Ladbrooks Retail Parks* [1992] 1 WLR 1278 (Ch). See also *Moncrieff v Jamieson* [2007] 1 WLR 2620 (HL).

Another leading theory relating to property right may be summarised as positivism and conceptualisation, more commonly described as the bundle of rights metaphor, which is discussed below.

(iv) Positivism and Conceptualisation

In the 19th century, William Blackstone provided a leading theory of property rights. Blackstone wrote, in Commentaries on the Laws of England, that property is: 'that sole and despotic dominion which one man claims and exercises over the external things of the worlds in total exclusion of the right of any other individual in the universe'.[380]

This famous statement comprises a number of key principles. Specifically, property is concerned with rights in rem; in other words, 'those rights which a man may acquire in and to such external things as are unconnected with his person'.[381] Further property belongs to 'one man',[382] as Blackstone notes, or, in other words, a single individual. Further, in relation to land, property rights extend to the centre of the earth and into the upper stratosphere.[383] Further the key and main right which is attached to property is the right to exclude 'any other individual in the universe'.[384]

Several academics adopted this analysis and held it as absolute, whether or not this was Blackstone's intention, and it has become known as the 'Blackstonian bundle of land entitlements.'[385] The theory 'presupposes impeccably demarcated parcels whose boundaries extend upward to the heavens and downwards to the depths of the earth'[386] and places upon owners powers and privileges to use, transfer and even abuse land. In the twentieth century,

[380] 2 Bl Comm 3.
[381] ibid 3.
[382] ibid 3.
[383] ibid 13-15.
[384] ibid 3.
[385] Robert C Ellickson, 'Property in Land' (1993) 102 *Yale Law Journal* 1315, 1362-63.
[386] ibid 1362-63.

however, Wesley Hohfeld sought to clarify the existing legal concepts and develop new ones, seeking to create a full legal taxonomy of property rights. Hohfeld, in a series of key legal articles, noted that property as a legal concept comprises privileges and powers as well as rights.[387] He stated further, in contrast to Blackstone, that property is not a relationship between a person and an object but, in fact, a legal relationship between people in respect of an object. In other words, Hohfeld articulates in rem rights as the mere expression of in persona rights in regards to a large, undefined class of people. It is Hohfeld's analysis which is recognised as laying the foundations for the understanding of property as a 'bundle of rights'.[388] The nature of this concept is that the term 'property' lacks a fixed meaning; instead, according to the bundle metaphor, each right, duty, privilege or power is but one of the sticks in a bundle, the sum of which forms a property relationship. The removal of one stick will not necessary destroy a classification of property. As noted in America jurisprudence in *Moore v Regents*[389]:

> '[Though a] (...) limitation or prohibition diminishes the bundle of rights that would otherwise attach to the property, what remains is still deemed in law to be a protectible property interest (…) [This is because], (**...**) property or title is a complex bundle of rights, duties, powers and immunities, [and] the pruning away of some or a great many of these elements does not entirely destroy the title.**'**[390]

Hohfeld recognised a tendency towards confusion and imprecision in the use and meaning of the term 'right' by judges. To provide clarification and reduce the ambiguity in the judgments, Hohfeld endeavoured to break down the term 'right' into eight distinct concepts which could be grouped as opposites and correlatives.

It was proposed by Hohfeld that right and duty are correlative concepts; in other words, one must always be matched by the other.[391] If one party has a right against a second party, then

[387] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16. Reprinted in Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essay's' (*Yale University Press Cook ed.* 1923) 63-64.
[388] See Katy Barnett Case Note, *Western Austrila v Ward* (2002) 191 ALR 1.
[389] *Moore v Regents* 51 Cal. 3d 120; 271 Cal. Rptr. 146; 793 P.2d 479.
[390] *People v Walker*, 90 P.2d 854, (1939).
[391] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16, 32.

this is equivalent to the second party having a duty to honour the first party's right. If the second party has no duty, then that means that the second party has a privilege; i.e. the second party can do whatever he or she pleases because the second party has no duty to refrain from doing so, and the first party has no right to prohibit the second party from doing so. [392]

[1] **Right(Claim-Right)**	**Liberty**	**Power**	**Immunity**
Duty	**No-Right**	**Liability**	**Disability**

The bundle of rights idea is well-founded and a leading theory in American property jurisprudence. The effect of the analysis changed the understanding of property to something which is highly flexible and malleable.

Given these competing theories of property, it is important to demonstrate why the analysis in this thesis adheres to numerus clausus and not other taxonomies, particularly the other leading theory of the bundle of sticks view. A key reason is that the bundle of sticks view does not fit with English law, which is also demonstrated, as referred to above, in English case law in *Hill v Tupper*.[393]

On the bundle of rights idea of property in land, the property rights held by a landowner can be viewed as composed of a bundle of individual property rights; for example the right to

[392] ibid 36.
[393] *Hill v Tupper* (1863) 2 H & C 121, 159 ER 51.

‘make particular uses of the land’. Therefore, in *Hill v Tupper*, one of the rights of the company (Basingstoke Canal Company) was the exclusive right to put pleasure boats on the canal and an argument could be made, based on a bundle of rights analysis, that the right to ‘make particular uses of the land’ could mean to separate the bundle of rights held by the company and transfer it on to Hill. However, the bundle of rights analysis does not fit with the decision in *Hill v Tupper* and demonstrates the lack of strength of the bundles of rights view because the court did not find that the Company had transferred a property right ‘to put pleasure boats on the canal’.

Interestingly, a Hohfeld analysis can be used to support this argument.[394] The company did not have a claim right against Tupper to put boats on the canal; otherwise, what content would Tupper’s duty have if the company were to have a claim right against Tupper to act or not act in a specific way?[395] In other words, the company was not legally protected from interference by Tupper. The correlativity stipulation requires that, if the company has a claim-right against Tupper, this entails Tupper owing a duty to the company. In this case, if the company had a claim right against Tupper to put boats on the canal, this would have entailed Tupper having a duty to not put boats on the canal. The company would need to identify a correlative duty on Tupper, which was not the finding of the court. This is why it was possible for Tupper to interfere with the company’s property without liability to the company.

The company’s right to ‘put boast on the canal’ was not a claim right but, in fact, a liberty, as there was no duty to abstain from the said action on Tupper. The correlativity relationship makes it clear that Tupper, against whom the liberty is held, had a ‘no-right’ concerning the

[394] The analysis is supported by a similar analysis provided by Ben McFarlane. See Ben McFarlane, *Landmark Cases in Land Law* (Hart Publishing 2013) 22.
[395] As Ben McFarlane notes ‘a claim right can never be to do or omit something: it is always us a claim that somebody else do or omit something’. See Ben McFarlane, *Landmark Cases in Land Law* (Hart Publishing 2013) 22. See also J Finnis, ‘Some Professorial Fallacies About Rights’ (1972) 4 *Adelaide Law Review* 377, 380.

activity to which the liberty relates. This, however, did not mean that Tupper did not have a liberty to interfere in the activity.

In *Hill v Tupper*, Hill of course needed a claim right against Tupper to put boats on the canal; however, such claim right could not be found by relying on the transfer of one of the company's bundle of sticks to Hill because the company had no such claim right against Tupper. Hill, of course, had a liberty against Tupper to put boats on the canal. The point is that, because the company and Hill did not have a claim right against Tupper but only a liberty, this means that Tupper can interfere with the exercise of the liberty.[396]

A definition of a property right in Ainsworth[397] provides a useful starting point regarding what a property right is, but this definition is subject to the vice of circularity. The difficulties of defining a property right are also noted above in addition to the two proposed theories concerning what a property right constitutes. The above theories of property seek to distil the essence of what constitutes a property right. Having considered above what property rights are and argued in favour of adherence to numerus clausus, the identification of a property right can be summarised, based on the above analysis, and as noted by Ben McFarlane, in short, a case of looking at the closed list and seeing whether a prospective property right is on it.[398]

Commentators argue that other methods exist which may be adopted to identify property rights. In Louise Tee's Land Law, issues, Debates and Policy, such ideas and concepts are

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[396] As Ben McFarlane notes 'In Hill of course [Hill] had had a liberty against [Tupper] to put boats on the canal but to succeed in his action Hill also needed a claim right against Tupper. Such a claim right cannot be found by simply relying on a transfer of one of the company's proprietary bundle of sticks'. See Ben McFarlane, *Landmark Cases in Land Law* (Hart Publishing 2013) 22.
[397] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, [1965] 2 All ER 472.
[398] For a 'right to count as property right there is a very easy way of telling… we simply need to (i) look at the list of property rights permitted by the property law system and (ii) see if [the right] is on that list'. Ben McFarlane, *The Structure of property law* (Hart Pub, 2008) para 1.2.1.

explored, including 'Abstract Definition'.[399] In other words, an alternative approach to the above methodology would be to seek to distil the hallmarks of a property right and then use these to derive from first principles whether a particular right is a property right or not. The problem with this approach is the complexity and factual context sensitivity regarding whether or not something is a property right[400] makes the identification of hallmarks which apply to all property rights a difficult task (for example, third party impact was a hallmark used in Ainsworth's definition; however, such a hallmark is subject to problems and criticism). Nevertheless, the hallmarks of a property right, that arguably becomes closer to what constitutes a property right, are considered in more detail below.

(v) Hallmarks of a property right

The is a strong academic following of the view that one hallmark that perhaps comes closest to the essence of what a property right is that it is the right to exclude others.[401] For example, Sukhninder Panesar, in his book, General Principles of Property Law,[402] provides an account of what constitutes a property right. He refers to the Australian Case of Victoria Park Racing. He notes that, what is important in identifying the hallmarks of a property right, is a 'right to exclude other from the enjoyment and benefit of the object or thing in question'.[403]

Conceptualising such a concept in respect of a broader range of rights in property, such as easements, leases and even chancel repair liability is more difficult than in respect of freehold rights (as referred to by Sukhninder Panesar) and, therefore, this concept requires greater unpacking in order to have any significance in the analysis in this chapter). It is necessary for

[399] Martin Dixon, 'Proprietary and non-proprietary rights in modern land law' in Louise Tee (ed), *Land Law, Issues, Debates, Policy* (1st Edition, Willian Publishing 2002) 16.
[400] ibid 8-28.
[401] Specifically in respect of private property.
[402] Sukhninder Panesar, *General Principles of Property Law* (Longman 2001) 10-20.
[403] In the case of private property.

a distinction to be drawn between a right in rem and a right in personam, something with which property lawyers are familiar. A right in rem is a right in respect of a thing. The right is said to 'bind the whole world'.[404] A right in personam, in contrast, is a 'right between specific individuals'.[405] The idea that rights in rem bind the whole world is best explained by Honore, in his work, 'Rights of Exclusion and Immunities against Diverting'. Honore states:

> 'A first point to notice is that the rights classified as in rem are protected by claims to abstentions not to performances on the part of persons generally…. The protection of these rights against person generally consists in a general prohibition of interference not in the general command to perform something and there appears to be no instance, either in the Anglo-American or continental lists of a right protected by a claim that persons generally should perform something… Hence it seems safe to assert that the class of rights which jurisprudential writers seek to characterise under the heading right in rem…. Is of rights protected by claims to exclude all persons who have not an exemption resting on a particular title'.[406]

The point is that, based on this analysis, a right in rem is a right to bind the whole world and exclude others. This includes not just freehold rights but applies to lesser rights, such as easements and leases. Specific regard should be paid to the property right in question. For example, the owner of a freehold right has the right to prevent others from trespassing on their land. In the case of an easement, the grantee of an easement of a right of way has the right to stop others from preventing them from using the right of way and this also applies to their successors in title.[407] Remedies are available for interference with the right in the tort of nuisance and an injunction or damages can be awarded for loss suffered. The specific property right affects the cause of action available.

The contention that excludability is central to the existence of a property right is supported by the case of *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*, referred to

[404] Sukhninder Panesar (n 402) 11.
[405] Sukhninder Panesar (n 402) 11.
[406] Honore, 'Rights of Exclusion and Immunities against Diverting' (1960) 34 Tulane LR 453, 458-459.
[407] See Susan Bright 'Of Estates and Interest: A Tale of Ownership and Property Rights' in Bright and Dewar (eds), *Land Law: Themes and Perspectives* (1998) 583-539.

above.[408] In this case, the High Court of Australia had to determine whether a property right existed based on the facts. The facts concerned whether a race course (which was surrounded by a large fence) had a property right which prevented a neighbouring property, owner by Mr Taylor, from allowing a radio station to broadcast from Mr Taylor's property the results from the race course. The results could be seen from Mr Taylor's property from a 5-metre-high platform constructed at the property. The broadcasting of the race results had a detrimental impact on the race courses business. Dixon J summarised the decision in the case as follows:

> 'The courts have not in British jurisdictions thrown the protection of an injunction around all the intangible elements of value that is value in exchange which may flow from the exercise by an individual of his power or resources whether in the organisation of a business or undertaking or in the use of ingenuity knowledge skill or labour. This is sufficiently evidence by the history of the law of copyright and by the fact that the exclusive right in invention trademarks design and names and reputation are deal with in English Law as special heads of protected interest and not under a wide generalisation'.[409]

As noted above, the point is 'a resource will only be admitted by the courts into the category of … property on the general principle of exclusion'.[410]

In short, property is a right over a resource which arises between 'a subject and a thing'. The thrust of this idea of property rights, on this analysis, is that a property right is a right 'good against the whole world', a right in rem,[411] and allows the holder of the asset to exclude others from the asset in question. There are, however, problems with such an analysis of this hallmark of a property right. Specifically, it does not take account of commentary that a property right 'comprises bundles of mutual relations rights and obligations between subjects

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[408] *Victoria Park Racing and Recreation Grounds co Ltd v Taylor* (1937) 58 CLR 479.
[409] ibid 509 (Dixon J).
[410] Sukhninder Panesar (n 402) 14.
[411] Merrill and Smith, 'The Property/Contract Interface' (2001) 101 *Columbia Law Review* 773, 780, 783–89. See also Merrill and Smith (n 359) 32. See also Merrill and Smith, 'What Happened to Property in Law and Economics?' (2001) 111 *Yale Law Journal* 357.

in respect of certain resources of objects', as elucidated by Hohfeld referred to above.[412] Property is more complex than, say, the right to a thing.

Hansmann and Kraakman state, in 'Property, Contract and Verification: The Numerus Clausus Problem and the Divisibility of Rights',[413] that such a definition of a property right does not distinguish between contract rights and property rights as the law treats them. In general, contract rights, like property rights, are 'good against all the world' inasmuch as any third party 'who intentionally interferes with a contractual right commonly faces liability for tortious conduct to the holder of the right'.[414] The problem with this analysis of a property right is that it fails to identify a difference between property and non-property rights as the law deals with them.[415] Further determining the existence of a property right on this basis is subject to the same circular reasoning as affects the Ainsworth definition, albeit considering property at a more fundamental level.

The approach adopted in this thesis is the same approach adopted as the law deals with the identification of property rights - Identification by analogy. A jurist's approach to understanding what a property right is not the task of this thesis nor indeed necessary, as shown by the analysis of Ben McFarlane. A list of the accepted proprietary rights is provided by numerus clausus. If chancel repair can be mapped successfully to one of these rights, it can arguably be determined whether or not chancel repair liability is a proprietary right. As Ben McFarlane noted, in 'The Numerus Clausus principle and covenants relating to land', 'a

[412] Sukhninder Panesar (n 402) 14. These complexities were effectively explained by the jurist Hohfeld in Fundamental Legal Conception. The idea is that property consists of a bundle of right. When lawyers discuss rights they may be referring to four difference things, these being (1) claim rights (2) privileges (3) powers and (4) immunities. This is important because it shows that property rights can be broken down into subdivisions consisting of smaller rights and interests and that property rights can be explained in terms of a bundle of rights and relations.
[413] H Hansmann and R Kraakman, 'Property, Contract and Verification: The Numerus Clausus Problem and the Divisibility of Rights' (2002) 31 *Journal of Legal Studies* 373, s410.
[414] ibid s410.
[415] ibid s410.

right can be given proprietary status only if its content matches that of a right already admitted to the list'.[416]

(vi) Mapping chancel repair liability to rights in numerus clausus

Having established the methodology and addressed potential challenges to its validity, it is now appropriate to consider in further detail how the methodology is to be applied. Chancel repair liability has been characterised as an easement and a covenant (as well as a customary right in chapter 3) in this thesis and why these concepts have been used was discussed in Chapter 1. In order for the analysis of this thesis to be meaningful, chancel repair liability must be compared with these rights effectively. The questions addressed to facilitate the required analysis in this thesis are as follows:

1. What is the nature of the target right and is this analogous with the nature of chancel repair liability? – The question is whether chancel repair liability is analogous with the proprietary right it is being characterised as in terms of the fundamental elements required to constitute the right.

2. In what circumstances is the target right enforceable and is this analogous with chancel repair liability? – Ultimately it must be possible for the target right to be acquired in a meaningful characterisation. Chancel repair liability has been shown to be an enforceable entitlement.[417]

[416] Ben McFarlane, 'The Numerus Clausus principle and covenants relating to land' in Susan Bright (eds), *Modern Studies in Property Law* (Hart Publishing, 2011) 312.
[417] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546.

3. Is the target right binding on third parties and is this analogous with chancel repair liability? As noted above, in a modern legal system, the third party impact of property rights is governed in certain circumstances by registration at the Land Registry.

By addressing these questions, the characteristics of chancel repair liability will be analysed to show whether it is a proprietary or non-proprietary right.[418]

(vii) Conclusion

This chapter has extended the debate and explored the conceptualisation of a property right by engaging in a broader academic discussion of what constitutes a property right. This is clearly fundamental in order to clarify how this thesis defines a property and a non-proprietary right when analysing whether chancel repair liability is a proprietary or non-proprietary right.

The case of *National Provincial Bank v Ainsworth* has been analysed in this chapter in order to shed light on what constitutes a property right as well as what academics have said about the decision and the hallmarks of a property right (especially the reference by Lord Wilberforce, in *National Provincial Bank v Ainsworth*, to 'permanence and stability'). It has been shown that the classic definition in *National Provincial Bank v Ainsworth* does not provide a robust method for determining whether or not something is proprietary or non-proprietary.

The principle of numerus clausus (and other taxonomies of property rights) has been analysed and arguments submitted for adherence to numerus clausus in this thesis over other property doctrine. Numerus clausus has been shown to mean that the list of proprietary rights is a closed list. Based on this analysis, the conclusion reached is that a property right is any of

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Further as noted in Chapter 1 of this thesis it is striking the link between the burden of chancel repair liability and benefit of rectorial glebe and tithes. The basic principle of the doctrine is that the claim to a benefit of a grant must also be accompanied with the burden associated with the covenant. This connection is explored and analysed later in this thesis.

those rights which appear within numerus clausus. Chancel repair liability is therefore analysed in the subsequent chapters, by way of analogy with proprietary rights which fall within numerus clausus.

In a meaningful analysis and characterisation of chancel repair liability as a property right, regard must be paid to whether or not chancel repair liability is analogous with the key elements which constitute a target property right, as which chancel repair liability is being characterised. Further, in addition, based on the above analysis, regard must also be paid to the enforcement and registration requirements of the property right, as which chancel repair liability is being characterised. This is in order to determine that the target right can be acquired and whether, following the effects of the requirements of registration, chancel repair liability remains analogous with the target property right. This raises the need to address the above three questions in this thesis to determine whether chancel repair liability is a proprietary right or not.

Chapter 3

Chancel repair liability as a custom

There is commentary and reference to chancel repair liability existing as a customary right and dispute regarding whether or not this is the case. It is appropriate therefore to draw an analogy with customary rights and analyse whether or not chancel repair liability can be characterised as one.

As the main issue at the heart of this thesis is the question of whether chancel repair liability can be characterised as either a proprietary or non-proprietary right, it is essential to clarify the exact status of customs and customary rights and whether they themselves constitute either personal of proprietary rights. This is in order that a determination that chancel repair is or is not a customary right is relevant to the determination regarding whether chancel repair liability is proprietary or not, which is considered below.

Custom (like prescription) is a way of claiming rights. As noted in *Rowles v Mason*:[419] 'Prescription and custom are brothers and ought to have the same age, and reason ought to be the father and congruence the mother, and use the nurse, and time out of memory to fortify them both'.

A comparison between custom and prescription assists in elucidating the characteristics of custom. A key difference is that prescription is personal whereas custom is local. In other words, prescription in claimed by individuals whereas custom is not claimed necessarily by a specific individual but by a particular locality.[420] This means that the claim of a right by custom

[419] *Rowles v Mason* (1612) 2 Brownl 192, 198 (Coke CJ).
[420] *Austin v Amhurst* (1877) 7 ChD 689, 692 (Fry LJ); *Mercer v Denne* [1904] 2 Ch 534, 556 (Farwell J).

may arise where it could not arise by prescription; for example, where an individual could not obtain a right in their own name. The point was noted in *Foiston v Crachroode*, 'Where the claimant has a weak and temporary estate, he cannot claim in his own right, but must have recourse either to the place, and allege a custom there'.[421] Further, a duty to fence land against a common may arise by custom, where the circumstances are such that the duty could not arise by virtue of an easement by prescription (this is discussed in greater detail in the next chapter). For a successful claim for an easement by prescription however, the right must have been capable of being the subject matter of a deed of grant. In the case of a custom, however, the subject matter is incapable of being created by an ordinary deed of grant.[422] Further, the custom must be an immemorial local custom to have the force of law.[423]

Customary rights are those acquired by custom. Rights can be acquired by custom which fulfil the necessary criteria (discussed in this chapter) and these rights may affect the ownership of land.[424] These rights may take the form of an easement, and therefore appear to constitute a property right; however, because they have an element missing required for the creation of an easement, they have been termed a 'quasi easement'.[425]

Traditionally, easements are rights which can be granted to and released by the person with the benefit.[426] In contrast, generally, rights acquired by custom are ones where the benefit is enjoyed by a number of people in a locality whose number changes and alters so that they are incapable of taking a grant. The point is that customary rights are not a true property right insofar as an easement, as they only constitute a quasi-easement. Whether a quasi-easement

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[421] *Foiston v Crachroode* (1587) 4 Co Rep 31b, 32a.
[422] See Egerton v Harding discussed in the next chapter. *Egerton v Harding* [1975] QB 62, 70–72, [1974] 3 All ER 689, 693–694 (Scarman LJ).
[423] See *Plumer v Leicester* (1329) 97 Selden Soc 45, 46.
[424] See *Mercer v Denne* [1904] 2 Ch 534, 557 (Farwell).
[425] Mercer v Denne [1904] 2 Ch 534, 57 (Farwell).
[426] See *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229, 239. It was said 'that all prescription presupposes a grant'.

is included within the scope of the easement which appears within numerus clausus is discussed below.

In the case of rights of way acquired by custom, as with other customary rights, they must provide access to a class of individuals rather than be for the benefit of a single piece of private property. A customary church way is an example of a right of way acquired by custom, benefiting a class of individuals by allowing them access to a parish church for the purpose of worship.[427] This type of right of way is restricted to parishioners and can only come into being by custom.[428] As noted above, this is because the parties with the benefit of the right will fluctuate and change as individuals move in and out of the parish. Further, it cannot be a public right which is granted because a public right is not restricted to the specific local locality. A customary right is not a public right as it does not exist throughout the 'whole realm'.[429]

Halsbury's Laws offer examples of other instances of customary rights of way, including access to a market, common fields, and a common spring of water.[430] Further, it should be noted that a customary right of way is, on the face of it, repairable by the class of people with the benefit of the right. In *Austin's Case*,[431] Hale CJ said: 'If it be a public way of common right, the parish is to repair it, unless a particular person be obliged by prescription or custom. Private ways are to be repaired by the village or hamlet, or sometimes by a particular person'. It can be concluded that custom is a means of acquiring rights. The rights acquired may be a quasi-easement but not a traditional easement.

[427] See *Boteler v Bristow* (1475) YB Trin 15 Edw 4, f 29, 7 (Bryan CJ); YB Pas 18 Edw 4, f 3, 15. See also *Batten v Gedye* (1889) 41 ChD 507. See also *Brocklebank v Thompson* [1903] 2 Ch 344.
[428] *Farquhar v Newbury RDC* [1909] 1 Ch 12, 16 (Cozens-Hardy MR). See also *Poole v Huskinson* (1843) 11 M & W 827.
[429] Thompson, *Barnsleys Conveyancing Law and Practice* (4th edn, OUP, 2005) 53.
[430] *Halsburys Laws* (Custom and Usage, 5th edn, 2012) vol 32, para 37. See also *Gateward's Case* (1607) 6 Co Rep 59b. See also Co Litt 110b; *Austin's Case* (1672) 1 Vent 189 (Hale CJ); *Goodday v Michell* (1595) Cro Eliz 441 (common fountain); *Race v Ward* (1855) 4 E & B 702 (customary right of way to a spring, with the ancillary right of taking water from it). See also *Pain v Patrick* (1691) 3 Mod 289, 294 (though the ferry and the right of way in this case seem to have been available to the public at large); *Fineux v Hovenden* (1599) Cro Eliz 664 (custom for the inhabitants of Canterbury to have a way connecting two streets).
[431] *Austin's Case (*1672) 1 Vent 189 (Hale CJ).

In Simonton's 'Austin's Classification of Proprietary Rights',[432] a Customary right was described, for example, in the case of a village or community, as having a certain right in land, as being like an easement 'and, therefore, would be classed with the servitudes. The only peculiarity is that the inhabitants of a village or community has the benefit of the right'.[433]

The point is that rights can exist by custom which affect the ownership of the land. The benefit of such rights may also be enjoyed by those who have no interest in the land in question.[434] Such rights are known as 'alieno solo'. The rights are accordingly incapable of taking a grant and the classes of persons enjoying them are continually changing and continually fluctuating in number.

Customary rights may exhibit characteristics of property rights but are likely to fall short of such classification because a necessary element is missing. A customary right would fall short of classification as a proper easement as being incapable of taking a grant. However, as noted by the editors of Halsbury's Laws, it may constitute a quasi easement:

> 'Rights may exist by custom which may affect the ownership of land and which may be enjoyed by persons having no estate or interest in the land. Such rights partake of the nature of easements, and are sometimes called quasi easements. Quasi easements are rights which are analogous to easements but are not strictly so, because some necessary element is wanting. Easements proper must be rights capable of being granted to and released by the persons enjoying them, whereas customary rights are generally enjoyed by, so that they are incapable of taking a grant'.[435]

In short, it may be noted that, typically, customary rights are not 'necessarily considered to be rights of property'.[436] It is clear that customary rights are non-proprietary.[437] The significance

[432] James W. Simonton, 'Austin's Classification of Proprietary Rights' (1926) 11 *Cornell Law Review* 3.
[433] ibid 292.
[434] For example *Abbot v Weekly* [1665] 1 Lev 176 dealt with rights for those living a particular village to dance on a lawn of a particular individual living in the village.
[435] *Halsburys Laws* (Custom and Usage, 5th edn, 2012) vol 32, para 5(I) 29.
[436] *Mason v Tritton* (1993) 6 BPR 13639 T 13644 (Young J).
[437] Such an analysis is supported by doctrine adopted in this thesis that proprietary rights are those rights which fall within numerus clausus. Customary rights are not stated within the closed list.

of a successful analogy of chancel repair liability as a customary right is that it is indicative of chancel repair liability constituting a non-proprietary right rather than a proprietary right.

This chapter provides an account of chancel repair liability as a custom. There is an academic commentary and interpretation of judicial authority which indicates that chancel repair liability is a customary right.[438] These and other key sources have been discussed in this chapter. Further, the nature of customs has been discussed in reference to the leading work in Halsbury's Laws on Customs, and analogies and distinctions have been made with the characteristics of chancel repair liability in terms of their key elements and their effect on third parties. This has been used to determine the extent to which chancel repair liability is analogous with a customary right. This chapter makes an original and significant contribution because it clarifies our existing equivalent understanding of chancel repair liability as a customary right, to determine whether it can be correctly classified as a customary right or not.

The questions identified in Chapter 2 will be applied to determine whether chancel repair liability can be characterised as a customary right. In doing this the authorities which are supportive of chancel repair liability existing as a customary right will be assessed. The questions identified in Chapter 2 in the context of a custom are noted below. Specifically, the questions to be addressed are:

1. What is the nature of a custom and is this analogous with chancel repair liability?
2. In what circumstances is a custom enforceable and is this analogous with chancel repair liability?

[438] *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, [1955] 2 All ER 607, 590.

3. Are customs binding on third parties and is this analogous with chancel repair liability?

1. <u>What is the nature of a custom and is this analogous with chancel repair liability?</u>

As noted above, a custom is a local rule,[439] existing from time immemorial,[440] which has obtained the force of law.[441] They are ancient entitlements of a distinct local nature.[442]

The common law legal system with which we are familiar is characterised by case law developed through the courts by judges whose decisions are binding on and create precedents for future cases. The common law arose in the middle ages. Prior to the rise of the common law, local customs could obtain the force of law within a local area or district. As noted in the Tanistry Case,[443] 'custom in the intendment of law is such a usage as has obtained the force of law and is in truth a binding law as regards the particular place, persons, and things which it concerns'.

Much of the effect of custom was lost following the enactment of legislation abolishing customs relating to land;[444] however, despite this and the widespread development of the common law, local customs still exist and may still take precedence over the common law on particular matters in specific localities today.[445]

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[439] *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, 68. Scarman LJ said 'Custom, being local law, displaces within its locality the common law'.
[440] Since 1189.
[441] *Tanistry Case* (1608) Dav Ir 28, 31-32.
[442] For example the case of *Mercer v Denne* [1904] 2 Ch 534, 3 LGR 385 concerned the drying of fishing nets in a particular location and *Hall v Nottingham* (1875) 1 Ex D 1, 45 LJQB 50 concerned the erection of a maypole and dancing around the same in a particular parish.
[443] *Tanistry Case* (1608) Dav Ir 28, 31–32.
[444] See The Administration of Estates Act 1925, s 45(1)(a) for example.
[445] See *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689; *Wyld v Silver* [1963] Ch 243, [1963] 1 QB 169, 312.

A right may be claimed by custom, but the characteristics of such a right are that it is not specific to an individual or body corporate but instead specific to a particular area, affecting a number of persons. The customary right must be claimed 'by or in respect of a locality'.[446] This, of course, is in contrast to a grant of rights (for example, by deed) where rights can be granted and released by those persons benefiting from them. As noted above a customary right is incapable of resulting from an original grant; in other words, it cannot be created by an ordinary deed because, typically, a customary right affects a number of persons in a particular locality who are subject to continuous fluctuations and changes.[447] It is this indefiniteness of customary rights which contributes to them being incapable of 'taking a grant'.[448]

<u>The nature of a custom and chancel repair liability</u>

As noted above, a custom is a local rule,[449] existing from time immemorial,[450] which has obtained the force of law.[451] It can be obtained either actually or by presumption. To be valid as a custom, the following key characteristics must be present. A custom must have 'existed from time immemorial, without interruption, in a certain place, was certain and reasonable in itself'.[452] In short, a custom must be immemorial, reasonable, certain and continued without interruption.[453] The requirement for a custom being immemorial is considered in detail in the

[446] For example see *Mercer v Denne* [1904] 2 Ch 534, 3 LGR 385, 556. This case concerned whether a custom for the drying of fishing nets on a beach, in Kent, could be established. Lord Farwell held 'the difference between custom and prescription being only that the right to the former must be claimed by or in respect of a locality, and to the latter by a person or corporation'.
[447] As stated by Viscount Maugham in *Wolstanton Ltd and A-G of Duchy of Lancaster v Newcastle-under-Lyme Corpn* [1940] AC 860, [1940] 3 All ER 101 'it is not correct in the case of a custom to suppose that there has been a grant'.
[448] They cannot be granted by ordinary deed. In *Gateward's Case* (1607) 6 Co Rep 59b (Coke CJ) it was said 'Every prescription ought to have by common intendment a lawful beginning, but otherwise it is of custom, for that ought to be reasonable, but need not be intended to have a lawful beginning as custom to have land devisable or of the nature of gavel-kind. These and the like customs are reasonable, but by common intendment they cannot have a lawful beginning, by no grant, or act or agreement but only by Parliament'. Further customary rights because they are not consistent with the common law are not capable of resulting from an original grant of the right.
[449] *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, 68. Scarman LJ said 'Custom, being local law, displaces within its locality the common law'.
[450] Since 1189.
[451] *Tanistry Case* (1608) Dav Ir 28, 31-32.
[452] *Lockwood v Wood* (1844) 6 QB 50, 64. This has been summarised by commentators such that to 'To be valid, a custom must have four essential attributes: (1) it must be immemorial; (2) it must be reasonable; (3) it must be certain in its terms, and in respect both of the locality where it is alleged to obtain and of the persons whom it is alleged to affect; and (4) it must have continued as of right and without interruption since its immemorial origin.' *Halsburys Laws* (Custom and Usage, 5th edn, 2012) vol 32.
[453] *Lockwood v Wood* (1844) 6 QB 50, 64.

following section. It is this attribute which is the most significant in the context of chancel repair liability and upon which this chapter will focus.

The custom must be immemorial

The custom must be immemorial or, in other words, it must have been in existence in the year 1189, which has been the date set for legal purposes.[454] 'No usage can be part of law, or have the force of a custom, that is not immemorial.'[455] If, however, it is impossible to show that a custom has existed since this date, then it can still be established where a presumption can be shown that it existed on that date, i.e. in 1189.[456] There is no prerequisite regarding the extent of the evidence required to show such a presumption. As Lord Cranworth LC said in *Hanmer v Chance*,[457] 'the law has laid down no rule as to the extent of evidence which is required to establish a custom, or from which the presumption or inference of the fact of a custom may be drawn. It is the province of a jury to draw these conclusions of fact'.[458] However, the evidence of a living witness going back as far as they can remember, or uninterrupted use for 20 years,[459] may well prove sufficient.[460] This is provided, however, that there is no evidence to the contrary to show that the custom could not have existed in 1189,[461] in which case the presumption of immemorial existence can be rebutted. There a number of ways in which this could be achieved. It could be by way of evidence to show that the custom did not exist in 1189 or earlier or finding a more recent source for the custom. In *Beckett (Alfred F) Ltd v Lyons*,[462] a custom was claimed by inhabitants of the county of Durham entitling them to collect sea-washed coal from a beach since time immemorial for use or sale.

[454] Time extending beyond the reach of memory.
[455] *Millar v Taylor* (1769) 4 Burr 2303, 2368 (Yates J); *London Corpn v Cox* (1867) LR 2 HL 239, 259 (Willes J).
[456] For example in *R v Rollett* (1875) LR 10 QB 469, 475 where there was a purported custom that the liability for highways repairs did not apply to a parish.
[457] *Hanmer v Chance* (1865) 29 JP 324, 4 De GJ & Sm 626.
[458] ibid.
[459] *Simpson v Wells* (1872) LR 7 QB 214, 217.
[460] Tindal CJ said user 'at a distant time raises the presumption of immemorial user'. See *Cf Leuckart v Cooper* (1835) 7 C & P 119, 126 (Tindal CJ).
[461] It should be noted in copyhold cases the time is different.
[462] *Beckett (Alfred* F*) Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833.

However, the presumption could be rebutted on the basis that the use of coal and the transport required to facilitate the sale of coal was undeveloped in 1189. The presumption was therefore rebutted. It would have been unreasonable to determine that a custom could have existed to this effect in 1189.[463]

In the context of chancel repair liability, a strong argument can be formulated that any presumption of immemorial existence can be rebutted and this is because any custom to repair a church chancel could arguably not have existed before the construction of the church and the church chancel itself.[464] In other words, the fact that many church chancels did not exist prior to 1189 provides potential evidence that a requirement to repair the church chancel could only have originated, in many cases, after 1189 and therefore does not meet the immemorial requirement of a custom. Some of the earliest churches constructed were Saxon in design in the period 700-1050, followed by the Norman churches in 1050-1190. It is only the chancel of these churches, as they were in existence prior to 1189, which may allow for chancel repair liability to be characterised as a custom.[465] The majority of the churches in England that we know today were built during the middle ages following a wave of church buildings as Christianity expanded throughout England and the rest of Europe.[466] There are very few Saxon churches still in existence.[467] In respect of these Saxon churches, the chancels were commonly replaced by the nave in the 14th century.[468] Accordingly, there is a relatively small number of chancels to which a custom of chancel repair liability could potentially apply. Such churches may include, for example, Greensted Church, in Greensted-juxta-Ongar, near Chipping Ongar in Essex. In this case, the chancel was constructed in the ninth century.[469]

[463] ibid.
[464] Unless there was already a church built in the locality and the custom was already established.
[465] Except arguably where a later church is in the locality of a church constructed prior to 1189 or more specifically in the locality of a chancel repair liability custom.
[466] B K Kuiper, *The Church in History* (WM B Eerdmans Publishing Co 1988).
[467] T Meaking, *A Basic Church Dictionary* (5th edition Canterbury Press 2013).
[468] Ernest Arthur Fisher, *An Introduction to Anglo-Saxon Architecture and Sculpture* (Faber 1959). All Saints' Church, Earls Barton, Northamptonshire is a good example of this.
[469] Even still the obligation to maintain the chancel may not necessarily have existed. Historically at this time, the clergy were endowered with monies to keep the church in repair as discussed in Chapter 1, specifically as Burn notes whatever were the tithes

However, the point about custom is that it is a rule of law giving rise to customary rights. Hence, a church chancel might be built after 1189 and, as long as the ostensible chancel repair liability custom is in force in the locality of the new church, a custom to repair it could apply. However, the strength of this argument depends on the extent of the locality of an ostensible chancel repair liability custom.[470] The new church would have to be within the locality of the custom, a custom cannot apply throughout the country but instead must be limited to a specific region or area, this must be a legally recognised area such as a town, city or parish and the extent of the locality must be certain.[471] Arguably, the locality of chancel repair liability characterised as a customary right at first sight may be thought to be the entire parish. However, as Chapter 1 above revealed, a duty to repair the church chancel does not apply to an entire parish but is only in respect of certain parcels of land to which the right applies. Accordingly, on this analysis, there is no definable legally recognised area, such as a town, city or parish, to which a chancel repair liability custom applies.[472] In *Brocklebank v Thompson*,[473] it was questioned whether a custom could apply to individual tenements within a manor. In obiter, Lord Joyce said, in respect of a claimed customary right for certain inhabitants of a parish to access a church through land retained by the Lord of a manor, that it is 'doubtful whether a usage, if proved, for the tenants of certain particular tenements … and those tenements only, to use the disputed way as a church path would be a good custom in law'.[474] His Lordship stated that the reason why a custom could not be found was because the individual parcel of land or collection of parcels did not form a precise locality known to the law.[475] The point is that the same reasoning can be applied to characterising chancel repair liability as a customary right. The duty to repair the church chancel is limited to a number of

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and offerings of the faithful they were brought into a common fund for, in addition to other matters, for the repair of the church. In other words a specific obligation to repair the chancel did not exist at that time.

[470] The size of the locality of a custom is discussed below.

[471] For example in *Hall v Nottingham* (1875) 1 Ex D 1, 45 LJQB 50, the locality of a customary right, to erect a maypole and dance around the same, was limited to people living in the parish.

[472] *Hall v Nottingham* (1875) 1 Ex D 1, 45 LJQB 50.

[473] *Brocklebank v Thompson* [1903] 2 Ch 344, 72 LJ Ch 626.

[474] ibid 353.

[475] ibid 353.

parcels of land within a parish. The locality of an ostensible chancel repair liability custom is not a legally recognised area, such as a town, city or parish. Accordingly, a claimed customary right of chancel repair liability would arguably fail on these grounds.

There is further evidence which is perhaps more persuasive still (and which does not require an assessment of the locality of the custom) that chancel repair liability is incapable of existing as a custom as it cannot have existed since time immemorial. The point is that, following the establishment of the doctrine of transubstantiation (the process by which bread and wine become the body and blood of Jesus Christ in Christian worship),[476] the clergy of the time were required to ensure that the chancel was partitioned off from the congregation.[477] Canon law gave effect to this requirement and to the requirement that the construction and repair of the church chancel was a distinct and separate responsibility from the nave and the rest of the church building through the Fourth Lateran Council of 1215. Based on this analysis, only churches (or chancels added to churches) constructed after the Fourth Lateran Council of 1215 can be said to have a chancel repair liability because, prior to this date, the chancels did not exist or there was no requirement for them to be maintained pursuant to canon law. The immemorial nature of chancel repair liability can be rebutted and this analysis is compatible with the earliest cases of chancel repair liability appearing after 1215.[478]

As chancel repair liability is not immemorial, it cannot be successfully characterised as a customary right.[479] It is difficult to satisfy the remaining essential criteria in the context of a

[476] Pursuant to the Fourth Lateran Council.
[477] See Chapter 1 above.
[478] For example *Pense v Prouse* (1695) 1 Ld. Raym. 59, 91 ER 934 (Holt CJ).
[479] The above analysis casts doubt of the existence of a chancel repair liability as an easement on the basis that immemorial usage of the chancel would not be possible if the chancel was not constructed or there was no requirement for them to be maintained prior to this date.

chancel repair liability as a customary right; however, given that chancel repair liability is not immemorial, it is unnecessary to consider the remaining elements of the criteria in detail.[480]

The above analysis elucidated the question outlined at the start of this section; specifically, what is the nature of a custom and is this analogous with chancel repair liability? The analysis of a custom has shown that chancel repair liability is not analogous to a customary right as it has not existed since time immemorial. The next section analyses the strength of the authorities which are in support of chancel repair liability being a customary right.

2. In what circumstances is a custom enforceable and is this analogous with chancel repair liability?

It is certainly apparent in key authorities that there exists a lack of consistency in the understanding of commentators, lawyers and academics regarding whether chancel repair liability is indeed a customary right.[481] In addressing the question 'in what circumstances is a custom enforceable and is this analogous with chancel repair liability?', the key authorities which indicate that chancel repair liability is a custom are analysed below.

Support for the view that chancel repair liability is not a customary right is found in the historic works on ecclesiastical law by Richard Burn. Richard Burn, in his work, Ecclesiastical Law, states that the repair of the church falls to the individual who was in receipt of the rectorial property.[482] Custom, in these circumstances, provides a transfer of the repair obligation of

[480] It should be noted at this stage that custom is a source of law and gives rise to customary rights. The scope of customary rights to give rise to proprietary rights is however arguably limited. As commentators note customary rights are not typically proprietary rights. See Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP, 2009) 1360 . See also *Mason v Tritton* (1993) 6 BPR 13639, 13644.

[481] There appears to be little doubt that by custom parishioners are liable to repair the nave of the church. There is however confusion as to whether chancel repair liability exists as a custom. It is not necessarily the case that the rector is liable to repair the church due to custom.

[482] Richard Burn, *Ecclesiastical Law*, vol 1 (H Woodfall and W Straham 1763) 247.

the nave of the church from the rector to the parishioners. This reasoning is compatible with the historical analysis provided in Chapter 1 above. Specifically, the bishop historically received the produce of the labour of the land (the tithes) for an entire diocese and a quarter of this was used for the repair of churches within a diocese. On appropriation and the appointment of a rector, the bishop's interest was released to the rectors in order for them to repair the parochial church chancel.[483] As Burns notes, 'the repair of the church belonged to him who received this fourth part'.[484]

However, this work conflicts with the later work of Robert Phillimore, who states generally that a rector is bound to repair the church chancel by custom.[485] Phillimore states 'the parson (rector) is bound to repair the chancel … by the custom of England which has allotted the repairs of the chancel to the parson (rector)'.[486] The reason for this, Phillimore states, is that custom has allotted the repair of the church chancel to the rector. He states further that that custom has allotted the repair of the rest of the church (principally the nave) to the parishioners.[487]

Commentators and lawyers have seemingly been unable to decide whether they think that chancel repair liability is a customary right or not. However, recently, evidence presented at the briefing on the Chancel Repairs Bill 2015 (a briefing on a private members bill seeking to abolish chancel repair)[488] claimed that chancel repair liability 'is solely based on supposed ancient custom, and customs'.[489]

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[483] ibid 247.
[484] ibid 247.
[485] See Robert Phillimore, *The Ecclesiastical Law of the Church of England*, Vol 2 (London: H Sweet, 1873), s6 (Repairs, alterations and facilities), 1785.
[486] ibid.
[487] He states 'generally the parson is bound to repair the chancel. Not because the freehold is in him (…) but by the custom of England which has allotted the repairs of the chancel to the parson and the repairs of the church to the parishioners'. Robert Phillimore, *The Ecclesiastical Law of the Church of England*, Vol 2 (London: H Sweet, 1873), s 6 (Repairs, alterations and facilities), 1785.
[488] Michael Hall 'Briefing on the Chancel Repairs Bill' (2015) LDLA.
[489] ibid.

However, Wynn-Parrry J said, in *Chivers & Sons Ltd v Secretary of State for Air*,[490] that chancel repair liability is a duty imposed on the owner of rectorial property. Wynn-Parry J explained the role of custom in connection which chancel repair liability. He stated:

> 'This burden (of chancel repair liability) is imposed for the benefit of the parishioners who by the custom of England have the liability to repair the nave but the corresponding right to require the rector to repair the chancel, and the rector in turn has the rectorial property out of the profits of which he is considered to have the means to do this'.[491]

Wynn-Parrry J reached his decision by applying reasoning from the decision in *Wickhambrook Parochial Church Council v Croxford*[492] and it is necessary to consider this case to determine what Wynn-Parrry J meant in *Chivers & Sons Ltd v Secretary of State* for Air in order to elucidate whether chancel repair liability is a custom based on these cases.

Lord Hanworth MR, in *Wickhambrook Parochial Church Council v Croxford*,[493] relied on the ancient authority of *Pense v Prouse* to determine whether chancel repair liability was a custom. In *Pense v Prouse*, Lord Holt said that 'by the custom of England, a parson (a rector) shall repair the chancel, and the parishioners the nave of the church'.[494] However, care must be taken when citing the above cases as an authority that chancel repair liability exists as a custom. This is because, pursuant to ecclesiastical law,[495] the rector ought to repair the whole of the church and this appears to have been the judgment of Lord Holt in *Pense v Prouse*, as he preceded the above quote by saying 'by the canon law the parson ought to repair the whole'. In other words, custom may release the rector from an obligation to repair the nave (the part where the parishioners sit) which is passed on to the parishioners, but does not, however, place the rector under an obligation to repair the chancel. The obligation to repair

[490] *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, [1955] 2 All ER 607, 609.
[491] ibid 609.
[492] Wickhambrook Parochial Church Council v Croxford [1935] 2 KB 417, 104 LJKB 635.
[493] ibid 432.
[494] *Pense v Prouse* (1695) 1 Ld. Raym. 59, 91 ER 934 (Holt C.J).
[495] Richard Burn, *Ecclesiastical Law*, vol 1 (H Woodfall and W Straham 1763) 247.

the chancel, based on a correct interpretation of this case is not based on custom.[496] Chancel repair liability is not a custom, based on the above analysis.[497]

Further, such analysis is consistent with the judgment of Ferris J in the divisional court in *Aston Cantlow v Wallbank*, who cited Halsbury's laws[498] as evidence that chancel repair liability was a common law right (and not a custom). The influence that custom has over chancel repair liability is that it may alter the position such that the rector is no longer liable for the repair of the nave of the church.[499] In *Aston v Cantlow*, there was insufficient evidence of any custom to displace the common law position, however.[500] Lord Scott of Foscote in the House of Lords, in *Aston v Cantlow*, stated that responsibility for the repair was subject to a custom only insofar that it could displace the common law position.[501]

The point is also supported generally by the Law Commission in their working paper, 'Transfer of Land Liability for Chancel Repairs',[502] which states that 'by the custom of England' chancel repair liability was divided between the rector and the parishioner.[503] The rector is responsible for the chancel and the parishioners responsible for the rest of the church.

Additional evidence that chancel repair liability is something other than a custom is also found in the Land Registration Act 2002. Customary rights are noted in paragraph 4 of both Schedule 1 and 3 of the Land Registration Act 2002. Chancel repair liability appeared in paragraph 16 (before it lost its overriding status in 2013). Schedule 1 and 3 detail unregistered interests which override first registration and unregistered interest which override registered

[496] *Pense v Prouse* (1695) 1 Ld. Raym. 59, 91 ER 934 (Holt C.J).
[497] This analysis is consistent with the judgment of Lord Hanworth MR in *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, 104 LJKB 635, 432.
[498] Lord Hailsham of St. Marylebone (Editor) *Halsbury's Laws of England* (4th edition, Butterworth 1980) vol 14, para 1100. See also Kevin Gray and Susan Francis Gray, Elements of Land Law (5th edn, OUP, 2009).
[499] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [2].
[500] ibid [6].
[501] ibid [97].
[502] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) para 2.3.
[503] ibid 2.3.

dispositions, respectively, but also classify chancel repair liability independently from customary rights. The point is that, if chancel repair liability were a customary right, then it would be unnecessary for it to be listed separately from customary rights.

This section has addressed the question 'in what circumstances is a custom enforceable and is this analogous with chancel repair liability?' by analysing the authorities which indicate that chancel repair liability is a custom. Based on the above analysis, it has been determined that chancel repair liability is not a customary right and, therefore, not enforceable as the same. Accordingly, it is therefore unnecessary and inappropriate to consider the third question outlined at the start of this chapter; specifically, whether 'customs are binding on third parties and is this analogous with chancel repair liability?', as chancel repair liability has been shown not to be a customary right.

Conclusion

There is evidence of confusion and conflicting understanding regarding whether chancel repair liability is or is not a custom. The above analysis has clarified the uncertainty and revealed that chancel repair liability is not a customary right.

The point is that parishioners can, pursuant to custom, be required to repair a church, save for the chancel (subject to sufficient evidence of a custom). However, the obligation to repair the chancel of the church, imposed on a rector, does not arise by custom but instead arises out of the historical source of payment to rectors from rectorial property.

Specifically, in addressing the question raised at the outset of this chapter ('What is the nature of a custom and is this analogous with chancel repair liability?'), it has been shown that chancel repair liability is not analogous with a customary right. Chancel repair liability has

been shown to be incapable of existing as a customary right because any presumption of immemorial use can be rebutted. A custom must be immemorial or, in other words, must have been in existence in the year 1189, which is not the case in the context of chancel repair liability.[504]

Further, in addressing the second question raised as the start of this chapter (specifically, 'In what circumstances is a custom enforceable and is this analogous with chancel repair liability?'), the authorities in support of the fact that chancel repair liability is enforceable as a custom have been analysed. The analysis has shown that the authorities suggested as supporting the stance that chancel repair liability is enforceable as a custom do not stand up to scrutiny. Chancel repair liability does not arise out of custom. Custom may operate to transfer responsibility for the nave of the church to parishioners if there is sufficient evidence of a custom to this effect but chancel repair liability itself is not a customary right.

Given that the first and second questions addressed in this chapter have revealed that chancel repair liability cannot be characterised as a custom, it is neither necessary nor appropriate to address specifically the third question raised as the start of this chapter concerning whether customs are binding on third parties and whether this is analogous with chancel repair liability.

The above analysis and conclusion are significant, as they have shown that chancel repair liability cannot be characterised as a customary right, which has often been used as a label to explain chancel repair liability. The analysis has clarified the uncertainty regarding the nature of chancel repair liability. Chancel repair liability cannot be characterised as a customary right.

[504] Time extending beyond the reach of memory.

Chancel repair liability was described at the start of this chapter as elusive. The analysis that chancel repair liability cannot be characterised as a customary right sheds light on the concept and, in turn, makes it less elusive. The following chapters will suggest alternative characterisations of chancel repair liability to address the research question; specifically, 'What is chancel repair liability?', a question that becomes even more highly charged following the above analysis. Chancel repair liability, characterised as an easement and a covenant will be analysed in detail in the following chapters.

Chapter 4

Chancel repair liability as an easement

This chapter seeks to characterise chancel repair liability as an easement. Easements are proprietary rights; they fall within numerus clausus.[505] Easements are rights that give one landowner rights over another landowner's land.[506] The latest edition of Gale on Easements describes easements as 'either a right to do something or a right to prevent something'.[507] As the Law Commission note, 'Most types of easement can be described functionally, as rights to do something on another's land' and Megarry and Wade state, 'The common law recognised a limited number of rights which one landowner could acquire over the land of another; and these rights were called easements'.[508]

Examples of easements include rights of way, rights of light and rights of water for example. This chapter considers whether chancel repair liability can be characterised as an easement.

In *Aston v Cantlow*, as referred to above, Lord Roger of Earlsferry states that he agrees with the judgment of Ferris J in the divisional court,[509] where Ferris J said, referring to chancel repair liability:

> 'It is, of course, an unusual incident because it does not amount to a charge on the land, is not limited to the value of the land and imposes a personal liability on the owner of the land. But in principle I do not find it possible to distinguish it from the liability which would attach to the owner of land which is purchased subject to a mortgage, restrictive covenant or other incumbrance created by a predecessor in title'.[510]

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[505] See Chapter 2 above.
[506] *Metropolitan Rly Co v Fowler* [1892] 1 QB 165, 56 JP 244, 171.
[507] Jonathan Gaunt and Paul Morgan, *Gale on Easements,* (16th edn, Sweet & Maxwell, 1997) para 1-78.
[508] Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011) para 2.18.
[509] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [171].
[510] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* (2000) 81 P & CR 165, [2000] 2 EGLR 149, 152.

This chapter unpacks the dicta of Lord Roger of Earlsferry, where he agrees with the description of Ferris J, that chancel repair liability may not be distinguished from the liability which would attach to the owner of land which is purchased subject to an 'other incumbrance'. The dicta is unpacked by way of characterising chancel repair liability as an incumbrance which would attach to the owner of land specifically a positive obligation easement. This is, of course, a challenging analysis specifically because the orthodox position is that positive obligation easements do not typically attach to successive owners of land.

As outlined in the above chapters, in order to analyse the characteristics of chancel repair liability to show whether it is proprietary in nature and should be classified as a proprietary right (and, in turn, should bind third parties), the following questions will be addressed in the context of chancel repair liability characterised as an easement.
Specifically:

1. What is the nature of an easement and is this analogous with the nature of chancel repair liability in terms of the fundamental elements required to constitute the right? In other words, is chancel repair liability capable of existing as an easement and can the criteria for an easement be established in connection with chancel repair liability?

2. In what circumstances is the easement enforceable and is this analogous with chancel repair liability? In other words, if chancel repair liability can be characterised as an easement, can it also be acquired as an easement (either expressly, or impliedly - by prescription, for example).

3. In what circumstances is an easement binding on third parties and is this analogous with chancel repair liability? In other words, if chancel repair liability can exist as an easement and

has been acquired, is it enforceable against the party owning the servient land, the ostensible servient landowner (i.e. a parishioner)?

By addressing these questions, the characteristics of chancel repair liability have been analysed to show whether it is proprietary in nature and can be classified as a proprietary right. These questions are relevant, as they form the basis for establishing whether an easement exists, is enforceable and should be binding on third parties. Each of these three questions have been considered in turn before a conclusion reached regarding whether chancel repair liability can be characterised as an easement.

Literature review and original and significant contribution

There is no specific literature on the characterisation of chancel repair liability as an easement and the work in this chapter makes an original and significant contribution to the understanding of chancel repair liability from this perspective. There are extensive writings on the nature of easements. Leading law texts have been used in this chapter to identify and discuss the key elements of easements[511] and their effect. These key elements have been compared with the characteristics of chancel repair liability (identified in earlier chapters). Further, the law of easements is currently highly charged with reform by the Law Commission, proposed in the report The Law Commission, Making Land Work: Easements, Covenants and Profits a Prendre,[512] and the findings have been considered in this chapter in the appropriate context.

[511] Including Gale, *Easements*, (16th edn, Sweet & Maxwell 1997); Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009); Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade The Law of Real Property* (8th edn, Sweet & Maxwell & Thomson Reuters 2012).
[512] Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011); Law Commission, *Easements, Covenants and Profits a Prendre Consultation* (Law Com CP No 186, 2008).

The nature of easements, like all property concepts, is not sacrosanct and subject to lively debate.[513] This has provided scope for original analysis, challenging the orthodox understanding of easements by undertaking a critical, detailed analysis of the key case law providing our current understanding of easements (including an analysis of Re Ellenborough Park[514] and the case law of fencing easements). The chapter is divided into the following sections:

i) The analogy that can be drawn between CRL with positive easement

ii) Problems that positive easement currently present - 'the right must not impose any positive burden on the servient landowner' and a Fencing Easement

iii) Problems with trying to characterise CRL as an easement – 'The decision in Regis and the decision in *Austerberry v Oldham* Corporation'

iv) Issues where the rights of those seeking to enforce CRL overlap with the rights of those enforcing a positive easement.

v) Third party impact?

vi) Conclusion

(i) <u>The analogy that can be drawn between chancel repair liability and positive easements</u>

Many of the key cases and authorities dealing with chancel repair liability reveal that it shares a number of similarities with easements. The question is whether the right for the church to

[513] For examples in connection with the requirement for dominant land see Anna Lawson 'Easements' in Louise Tee (ed), *Land Law Issues, debates, policy* (William Publishing 2002) who argues that the requirement for dominant land should be reduced and in connection with easement imposing positive burdens on servient landowners. See also A J Waite 'Easements: Positive Duties on the Servient Owner?' (1985) 44 CLJ 458 who argues in favour of this.
[514] *Re Ellenborough Park* [1956] Ch 131, [1955] 3 All ER 667.

have the church chancel repaired or to receive payment for the repair of the church chancel can be characterised as an easement. This point is discussed in more detail below.

The characterisation of chancel repair liability as an easement may take the following form. The Church of England has a right to receive monies[515] from parishioners for the repair of the church chancel.[516] The church owns the rectory, including the church chancel (the ostensible dominant land in the characterisation of chancel repair liability as an easement). The parishioner upon whom the chancel repair liability is levied owns land in the parish (ostensible servient land).[517] In other words, a potential successful characterisation of chancel repair liability as an easement is, arguably, that it is a right, for the benefit of the dominant landowner (the church), to receive a chancel repair liability payment or to have the church repaired, by a ostensible servient landowner (a parishioner). In other words, in this characterisation, chancel repair liability is a property right (easement) which places a servient owner, typically a local parishioner, under an obligation to satisfy the chancel repair liability which is enforceable and binding on the parishioners and their successors in title.

There are similarities, on the face of it, between chancel repair liability and easements. As the Law Commission note, an 'easement (…) can be thought of as, on the one hand, imposing a burden on a piece of land'.[518] Anyone who buys land, that is subject to it in favour of, for example, a neighbour, must accept the burden of that easement. As the Law Commission note further, 'land lawyers say that the right binds the land and that the purchaser cannot take the land free from it. On the other hand, the right gives a benefit to the right-holder, who will in most cases be another landowner'.[519] Such similar characteristics have been

[515] And claim monies if they are not received.
[516] Chancel Repairs Act 1932, s2.
[517] The right to claim chancel repair liability is often not revealed in the parishioners title documents which has had potential to be binding on successors in title in particular prior to chancel repair liability losing its overriding status in 2013.
[518] Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011) para 1.3.
[519] ibid para 1.3.

recognised in chancel repair liability. Chancel repair liability has been described in the House of Lords as a burden on land just like any other burden that runs with land and has been described as attaching to land. As Lord Hope of Craighead stated, referring to chancel repair liability, in the *Wallbank* case:[520]

> 'This is a burden on the land, just like any other burden that runs with the lands. It is, and has been at all times, within the scope of the property right which she acquired and among the various factors to be taken into account in determining its value. She could have divested herself of it at any time by disposing of the land to which it was attached. The enforcement of the liability under the general law is an incident of the property right which is now vested jointly in Mr and Mrs Wallbank'.[521]

Further, easements and chancel repair liability are similar in scope. Easements are limited rights, falling short of rights of ownership or possession.[522] The same has been determined of chancel repair liability, based on the analysis in Chapter 2.[523]

Chancel repair liability and easement are similar in terms of some of their key characteristics.[524] However, easements and chancel repair are functionally different. An easement typically only plays a passive role in facilitating and controlling the use of land over time.[525] The function of chancel repair liability, in contrast, places a positive duty on a liable party. Nevertheless, there are instances where easements have been found which place a positive duty on a servient landowner; for example, in the case of a fencing easement. The difference in function is discussed in more detail below and the cases of positive easement

[520] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [71] (Lord Hope of Craighead).
[521] ibid [71] (Lord Hope of Craighead).
[522] The Law Commission state 'We can give a cumbersome description and say that they are non-possessory, non-security rights in land'. Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011) para 2.16.
[523] Chancel repair was determined as not a 'cardinal feature' of an ownership interest as those rights 'conferred by the rules of a property institution to protect ownership interests'.
[524] The Law Commission notes the key elements for an easement see Law Commission, *Easements, Covenants and Profits a Prendre* (Law Com No 327, 2011) para 2.22-2.30.
[525] In respect of fencing easements the Law Commission states 'It appears to be an exception to the principle that an easement cannot involve the servient owner in the expenditure of money'. Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011) para 5.93.

analysed to consider whether they assist in the characterisation of chancel repair liability as an easement in this chapter. The analysis also highlights the problem with positive easement; specifically, easements do not typically place a positive duty on a servient landowner, something which the Law Commission has described as 'anomalous'.[526]

The leading case of Re Ellenborough Park[527] identified the criteria which must be met in order for an easement to be established.[528] In Re Ellenborough, the question for the court was whether an easement existed for residents of houses adjacent to a park to exercise an easement over the park. The court,[529] in reaching its decision, identified the key elements for the establishment of an easement. These were that: (1) There must be a dominant and a servient tenement;[530] (2) an easement must accommodate the dominant tenement, that is be connected with its enjoyment and for its benefit;[531] (3) the dominant and servient owners must be different persons;[532] and (4) the right claimed must be capable of forming the subject matter of a grant and what this means is that there must be a capable grantor and a capable

[526] Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011) para 5.93.
[527] *Re Ellenborough Park* [1956] Ch 131, [1955] 3 All ER 667.
[528] This is relevant because *Re Ellenborough Park* [1956] Ch 131, [1955] 3 All ER 667 is the leading case in the requirements for the existence of an easement.
[529] *Re Ellenborough Park* [1956] Ch 131, [1955] 3 All ER 667 (Danckwerts J).
[530] In other words the property or estate. There must be dominant land and servient land: The first element of the criteria in *Re Ellenborough Park* [1956] Ch 131, [1955] 3 All ER 667 is that easements are rights which exist for the benefit of one person's land over another person's land. There must be both dominant land and servient land or in other words land which is benefited (the dominant land) and land which is burdened (the servient land). An easement cannot exist without this being in place, it cannot exist in gross and it cannot exist if the land is not yet determined. The point is that an easement seeks to benefit specific land and not individual persons. The requirement for two tenements for an easement is well founded in case law. A successful characterisation of chancel repair liability as an easement requires that there is dominant land and servient land. In a characterisation of chancel repair liability as an easement the dominant land would be that land owned by the church and benefiting from the right claimed as an easement. The servient land over which the easement is ostensibly exercised is the land owned by the parishioner, affected by chancel repair liability. Accordingly, both the dominant and servient land are identifiable.
[531] The easement must accommodate the dominant tenement: A further requirement of an easement identified in *Re Ellenborough Park* was that an easement must provide a significant benefit on the dominant land rather than a personal convenience. What this means is that the benefit of the easement must not bestow only a personal advantage to the owner of the dominant land. Applying such a principle to chancel repair liability it can be noted that there are strong arguments that chancel repair liability provides a benefit to the dominant land. There is evidence that without such an easement to repair the church chancel would fall into disrepair. There is therefore a strong argument that such an easement 'exists for the reasonable and comfortable enjoyment of the dominant tenement' which as noted by Lord Hope of Craig, in *Moncrieff v Jamies* [2007] UKHL 42, [2008] 4 All ER 752 is at the heart of an easement.
[532] The dominant and servient owners must be different persons: The rectorial property is vested in the church, the dominant landowner. The servient land will be held by a parishioner. As an easement relates specifically to land in the ownership of someone else it is not possible for an easement to exist when the dominant and servient land are vested in the same party. It is not meaningful for a person to have rights in themselves and should such a circumstance arise, for example if servient land is acquired by a dominant landowner then the easements burdening the servient land can merge in the dominant land and be extinguished. There is clear distinction between the landowner by the church and that owner by the parishioner and therefore the characterisation of chancel repair liability in this chapter arguably satisfies the requirement that the dominant and servient owners must be different persons.

grantee;[533]; the right must be sufficiently definite;[534] the right must be within the general nature of the rights traditionally recognised as easements;[535] the right must not deprive the servient owner of all beneficial proprietorship;[536] and the right must not impose any positive burden on the servient owner.[537] It is clear that chancel repair liability, characterised as an easement, may satisfy most of the above criteria by considering the *Wallbank* case.[538] In this case, there was an ostensible dominant and a servient tenement (the chancel land and the Wallbanks' land, respectively); the easement accommodated the ostensible dominant tenement, that is it was for the benefit of the dominant land and connected with its enjoyment. Further the dominant and servient owners were different persons (i.e., the church and the Wallbanks). However, it is the final criterion which is the most difficult to reconcile. It is the requirement that the right must not impose any positive burden on the servient owner which is of most difficulty and interest in the characterisation of chancel repair liability as an easement and upon which this chapter will focus.

[533] There must be a capable grantor of the easement. The owner of the ostensible freehold servient land (likely to be owned by a parishioner in the parish) would constitute a capable grantor. This is because a capable grantor is one who is entitled to a proprietary interest in land, in most cases this is likely to be the freehold estate in the servient land (but may include a leasehold estate).
There must be a capable grantee: A further requirement for a right to be capable of being the subject matter of a grant is that there not only must be a capable grantor but there must also be a capable grantee. The church is capable of being characterised as a capable grantee in the absence of evidence to the effect they are legally incompetent to receive a grant.
[534] The right must be sufficiently definite: A further requirement for a right to be capable of being the subject matter of a grant is that the right must be sufficiently definite. The ostensible grant of an easement in connection with chancel repair liability is more likely to have sufficient clarity when expressly stated in the deeds or property title. In the absence of this then there can be difficulty determining the extent of property affected by chancel repair liability because as noted in Chapter 1, discovering the extent of chancel repair liability can be difficult. Liability due to enclosure awards should be identifiable from plans attached to the enclosure awards which will be held within the parish records[534] however even on sight of the same matching what appears on the plans to what appears on the ground may be a difficult task.
[535] The right must be within the general nature of the rights traditionally recognised as easements: A further requirement for a right to be capable of being the subject matter of a grant is that the right must be within the general nature of the rights traditionally recognised as easements. Chancel repair liability is not currently recognised as an easement. Whilst the existing catalogue of easements is not closed there are difficulties inherent in recognising new easements. Chancel repair liability as an easement certainly would appear to extend the parameters of what are currently common easements encountered. It is generally understood that an easement is a right to do something on the servient land or a right to prevent the servient landowner from doing something on their own land. However the list of easements is not closed as noted in *Dyce v Lady* (1852) 1 Macq 305 but 'alter and expand with the change that take place in the circumstance of mankind'. Determining the existence of new easements is not therefore entirely prohibited.
[536] The right must not deprive the servient owner of all beneficial proprietorship: A further requirement for a right to be capable of being the subject matter of a grant is that the right must not deprive the servient owner of all beneficial proprietorship. Chancel repair liability characterised as an easement does not grant exclusive and unrestricted use to the church of rectorial property in order to deprive a lay rector of all their beneficial property.
[537] Discussed in detail below. *Re Ellenborough Park* [1956] Ch 131, [1955] 3 All ER 667.
[538] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546.

A fencing easement does not conform to the standard easement formula because it imposes a position burden on a servient landlord. Further, chancel repair liability shares a number of similarities with a fencing easement; specifically, they both concern an obligation to repair and both are capable of being binding on successors in title. A closer examination of the circumstances that give rise to a fencing easement sheds light on whether or not chancel repair liability could constitute an easement and can be shown to be analogous with it. The sections below analyse the problems that positive easement currently present in addition to the problems that exist in trying to characterise chancel repair liability as an easement, particularly in respect of the positive obligation to repair. The later sections in this chapter analyses issues where the rights of those seeking to enforce chancel repair liability overlap with the rights of those enforcing a positive easement.

(ii) Problems that positive easements currently present - 'the right must not impose any positive burden on the servient landowner' and a Fencing Easement

A true easement is the right to do something and not the right to have something done.[539] An obligation to do something on land owned by a person, by that individual, generally arises pursuant to a contractual or statutory obligation.[540] However, it has been recognised by the courts that an obligation to maintain a fence may arise on the owners of a parcel of land thereon for the benefit of adjacent land.[541] Such an easement has been referred to as a quasi-easement or spurious easement.[542] The Law Commission noted, in their report 'Easements, covenants and Profits a Prendre', in respect of fencing easements:

> 'The existence of an easement of fencing is an anomaly; it has been described as a 'spurious easement'. It appears to be an exception to the principle that an easement

[539] Jonathan Gaunt and Paul Morgan, *Gale on Easements,* (16th edn, Sweet & Maxwell, 1997) 1-69.
[540] ibid. See also *Hilton v Ankesson* (1872) 27 LT 519, [1861–73] All ER Rep 994.
[541] *Lawrence v Jenkins* (1873) LR 8 QB 274, 37 JP 357.
[542] Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011) para 5.93.

> cannot involve the servient owner in the expenditure of money. It seems that it can arise by prescription, when the servient owner has responded to requests to mend a fence, over many years. This is clearly anomalous; for a fencing easement to arise by implication or by prescription would be as implausible and contrary to principle as the prescription or implication of any covenant'.[543]

The obligation to repair in respect of a fencing easement is founded on the basis of long use, whereby the servient landowner, on notification from the dominant landowner, has consistently repaired the fence.[544] Further, when land has been enclosed, fencing off common land, the landowner who has fenced off their land has been obliged to maintain the fence for the benefit of the commoners and their successors in title.[545]

However, generally, positive obligation easements are unacceptable. In *Liverpool City Council v Irvin*, a case which considered the duty on the council to keep the common parts of the estates in repair, Lord Wilberforce said, 'One starts with the general principle that the law does not impose on a servient owner any liability to keep the servient property in repair for the benefit of the owner of an easement',[546] which reflects the orthodox understanding of easement; specifically, that the right must not impose a positive duty on the servient landowner. Further, as stated by Smith J in *Sugarman v Porter*,[547] in referring to a fencing easement, 'This right rests uneasily as an easement because it casts a burden exceptionally upon the owner of the servient tenement to 'put his hand in his pocket'.[548] There are further English cases on the same point. In *Rance v Elvin*, there was neighbouring dominant and servient land. The dominant landowner claimed that he had an easement to receive water from pipes that ran over neighbouring servient land and that the right imposed a positive duty on the servient landowner to maintain the flow of water by potentially paying for the water

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[543] ibid para 5.93.
[544] *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689.
[545] *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625. The right is binding on successors in title pursuant to the Law of Property Act 1925, s62.
[546] *Liverpool City Council v Irwin* [1977] AC 239, 256.
[547] *Sugarman v Porter* [2006] 2 P & CR 274.
[548] ibid 47.

entering their pipes. The Court of Appeal, in *Rance v Elvin*,[549] rejected the argument that a dominant landowner can have an easement in such circumstances. In short, it said the dominant land can have an easement that 1) allows the dominant land to receive water as long as the servient landowner chooses to keep his pipes connected to the water supply but (2) does not impose a positive duty on the servient landowner to keep his pipes connected and (3) does not impose a positive duty on the servient landowner to pay for water used by the dominant landowner. The right claimed in *Rance v Elvin*[550] did not impose a positive duty on the servient landowner

The tension between fencing easements and the general nature of easements is something which has not escaped mainstream academic discussion. The fact that fencing easement are permitted is unclear and commenters point to various explanations. These include (as noted below) that is it a result of the 'benefit and burden' principle; that these decisions arose out of a very specific context[551]; that it is a 'spurious easement' and an anomaly; and that it is an exception to the general rule. Ben McFarlane, in The Structure of Property Law,[552] notes that a key requirement of an easement is that it does not impose a positive duty on the servient land.[553] He notes that there exists reluctance in the property law of England and English law in general to impose a positive duty on the rest of the world for the benefit of the dominant land. He references *Stovin v Wise*, where Lord Hoffmann discussed this reluctance to impose positive duties.[554] Lord Hoffman said, in this case, 'Except in special cases … English law does not reward someone who voluntarily confers a benefit on another. So, there must be some special reason why he should have to put his hand in his pocket'.[555] Ben McFarlane does,

[549] *Rance v Elvin* (1985) 49 P. & C.R. 65
[550] ibid.
[551] *Jones v Price* [1965] 2 QB 618; *Crow v Wood* [1971] 1 QB 77, [1970] 3 All ER 425; *Egerton v Harding [*1975] QB 62, [1974] 3 All ER 689.
[552] Ben McFarlane, *Structure of Property Law* (First Edition, Hart Publishing 2008).
[553] ibid 845.
[554] *Stovin v Wise* [1996] AC 923, 943-944.
[555] ibid 944.

however, note that a fencing easement, on the face of it, provides an exception to the rule that an easement does not impose a positive duty. However, the commentator is critical of whether a fencing easement can actually be a real easement.[556] One way in which the commentator seeks to explain the duty to fence[557] is that the servient land may lack a direct right arising as a result of the 'benefit and burden' principle.[558] Specifically, the commentator notes, 'a duty to fence may be the price paid by those whose own land adjacent to the moor, in return for a right to graze sheep on that ancient common land'.[559]

In Cheshire and Burn's Modern Law of Real Property, the editors note that a right to have a fence maintained by an adjoining owner was recognised by the Court of Appeal as 'a right in the nature of an easement'.[560] They state further that, in the situation 'where the owner of the servient tenement would be under a duty to spend money or to fulfil some other positive obligation',[561] it is unlikely that an easement will arise with the exception of a fencing easement.[562]

Similar commentary is provided by Mackenzie and Philips in their Textbook on Land Law.[563] They note that, whilst a fencing easement has been recognised in at least three decisions of the Court of Appeal, all these decisions arose out of a highly specific context.[564] Specifically, they all arouse in the context of cattle trespass, where the owner of cattle claimed that a neighbour should have fenced off land to keep the cattle owner's cattle out. In other words, the servient landowner, subject to the fencing easement, should have fenced his land for the benefit of the cattle owner, the dominant landowner.

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[556] Ben McFarlane, *Structure of Property Law* (First Edition, Hart Publishing 2008) 846.
[557] In particular the decision in *Crow v Wood* [1971] 1 QB 77.
[558] See this discussion of this point in more detail in the following chapter.
[559] Ben McFarlane, *Structure of Property Law* (First Edition, Hart Publishing 2008) 846.
[560] E H Burn and J Cartwrigth, *Cheshire and Burn's Modern Law of Real Property* (18th Edition, OUP 2011) 643.
[561] ibid.
[562] *Jones v Price* [1965] 2 QB 618; *Crow v Wood* [1971] 1 QB 77, M & B, 710.
[563] Mackenzie and Philips, *Textbook on Land Law* (15th Edition, OUP, 2014).
[564] *Jones v Price* [1965] 2 QB 618; *Crow v Wood* [1971] 1 QB 77, [1970] 3 All ER 425; *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689.

In Diane Chappelle's Land Law, she notes that an easement does not involve the servient landowner in any positive burden and refers to *Regis Property Co Ltd v Redman*[565] in support. The commentator notes 'it was held that there could be no easement to maintain a supply of hot water: this would require the servient owner to supply the water and also heat it'.[566] She notes the exception of a fencing easement,[567] but agrees with Gale on Easements, that a fencing easement is a 'spurious easement' because it involves the servient landowner in the expenditure of money.[568]

In Jackson Stevens and Pearce's Land Law,[569] the author notes a right which requires a servient owner to take positive action and spend money transcends and goes beyond the limits of the characteristics of an easement. The authors also refer to *Regis Property Co Ltd v Redman*[570] and note that the Court of Appeal held that the obligation to supply hot water and central heating could not constitute an easement because 'it involved the performance of service which was essentially a matter of personal contract as distinct from a proprietary right'.[571] The editors state further a number of exceptions to the general rule. They note that a fencing easement imposes an obligation on the servient landowner to take action.[572] The authors also note further exceptions in relation to an easement carrying with it positive obligation binding on a servient landowner, if required in the circumstances.[573] They also refer to the case of *Holbeck Hall Hotel Ltd v Scarborough BC*,[574] and note that there are circumstances in which a servient landowner, for the benefit of a dominant landowner, may be required to take positive steps to maintain a right of support. A closer examination of this case reveals that it concerned a claim by owners of land on a clifftop where the claimant's hotel stood against the defendants

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[565] *Regis Property Co Ltd v Redman* [1956] 2 QB 612.
[566] Diane Chappelle, *Land Law* (7th Edition, Pearson Longman, 2006) 409.
[567] *Crow v Wood* [1971] 1 QB 77.
[568] Diane Chappelle, *Land Law* (7th Edition, Pearson Longman, 2006) 409.
[569] Jackson, Stevens and Pearce, *Land Law* (4th Edition, Sweet & Maxwell, 2011).
[570] *Regis Property Co Ltd v Redman* [1956] 2 QB 612.
[571] Jackson Stevens and Pearce, *Land Law* (4th Edition, Sweet & Maxwell, 2011) 477.
[572] ibid 478.
[573] See *Liverpool City Council v Irwin* [1977] AC 239, 256.
[574] *Holbeck Hall Hotel Ltd v Scarborough BC* [2002] 2 All ER 705.

who were the owners of the land at the foot of the cliff. Some landslip was foreseeable and the court held that the servient landowner was under a duty to take positive steps to provide support to the neighbouring property.[575]

In Megarry & Wade,[576] the editors state the right to have something done is not an easement, quoting directly from Gale on Easements.[577] The editors note that it is unlikely that easement would be found if the servient owner were required to expend money. *Regis Property Co Ltd v Redman*[578] and *Rance v Elvin*[579] are cited in support, with the exception of the obligation to fence land in order to keep out cattle and perhaps certain obligation to repair sea walls, river banks and gutters.[580]

Kevin Gray, in Elements of Law,[581] notes that it is only in special circumstances that an easement can impose a positive duty on the servient landowner. He notes the cases of *Jones v Price* and also refers to *Keighley's Case*,[582] where property that fronts on to the sea may be subject to an easement to repair the sea wall.[583]

The conclusion which can be drawn from the above cases and academic commentary is that the circumstances when a positive duty may be imposed by an easement are highly limited. Such circumstances only arise in a handful of cases including in respect of fencing easements and potentially in connection with sea walls. However, there is very little clear explanation regarding why this is the case or why the circumstances are limited in this way. The above

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[575] ibid.
[576] Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade The Law of Real Property* (8th edn, Sweet & Maxwell & Thomson Reuters, 2012) 1252.
[577] ibid 1252.
[578] *Regis Property Co Ltd v Redman* [1956] 2 QB 612.
[579] *Rance v Elvin* (1985) 49 P. & C.R. 65, 69-70.
[580] Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade The Law of Real Property* (8th edn, Sweet & Maxwell & Thomson Reuters, 2012) 1252.
[581] Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP, 2009) 621.
[582] Keighley's Case (1610) 10 Co Rep 139a, 139b, 77 ER 1136, 1137.
[583] Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP, 2009) 621.

cases and academic commentary also fail to clarify why positive easements are not readily accepted. Gale on Easement explains a fencing easement as 'spurious' and unorthodox.[584]

However, there are a number of other circumstances in which a positive easement historically has been found to exist and a strong argument has been constructed by commentators that these are preserved.[585] The positive duties imposed on the servient landowners historically have included an obligation to repair sea-walls as well as river banks and gutters.[586] The positive obligations imposed on servient landowners have also included an obligation to clean ditches and further repairing obligations have been found to constitute an easement.[587] Such positive obligations are clearly recorded in a line of cases that finds that positive obligations exist as easements.[588] There is little justification, as noted by commentators, for distinguishing these positive obligations from other easements or the necessity to classify them as anything other than a true easement rather than giving them a different, uncertain label, specifically 'quasi-easement', and rejecting their proprietary status.[589] As Lord Denning said, in *Crow v Wood*,[590] 'a right to have your neighbour keep up the fences is a right in the nature of an easement'.[591] These points are analysed in further detail below.

In A J Waite's analysis of positive duties in 'Easements: Positive Duties on the Servient Owner?',[592] an argument is constructed that historic positive easement has persisted up until the modern day (further, see M A Peel).[593] The most persuasive arguments raised in A J

[584] In other words not consistent with orthodox understanding of an easement.
[585] A J Waite, 'Easements: Positive Duties on the Servient Owner?' (1985) 44 CLJ 458.
[586] For example in *R v Leigh* (1839) 10 Ad & El 398, 2 Per & Dav 357 a landowner was required to repair a sea wall. Further, in *Fobbing Sewers Comrs v R* (1886) 11 App Cas 449, 51 JP 227 the frontages were liable to repair the sea wall.
[587] See Milsom 'Trespass from Henry III to Edward III' (1958) 74 L.Q.R. 430-434; M. A. Peel 'What is an Easement?' (1964) 28 Conv. (N.S.) 450, 451-453.
[588] A J Waite, 'Easements: Positive Duties on the Servient Owner?' (1985) 44 CLJ 458, 461.
[589] As noted in Jonathan Gaunt and Paul Morgan, *Gale on Easements* (16th edn, Sweet & Maxwell, 1997). Also noted by commentators A J Waite, 'Easements: Positive Duties on the Servient Owner?' (1985) 44 CLJ 458, 461.
[590] *Crow v Wood* [1971] 1 QB 77, [1970] 3 All ER 425, 84-85.
[591] See Goddard, *Law of Easements* (1st ed. Stevenson & Sons Ltd, 1871) 281-282 for a further endorsement of this view. See also *Bernardstone v Heighlyng* (1342) Y.B. Pas. Ed. III (Rolls ser.) Further, support for the argument that positive easements are nothing other than true easements is provided in earlier editions of Gale of Easements editions 1-12.
[592] A J Waite 'Easements: Positive Duties on the Servient Owner?' (1985) 44 CLJ 458.
[593] M A Peel, 'What is an Easement?' (1964) 28 Conv (NS) 450, 451.

Waite's analysis of positive duties relate to the findings that the modern cases provide an unreliable authority that positive easements cannot be created. Waite, in his article, explores the modern rationale regarding why positive easements are not permitted in English law. He finds that the grounds are not robustly formed and, further, that there is no general prohibition against positive easements. A J Waite recognises historically that there were a number of circumstances when a positive easement could arise. He notes:

> 'The obligation to fence against a neighbour's cattle is well established as an easement, although it is commonly regarded as anomalous and has been described variously as a "quasi easement" and "not a true easement"'.[594]

Waite says that this is presumably because the vast majority of easements cast no such positive burden on the servient owner. He notes, however:

> 'other duties on the servient owner to repair sea-walls, river banks and gutters, to clean out ditches and other repairing obligations also appear to have ranked as easements. These duties were well established and recognised in a long line of cases'.

In addition to the cases quotes above, further confirmation of the circumstances when a positive easement could arise is provided in early additions of Gale on Easements. Gale states:

> 'Although, as it should appear by the civil law, with the single exception of the servitus oneris ferendi, no easement could exist which imposed on the owner of the servient tenement an obligation to repair and any stipulation to that effect was personal, binding on the contracting parties only, and not imposing any charge upon the inheritance, so as to pass with it into the hands of a new owner; yet there is little doubt that, by the law of England, such an obligation may be imposed either by express grant or prescription'.[595]

The same point appears in later editions of Gale all the way up to the 13th edition.[596] This passage has, however, disappeared from the later editions.

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[594] A J Waite 'Easements: Positive Duties on the Servient Owner?' (1985) 44 CLJ 458, 461.
[595] Gale, *Gale on Easements* (2nd ed., 1849), ch entitled 'Incidents of Easements'.
[596] The same passage appears in later editions from 3rd to 12th edition.

The question arises, therefore, of how the rule against easements of positive obligation came about. The rule appears to emanate from Gale. As noted by A J Waite, Gale's view was that the origins of the English Law of Easements lay in Civil Law, to which he refers to in his work. In the preface to the first edition of his work, Gale states:

> 'As in many other branches of the law of England, the earlier authorities upon the law of Easements appear to be based upon the Civil Law, modified, in some degree probably by a recognition of customs which existed among our Norman ancestors .... In the majority of cases both ancient and modern, probably from a consideration of this being the origin of the law, recourse has been had for assistance to the Civil Law'.

In Roman law, the rule was 'servitus in faciendo consistere non potest', i.e., a servitude cannot impose a positive duty. There was an exception to the rule, to which Gale refers: the servitude oneris ferendi - a right to have a wall supported by a neighbour.

As A J Waite notes, 'Gale's civilian outlook led him to give the English law of easements a Roman Law framework even though the historical justification may not have been as great as he thought'. The English rules were assimilating those of Roman law and led Gale to state 'As a general rule, easements impose no personal obligation upon the owner of the servient tenement to do anything the burden of repair falls upon the owner of the dominant tenement'.

The statements went further than before and discouraged easements of a positive obligation. A similar view was adopted in later editions of Gale but went even further (this may have been influenced by the fact, as recognised by A J Waite, that other texts were beginning to discarding the repairing easement exception, perhaps due to the fact that the importance of such easements had declined owing to the imposition of duties on the statutory authorities

to undertake the necessary repairs).[597] Gale states, 'a right to have something done is not an easement, nor is it an incident of an easement', and the fencing obligation was recognised as 'the only surviving trace of a prescriptive obligation to keep anything in repair'.

This passage of Gale was later approved in *Jones v Price*[598] and *Rance v Elvin*, and other positive obligation easements now appear very unlikely to find judicial support, although A J Waite was, at the time, optimistic on this point. He states:

> 'Only the House of Lords could now hold that easements of positive obligation in general are permissible. However, the question remains whether any of the easements of repair (other than fencing) which were expressly preserved in the earlier editions of Gale have survived'.[599]

The problems that positive easement currently presents were discussed above and it is clear that, whilst they do not fit neatly into a modern English legal system, they appear to be more of a technical rather than a practical nature. However, given: that the historical exception to the rule, that to have something done is not an easement, applies to very limited circumstances, potentially only fencing a neighbour's wall; the judicial endorsement of the passages in Gale and, given that there has been no specific recognition of chancel repair liability as an easement in this context, it seems very unlikely that chancel repair liability could be successfully argued to exist as a positive easement, based on the above analysis. Nevertheless, the next section considers these points and other case law further in an attempt to address particular problems associated with trying to characterise chancel repair liability as an easement in order to address the questions raised at the start of this chapter fully.

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[597] For example, Goddard's Law of Easements 1st edition (1871) to 6th edition (1904). Goddard takes the view that positive obligations may be imposed but that 'such rights are not easements but depend on entirely different principles of law'. See Goddard, *Law of Easements* (6th edition, Stevenson & Sons Ltd 1904) 23.

[598] *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625. Approved by Willmer L.J. in Jones v Price and he said of the fencing obligation 'It is not a true easement, for, properly speaking, an easement requires no more than sufferance on the part of the occupier of the servient tenement, whereas an obligation to maintain a hedge involves the performance of positive acts'.

[599] He notes a further possible exception is the duty to maintain sea walls. A J Waite, 'Easements: Positive Duties on the Servient Owner?' (1985) 44 CLJ 458.

iii) Particular problems with trying to characterise chancel repair liability as an easement - 'The decision in Regis and the decision in *Austerberry v Oldham* Corporation'

The authority for the modern rule that a positive obligation is incapable of existing as an easement lies in a handful of key cases. The key cases are discussed below. One of the key authorities is *Regis Property Co. Ltd. v Redman*.[600] Megarry and Wade states 'A right to have something done is not an easement'[601] and 'it is unlikely that a right would be accepted as an easement if it involved the servient landowner in the expenditure of money'.[602] The editors of Megarry and Wade take this reference from *Regis Property Co Ltd v Redman*.[603] The case concerned an obligation regarding the supply of hot water. In 1943, the claimant and landlord of the ostensible servient land took on the liability of providing hot water and central heating to the tenant of the ostensible dominant land. There followed a number of subsequent changes in the ownership of the dominant land. The obligation on the servient landowner was to use:

> 'best endeavours … to maintain at all times a reasonable and adequate supply of hot water for domestic purposes to the flat through the central installation (if any such heating installation is installed in the building) and to keep the radiators (if any) in the flat sufficiently and adequately heated through the central heating installation (if any such heating installation is installed in the building). Provided that the [landlords] shall not be liable to supply hot water for the central heating installation (if any) except during the cold season between dates to be determined at their [landlords'] discretion and provided also that the [landlords] shall not be liable in damages in the event of any interruption of such services'.

The servient landowner then claimed an increase in rent for taking on the liability (as well as other burdens) under s2 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act

[600] *Regis Property Co Ltd v Redman* [1956] 2 QB 612, [1956] 2 All ER 335.
[601] Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade The Law of Real Property* (8th edn, Sweet & Maxwell & Thomson Reuters, 2012) 1252.
[602] ibid.
[603] *Regis Property Co Ltd v Redman* [1956] 2 QB 612, [1956] 2 All ER 335.

1920.[604] The basis for the claimed increase in rent was that the benefit of the provision of hot water had transferred to the current owners of the dominant land, pursuant to S62 Law of Property Act 1925. In other words, the servient landowner was required to provide hot water services to the dominant landowners' successors in title, as it was an easement, a property right, which benefited the dominant landowners' successor in title. The easement was claimed to pass pursuant to S62 Law of Property Act 1925.[605]The court held, however, that the right to receive a supply of hot water and central heating could not be treated as having passed by virtue of section 62 of the Law of Property Act, 1925, since it was not a right, easement or privilege of the kind contemplated by that section.[606] Jenkins J stated:

> 'The obligation in question involves the performance of services, and is essentially a matter of personal contract as distinct from a right, easement or privilege capable of being granted by lease or conveyance so as to pass under the general words implied by S62 of the Law of Property Act 1925'.[607]

The reason why it was held that it was not such a right, easement or privilege that could be recognised for the purpose of 62 of the Law of Property Act, 1925 was because it involved the 'performance of services' and was a 'personal contract', distinct from a right or easement which could be granted by a lease or conveyance in order to pass under the general words implied by section 62.[608] There was a lack of authority provided to support the decision reached in the case. Commentators have sought to explain the decision by noting that 'positive easements, with the exception of the 'spurious easement' of hedging, are unknown to the law'.[609] However, it has been argued by A J Waite that this does not appear to be the correct analysis and fails to reflect what the court said. On A J Waite's analysis, the provision

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[604] The statute provided for increase in rent. The statute was later repealed.
[605] Law of Property Act 1925, s62. Which states 'A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof'.
[606] *Regis Property Co Ltd v Redman* [1956] 2 QB 612, [1956] 2 All ER 335.
[607] ibid 344.
[608] *Regis Property Co Ltd v Redman* [1956] 2 QB 612, [1956] 2 All ER 335, 344. 'The obligation in question involves the performance of services, and is essentially a matter of personal contract as distinct from a right, easement or privilege capable of being granted by lease or conveyance so as to pass under the general words implied by section 62'. See also A J Waite 'Easements: Positive Duties on the Servient Owner?' (1985) 44 CLJ 458, 466.
[609] P. Jackson, *The Law of Easements and Profits* (London, Butterworths, 1978) 93-94.

of hot water and central heating was held by the court as the performance of services, those personal services being the supply of hot water (requiring the servient landowner to make provision for the water to be heated). It also constituted a personal contact,[610] as it was reliant on the skills and services of the ostensible servient landowner to provide hot water (not cold water). As noted above, an easement must accommodate the dominant tenement.[611] It is insufficient that a purported easement only bestows a personal benefit on the dominant landowner rather than being for the benefit of the dominant land.[612] It is clear that a 'personal contract' is incapable of existing as an easement.[613] Such an analysis is supported by A J Waite. He states

> 'It is submitted that an obligation to supply hot water was held to be incapable of constituting an easement not because of its positive but rather its personal nature. It is well established that purely personal contracts are not assignable and so have no proprietary effect. The essence of a personal contract is that in the event of an assignment an increased burden of a personal (not of a purely financial) nature would be placed on one of the parties. Thus, an increased demand for hot water in a case such as *Regis Property Co. Ltd. v Redman* would require some additional work by the servient landlord to heat the water. On the other hand, an obligation to supply cold water to the dominant tenement would not constitute a personal contract because no extra work would be involved'.[614]

This analysis may be unpacked further. It is a not a straightforward task of determining whether a benefit accommodates a dominant tenement. What is required is that there must be between the dominant and servient tenement 'a connection of real benefit to the former [the dominant tenement]….which is of such a character as would ordinarily be classified as a right or condition running with the land and not merely a contractual right enuring to the benefit only of persons who are parties thereto at its inception'.[615]

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[610] Daniel Greenberg, *Jowitts Dictionary of English Law* (4th edn, Sweet & Maxwell, 2015).
[611] *Hill v Tupper* (1863) 2 H & C 121, 159 ER 51.
[612] *Dewsbury v Davies* (unreported, Court of Appeal, 21 May 1992).
[613] ibid.
[614] A J Waite 'Easements: Positive Duties on the Servient Owner?' (1985) 44 CLJ 458, 466.
[615] *Dukart v District of Surrey* (1978) 86 DLR (3rd) 609, 616.

It is arguable that the benefit of the supply of hot water (requiring the servient landowner to make provision for the water to be heated) is of such a character as would arguably be classified as a right or condition not running with the land and merely a contractual right to personally benefit only persons who are parties thereto.

The finding in *Regis Property Co. Ltd. v Redman* was that the supply of hot water (distinct from cold water) was the 'performance of services' and a 'personal contract' was insufficient for an easement to exist. An easement could not be found (and this was irrespective of its positive nature of the obligation) because a personal benefit does not accommodate the dominant tenement. The supply of hot water was a personal benefit to the dominant landowner.[616]

It therefore follows that the argument in *Regis Property Co. Ltd. v Redman* does not provide the appropriate authority for which it is often relied upon, i.e. on the above analysis, it is not an authority that a positive obligation cannot exist as an easement (the point is that the performance of personal services in Regis Property Co. Ltd. was incapable of forming an easement not because of its positive nature but because it was personal; the supply of hot water services did not accommodate the dominant land and therefore is incapable of forming a grant of easement). The above analysis is important and significant because the case is commonly cited as an authority that 'where the exercise of the right requires the servient tenement owner to spend money, the right cannot be an easement'.[617] The case is cited in many texts that an easement cannot create a positive obligation. The above analysis is also supported by the rationale of the decision reached in *Shayler v Woolf*, discussed below.

[616] A J Waite argued the supply of hot water was a personal service because the servient landowner had to heat the water, requiring work of a variable nature on behalf of the servient landowner. This is in contrast to a fencing easement which is not variable and requires reasonable fences in ordinary circumstance (like cold water). See A J Waite 'Easements: Positive Duties on the Servient Owner?' (1985) 44 CLJ 458, 466. See also *Coaker v Willcocks* [1911] 2 KB 124, 80 LJKB 1026. In the same way the church chancel is required to be kept in a reasonable repair. See Lewison J in the Chancery Division of the High Court held the obligation on the rector was to 'keep the chancel' in repair. *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley Warwickshire v Wallbank* (2007) Times, 21 February, [2007] All ER (D) 50 (Feb).

[617] See for example Editor, 'Easement Notes' (Oxbridge Notes, 2014) <http://www.oxbridgenotes.co.uk/notes/multiple-institutions/2014/gdl-land-law-notes/samples/easements-1> accessed 1 March 2015.

Shayler v Woolf

The case of *Shayler v Woolf*[618] concerns similar facts; however, a different conclusion was reached. In *Shayler v Woolf*, the case concerned a covenant to supply water by the covenantor to the covenantee. The court of appeal held that the covenant to provide water did not relate to providing a personal service. The covenant was clearly for the benefit of the land and not relevant to a particular covenantee. Further, there was no additional burden placed on the covenantor depending on who the covenantee was following an assignment. An assignment would not create any greater burden for the covenantor. Lord Greene MR held:

> 'There is nothing in the nature of personal services concerned in this agreement … if the water supply is personal to the purchaser herself, what is to happen when she dies? What is to happen if she wants to sell? Obviously, the value of the bungalow [the property] would be very much lower unless she could pass to the purchaser the benefit of this agreement, because the bungalow [the property] would not have a water supply. Looking at the whole nature of the subject matter, it seems to me impossible that any sensible persons could have intended in the circumstances that the right to this supply should be personal to Mrs. Peacock [the buyer] herself'.[619]

Shayler v Woolf, when compared with *Regis Property Co. Ltd. v Redman* helps to elucidate a distinction between a personal obligation and an easement in similar circumstances. The interface lies in the fact that the obligation to supply water was not for the benefit of the dominant land, in *Regis Property Co. Ltd. v Redman*; it was a personal obligation to supply hot water.[620] In contrast, in *Shayler v Woolf*, the provision of cold water did not create a personal obligation, and the easement accommodated the dominant land. There was no extra work required of the servient landowner to provide cold water. No provision was required to heat the water and there was no reliance on any skill or services of the servient landowner. In

[618] *Shayler v Woolf* [1946] Ch 320, [1946] 2 All ER 54.
[619] ibid 332.
[620] *Regis Property Co Ltd v Redman* [1956] 2 QB 612, [1956] 2 All ER 335.

Shayler v Woolf, the supply of cold water was facilitated by a pump whereas, in contrast, in *Regis Property Co. Ltd. v Redman*, extra work to heat the water by the servient landowner was required.[621]

Regis Property Co. Ltd. v Redman is one of the key authorities against the existence of a positive easement and, based on the above analysis, it does not necessarily stand up to scrutiny on the basis upon which it is often cited; specifically, that it is an authority that positive covenants cannot exist.

However, despite potential doubt as to the reliability of *Regis Property Co Ltd v Redman*, the rule that the right to have something done is not an easement has been adopted in other cases. In *Rance v Elvin*,[622] a servient owner could not be obliged to pay for the supply of water to his own land so that it could pass 'to the dominant land'. In *Cardwell v Walker*,[623] it was questioned whether a servient owner could be obliged to provide access to an electricity supply by providing tokens for the dominant owners, and it was decided on other grounds. In *Moncrieff v Jamieson*,[624] there could be no easement to use a neighbour's swimming pool because it would require work to fill and maintain the same by the servient landowner. In *Pomfret v Ricroft*,[625] it was established that a servient owner is under no obligation imposed by the general law to maintain the subject matter of an easement.

Although arguments can be constructed that Regis is not the authority for that which it is often cited, it has subsequently been accepted. The existing authorities therefore provide a particular problem when seeking to characterise chancel repair liability as an easement. It is important to recognise these limitations. The analogy between chancel repair liability and

[621] A J Waite, 'Easements: Positive Duties on the Servient Owner?' (1985) 44 CLJ 458, 466.
[622] *Rance v Elvin* (1985) 50 P. & C.R. 9, 13.
[623] *Cardwell v Walker* [2003] EWHC 3117; [2004] 2 P. & C.R. 9.
[624] *Moncrieff v Jamieson* [2007] UKHL 42, [2008] 4 All ER 752.
[625] *Pomfret v Ricroft* (1669) 1 Wms Saund 321.

easements on this point ultimately is strained and struggles to work, which demonstrates the limitation of the characterisation. The point is that, based on the above analysis, chancel repair liability struggles to exist as an easement. The next section considers further whether chancel repair liability as an easement adheres to the requirements of an easement by considering some of the key cases surrounding positive obligation fencing easements and issues where the rights of those seeking to enforce chancel repair liability overlap with the rights of those enforcing a positive easement.

Fencing easements

There a number of key cases which elucidate the nature of the positive easement of fencing. These are *Jones v Price*,[626] *Crow v Wood*[627] and *Egerton v Harding*,[628] and are discussed below.

Jones v Price

The case of *Jones v Price* concerned a claim by a landowner for damages caused by their neighbour's cattle trespassing on their land. The defendants counterclaimed that the claimant was required to maintain a boundary fence between the properties. The Court of Appeal held that that the right requiring the claimant to maintain the boundary fence could exist as an easement. It was held that a legal obligation on the servient landowner to repair a boundary feature on the servient land could exist for the benefit of the neighbouring dominant landowner. Willmer LJ held 'It is clear that a right to require the owner of adjoining land to keep the boundary fence in repair is a right which the law will recognise as a quasi-easement'.[629] In addition to demonstrating that the right in question was capable of existing

[626] *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625.
[627] *Crow v Wood* [1971] 1 QB 77, [1970] 3 All ER 425.
[628] *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689.
[629] *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625, 630.

as an easement, for it to have third party impact, it was necessary to show that it had been acquired. The court said that the 'defendant can, therefore, only succeed if he establishes that the right which he claims has been acquired by prescription'.[630] The court stated that the easement could be acquired by prescription under the doctrine of lost modern grant.[631] In the case, there was, however, insufficient evidence to establish a prescriptive right. In Diplock's LJ judgment, he said 'It is tempting to think that its real origins lie in local custom but this explanation was rejected in 1670 in *Polus v Henstock*'.[632] It was determined that the fencing easement arouse out of the common law. Whilst, in this case, the easement had not been acquired, the Judgment confirmed that a fencing easement is capable of existing as an easement.

Crow v Wood

The facts of *Crow v Wood*[633] concerned similar circumstances to *Jones v Price*. In *Crow v Wood*, the parties to the action were farmers. Damages were claimed by the claimant for damage caused to their property by the neighbour's livestock (exercising a right to stray) trespassing on the claimant's land. The claimant had not however kept their fences and wall in good repair. The defendant counterclaimed that an easement to repair the fence existed and, further, it had been acquired by prescription (an implied grant of easement at common law and/or pursuant to s62 of the Law of Property Act 1925) that the claimant was to maintain their fence. The defendant counterclaimed that the damage was caused as a result of the claimant's failure to maintain the fences. The claimant succeeded in the divisional court but the Court of Appeal upheld the defendants' appeal. Specifically, the Court of Appeal held that

[630] ibid 630. Prescription is a method of acquiring a right to an easement (it can be established by long user, 20 years under the doctrine of lost modern grant and since 1189 in the case of immemorial use).
[631] *Barber v Whiteley* (1865) 29 JP 678, 34 LJQB 212; *Sutcliffe v Holmes* [1947] KB 147, [1946] 2 All ER 599.
[632] *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625, 634.
[633] *Crow v Wood* [1971] 1 QB 77, [1970] 3 All ER 425.

the right to have a neighbour maintain their fence was a right which was compatible with that right being an easement. Further, it could be the subject of a grant in law and could bind successors in title. Lord Denning stated that, to have a fence or wall kept in repair is in the nature of an easement, even if not strictly in line with an orthodox easement (because it requires the expenditure of money). To support this point, Lord Denning stated that the right is 'capable of being granted by law so as to run with the land and to be binding on successors'. The right to have a fence or wall kept in repair was, in Lord Denning's judgment, an easement because it was capable of being granted by law as an easement because it was in the nature of an easement and treated in practice by the courts as an easement. Lord Denning, to support his finding, referred to Professor Glanville Williams'[634] determination that a right to fencing was an easement as this was the 'practice of the courts'.[635] Lord Denning also referred to the earlier decision in *Jones v Price*,[636] where it was held in that case that the right for an adjoining owner to repair the boundary fence was a right that the law will recognise as an easement.[637]

Egerton v Harding

The case of *Egerton v Harding*[638] added clarity as to the circumstances in which a fencing easement arose. The facts concerned two properties which adjoined common land and both properties had a right to graze over this land. The defendant (the dominant landowner) had grazed livestock on the common for many years. The claimant (the servient landowner) did not exercise their right. Livestock belonging to the defendant subsequently trespassed on the claimant's land and caused damage. The claimant sued for damages and the defendant

[634] Glanville Williams, *Liability for Animals* (Cambridge University Press 1939) 209.
[635] ibid.
[636] *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625, 633.
[637] ibid 633. Edmund Davies LJ also held that the duty to fence arises from evidence that the land is accustomed to be fenced.
[638] *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689.

counterclaimed that the claimant was under an obligation to repair the fence. The case of *Egerton v Harding* makes it clear that the key aspect of a positive easement is the obligation. As noted by Scarman LJ, in this case, a positive easement to fence is 'a private right and obligation between neighbouring landowners'.[639] Further, Scarman LJ stated, in referring to *Jones v Price*,[640] in order to establish a positive easement for fencing, it must be shown that the fence was maintained[641] 'as a matter of obligation towards the adjoining owner' and is not simply a voluntary act.[642] Scarman LJ disagreed with the dictum of Edmund Davies LJ in Crow v, Wood[643] where he said: '… whatever be the legal basis of a duty to fence, the balance of authorities for centuries favours the view that the obligation, when it exists, arises from proof that the land is accustomed to be fenced and that it is immaterial that a party has voluntarily fenced his premises simply for, it may be, his own protection …' In *Egerton v Harding*, Scarman LJ considered whether there was evidence of an obligation to maintain the fence and noted that 'the defendants are faced with great difficulties when they seek to establish a right in the nature of an easement'.[644] He noted that there was a lack of evidence of an obligation to fence. He stated: 'There is no evidence of any enclosure of Sprat's Cottage, and no evidence directly implicating its occupiers of prescriptive right or of lost modern grant. There is evidence that for a number of years the occupiers of Sprat's Cottage maintained the blackthorn hedge in cattle-proof condition; but there is no indication whether this was done voluntarily or as a matter of obligation towards the common'.[645] Scarman LJ concluded that he was unable to establish an easement of fencing, in this case, because there was insufficient evidence of an obligation to fence.[646]

[639] ibid 691.
[640] *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625, 634.
[641] *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, 691.
[642] *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625, 634 (Willmer LJ citing *Hilton v Ankesson* (1872) 27 LT 519, [1861–73] All ER Rep 994).
[643] *Crow v Wood* [1971] 1 QB 77, [1970] 3 All ER 425, 431.
[644] *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, 691.
[645] ibid 691.
[646] ibid 691.

In other earlier cases, the degree of required evidence of an obligation to fence has been elucidated. In *Hilton v Ankesson*[647] a fence has been maintained for 50 years by the defendant and their predecessors in title. No notice or requests to repair the fence have been made on the defendant or their predecessors in title and it was held that there was no obligation to repair the fence.[648] However, it was held that, if repairs had been carried out on request, this may provide sufficient evidence of an obligation to repair. A similar point was made in *Laurence v Jenkins*.[649] In this case, a fence has been maintained for 40 years by the defendant and, for the final 13 years, this had been done on request. The court determined that this was sufficient evidence for the obligation to fence to be established. The point is that *Hilton v Ankesson*[650] and *Laurence v Jenkins*[651] demonstrate that notice or a request to repair, and work being done pursuant to that notice would have provided evidence of a necessary obligation to fence to be established. Arguably, this would have provided sufficient evidence if these had been the facts in *Egerton v Harding*.

In *Egerton v Harding*, it was held that a duty to fence could arise not only by a grant of easement but also by custom, if there was immemorial usage of a duty to fence.[652] It was unnecessary for lawyers to be legal historians to determine whether there had been usage since time immemorial, however.[653] Once an immemorial usage of fencing could be shown to exist in respect of a duty to fence, then this was sufficient to prove a duty to fence, provided that it could be shown that it arose from a possible legal origin.[654] Scarman LJ said:

> 'But, in our judgment, there is a way of deciding this case which does not require a judge to be a legal historian. In our opinion, once there be established an immemorial usage of fencing against the common as a matter of obligation, the duty to fence is

[647] *Hilton v Ankesson* (1872) 27 LT 519, [1861–73] All ER Rep 994.
[648] ibid.
[649] *Lawrence v Jenkins* (1873) LR 8 QB 274, 37 JP 357.
[650] *Hilton v Ankesson* (1872) 27 LT 519, [1861–73] All ER Rep 994.
[651] *Lawrence v Jenkins* (1873) LR 8 QB 274, 37 JP 357.
[652] In addition to evidence of notice being served and a servient landowner complying with this obligation by repairing the fence - evidence of the obligation being satisfied. See *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689 at 694. See also *Polus v Henstock* (1670) 86 ER 67; *Barber v Whiteley* (1865) 29 JP 678, 34 LJQB 212; *Godfrey v Godfrey* [1965] AC 444,[1964] 3 All ER 154.
[653] An easement by prescription and a customary right can both arise for immemorial usage.
[654] The origin of the duty to fence could be either a grant of easement or a customary right.

proved, provided always it can be shown that such a duty could have arisen from a lawful origin'.[655]

In other words, if evidence can be found from time immemorial that a right by the dominant landowner to request the servient landowner to repair the servient landowner's fence has been exercised, then a positive fencing easement can established (even if the legal origin of the right is in fact one that arises from custom), provided that it could have arisen from a lawful origin.[656] The reason for repairing the fence must also be because the servient landowner has been requested to do so by the dominant landowner and fencing has not been repaired solely for the servient landowner's benefit.[657]

The conclusion of this section is very important because it shows that a positive obligation can be classified as an easement (but arguably in very limited ircumstances). In addition to this, it is unnecessary to show that the historical origin of a duty to repair arises from the grant of an easement. It is sufficient to show that the duty to repair has been exercised since time immemorial and could have arisen from a lawful origin (whether a grant of easement, custom or otherwise). Chancel repair liability is analogous, in one sense, to an easement to repair a fence in particular because it places a positive obligation on a party to expend money or work for the benefit of neighbouring property. Based on the above analysis of a fencing easement, in the above three cases, it is arguable that chancel repair liability is not defeated from being characterised as an easement because it places the servient landowner under a positive obligation to repair the church chancel; however, there is no evidence that it would be treated

[655] *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, 691.
[656] *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625; *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689.
[657] *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625. The cases of *Barber v Whiteley* (1865) 29 JP 678, 34 LJQB 212 and *Godfrey v Godfrey* [1965] AC 444, [1964] 3 All ER 154 were considered and court determined that an obligation to fence could be acquired by long use and it was not necessary draw a strict distinction between a custom to fence and easement to fence in order to show an obligation to fence.

in this way and the above cases are limited to the very specific circumstances of a fencing easement.[658]

Austerberry v Oldham Corporation

A further potential particular difficulty with positive easements is the decision in *Austerberry v Oldham Corporation*,[659] which is particularly relevant in connection with whether chancel repair liability is analogous with easements in terms of whether they bind successors in title (discussed in further detail below). As noted by the Law Commission referring to whether positive covenants (rather than easements) run with the land, it states 'positive freehold covenants did not (…) *Austerberry v Corporation of Oldham* is also regarded as authority for the rule'.[660] A potential particular difficulty with positive easements is the decision in *Austerberry v Oldham Corporation*.[661] It was held in this case that the burden of positive (unlike restrictive) covenants does not pass either in equity under the rule in *Tulk v Moxhay* or in common law (discussed in more detail below). Whilst this chapter is concerned with positive obligation easements (not covenants – which are discussed in Chapter 5 below), potential difficulty may be thought to arise where the obligation is not itself an easement but is merely ancillary to an easement. However, it is important to be clear, as noted by one commentator: 'there is no problem if the repairing obligation even though framed as a covenant is, when properly construed, an easement'.[662] This was conceded by Lindley L.J. in Austerberry. Lindley L.J. said:

> 'I am not prepared to say that any covenant which imposes a burden upon land does run with the land, unless the covenant does, upon the true construction of the deed

[658] Further, the above cases indicate that a positive easement for fencing can be acquired by prescription (common law or lost modern grant). The right is not however within the Prescription Act 1832 and therefore may only be acquired by common law prescription or prescription by lost modern grant. In *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625 it was thought a duty to fence could not arise by custom. However, in *Egerton v Harding* it was held that it could arise this way. In circumstances when there is immemorial usage of fencing (in *Egerton v Harding* it was against common land) the duty to fence is proved provided it had a lawful origin, whether the lawful origin arises from prescription or custom.
[659] *Austerberry v Oldham Corporation* (1885) 29 Ch D. 750.
[660] Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011) para 5.12.
[661] *Austerberry v Oldham Corporation* (1885) 29 Ch D. 750.
[662] A J Waite, 'Easements: Positive Duties on the Servient Owner?' (1985) 44 CLJ 458, 470.

> containing the covenant, amount to either a grant of an easement ... or some estate or interest in land'.[663]

The decision in Austerberry was concerned with the inability of provisions which are covenants, as distinct from grants, to run with the land. Accordingly, chancel repair liability as an easement would need to be granted as an easement rather than a covenant attached to an easement, in order not to be caught by the decision in *Austerberry v Oldham Corporation*. Support for this analysis can be found in the recent decision in *Churston Golf Club v Haddock*.[664] In this case, the court confirmed that a fencing easement can be created by express grant. Further, if a particular clause is construed as a grant of a fencing easement, rather than a covenant to fence, then the rule that a positive covenant does not run with the land is not engaged.

The dispute regarded an obligation to fence the boundary between two parcels of land. The claimant, Mr Haddock, was the successor in title to the 'Trustees' named in the following clause which was contained in a 1972 conveyance:

> 'The Purchaser hereby covenants with the Trustees that the Purchaser and all those deriving title under it will maintain and forever hereafter keep in good repair at its own expense substantial and sufficient stock proof boundary fences walls or hedges along all such parts of the land hereby conveyed as are marked T inwards on the plan annexed hereto'.[665]

The court found for Mr Haddock, holding that this was an easement, the burden of which passed on to the adjoining owner. However, as noted above, the problem was that easements in general do not give rise to a positive obligation on the owner of the servient tenement to do something (such as spend money). It was submitted by the adjoining owner's counsel that, although the grant of a fencing easement was possible in theory, it was impossible in practice due to the rule in Austerberry.[666] The court decided, however, that it is possible for a clause

[663] *Austerberry v Oldham Corporation* (1885) 29 Ch. D. 750, 781 (Lindley L.J.).
[664] *Churston Golf Club v Haddock* [2018] EWHC 347 (Ch), [2018] 4 WLR 53.
[665] ibid 4.
[666] *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750.

in a conveyance to create a fencing easement. Reliance was placed on the cases referred to above which make it clear that the origin (or at least one of them) of the fencing easement lies in grant.[667] In Birss J's judgment in High Court, since clauses in conveyances can grant other sorts of easement, there is no reason why they cannot create this sort of easement. However, Birss J was careful to ensure that his judgment did not mean that any attempt to create an easement which imposes any other sort of positive obligation is now possible. He noted that this was far from the case, as such wider sort of positive obligation easement has not been recognised by the courts. However, since a fencing easement is a thing which can exist, can run with the land and whose origin can lie in grant, Birss J could not imagine why two parties who wish one to be granted cannot do so. The court confirmed that the decision in Austerberry was irrelevant where a clause was determined as a grant as opposed to a covenant. However the Court of Appeal recently overturned the decision of Birss J in that a standard form of fencing covenant should be treated as a 'fencing easement', capable of binding successors in title because this would be 'at odds with both the language and the composition of the [1972] conveyance'[668] in particular because the word 'covenants' was expressly used in the 1972 conveyance. The decision whether it is possible to create a fencing easement by express grant was not addressed.[669]

The above authorities show that fencing easement can exist. However fencing easements are potentially not the only positive easements requiring the servient owner in the expenditure of money. There are a number of other limited occasions. One such occasion relates to the repair of sea walls; these are discussed in further detail in the next section.

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[667] Birss J said 'That is a right by grant in a necessary part of the reasoning which leads to the courts accepting that these obligations exist at all. Given that, then it seems to me that it must be possible for two parties to actually create such a conveyance, in other words in a clause in a conveyance of the relevant land. That does not mean such an easement has in fact been created in any given case but if, on its true construction, a clause purports to create an easement of fencing, in other words the objective view of the intention of the parties is that that is what they intended to achieve, I cannot see any good reason in law or principle why that should be declared legally impossible'. *Churston Golf Club v Haddock* [2018] EWHC 347 (Ch), [2018] 4 WLR 53, 24. See also *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750.

[668] *Churston Golf Club v Haddock* [2019] EWCA Civ 544, [2018] 4 WLR 53, 34.

[669] *Churston Golf Club v Haddock* [2019] EWCA Civ 544, [2018] 4 WLR 53.

Sea Walls

As noted by the editors of Halsburys Laws,[670] an obligation to repair, or to contribute to the cost of repairing, sea walls can arise by prescription. In this respect it was laid down in Keighley's Case that:

> 'one who is bound by prescription to keep a wall in repair discharges this obligation, and is not in default, if he has kept it in repair so as to withstand all ordinary storms, and that he is not bound to keep it in a condition to resist extraordinary storms (…)'.[671]

Keighley's Case makes the point that, when one bound by prescription to repair a wall has kept it in good repair, and of such height and as sufficient as was accustomed, all persons interested in its maintenance must be taxed for the cost of restoration, in the event of the wall being broken, or overflowed, by a 'sudden and unusual increase of water,' there being no fault in him who ought to repair it. That doctrine has been recognised in subsequent decisions, of which *Rex v Somerset*[24] is a notable example. In that case, the whole level was found liable, because the repairs were necessitated by an extraordinary flood, the judgment proceeding upon an admission that previous repairs had always been executed by the frontager, and never at the expense of the level.[672]

The above cases do not provide a general prohibition against the existence of positive easements; however, it should be noted that it is clear that the fencing easements and obligations to repair sea walls referred to above arise from very specific circumstances and for a specific purpose. At this stage, the scope for applying a general rule permitting positive

[670] *Halsbury's Laws* (Water and Waterways, 5th edn, 2018) vol 101, para 767.
[671] It is stated further in *Keighley's Case* (1609) 10 Co Rep 139a 'This has, as stated in The Commissioners of Sewers for the Levels within the Limits of the Parish of Fobbing and other Parishes v The Queen (on the Prosecution of John Abbott) by Lord Herschell, been regarded as the law ever since the time of Lord Coke. It has been recognised in various cases, notably those of *Rex v Somerset* and *Rex v Commissioners for Essex'*. *Keighley's Case* (1609) 10 Co Rep 139a.
[672] The authority in *Keighley's Case* has been applied in subsequent cases including *Hudson v Tabor*; *R. (on the Prosecution of Abbott) v Commissioners of Sewers for Parish of Fobbing*; *Fobbing Sewers Comrs v R.*

easement to repair to chancel repair liability would be a big leap. Clearly. an argument based on the above analysis that chancel repair liability may be characterised as an easement would be very strained. The next section considers issues where the rights of those seeking to enforce chancel repair liability overlap with the rights of those enforcing a positive easement.

(iv) Issues where the rights of those seeking to enforce chancel repair liability overlap with the rights of those enforcing a positive easement.

We have shown, based on the above analysis, that there are particular difficulties associated with trying to characterise chancel repair liability as an easement. The analysis shows that chancel repair liability struggles to exist as an easement because of its positive duty nature (however, aside from this point, there are analogous characterises). If chancel repair liability was capable of existing as a positive easement, in the same way as a fencing easement, then, based on the above analysis, it is unnecessary to show that the historical origin of duty to repair arises from the grant of an easement to arise by prescription. It is sufficient to show that the duty to repair has been exercised since time immemorial and could have arisen from a lawful origin (whether a grant of easement, custom or otherwise). Further, it has been shown that a fencing easement may be capable of being granted expressly; however, this does not mean any attempt to create an easement expressly, which imposes any other sort of positive obligation, can exist; it is only where such positive obligation easement has been recognised by the courts. This causes problems regarding the classification of chancel repair liability as an easement because such a positive obligation easement has not been recognised by the courts as an easement.

The test in Ellenborough Park[673] has not fully been satisfied by chancel repair liability classified as an easement. Nevertheless, to provide a full analysis, the next point to be addressed in determining whether chancel repair liability can be characterised as an easement is to

[673] *Re Ellenborough Park* [1956] Ch 131, [1955] 3 All ER 667.

determine whether chancel repair liability can be acquired as an easement. This will address the second question identified at the start of this chapter; specifically, in what circumstances is a chancel repair liability easement enforceable and is this analogous with chancel repair liability? In other words, if chancel repair liability can be characterised as existing as an easement (and, based on the above analysis, this would require a change in the law), can it also be acquired as an easement (either expressly, or by implication - by prescription for example). As has been elucidated above, case law reveals this to be possible in the context of a fencing easement. Further, it is unnecessary to show that a historical origin of a duty to repair arises from the grant of an easement. It is sufficient to show that the duty to repair has been exercised since time immemorial and could have arisen from a lawful origin (whether a grant of easement, custom or otherwise). The acquisition of an easement is discussed in more detail in the next section which, in turn, is important in the analysis of chancel repair liability as a proprietary right.

Has the Easement been acquired?

In the characterisation of chancel repair liability as an easement, ascertaining the nature of the right is only the first step. It must also be demonstrated that the right has, in fact, been acquired and is enforceable. This requires the second question, outlined at the start of this chapter, to be addressed; specifically, in what circumstances is the easement acquired and is this analogous with chancel repair liability? In other words, if chancel repair liability can exist as an easement, can it also be acquired as easements (either expressly, or impliedly – for example, by prescription)? Given, however, the above analysis and the fact that chancel repair liability struggles to meet the criteria for the existence of an easement, the analysis in

this section (in respect of the second question outlined at the start of this chapter) is only of hypothetical value.

Express easements and prescriptive easements

Legal easements are created by deed.[674] Evidence of chancel repair liability may appear in the deeds or be recorded in the registers of title. Based on the above analysis, chancel repair liability has struggled to satisfy the criteria for the existence of an easement.

The circumstance which is of most interest, in terms of whether chancel repair liability can be acquired as an easement, is the case where chancel repair liability does not appear in the transfer deed or other deeds and where it has, arguably, been acquired prescriptively.[675] Easements that are acquired by prescription are of particular interest because they are acquired by long use, rather than by an express provision in the deeds.[676] The basis of the doctrine is that the long use of a right should be legitimised in law. Easements that are acquired by prescription accordingly provide a potential explanation regarding how a chancel repair liability easement could (hypothetically) be acquired as an easement. As noted above, there is evidence for a positive obligation being enforced prescriptively and it is this means of acquisition which will be considered in detail.[677] There are three methods of acquiring easements by prescription. Specifically, these are common law prescriptions; pursuant to the doctrine of lost modern grant and under the Prescription Act 1832, which are discussed below. First, however, case law reveals there are various elements required of a claimed easement, which need to be satisfied, in order for it be acquired by prescription. These elements apply

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[674] Law of Property Act 1925, s52(1) states 'Conveyances to be by deed: (1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed'.

[675] Chancel repair liability appearing expressly in deeds and documents would satisfy the criteria for being acquired expressly and the point is not considered in detail further.

[676] Easements may also be implied pursuant to *Wheeldon v Burrows* (1879) 12 Ch D 31, [1874-80] All ER Rep 669. The circumstances covered by this case have effectively been put into effect pursuant to the Law of Property Act 1925, s62. Further, the implied nature of an easement, or in other words its ability to bind successors in title without appearing in title is analogues in one sense to the nature of chancel repair liability (prior to October 2013) binding successors in title without need for registration.

[677] *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, 691.

to each of the above three methods of acquiring easements by prescription. These requirements are discussed below in the context of chancel repair liability.[678]

Continuity

To claim an easement by prescription, there is a requirement that there has been continuity of the right sought to be acquired as an easement.[679] Case law reveals that the user asserting such a right must be a continuous, even if infrequent, user.[680] A track record of a parochial church council successfully pursuing parishioners for the cost of repair of chancel repair liability is likely to satisfy the continuity requirement. A lack of use does not destroy a claim;[681] however, frequency of use can affect the validity of a claim and therefore a parochial church council which has never called for payment from parishioners to repair a church chancel is likely to find it more difficult to establish a continuous user. In cases where there is a lack of use by the parochial church council (or, for example, where the church has repaired the chancel itself), the question arises of whether any right still exists or whether it has been abandoned. An argument can be constructed that an ostensible chancel repair liability easement has not been abandoned despite limited evidence of calls by the parochial church council on parishioners to repair a church chancel. As found in *Tehidy Minerals Ltd v Norman*,[682] in order for an easement to be abandoned it must be the case that there was no intention by the dominant landowner that the easement would not be exercised in the future by the dominant landowner or their successor in title. It was held in this case that an easement could 'only be abandoned where there was a fixed intention never to exercise the right again'.[683] What is required is a positive act of abandonment demonstrated by the dominant

[678] Specifically these are the right that must have been exercised continuously and must have been exercised as a right.
[679] *Lovett v Fairclough* (1990) 61 P & CR 385, 399.
[680] *Orme v Lyons* [2012] EWHC 3308 (Ch).
[681] *Axler v Chisholm* (1978) 79 DLR (3d) 97, 101.
[682] *Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475.
[683] *Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475, 553.

landowner's conduct.[684] Non-use is insufficient to establish abandonment. For example, non-use of a right of way for 175 years was insufficient to shown abandonment in *Benn v Hardinge*.[685] It was held, in this case, that ''Abandonment is not, we think, to be lightly inferred. Owners of property do not normally wish to divest themselves of it [referring to the easement] unless it is to their advantage to do so, notwithstanding that they may have no present use for it'.[686] ,Abandonment will not be assumed due to a lack of use. The point is clearly evidenced in modern case *CDC2020 Plc v Ferreira*.[687] In this case, there was a right of way in favour of dominant land to access a number of garages at a site. The dominant land changed hands and the site was subsequently turned into a carpark and redeveloped. A number of years later, the site owner refused access to the dominant landowner on the basis that the easement to access the site had been abandoned. It was held that the redevelopment of the servient land did not result in the abandonment of the easement.[688] There is little evidence of the church demonstrating any such intention of abandonment. The church meeting the chancel repair costs themselves on the above analysis does not show abandonment of a chancel repair liability easement, and there is no evidence of an intention that the church will never 'make use of the easement'[689] again. In other words, the fact that the church is currently meeting the chancel repair costs themselves does not mean that they will necessarily do so in the future. A church chancel may fall into disrepair in the future, at which point a chancel repair liability easement may wish to be exercised by the church.

<u>As a right</u>

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[684] *Williams v Usherwood* (1983) 45 P & CR 235.
[685] *Benn v Hardinge* (1992) 66 P & CR 246.
[686] *Benn v Hardinge* (1992) 66 P & CR 246.
[687] *CDC2020 Plc v Ferreira* [2005] EWCA Civ 611.
[688] All this means is that there are very few cases of abandonment. One case where abandonment was found was *National Guarantee Manure company v Donald* (1859) 4 Hurl. & N. 8, 157 E.R. 737. In this case the use was to a right of water from a canal which was subsequently filled in brought an end to the easement. Commentators have not made their mind up as to the reasoning for the decision. Emma Warring identifying Pollack comments that where an easement is granted for a particle purpose and that purpose comes to an end then so does the easement. See Waring**,** Hickey & Douglas, *Landmark Cases in Property Law* (Hart Publishing 2015), 268
[689] *Benn v Hardinge* (1992) 66 P & CR 246.

For an easement to be acquired by prescription, it must be shown that the right has been used as if the claimant used the right as if they were entitled to it.[690] Such a use is one which is used without permission, force or secrecy.[691] The rationale for the rule is that the claimant must show his use of the right but also that the servient landowner has acquiesced to the right. As stated by Fry J in *Dalton v Angus & Co*.[692] 'The (…) law of prescription (…) (is determinate on) acquiescence'.[693] Whether an ostensible chancel repair liability easement can be used without permission, force or secrecy and whether the servient landowner has acquiesced to the right is considered in detail below.

Servient Landowner Acquiescence

The most demanding test on a chancel repair liability being acquired by prescription is whether there has been acquiescence by the servient landowner of the easement. This is a key requirement of prescription. Prescription requires the servient landowner to have acquiesced to the user 'as of right'.[694] This can take the form of informal acceptance where the use is 'such to bring home to the mind of a reasonable person that a continuous right of enjoyment is being asserted'.[695] If such circumstances arise and the servient owner does not do anything, he will be: 'taken to have recognised the right and not intended to resist it'.[696] Mere tolerance of the right will not defeat the right.[697] Giving permission will, however, defeat a right; for example, by granting a licence.[698]

[690] Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade The Law of Real Property* (8th edn, Sweet & Maxwell & Thomson Reuters, 2012) 1301.
[691] *Solomon v Mystery of Vinters* (1859) 4 H & N 585, 602 (common law prescription). See also *Sturges v Bridgman* (1879) 11 Ch D 852, 863 (lost modern grant). See also Tickle v Brown (1836) 4 A & E 369 at 382 (Prescription Act 1832). Cited in Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade The Law of Real Property* (8th edn, Sweet & Maxwell & Thomson Reuters 2012) 1302.
[692] *Public Works Comrs v Angus & Co, Dalton v Angus & Co* (1881) 6 App Cas 740, 46 JP 132.
[693] ibid 773. It can not be inferred due to something else.
[694] *Public Works Comrs v Angus & Co, Dalton v Angus & Co* (1881) 6 App Cas 740, 46 JP 132, 773, 774.
[695] *Mills v Silver* [1991] Ch 271, [1991] 1 All ER 449, 462.
[696] ibid 462.
[697] ibid 462.
[698] *Sydney Edgar Hill v David Rosser* [1997] EWCA Civ 2187.

An example helps to place the above point in context. Take, for example, a landowner A taking a short cut to work through a neighbouring landowner B's garden on a regular basis. If 1) B is aware of A passing across their garden and 2) has the power to do something about it (in this analogy, for example, by locking their garden gate) and 3) does nothing about it, then B will arguably have acquiesced to a prescriptive easement.[699] In short, what is required is: knowledge of the potential act constituting the prescriptive easement; the ability to do something about it and subsequently doing nothing about it. This was held to be the case in *Dalton v Angus* by Fry J.[700] In this case, a right of support was claimed by a dominant land holder over the neighbouring servient land. When the neighbour of the servient land removed the support, the dominant landowner claimed that they had acquired an easement of support by prescription. There was doubt not just regarding whether the servient landowner had knowledge of the right but also regarding whether the servient landowner had the power to do anything about it other than perhaps granting an express right of support but this would need to have been done within the prescription period. As Fry J noted, there must be power for the servient landowner to prevent an acquisition of an easement. In *Dalton v Angus*, Fry J determined that it was impossible, based on the facts, for this to take place because benefiting from support was not something that was 'actionable nor preventable' by the neighbour.[701] As noted above, in order for the acquiescence of an easement to occur, there must be knowledge of the acts done by the servient landowner. In *Dalton v Angus*, one of the questions was whether the servient landowner have knowledge that they provided support to the dominant landowner. Fry J considered this unlikely. He said that this would be

[699] As Fry J said: 'I cannot imagine any case of acquiescence in which there is not shown to be in the servient owner: (i) a knowledge of the acts done; (ii) a power in him to stop the acts or to sue in respect of them; and (iii) an abstinence on his part from the exercise of such power'. *Public Works Comrs v Angus & Co, Dalton v Angus & Co* (1881) 6 App Cas 740, 46 JP 132, 29.

[700] *Public Works Comrs v Angus & Co, Dalton v Angus & Co* (1881) 6 App Cas 740, 46 JP 132.

[701] 'If the building of a house by one man which derives support from the adjoining land is neither actionable nor preventable by the owner of the adjoining soil, it seems difficult to see on what principle a covenant as to the user of his own soil can be inferred against the man who can do nothing'. See *Public Works Comrs v Angus & Co, Dalton v Angus & Co* (1881) 6 App Cas 740, 46 JP 132, 30.

extremely difficult to determine without 'actual excavation and experiment' and therefore it would be unjust to impute knowledge of the potential burden created by the neighbouring property on the servient landowner and find a prescriptive easement.[702] Fry J held that what was required was that the servient landowner has actual or constructive knowledge of the use.[703] He stated 'for a man cannot, as a general rule, be said to consent or to acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses'.[704]

The above analysis can be applied to chancel repair liability. When applying the above analysis, the questions to ask are: whether there is knowledge, on behalf of a parishioner, of chancel repair liability affecting the property; whether there is an ability for the parishioner (the servient landowner) to do something about it and, subsequently, whether they do anything about it.[705] Adopting the judgment in *Dalton v Angus*, knowledge of chancel repair liability is provided where there is actual or constructive knowledge of the same.[706] For example, a parishioner will have constructive knowledge of chancel repair liability recorded in the public records.[707] Further, there is power for a servient landowner to do something about a chancel repair easement being acquired in contrast to the facts in *Dalton v Angus*, where only a drastic and disproportionate measure would be required to avoid an easement being

[702] See *Public Works Comrs v Angus & Co, Dalton v Angus & Co* (1881) 6 App Cas 740, 46 JP 132, 777 where it was stated 'it would be difficult or impossible to tell what is the incidence of the burden created by a house except by actual excavation and experiment. The circumstances of the case render it, in my opinion, unjust to impute to a neighbour that plain knowledge of what is going on in his neighbourhood which can alone justify the depriving a man of a right to use his own land in a lawful manner'.
[703] The significance of whether or not the liability was discoverable, and thus whether the purchaser had either actual or constructive knowledge of the existence of the right has been noted by commentators. Martin Dixon in Martin Dixon, *Modern Land Law* (8th edn, Routledge, 2012) discusses this in the context of *Dalton v Angus* and the requirement that the servient landowner knew of the existence of the interest. Fry J in *Public Works Comrs v Angus & Co, Dalton v Angus & Co* (1881) 6 App Cas 740, 46 JP 132 held that if the servient landowner has either actual or constructive knowledge of the use then this is supportive of claim to a prescriptive easement.
[704] *Public Works Comrs v Angus & Co, Dalton v Angus & Co (*1881) 6 App Cas 740, 46 JP 132, 775.
[705] Given the historical origin of chancel repair liability the acquisition of chancel repair liability is likely to have taken place many years ago and it binding successors in title due to its proprietary nature thereafter. In the case of chancel repair liability what is clear is that typically chancel repair liability is capable of being acquired as an easement if it has not already been acquired.
[706] This is subject to notice provided by registration at the Land Registry discussed below.
[707] However, this is subject to notice provided by Land Registration discussed further below.

acquired. In *Dalton v Angus*, it would have required, as stated by Fry J, 'excavation for the sole purpose of letting down a neighbour's house' which Fry accepted was possible but it was 'so expensive, so difficult, so churlish a character, that it is not reasonably to be required in order to prevent the acquisition of a right'.[708] In effect, the servient landowner would have to destroy their property to avoid the acquiescence of an easement. In the case of chancel repair liability, the point at which knowledge of the easement was acquired is important in determining whether the servient landowner has the power to do anything about acquiescing to an easement. It is arguable that actual or constructive knowledge of chancel repair liability is available in the public records.[709] However, there may be no knowledge, actual or constructive, until those public records came into existence.[710] It is therefore only since 1958[711] that, arguably, sufficient knowledge existed (of those chancel repair liabilities revealed in the public records). It is of course only on the transfer of land that a buyer (via their solicitor) can be expected to search the public records to discover chancel repair liability. It is on the transfer of land, after the enactment of the Public Records Act, that a buyer will have knowledge, actual or constructive, of chancel repair liability recorded in the public records, having acted diligently in searching the public records prior to purchasing the land. This means that the acquiescence of a chancel repair liability easement can, arguably, only take place on the purchase of the land. It is at this point that an easement will be acquired if a buyer proceeds with a purchase. However, if the buyer decides not to proceed, then the easement will not be acquired. In other words, the servient landowner has the power to do something about the acquiescence of an easement by only proceeding to buy the land if prepared to accept chancel repair liability.[712] The buyer may choose to do nothing about chancel repair liability and proceed to purchase the property and, in doing so, acquiesce to the easement.[713]

[708] *Public Works Comrs v Angus & Co, Dalton v Angus & Co* (1881) 6 App Cas 740, 46 JP 132, 30.
[709] However, evidence of not all chancel repair liability is recorded there.
[710] Pursuant to the Public Records Act 1958.
[711] The date the Public Records Act 1958 was enacted.
[712] *Mills v Silver* [1991] Ch 271, [1991] 1 All ER 449, 279.
[713] The point is that it is the purchase of land subject to chancel repair liability (and subject to whether it is reasonably determinable) which arguably demonstrates the acquiescence to the prescription subject to it being reasonably discoverable.

If it can be reasonably regarded that the church asserts rights over the parishioners' property and they did nothing about it, it cannot be successfully argued that the rights were exercised with permission.[714] Based on the above analysis, there is hypothetically scope for acquiescence by a parishioner as a servient landowner to an ostensible chancel repair liability easement.

Without permission

A claim for a right to chancel repair liability acquired by prescription will fail if such a right has been with permission.[715] The nature of chancel repair liability, as identified with the conveyancing trap, is that parishioners as servient landowners can be liability for chancel repair liability without being aware of their liability and granting permission. On this basis, a claimed chancel repair liability easement would be acquired without permission.

Without Secrecy

A claim for a right acquired by prescription will fail if such a right has been concealed.[716] This can cause problems for chancel repair liability as the right is difficult to determine and not always obvious. In the Court of Appeal case *Union Lighterage Co v London Dock Co*, it was a requirement that to acquire a prescriptive easement over another's land requires the enjoyment, by the dominant landowner, to be 'of such character that an ordinary [servient land] owner of the land diligent in the protection of his interest would have or must be taken, to have a reasonable opportunity of becoming aware of that enjoyment'.

[714] The common way permission is often granted for rights is by way of licence. In the context of chancel repair liability the same is arguably tolerated and acquiesced to at the point of property acquisition provided that it was discoverable. *Mills v Silver* [1991] Ch 271, [1991] 1 All ER 449.
[715] *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229, 72 LJ Ch 558.
[716] *Bright v Walker* (1834) 1 CM & R 211, 219.

On this basis, it would be question of fact regarding what evidence could be shown that chancel repair liability affected the property and whether this was something which could have been determined reasonably by the servient landowner. Arguably, liability due to enclosure awards, former rectorial glebe and land recorded in a record of ascertainment as having a chancel repair liability may all potentially be determinable by a landowner's conveyancer at the point at which the servient landowners acquired their land or alternatively only some may be determined and herein lies a problem with chancel repair liability.[717] It should be stressed that there is no deliberate concealment on behalf of the church as the dominant landowner; it is the case that chancel repair liability is difficult to discover. On this basis, a claimed chancel repair liability easement could hypothetically be acquired without secrecy.

<u>Without force</u>

The term 'without force' is relevant in particular to, for example, forced rights of way, for example, by breaking down locked doors or gates. In *Newham v Willison*, it was stated that 'once there is knowledge on the part of person seeking to establish prescription that his user is being objected to and that the use which he claims has become contentious'.[718] The point does however have limited impact on a chancel repair liability characterisation. On this basis, a claimed chancel repair liability easement would be acquired without force. Accordingly, the above analysis has revealed that an ostensible chancel repair liability easement could hypothetically be used without permission, force or secrecy and there is scope for the servient landowner to acquiesce to the right.

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[717] *Diment v NH Foot Ltd* [1974] 1 WLR 1427, 1433. There is an argument that given chancel repair liability is of ancient origin, results in a presumption that servient landowner had knowledge of such an incumbrance. It would then be upon the servient landowner to rebut this presumption, which would no doubt turn on an argument that chancel repair liability could not reasonably be determined.
[718] *Newnham v Willison* (1987) 56 P & CR 8, 19.

However, whilst the above analysis in respect of chancel repair liability being acquired as an easement is only hypothetical, there are some major difficulties with it. One problem is that, whilst there are similarities between chancel repair liability and a fencing easement, there is no evidence that chancel repair liability is dealt with in the same way. A further problem is that the above analysis would only have any relevance to unregistered land. In the case of registered land (or land subject to first registration), whether or not chancel repair is binding is governed by land registry rules. This has been noted in the above chapters (and is discussed in further detail below in the section addressing the third question outlined at the start of this chapter - (v) Third party impact).[719] Nevertheless, continuing the hypothetical analysis of the analogy between the way in which easements are acquired and chancel repair liability, the next section considers further the methods by which easements are acquired by prescription. Analogies are made with the characteristics of chancel repair liability.

Common law Prescription/the doctrine of lost modern grant/prescription act 1832

The above analysis considers some of the key requirements in order to claim an easement by prescription. The methods of acquiring easements in the context of chancel repair liability are considered in this section. The aim of the analysis is to determine in which circumstances an easement is acquired and whether this is analogous with chancel repair liability.[720]

[719] In short where the land was registered after 12 October 2013 prior to first registration, the legal owner of the land will be bound by any chancel repair liability. On first registration, they will hold the estate free of such interests unless they are protected by notice at the time of first registration. When an application is made for first registration, the registrar will enter the burden of such an interest which appears from their examination of the title to affect the registered estate. Where the land was registered before 12 October 2013, even if chancel repair liability has not been protected by the entry of a notice in the register, the land will remain subject to it but, unless such a notice is entered, a person who acquires the registered estate for valuable consideration by way of a registrable disposition after 12 October 2013 will take free from that interest. Until such a disposition is registered, the person having the benefit of the interest may apply to protect it by entry of notice.

[720] In other words, if chancel repair liability can exist as easement can it also be acquired as easements (either expressly, or impliedly – for example by prescription)?

There are three methods of acquiring an easement by prescription. These are common law prescription; the doctrine of lost modern grant and pursuant to the prescription act 1832. Having considered the various elements required of a claimed easement in order for it be acquired by prescription, which apply to each of the above three methods, it is now appropriate, against this backdrop, to consider each of the methods of acquiring easement in the context of chancel repair liability.

In simple terms, the common law understanding of a prescription is that the law assumes a presumed grant (in other words, it is presumed to exist and capable of being granted) where there has been use as of right since time immemorial, since 1189. In other words, to acquire an easement by common law prescription, there needs to be evidence that an easement has been enjoyed since this time as a right.[721] However, such a presumption could be rebutted if there was evidence of a break in the exercise of a right or there had been merger of the dominant and servient land or evidence showing that the right could not or did not exist,[722] or evidence that the right could not have started before 1189. The problem in terms of characterising chancel repair liability as an easement acquired by common law prescription is that, as noted in Chapter 3, there is evidence that chancel repair liability did not exist prior to 1189, as the church was not constructed or, if it was, there was not a requirement for the chancel to be maintained.

A further method of acquiring a right by prescription in addition to common law prescription discussed above is prescription pursuant to the doctrine of lost modern grant. The doctrine of lost modern grant provided a cure for some of the problems in the workability of common

[721] From 'whereof the memory of man runneth not to the contrary'. See *Hulbert v Dale* [1909] 2 Ch 570. To a large extent this form of prescription has been replaced by the doctrine of lost modern grant and Prescription Act 1832. The common law doctrine was later modified such that 20 years of continuous use raised a presumption that the use commenced before 1189. See *Darling v Clue* (1864) 4 F & F 329, 334. This was likely to be due to the fact that showing continuous use since 1189 became unworkable. See *R v Oxfordshire CC Ex p Sunninghwell PC* [2000] 1 AC 335, 350.

[722] *Bury v Pope* (1586) Cro Eliz 118, 1 Leon 168. See also *Duke of Norfolk v Arbuthnot* (1880) 5 CPD 390.

law prescription. The doctrine of lost modern grant provides for claims for easements to be acquired by prescription when there has been 20 years' use 'as a right'. In this sense, it provides a cure for the deficiencies of common law prescription because it is presumed that the right claimed came into existence after 1189 pursuant to a deed of grant[723] and such a deed of grant is lost.[724] The doctrine accepts that it is unlikely that one is able to show the origin of rights dating back to 1189.[725] In contrast to the grounds for the establishment of a common law easement, an easement acquired pursuant to the doctrine of lost modern grant is not rebutted when evidence is shown that the exercise has not been continuous after the 20 year period,[726] or that a deed of grant was not ever made.[727] The case of *London Tara Hotel Ltd v Kensington Close Hotel Ltd* demonstrates this point.[728] The case concerned a roadway over which a licence had been granted but such a licence had expired over 20 years previously. The court considered whether a claimed prescriptive easement had been acquired. The court held that, on expiry of the licence, the roadway had been used without permission and without force. Further, there was no secrecy in the actions of the dominant landowner's (and their successor in title's) use of the servient land. The court held that there was no implied licence granted and that nothing further was required for an easement to be found. The case clearly evidenced that a 20-year period of use was sufficient to establish the easement. In the later case of *Orme v Lyons*,[729] it was held that even the infrequent use of an easement over a

[723] Editor National Archives, 'Easements – Prescription' (*Practical Law Company* 2016) <http://uk.practicallaw.com.lawdbs.law.ac.uk/1-385-9229?q=easement+prescription#a727227> accessed 1 February 2016.
[724] *Public Works Comrs v Angus & Co, Dalton v Angus & Co* (1881) 6 App Cas 740, 46 JP 132.
[725] The date of the accession of Richard 1 to the throne, and provides for a convenient fiction, for the establishment of an easement. In *Public Works Comrs v Angus & Co, Dalton v Angus & Co* it was decided that, where 'there has been upwards of 20 years uninterrupted enjoyment of an easement, such enjoyment having the necessary qualities to fulfil the requirements of prescription, then (...) the law will adopt a legal fiction that such a grant was made, in spite of any direct evidence that no such grant was in fact made'. As chancel repair liability is of ancient origin it is arguably the case that chancel repair liability can be acquired by common law prescription. However, whilst chancel repair liability is of ancient origin many Church of England churches were not constructed until the middle ages and after 1189. Some of the earliest churches constructed were Saxon in design in the period 700-1050 followed by the Norman churches in 1050-1190. It is only the chancel of these churches, as they were in existence prior to 1189, which may allow for chancel repair liability to be acquired pursuant to common law prescription. The majority of churches in England we know today were built during the middle ages following a wave of church buildings as Christianity expanded throughout England.
[726] *Matthews and another v Herefordshire Council* [2011] EWLandRA 2010/0056.
[727] *Public Works Comrs v Angus & Co, Dalton v Angus & Co* (1881) 6 App Cas 740, 46 JP 132.
[728] *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2011] EWCA Civ 1356, [2012] 2 All ER 554.
[729] *Orme v Lyons* [2012] EWHC 3308 (Ch).

requested period was sufficient to establish a grant of easement pursuant to the doctrine of implied grant.

A problem associated with characterising chancel repair liability as an easement acquired by prescription pursuant to the doctrine of lost modern grant is that, whilst it may satisfy the requirement that it has been enjoyed for over 20 years, it may not satisfy the criteria for the easement to be exercised 'without permission' because notice requesting repair would defeat the requirement.[730] This, of course, would need to be determined on a case by case basis but, because 'notice' is required to provide evidence of the 'obligation' for an easement to exist (as discussed above), the same notice may result in the easement being exercised with permission. However, this analysis does not stand up to scrutiny. For example, the servient landowner may grant a dominant landowner a licence to pass over their land and thereby avoid an easement being acquired by the dominant landowner by granting permission. In the characterisation of chancel repair liability, notice is served by the dominant landowner requesting the servient landowner to pay chancel repair liability. This is not equivalent to a servient landowner granting permission for a right of way to avoid an easement being acquired or, in other words, being granted permission to avoid an easement being acquired.

A further method of acquiring a right by prescription in addition to common law prescription and pursuant to the doctrine of lost modern grant is prescription pursuant to the Prescription Act 1832. The Prescription Act 1832 does not replace the common law and it is commonly construed as a piece of legislation that is in need of updating. Pursuant to the Prescription Act 1832, 40 years use as of right is 'absolute and indefeasible' when it is without interruption

[730] The same problem also arises in respect of an argument that chancel repair liability has been acquired pursuant to common law prescription.

and without written consent.[731] The 40-year period must exist prior to the point at which proceedings are issued for a declaration from the court that the easement exists.

Summary

Chancel repair liability has been analysed in this section to determine whether it is analogous to the way in which easements are acquired. The requirements for an easement to be acquired by prescription have been noted above. The key point is that hypothetically links can be made between chancel repair liability and the requirements for an easement by prescription. However, the analysis is only relevant to unregistered land. Further the analysis is hypothetical because it has been determined above that chancel repair liability is unlikely to be able to exist as an easement. Exploring the hypothetical argument further, the next section addresses the third question identified at the start of this chapter. Specifically, the chapter considers the binding effect of chancel repair on third parties and develops in more detail points raised above.

(v) Third party impact?

Ascertaining the nature of chancel repair liability and determining whether the right has, in fact, been acquired have been analysed above. This leads now to answering the third question outlined at the start of the chapter; specifically, in what circumstances is an easement binding on third parties and is this analogous with chancel repair liability? This section will consider the third party impact of chancel repair liability, characterised as an easement in the context of registered and unregistered land. The ability of legal interests to bind successors in title is dependent on whether the land concerned is registered or unregistered land.

[731] Prescription Act 1832, s2.

There is confusion and a lack of clarity regarding the third party impact of chancel repair liability. Specifically, to what extent is chancel repair liability, as a result of it losing its overriding status, still capable of being registered and binding on successors in title? Is it only so far as the current owners? These questions are address below. Further, the discussion on the problems created by the change in status of chancel repair liability on 13 October 2013, specifically chancel repair liability's loss of its overriding status, and the possibility of the holder of the right of entering a notice to protect the right have been discussed. Particular distinction has also been made between registered and unregistered land. Further, distinction has been made between enforceability against the current owner of property subject to chancel repair liability and enforceability against a purchaser for value.

<u>Current position</u>

As of 12 October 2013, chancel repair liability ceased to be an interest capable of overriding first registration or a registered disposition.[732] In order for the liability now to be protected, a notice must be entered on the register (in the case of registered land), or by registering a caution against first registration (in the case of unregistered land).[733]

> An applicant seeking to protect their interest by way of notice or caution against first registration may apply for an official search of the index map to establish whether or not any part of the land searched is registered and, if so, the title numbers concerned and the type of registration that has been disclosed.[734]

[732] See Land Registry, 'Overriding interests that lost automatic protection in 2013' (Practice Guide 66, Land Registry April 2018). See also Land Registration Act 2002, s117. See also Land Registration Rules 2002 (Transitional Provisions) (No 2) Order 2003, r2.
[733] France Silverman, *Conveyancers Handbook* (25th edn, Law Society Sept 2018).
[734] Land Registry, 'Overriding interests that lost automatic protection in 2013' (Practice Guide 66, Land Registry April 2018).

If it is the case that a notice or a caution against first registration has not been used to protect chancel repair liability by 12 October 2013, as stated in the Law Society conveyancer's handbook, this does not mean that chancel repair liability has 'ceased to exist'.[735] The resulting position differs depending on whether the land is registered or not.

In the case of registered land pursuant to s29 Land Registration Act 2002, where a notice has not been entered on the register before 13 October 2013, 'liability for chancel repair will continue until a registrable disposition made for valuable consideration is completed by registration'.[736]

In the case of unregistered land after 12 October 2013, on first registration, 'the estate owner will hold free from chancel repair liability unless notice of the liability is entered on the register at the time of first registration'.

However, it should be noted that, where chancel repair liability has not been protected by notice or caution against first registration before 13 October 2013, it does not automatically cease to exist on that date. The Land Registry will accept an application for the entry on the register of a notice to protect a claim to chancel repair liability after a transfer for value has been registered.[737] As stated by the Land Registry, and as repeated in the Law Conveyancers Handbook:

> 'HM Land Registry will still accept applications for the registration of notices to protect overriding interests that lost their automatic protection after 13 October 2013 and will not check whether the registered proprietor has changed since this date before proceeding with the application'.[738]

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735 France Silverman, *Conveyancers Handbook* (25th edn, Law Society, Sept 2018) para B10.6.11.
736 ibid para B10.6.11.
737 There are two forms of notice which may be lodged - an agreed notice or unilateral notice. In each case there is an objection for the owner of the land to object to the entry of the notice. If the application is for an agreed notice, HM Land Registry will serve notice of the application on the proprietor giving him the opportunity to object if he so wishes. Where the application is for the entry of a unilateral notice, the proprietor will be notified that the notice has been entered in the register and it will remain open for the proprietor to apply to cancel the unilateral notice by lodging an application in Form UN4.7.
738 Land Registry, 'Overriding interests that lost automatic protection in 2013' (Practice Guide 66, Land Registry April 2018) para 5.

The consequences of this are not entirely clear. As noted in the Law Society's conveyancer's handbook and the Land Registry Practice Guide 66[739]:

> 'The courts have yet to consider whether it may be possible for application to be made to alter the register to enter a notice where the proprietor has taken free of the interest on first registration or following the registration of a disposition for valuable consideration'.[740]

This causes uncertainty and confusion which is discussed in further detail in the next section.

<u>Problems created by the change in status of chancel repair liability on 13 October 2013</u>

Chapter 1 above provides an explanation regarding the way in which chancel repair liability may arise today (it may give rise to a liability as a consequence of a liability being recorded in a record of ascertainment, where land is former rectorial glebe or where the land has been exchanged for tithes pursuant to an enclosure award). Further, as explained above, despite chancel repair liability no longer being classified as an overriding interest,[741] it is still arguably capable of having a third-party impact. The argument is that chancel repair liability's loss of its overriding status does not extinguish the interest but merely postpones the interest. The point is that only postponing the interest does not mean that it is void. As discussed above, the result of this is that chancel repair liability, despite losing its overriding status, is still arguably capable of being registered and binding successors in title (however this point has yet to be tested). The point is something which it is expected to be dealt with in the Law Commission's current program of law reform. The Law Commission state, in respect of their 13th Programme of Law Reform project Registered Land and Chancel Repair Liability, 'The intention of the Land Registration Act 2002 was that chancel repair liability should not bind purchasers of land after 2013 unless protected on the register. However, since the 2002 Act

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[739] Land Registry, 'Overriding interests that lost automatic protection in 2013' (Practice Guide 66, Land Registry April 2018).
[740] ibid. See also France Silverman, *Conveyancers Handbook* (25th edn, Law Society, Sept 2018) para B10.6.11.
[741] Law of Property Act 1925, s53 requires that there must be a written instrument for a proprietary interest (both legal and equitable).

was brought into force, a question has arisen about the legal status of the liability, and so whether homeowners are nevertheless bound despite that Act'. The Law Commission state the work is in respect of closing a historic loophole and saving homeowners millions in insurance. This project has not yet started.

Registration

The question addressed in this section (specifically in what circumstances an easement is binding on third parties and whether this is analogous with chancel repair liability) is a relevant and meaningful question to address. Should an easement be analogous with chancel repair liability in terms of its third-party impact, then this will support the analysis (all be it hypothetical) that chancel repair liability is a proprietary right. The third-party impact of chancel repair liability is, however, largely governed by the Land Registration Act. The requirements for the registration of chancel repair liability in order for it to have a third party impact in terms of registered land and unregistered land have been noted above.[742]

In respect of prescriptive easements (which is the type of easement to which chancel repair has been analysed as being analogous in the above sections), commentators note that easements acquired by prescription are legal easements, as they are a presumed grant. For example, Halsbury's Laws states 'Easements created by prescription are legal easements which come into existence as the result of a long period of use'. As legal easements are overriding interests, then such prescriptive easements are overriding. The registration requirements for easements are governed by the Land Registration Act. Express easements

[742] It is important to be clear that the register of title in intended to 'mirror' correctly accurately all the rights and liabilities at any time affecting land. Land Registry, *Annual Report and Accounts 2002-03* (HC891, July 2003) app3 (at 94).

out of registered land must be completed by the entry of a notice in respect of the relevant burden in the registered title or the servient owner[743] and by the registration of the correlative benefit in the register of title (if any) of the dominant owner.[744] [745] Further, the benefit of a legal easement granted out of unregistered land in favour of already registered dominant land may be registered against the dominant land.[746] Non-compliance with the relevant registration requirements result in the easement having only equitable status and also ensures that it can never override further registered dealings with land.[747] Irrespective of the way in which the easement is created no equitable easement which comes into effect on or after 13 October 2003 can override a registered disposition of servient land.[748] The above requirements for easement differ from those for chancel repair liability; in particular, there is no requirement for registration of a notice in the benefiting land in respect of chancel repair liability.

As the third party impact of property rights is based on whether they are registered or not and the way in which they are dealt with under the Land Registry Act is based on an identification of the interest, i.e. easement, it is not meaningful to add weight to the fact that chancel repair liability is an easement because it has the same third party impact as chancel repair liability when the third party impact of an easement is determined by the identification of the fact that it is an easement. Whilst there exist similarities in the way in which chancel repair and easement bind third parties, this cannot add weight to the analysis that chancel repair liability is analogous to an easement. What the analysis in the above section shows is that the binding effect of chancel repair liability is governed by its own land registry rules, which differ from those of easements.

[743] Land Registration Act 2002, s38; Land Registration Act 2002, sch 2, para 7(2)(a); Land Registration Rules 2003, r9(a).
[744] Land Registration Act 2002, ss27(2)(d) and 59(1); Land Registration Act 2002, sch 2, para 7(2)(a); Land Registration Rules 2003, r5(b)(ii).
[745] For example a presumed grant under the doctrine of prescription.
[746] Land Registration Act 2002, s13(a); Land Registration Rules 2003, r73A.
[747] Land Registration Act 2002, ss29(1) and 29(2)(a)(ii); Land Registration Act 2002, sch 3, para 3(1).
[748] Land Registration Act 2002, ss27(1) and 27(2)(d).

(vi) Conclusion

The analysis in this chapter has attempted to characterise chancel repair liability as an easement. Chancel repair liability was characterised as an easement, manifesting itself as a right to payment from an ostensible servient landowner (a parishioner) to the dominant landowner (the church). The characterisation of chancel repair liability in this way means that it takes the form of a positive easement. Easements fall within the closed list (numerous clauses) of proprietary rights. However, that attempt proved unsuccessful. Chancel repair liability cannot be successfully characterised as an easement. It is therefore submitted on this analysis that this chapter does not provide evidence that chancel repair liability is a proprietary right in the circumstances described above.

Three questions have been addressed in this chapter. Firstly, whether chancel repair liability is capable of existing as an easement; secondly if chancel repair liability is capable of existing as an easement, has the easement been acquired and enforceable; and, finally, if an easement has been acquired whether it is capable of binding successors in title. In order to determine whether chancel repair liability is capable of existing as an easement, the criteria for the establishment of an easement were considered in the context of chancel repair liability. It has not been successfully shown that the criteria for the establishment of an easement could be met, as found in Re Ellenborough Park.[749] One of the particular difficulties with the characterisation is that the orthodox position establishing whether an easement is capable of forming the subject matter of a grant is that 'the right must not impose any positive burden

[749] *Re Ellenborough Park* [1956] Ch 131, [1955] 3 All ER 667. Chancel repair liability was shown to satisfy specifically that: '(1)There must be a dominant and a servient tenement (2) an easement must accommodate the dominant tenement, that is be connected with its enjoyment and for its benefit (3) the dominant and servient owners must be different persons and (4) the right claimed must be capable of forming the subject matter of a grant'.

on the servient owner'.[750] A comparison was therefore made to the limited circumstances in which positive easements have been found to exist, acquired and enforced. In particular, a comparison has been made with a positive fencing easement. One particular difficulty is that, generally, easements do not place a positive obligation on the (ostensible) servient landowner. In an attempt to determine whether the positive element of the characterisation of chancel repair liability as an easement is fatal to its existence, the nexus of a positive easement has been analysed.

Given that the historical exception to the rule, that to have something done is not an easement, applies to very limited circumstances, potentially only fencing a neighbour's wall, the judicial endorsements of the passages in Gale, and the fact that there has been no specific recognition of chancel repair liability as an easement, it is highly unlikely that chancel repair liability could be successfully argued to be a positive easement. The existing authorities therefore present a particular problem when seeking to characterise CRL as an easement. It is important to recognise these limitations. The analogy between chancel repair liability and easements ultimately is strained, is ineffective, and demonstrates the limitation of the characterisation. The fact that fencing easements can be created does not mean that any attempt to create an easement which imposes any other sort of positive obligation is possible. This wider sort of positive obligation easement has not been recognised by the courts.

Why is this conclusion relevant?

It was noted at the start of this thesis that an easement was identified as a suitable candidate to analyse, by way of an analogy, with chancel repair liability. Ferris J said, 'in principle I do not find it possible to distinguish [chancel repair liability] from the liability which would attach to the owner of land which is purchased subject to a (…) restrictive covenant or other incumbrance created by a predecessor in title'. [751]

[750] Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP, 2009) 620.
[751] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* (2000) 81 P & CR 165, [2000] 2 EGLR 149, 152.

Clearly, the above analysis makes the point that chancel repair liability is functionally different to and distinguishable from an easement (or, to use Ferris J's words, 'other incumbrance created by a predecessor in title') because, as has been shown above, chancel repair liability imposes a positive duty whereas an easement does not, save fencing easements (and potentially a few other cases). Chancel repair can be distinguished 'from the liability which would attach to the owner of land which is purchased subject to an' easement (a type of incumbrance) because such liability would not amount to a positive duty obligation. A positive duty obligation cannot be an easement (save in the case of a fencing easement) and chancel repair liability is a positive duty obligation. Chancel repair can be distinguished from one incumbrance, to which Ferris J refers.

It is this key facet (the fact that chancel repair imposes a positive duty) that means it falls outside of being able to be constituted as an easement and, in turn, does not fall within numerus clausus (having not been successfully characterised as an easement).

The fact that chancel repair liability is arguably a quasi-easement (something falling short of a full easement; for example, a fencing easement) and its apparent similarities with fencing easements is supportive of chancel repair liability having property-like characteristics. Fencing easements have been characterised as property rights and identified by the Law Commission as being capable of constituting new land entitlements.

It was noted in Chapter 1 of this thesis how the proprietary status of chancel repair liability was uncertain and one of the aims of this thesis was to make it less elusive, particularly in relation to its property non-proprietary status. The conclusion that chancel repair liability cannot constitute an easement and above analysis achieves this objective.

Further, the analysis of the third party impact of chancel repair, noted above, shows that this has been highly governed, since October 2013, by Land Registration rules and the third-party impact of chancel repair liability is not dealt with in the same way as easements. The Law Commission referred to the fact that chancel repair liability was always attached to the ownership of the rectory in analysing the same. They state:

> 'It will however be clear from what we have already said that the chancel repair liability was always attached to the ownership of the rectory (the rectorial glebe and tithes), and not to the right to appoint to the rectory, (or, in more recent times, vicarage). The chancel repair liability follows the history of the rectorial property, because the owner of what is at any point of time rectorial property is the rector (or at least a rector)'.[752]

However, as the analysis of the third party impact of chancel repair has noted above, this has been highly governed since October 2013 by Land Registration rules and not by similarities with easements (there is no evidence that they will be dealt with in the same way). Chancel repair liability has been analysed in this chapter as having a binding effect, dependent on whether protected by notice and the land registered or not and whether the land is registered or unregistered. Specifically, in the case of registered land, where a notice has not been entered on the register before 13 October 2013, 'liability for chancel repair will continue until a registrable disposition made for valuable consideration is completed by registration'. Further, 'In the case of unregistered land after 12 October 2013, on first registration, 'the estate owner will hold free from chancel repair liability unless notice of the liability is entered on the register at the time of first registration'. The fact that the binding effect of chancel repair liability is linked to land registry rules creates greater certainty and, in turn, addresses some of the problems with it identified in Chapter 1. However, given that the Land Registry will accept an application for the entry on the register of a notice to protect a claim to chancel repair liability after a transfer for value has been registered, this may create different problems.

[752] Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP No 86, 1983) para 2.9.

The analysis is this chapter does not mean that chancel repair liability is not a proprietary right. The scope of the conclusion is limited by the fact that the analysis in this chapter analyses chancel repair by way of analogy with only one proprietary right falling within numerus clauses. There are of course other property rights within numerus clauses.

Wider Issues and limitations

Chancel repair is, arguably, located close to the interface between proprietary and non-proprietary rights. The fact that chancel repair liability shares similar characteristics to a fencing easement is suggestive of this. The analysis in this chapter is supportive of the argument that the rigid formality of numerus clausus is softening, with rights close to the interface of proprietary and non-proprietary rights demonstrating characteristics unfamiliar with their classification. For example, the analysis reveals scope for fencing easement (as Lord Denning said in *Crow v Wood*,[753] 'a right to have your neighbour keep up the fences is a right in the nature of an easement')[754] to be characterised as a property right and a fencing easement is not something fitting neatly within the classification of an easement (and following adherence to numerus clausus, also a property right). The point is of significance because numerus clausus is a fundamental cornerstone of land law. Calls for the loosening up of numerus clausus have been growing[755] and the above analysis is supportive of this point.

A caveat to the relevance of characterising chancel repair liability must also be identified, given the analysis of the effect of Land Registration on the third-party impact of chancel repair liability. Specifically, based on the above analysis, the binding effect of chancel repair liability

[753] *Crow v Wood* [1971] 1 QB 77, [1970] 3 All ER 425, 84-85.
[754] See Goddard, *Law of Easements* (1st ed. Stevenson & Sons Ltd 1871) 281-282 for a further endorsement of this view. See also *Bernardstone v Heighlyng* (1342) Y.B. Pas. Ed. III (Rolls ser.).
[755] J H Dalhuise, 'European Private Law: Moving from a closed system to an Open system of Proprietary Rights' (2001) 5 Edinburgh L Rev 273.

is determined by whether or not it is registered at the Land Registry and whether the land in question is registered or unregistered land. Chancel repair does not appear specifically in numerus clauses, which comprises proprietary rights (which traditional have the potential to bind a purchaser of land (personal rights do not)[756] yet chancel repair liability does have the potential to bind purchasers despite not expressly appearing within numerus clauses and not being an easement (although chancel repair liability is to be characterised as a covenant in the next chapter). Given this, the rigidity of numerus clausus suddenly appears somewhat shaky (and raises the question of why are we restricting the list of property rights to a fixed list in order to avoid dealing with unfamiliar and non-uniform entitlements[757] when such right is comprehensively recorded in the public registers). We have noted that the above numerus clausus has been described by commentators as not unequivocally static and rigid but, rather, dynamic. As noted above, Davidson states that there exists dynamism within the numerus clausus list in terms of what is or is not included in it. The dynamism demonstrated described above adds weight to the view that the strict rigidity of numerus clauses is relaxing. As Kevin Gray notes, 'The modern drive of comprehensive recording of rights in registers has reduced the need to constrict the menu of rights deemed capable of proprietary status'.[758]

The key points arising out of the analysis in this chapter, which in turn have made chancel repair liability less elusive, are noted below:

1) Chancel repair liability cannot be characterised successfully as an easement and is not a proprietary right based on the analysis in this thesis.
2) Chancel repair liability exhibits similarities with the characteristics of a fencing easement. An argument that chancel repair liability manifests itself as a positive easement will ultimately fail, however, as positive easements are limited to highly

[756] *Edlington Properties Ltd v J H Fenner & Co Ltd* [2006] 1 WLR 1583, 21.
[757] T Merrill and H Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 *Yale Law Journal* 1, 24-38.
[758] Kevin Gray and Susan Francis Gray, *Elements of Land Law*, (5th edn, OUP, 2009) para 1.7.14.

specific and limited circumstances and there is little evidence that chancel repair will be dealt with in the same way.

3) The binding effect of chancel repair liability is heavily governed by the Land Registration Act 2002. The characterisation of chancel repair liability as an easement attached to a right is limited only to cases where a notice has not been entered on the register before 13 October 2013 and until a registrable disposition made for valuable consideration is completed by registration, or further in the case of unregistered land.
4) Uncertainty and problems related to establishing the binding nature of chancel repair liability are reduced pursuant to the registration requirements under the Land Registration Act 2002.

The conclusion revealed by the characterisation provided in this chapter is that chancel repair cannot be successfully characterised as an easement. Chancel repair liability is characterised as a covenant in the next chapter.

Chapter 5

Chancel repair liability as a covenant

A covenant is a 'promise (…) where one party ("the covenantor") promises another party ("the covenantee") that he will or will not engage in some specified activity in relation to a defined area of land'.[759] Like many concepts in the land law of England, freehold covenants allow landowners to restrict the use of land or require something to be done to the land. They may be, as the Law Commission describe, 'positive, requiring something to be done, or negative/restrictive, preventing the covenantor from doing something'.[760] Covenants provide an important mechanism for exercising external control over land.

A restrictive covenant is an undertaking contained in a deed by which one party (the 'covenantor') promises another party ('the covenantee') that he will or will not engage in a certain specified activity in relation to a defined area of land.[761] It is a highly useful tool for preventing land from being used in a particular way; for example, a covenant in a deed preventing the building of more than one property would be an example of a restrictive covenant. The other type of covenant is a positive covenant; for example, requiring the covenantor to erect a stock proof fence. Positive covenants require specific acts or services to be provided by the covenantor. The distinction between positive and negative covenants is important for property lawyers as the orthodox view is that the classification determines whether the covenant binds successors in title or, in other words, whether the benefit and burden of covenants can pass to third parties. Chancel repair liability can be compared in a meaningful way to positive covenants and the positive obligations contained in covenants. Perhaps the most fundamental is that, like chancel repair liability, a positive covenant will place a party under a legal obligation to perform a particular act; for example, to repair a wall

[759] Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009) para 3.3.1.
[760] Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011) para 2.37.
[761] Jonathan Gaunt and Paul Morgan, *Gale on Easements,* (16th edn, Sweet & Maxwell 1997).

or perhaps repair a church chancel. The purpose of this chapter is to analysis whether chancel repair liability can be characterised as a freehold covenant.

The rationale for characterising chancel repair as a covenant is provided in the dicta in *Aston v Cantlow* by Lord Roger of Earlsferry who states that he agrees with the judgment of Ferris J in the divisional court where Ferris J said, referring to chancel repair liability:

> 'It is, of course, an unusual incident because it does not amount to a charge on the land, is not limited to the value of the land and imposes a personal liability on the owner of the land. But in principle I do not find it possible to distinguish it from the liability which would attach to the owner of land which is purchased subject to a mortgage, restrictive covenant or other incumbrance created by a predecessor in title'.[762]

This chapter unpacks the dicta of Lord Roger of Earlsferry, where he agrees with the description of Ferris J, that chancel repair liability may not be distinguished from the liability which would attach to the owner of land which is purchased subject to a 'restrictive covenant'. The dicta are unpacked by way of characterising chancel repair liability as a covenant (albeit in fact a positive covenant). This is, of course, a challenging analysis, specifically because the orthodox position is that positive covenants do not typically attach to successive owners of land and chancel repair liability is a positive rather than a negative obligation. However, the analysis is required to address the research question outlined at the start of this thesis. Analysing whether chancel repair liability is a proprietary right has been undertaken in this chapter by examining whether chancel repair liability is analogous to a covenant.

In order to analyse the characteristics of chancel repair liability to show whether it is proprietary in nature and may be classified in this chapter as an covenant (which, in the case

[762] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [171]. See also at *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* (2000) 81 P & CR 165, [2000] 2 EGLR 149, 152.

of a restrictive covenant, is a proprietary right within numerus clausus), the following questions will be addressed in the context of chancel repair liability as a covenant.
Specifically:

1. What is the nature of a covenant and is this analogous with the nature of chancel repair liability? The question is whether chancel repair liability is analogous with a covenant in terms of the fundamental elements required to constitute the right. To answer this question, the nature of freehold covenants has been considered and compared with the nature of chancel repair liability to determine whether they are analogous. Specifically, the question of whether chancel repair liability can exist as a covenant has been addressed.

2. In what circumstances is a covenant enforceable and is this analogous with chancel repair liability?

3. Is a covenant binding on third parties and is this analogous with chancel repair liability? As noted above, in a modern legal system, the third party impact of property rights is governed in some circumstances by complying with the correct formalities at the Land Registry.

By addressing these questions, the characteristics of chancel repair liability will be analysed to show whether it is proprietary in nature and may be classified as a proprietary right. The second and third questions have been considered simultaneously in the analysis below due to their interlocking and overlapping elements.
It is important to note at the outset some of the limitations in this chapter. As has been noted in the above chapters, where the land was registered after 12 October 2013 prior to first registration, the legal owner of the land will be bound by any chancel repair liability. On first registration, they will hold the estate free of such interests unless they are protected by notice

at the time of first registration. When an application is made for first registration, the registrar will enter the burden of such an interest which appears from their examination of the title to affect the registered estate.[763] Where the land was registered before 13 October 2013, even if chancel repair liability has not been protected by the entry of a notice in the register, the land will remain subject to it but, unless such a notice is entered, a person who acquires the registered estate for valuable consideration by way of a registrable disposition after 12 October 2013 will take free from that interest.[764] Until such a disposition is registered, the person having the benefit of the interest may apply to protect it by entry of notice. Further, in respect of unregistered land, on first registration after 12 October 2013, the estate owner will hold the property free from chancel repair liability unless notice of the liability is entered on the register at the time of first registration.

The binding effect of chancel repair liability is therefore, in specific circumstances, governed by the Land Registration Act 2002 (and not reliant on a characterisation as a proprietary right). Therefore, when analysing chancel repair liability as analogous to a covenant in this chapter, the analysis is limited to those circumstances when chancel repair liability is binding but not pursuant to the Land Registration Act 2002. The characterisation would not work otherwise, because the rules for the registration of covenants and chancel repair are distinct and not dealt with in the same way. The analysis of the enforcement and binding effect of chancel repair liability, by way of analogy to covenants, therefore is limited to those circumstances where a notice has not been entered on the register before 13 October 2013 and until a

[763] Where the land was registered after 12 October 2013 - Prior to first registration the legal owner of the land will be bound by any such interests because each of them is a legal interest. On first registration they will hold the estate free of such interests unless they are protected by notice at the time of first registration. When an application is made for first registration, the registrar will enter the burden of such an interest which appears from their examination of the title to affect the registered estate (Land Registration Rules 2003, r35). Where the land was registered before 13 October 2013 - Even if the interest has not been protected by the entry of a notice in the register, the land will remain subject to it. But, unless such a notice is entered, a person who acquires the registered estate for valuable consideration by way of a registrable disposition after 12 October 2013 will take free from that interest (Land Registration Act 2002, s29). Until such a disposition is registered the person having the benefit of the interest may apply to protect it by entry of notice.

[764] Land Registration Act 2002, s29.

registrable disposition made for valuable consideration is completed by registration, or further in the case of unregistered land.[765]

Literature review

There is no specific literature on the characterisation of chancel repair liability as a covenant. There are extensive passages on the nature of covenants in leading texts. Further, key case law, including *Tulk v Moxhay*,[766] *Halsall v Brizell*,[767] *Rhone v Stephens*[768] and *Davies v Jones*, has been considered.[769] *Davies v Jones*[770], in particular, and leading law texts have been used to identify and discuss the key elements of covenants and their effect, which have been compared with the characteristics of chancel repair liability (identified in earlier chapters). Further, the law of covenants is currently highly charged with reform by the Law Commission, proposed in the report, the Law Commission, Making Land Work: Easements, Covenants and Profits a Prendre.[771] The findings of this work have been considered in this chapter in the necessary context. The nature of covenants, like all property concepts, is not sacrosanct and subject to lively debate. This has provided scope for original analysis challenging the orthodox understanding of covenants and the current understanding of chancel repair liability by undertaking a critical and detailed analysis of key case law and commentary. In particular, this has included an analysis of case law concerning covenants attached to rights and positive covenants. The purpose of this chapter is to determine whether chancel repair liability is

[765] For both registered and unregistered land, 'The courts have yet to consider whether it may be possible for application to be made to alter the register to enter a notice where the proprietor has taken free of the interest on first registration or following the registration of a disposition for valuable consideration'. See France Silverman, *Conveyancers Handbook* (25th edn, Law Society, Sept 2018) para B10.6.11.
[766] *Tulk v Moxhay* (1848) 2 Ph 774, 18 LJ Ch 83.
[767] *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371.
[768] *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65.
[769] *Davies v Jones* [2009] EWCA Civ 1164, [2010] 2 All ER (Comm) 755
[770] ibid.
[771] Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011); Law Commission, *Easements, Covenants and Profits a Prendre Consultation* (Law Com CP No 186, 2008).

analogous to a covenant and whether it is a proprietary right and should be binding on third parties. The structure of this chapter is subdivided into the following sections:

i) What is the nature of a covenant and is this analogous with the nature of chancel repair liability?
ii) Covenants attached to rights?
iii) Applying the test in *Davis v Jone*s to Chancel Repair Liability
iv) The doctrine of mutual benefit and burden
v) Numerus Clausus
vi) Conclusion

(i) What is the nature of a covenant and is this analogous with the nature of chancel repair liability?

In respect of the first question identified at the start of this chapter (What is the nature of a covenant and is this analogous with the nature of chancel repair liability?), a covenant is an undertaking contained in a deed, by which one party (the 'covenantor') promises another party ('the covenantee') that he will or will not engage in some specified activity in relation to a defined area of land.[772] A covenant may be either restrictive or positive in nature. Whilst chancel repair liability may take the form of an obligation in a deed, it is well established that

[772] Jonathan Gaunt and Paul Morgan, *Gale on Easements,* (16th edn, Sweet & Maxwell 1997).

that the burden of a positive covenant does not bind successors in title[773] whilst the burden of a restrictive covenant may do so. As the Law Commission note:

> 'restrictive covenants that meet the conditions laid down in *Tulk v Moxhay* function as property rights; the benefit of such a covenant can pass to the covenantee's successor, and the burden is enforceable against a landowner who did not make the covenant. We say that the burden runs with the land, or that the land is burdened by the covenant. But only restrictive covenants behave in this way; positive covenants do not'.[774]

Chancel repair liability has been analysed above as binding on successors in title by virtue of being registered at the Land Registry; in the case of registered land, by entering a notice on the title and in the case of unregistered land by registering a caution against first registration. Apart from some uncertainty in the law (see the discussion above regarding how the failure to register a chancel repair liability interest does not make it void), this is the way in which chancel repair liability binds successors in title today. Therefore, even if chancel repair liability may take the form of a covenant, as noted in respect of the first question above, in respect of the second question identified at the start of this chapter (specifically, in what circumstances is a covenant enforceable and is this analogous with chancel repair liability) and the third question raised at the outset of this chapter (specifically, is a covenant binding on third parties and is this analogous with chancel repair liability), chancel repair is not analogous with a covenant because both positive and restrictive covenants are enforceable but only restrictive covenants are typically binding on third parties. This is reflected in Land Registry practice; the Land Registry will not register a burden of a positive covenant. In contrast, chancel repair liability is positive and binding on successors in title pursuant to being registered accordingly at the Land Registry.

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[773] In *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403, 408 the Court of Appeal held that the decision in *Tulk v Moxhay* (1848) 2 Ph 774, 18 LJ Ch 83 did not apply to positive covenants. A positive covenant to enforce was declined in this case.

[774] Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011) para 2.41.

The characteristics of covenants are not analogous with chancel repair liability. Chancel repair liability, based on the above analysis, cannot be characterised as a covenant and, in turn, is not a proprietary right.[775]

(ii) Covenants attached to Rights

Despite the above determination that the burden of a positive covenant[776] does not bind successors in title, this is not the end of the story. Chancel repair liability can arguably be characterised as a covenant attached to a right (the type and nature of such right is discussed further below). The development of the doctrine of 'mutual benefit and burden'[777] has been considered below to determine whether this principle can provide an indirect mechanism for the enforcement of a chancel repair liability as a positive covenant.

It should be noted that such a doctrine is not without judicial support in the context of chancel repair liability. As Wynn-Parry J said, in Chivers & Sons Ltd,[778] in his judgment, chancel repair liability was based on the maxim that he who had the benefit of the rectory must bear the burden. Further, as noted in Chapter 1, it is clear from Lord Scott's analysis that he considered that the rector benefited from valuable proprietary rights being glebe land and tithes as these constituted the rectory. Lord Scott does not state that chancel repair liability is a proprietary right, but does state that rectorial glebe land and tithes (the proprietary rights he does identify) provide 'both for his maintenance [the rector] and a fund from which he [the rector] could pay for chancel repairs'.[779] In other words his dicta was that chancel repair liability is a

[775] It is noted that the orthodox view of covenants is that only restrictive covenants are proprietary rights.
[776] Both in law and equity.
[777] Established in *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371.
[778] *Chivers & Sons Ltd v Secretary of State for Air (Queens' College, Cambridge, Third Party)* [1955] 2 All ER 607, 592.
[779] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [97].

concomitant repairing obligation to these proprietary rights.[780] This was a point also made in the Court of Appeal, a decision overturned by the House of Lords. In the Court of Appeal, it was said, 'A rectory also included the obligation to keep the chancel of the church in repair out of the same profits. It was these proprietary rights and concomitant repairing obligations which the word "rectory" in its original usage connoted'.[781] The above analysis is supported later in Lord Scott's judgement where, after discussing the way in which the rectory came to fall into lay hands following the dissolution of the monasteries, he notes 'the proprietary rights acquired by lay rectors would have included the rectorial glebe and the rectorial tithes'. In other words, chancel repair liability is not identified specifically as a proprietary right but as a concomitant repairing obligation to these proprietary rights.[782]

An alternative characterisation, therefore, of chancel repair liability is that it is a concept which manifests itself in a way which requires parishioners to repair the church chancel as if bound by a positive covenant but, in order for the positive covenant to be potentially binding, it must be attached to a right (capable of a grant). Such a right exists, as there is a right for the parishioners to attend their parish church for worship (there may be others) and annexed to it is arguably the positive covenant to repair the church chancel. The purpose of this section is to analyse the case law related to the circumstances in which a positive covenant is capable of binding third parties when attached to a right and to determine whether chancel repair liability can be characterised in this way. Attaching a positive covenant to a right can provide an indirect way of enforcing positive covenants on successors in title.[783] This will also address the second and third questions identified at the start of this chapter (in the context of the

[780] A point identified by Sir Andrew Morritt in the Court of Appeal in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2001] EWCA Civ 713, 9.
[781] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2001] EWCA Civ 713, 9
[782] Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37, [2004] 1 AC 546 [101].
[783] For example *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371.

conditions attached to rights); specifically, is chancel repair liability characterised as a positive covenant that is enforceable and binding on third parties?

It should be noted, however, that, unlike restrictive covenants, positive covenants do not fall within numerus clausus and, therefore, on the basis of the doctrine of property rights adopted in this thesis (the numerus clausus principle), they are not proprietary rights. However, as has been identified in this chapter, there is an appetite for reform. The Law Commission in 1984 recommended reforms to the restrictive and positive covenant landscape by proposing the 'Land Obligation',[784] pursuant to which it would be possible to impose both restrictive and positive covenants on servient land for the benefit of dominant land. The recommendations have not been adopted but there has been a renewed interest and appetite for reforming the existing framework by implementing the Law Commission's recommendations pursuant to their Consultation Paper on the reform of the law of servitudes.[785] Further, it is should be noted that numerus clausus is not unequivocally static and rigid, as noted by commentators (and as noted above in Chapter 4).[786] Davidson, in his article 'Standardization and Pluralism in Property Law',[787] argues that the structure of numerus clausus is not completely static but rather dynamic. Davidson states that there exists dynamism within the numerus clausus list in terms of what is or is not included on it. Davidson offers several examples to support his argument, including the decline of the fee tail[788] which has 'been removed almost entirely from the legal landscape'.[789] Another, more familiar example is a lease.[790] Historically, a lease was a personal right not a proprietary right[791] but, with the passage of time, it was accepted

[784] Law Commission, *Transfer of Land: The Law of Positive and Restrictive Covenants report* (Law Com No 127, 1984).
[785] See Law Commission, *Easements, Covenants and Profits a Prendre Consultation* (Law Com CP No 186, 2008). See also Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011).
[786] See Nestor M. Davidson, 'Standardization and Pluralism in Property Law', [2008] *The Fordham Law Archive of Scholarship and History* 1611. See also J H Dalhuise, 'European Private Law: Moving from a closed system to an Open system of Proprietary Rights (2001) 5 Edinburgh L Rev 273.
[787] Nestor M. Davidson, 'Standardization and Pluralism in Property Law', [2008] The Fordham Law Archive of Scholarship and History 1611.
[788] The fee tail was a type of trust which restricted the sale of property. It was abolished in 1925 pursuant to the Law of Property Act 1925.
[789] Nestor M. Davidson, 'Standardization and Pluralism in Property Law' (n 787).
[790] In other words an estate which a landlord confers on a tenant providing exclusive possession for a term of years.
[791] See *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289. The lease only created rights in personam.

that a tenant's occupation could be protected against third party claims and enforced against the whole world rather than solely against the landlord.[792] A similar transformation has taken place in respect of restrictive covenants. It is approaching 200 years since the decision in *Tulk v Moxhay* allowed for permanently binding freehold covenants (albeit this was later curtailed to restrictive covenants). It is therefore arguable that the fact: attaching a positive covenant to a right provides an indirect method of enforcing a positive covenant against successors in title;[793] the Law Commission has made recommendations for the reform of the law of servitudes[794] with the effect that positive covenants should be binding on successors in title; and, historically, positive covenants were (at least for a time) binding on successors in title,[795] there is a strong argument that positive covenants should be a proprietary right. This is obviously different to saying that a positive covenant is a proprietary right and therefore it is important to recognise this limitation in the analysis below. At best, the analysis will show that chancel repair liability may be characterised as a positive covenant (attached to a right); however, this is not evidence that chancel repair liability is a proprietary right (it only provides an argument that it perhaps should be). Whether chancel repair liability, characterised as a positive covenant, is capable of being enforced and is binding on successors in title is discussed in detail below.

When is a positive covenant enforceable and binding on third parties?

The analysis below recounts the historical development of the circumstances when positive covenants are potentially binding on successors in title in order to establish evidence of a building momentum of force in the legal landscape that positive covenants are binding on

[792] See A W Brian Simpson, *A History of Land Law* (2nd edn, Oxford Scholarship Online 2012). See also Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP, 2009) 308.
[793] See the analysis in this chapter.
[794] Law Commission, *Transfer of Land: The Law of Positive and Restrictive Covenants report* (Law Com No 127, 1984).
[795] *Tulk v Moxhay* (1848) 2 Ph 774, 18 LJ Ch 83.

covenantors' successors in title and this analysis has then been applied to chancel repair liability.

In the 1957 decision in *Halsall v Brizell*,[796] a positive covenant was enforced against a property owner who was the successor in title to the original covenantor. The covenant required the original covenantor and their successors in title to pay a proportional cost for the repair and maintenance of estate roads and sewers as well as a promenade and sea walls in order to exercise their rights over the same. The positive covenant was held enforceable because the original covenantor and their successors in title could not exercise the rights without paying the costs of maintaining and repairing the same to ensure that they could be exercised. The covenant was effectively attached to an easement.

Lord Templeman considered the decision in *Halsall v Brizell* in *Rhone v Stephens* in 1994.[797] In *Rhone v Stephens* (as has been noted above), the facts of the case were that a covenant had been provided by a house owner to the owner of a neighbouring cottage to keep the house roof in repair. The ownership of the house and cottage had passed to successors in title over the years a number of times since the covenant was first made. When the roof of the house subsequently fell into disrepair, the cottage owner sought to enforce the benefit of their covenant against the then current house owner and the question for the court was whether the positive covenant was enforceable. In other words, the question for the court was whether the positive covenant bound the original house owners' successors in title? Lord Templeman, in his judgement, said that *Halsall v Brizell* was a case where rights of way could not be exercised over a roadway[798] without ensuring the roadways were maintained. The point was that there was a positive covenant imposed on those individuals with the benefit of the right of way which bound successors in title. Lord Templeman made it clear, however,

[796] *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371.
[797] *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65.
[798] This was in addition to sewers, a promenade and sea wall.

that not all easements with covenants attached would render a positive covenant enforceable. What was critical, Lord Templeman held, was that the right and the covenant must be connected. He said:

> ‘I am not prepared to recognise the “pure principle”[799] that any party deriving any benefit from a conveyance must accept any burden in the same conveyance. Sir Robert Megarry relied on the decision of Upjohn J. in *Halsall v Brizell* [1957] Ch. 169. In that case the defendant's predecessor in title had been granted the right to use the estate roads and sewers and had covenanted to pay a due proportion for the maintenance of these facilities. It was held that the defendant could not exercise the rights without paying his costs of ensuring that they could be exercised’.[800]

The covenant needed to be relevant to the exercise of the easement. In Lord Templeman's analysis of *Halsall v Brizell*,[801] the benefit of using the roadways was sufficiently relevant to the burden of having to contribute to the cost of maintaining the roadways. On this basis, Lord Templeman agreed that the positive covenant in *Halsall v Brizell*[802] was binding on successors. Lord Templeman stated:

> ‘conditions can be attached to the exercise of a power in express terms or by implication. *Halsall v Brizell* was just such a case and I have no difficulty in whole-heartedly agreeing with the decision. It does not follow that any condition can be rendered enforceable by attaching it to a right nor does it follow that every burden imposed by a conveyance may be enforced by depriving the covenantor's successor in title of every benefit which he enjoyed thereunder. The condition must be relevant to the exercise of the right’.[803]

Lord Templeman held, in *Rhone v Stephens*, that the right of support which the covenantee enjoyed (the easement of eavesdrop) was a right of minimal benefit and insufficiently relevant that the covenant requiring the roof of the house to be repaired could be attached to such a right. He held that there was also no element of choice for the covenantor. The covenantor was unable to renounce their right of support and give up the burden of roof repairs as the

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[799] The pure principle is that all easements with covenants attached would render a positive covenant enforceable. See later for a discussion of Pure Principle.
[800] *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65, 73.
[801] *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371.
[802] ibid.
[803] *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65, 73.

building would be unable to exist and would potentially fall down without the right of support (and this was in contrast to *Halsall v Brizell* where the right to access the roadways could have been renounced and the payment for repair avoided). It was held in *Rhone v Stephens* that it was not possible for the covenantor to opt out of the benefit of the right of the easement of support ('in theory or practice') and, for this reason, the positive covenant to repair the roof was not binding. Accordingly, the positive covenant in *Rhone v Stephens* was found not be binding on the covenantors' successor in title. It was stated:

> 'there were reciprocal benefits and burdens enjoyed by the users of the roads and sewers. In the present case Clause 2 of the 1960 Conveyance imposes reciprocal benefits and burdens of support but Clause 3 which imposed an obligation to repair the roof is an independent provision. In *Halsall v Brizell* the defendant could, at least in theory, choose between enjoying the right and paying his proportion of the cost or alternatively giving up the right and saving his money. In the present case the owners of Walford House could not in theory or in practice be deprived of the benefit of the mutual rights of support if they failed to repair the roof'.[804]

The decision in *Rhone v Stephens* (affirmed in *Thamesmead Town Ltd v Allotey*) suggested that there were two limbs to positive covenants being enforceable and binding on successors in title. The first is that the covenantor or their successor in title must benefit from a right attached to the covenant, it must be relevant to the exercise of the right and, secondly, it must be possible to opt out of the rights if a covenantor is unwilling to be bound by the covenant,[805] the effect of which is that it must be possible for the benefit of the right to be deprived from the covenantor or their successor in title if they fail to take on the burden.[806]

Chancel repair liability manifests itself in a way which requires parishioners to repair the church chancel as if bound by a positive covenant but, in order for the positive covenant to be potentially binding, it must be attached to a right, relevant to the exercise of the right, pursuant to the above analysis and characterisation. Such a right exists and it is a right for the

[804] *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65, 73.
[805] Recognised in *Thamesmead Town Ltd v Allotey* (1998) 76 P & CR D20, 79 P & CR 557.
[806] ibid 562.

parishioners to attend their parish church for worship (there may be others) but annexed to it is, arguably, the positive covenant to repair the church chancel. In order to analyse the validity of such a characterisation, the further question to be addressed is whether a parishioner can give up their right of worship and in doing so escape the burden of chancel repair liability. As has been noted above, this was a requirement for the enforcement of a positive covenant revealed by the above case law.

The right of worship

Parishioners have the right to enter the church for the purpose of sacred worship.[807] The case often cited as the authority in support of this point is *Cole v Police Constable*.[808] The case concerned the expulsion on the order of the Dean, of Mr Cole, from Westminster Abbey where Mr Cole had offered his services as a guide to show visitors around the building. The divisional court took the opportunity to address the circumstances and the rights of parishioners to attend church. The divisional court held that the right was of ancient origin and a common law right. The court held that, because the use of a church is dedicated to worship, then it is, in effect, 'dedicated to the use of parishioners to be there for worship'.[809] Further commentators point to the fact that the land was originally endowed by landed estate owners in order (following the construction of a church) for parishioners to worship in their parish as evidence that parishioners have the right to enter the church for the purpose of sacred worship.[810] An implied easement arises when the easement is necessary to give effect to the

[807] *Cole v Police Constable 433A* [1937] 1 KB 316, [1936] 3 All ER 107.
[808] ibid.
[809] ibid 333. It was stated in *Cole v Police Constable* that 'the parishioner's right to attend his parish church must be of far more ancient origin than that [i.e. the Acts of Uniformity], and may be described as a common law right. The church, by being dedicated to sacred uses, is being dedicated to the use of parishioners to be there for worship (…) the right of the parishioner to attend his church (…) depends, not upon the statute, but upon the wide and common law right'.
[810] P Jones, 'The Right to Worship' (*Ecclesiastical Law,* November 2012) <https://ecclesiasticallaw.wordpress.com/tag/cole-v-police-constable-443a/> accessed Feb 2018.

manner in which the land transferred was intended to be used.[811] The fact that the land was originally endowed by landed estate owners in order for parishioners to worship in their parish is evidence of an implied easement.[812] There are, however, some limitations imposed on the right which include the fact that the right may not be exercised at any time but only when the church is open for divine service unless special permission has been granted.[813] Commentators also note that such a right is a proprietary right.[814] The judgment in *Cole v Police Constable*[815] supports the view that the origin of the parishioners' common law right to worship is proprietary and, further, non-parishioners do not have a right to worship.[816]

Based on the above analysis, common law recognises that parishioners have a right of worship in their parish church, because the land and building were first endowed so that they might do this. Common law, therefore, gives effect to the donor's intention. The point is however that, subject to a small number of non-material exceptions, parishioners have a right of worship and these same parishioners may be subject to a chancel repair liability. Accordingly, it follows that there is an ostensible connection with the church chancel and a right of worship, and this is discussed further below.

Subsequent cases refining the decision

Subsequent cases have refined the decisions in *Halsall v Brizell*[817] and *Rhone v Stephens*.[818] In *Thamesmead Town Ltd v Allotey* in 1998,[819] the Court of Appeal considered the decisions in

[811] *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634, 84 LJKB 874. As was stated in this case 'An easement would only be implied if it were necessary to give effect to the common intention of the parties to the grant with reference to the (…) purposes in and for which the land granted was to be used'.
[812] An easement is a proprietary right and is binding on third parties.
[813] *Jarrett v Steele* (1820) 161 English Reports 1290.
[814] P Jones, 'The Right to Worship' (n 810).
[815] *Cole v Police Constable 433A* [1937] 1 KB 316, [1936] 3 All ER 107.
[816] ibid (Goddard J).
[817] *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371.
[818] *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65.
[819] *Thamesmead Town Ltd v Allotey* (1998) 3 EGLR 97, 100.

Halsall v Brizell[820] and *Rhone v Stephens*.[821] In *Thamesmead Town Ltd v Allotey*,[822] the defendant had the right to use sewers but refused to pay his contribution to the cost of maintaining the same in connection with his property. The defendant was not the original covenantor but a successor in title. Peter Gibson LJ recognised the primitive test for enforceable positive covenants in *Rhone v Stephens*[823] and agreed with the decision of Lord Templeman that, simply because the benefit of a right was received pursuant to a conveyance by a successor in title, this did not mean that the burden of a positive covenant could be enforced. He held that the benefit received by the successor in title must not be incidental if the burden of a positive covenant is to be enforced.[824] Peter Gibson LJ also considered whether a successor in title should be afforded the opportunity to reject the benefit of the rights and, in doing so, avoid the burden of the positive covenant.[825] The argument against this point he considered was that a successor in title when he enters into the conveyance or other transaction is taking the title subject to the incumbrances burdening the title, whether he has chosen to enjoy a benefit or not. The point was whether Lord Templeman had been incorrect to hold in *Halsall v Brizell*[826] that the burden of a positive covenant could be avoided if the benefit of the connected rights were rejected. The reason for this is that, from a practicable view, it leads to the difficult conclusion that a claimant would need to monitor whether the benefit of rights had been exercised in order to determine whether the burden of a positive covenant were enforceable. In the case of chancel repair liability, this would require the parochial church council to monitor whether a successor in title were enjoying exercising a right of worship in the parish church in order to determine whether the burden

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[820] *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371.
[821] *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65.
[822] *Thamesmead Town Ltd v Allotey* (1998) 76 P & CR D20, 79 P & CR 557, 100.
[823] *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65.
[824] In *Thamesmead Town Ltd v Allotey* (1998) 76 P & CR D20, 79 P & CR 557, 100. It was held 'In my judgment, it cannot be sufficient that the taking of an incidental benefit should enable the enforcement of a burden against a person who has not himself covenanted to undertake the particular burden. Lord Templeman's reference to rights and power suggests that the successor in title must be able as of right to obtain the relevant benefit. I have already pointed out that not only is there no right conferred on the defendant by the 1988 transfer to use the communal areas but also the plaintiff has no obligation to maintain those areas'.
[825] This was a submission of the claimant counsel in *Thamesmead Town Ltd v Allotey* (1998) 76 P & CR D20, 79 P & CR 557.
[826] *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371.

of chancel repair liability were enforceable.[827] Such a task would be potentially difficult but, however, not an insurmountable administrative task. Peter Gibson LJ sought to clarify the position, He noted that, in *Halsall v Brizell*,[828] the point was that a successor in title was able to decide whether to exercise the benefit of a right and, in *Rhone v Stephens*,[829] in addition to this, a successor in title should be able to give up the benefit if taken and thereby escape the burden. This did not mean the successors in title had to have the choice as to whether they accepted the rights in the first place. Peter Gibson LJ stated:

> 'As I have already pointed out, in *Halsall v Brizell* (…) Upjohn J. was expressing the relevant principle in terms that the successors in title could choose whether or not to take the benefit of the deed. Similarly, in *Rhone v Stephens*, Lord Templeman in distinguishing *Halsall v Brizell*, expressed himself in terms which indicated that the successors in title had to have a choice whether to exercise the right or, having taken the right, whether to renounce the benefit. Lord Templeman was not expressing himself in terms that the successors in title had to have a choice whether to acquire the rights at all'.[830]

Despite the difficulty noted above, Peter Gibson LJ affirmed the test devised in *Rhone v Stephens*.[831]

The basis on which positive covenants could be enforced was developed further in subsequent cases. It was expanded to other rights and instruments, for example, as in *Jenkins v Young Bros Transport Ltd*[832] and *Baybut v Eccle Riggs Country Park Ltd* 2006.[833] In *Jenkins v Young Bros Transport Ltd*, it was held in connection with a conditional fee agreement that the benefit and burden would pass to a successor in title because 'The benefit of being paid was inextricably linked to … its burden'.[834] Further, in *Baybut v Eccle Riggs Country Park Ltd*,[835]

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[827] Whilst creating logistical challenges it perhaps provides a fairer result. For those who do not worship then they would not be bound by the liability.
[828] *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371.
[829] *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65.
[830] *Thamesmead Town Ltd v Allotey* (1998) 76 P & CR D20, 79 P & CR 557, 100.
[831] Peter Gibson LJ said in *Davies v Jones* [2009] EWCA Civ 1164, [2010] 2 All ER (Comm) 755, that 'Lord Templeman had suggested that there were two requirements for that exception to apply, namely (1) relevance of the burden or its discharge to the exercise of the rights which enable the benefit to be obtained and (2) the opportunity to choose whether or not to exercise the right or having taken the right whether to renounce its benefit, as opposed to a choice whether or not to acquire the rights at all'.
[832] *Jenkins v Young Bros Transport Ltd* [2006] 1 WLR 3189.
[833] *Baybut v Eccle Riggs Country Park Ltd* (2006) Times, 13 November, [2006] All ER (D) 161 (Nov).
[834] *Jenkins v Young Bros Transport Ltd* [2006] 1 WLR 3189, 30.
[835] *Baybut v Eccle Riggs Country Park Ltd* (2006) Times, 13 November, [2006] All ER (D) 161 (Nov).

purchasers of a caravan site sought to terminate pitch licences. It was held the purchasers were bound by the burden of licences. There was a covenant in the sale contract that the purchaser would perform the obligations in the licences and the benefit of the licences, which was the income from pitch licences, was conditional on the burden of allowing the licences to occupy their pitches.[836] The grounds in both *Jenkins v Young Bros Transport Ltd* and *Baybut v Eccle Riggs Country Park Ltd* were held consistent with the principles developed in *Rhone v Stephens*, *Thamesmead Town Ltd v Allotey* and *Davies v Jones*.[837]

In light of these cases, in *Davies v Jones* in 2009, Sir Andrew Morritt C refined the basic principle established in *Rhone v Stephens*[838] regarding when a positive covenant was enforceable, as follows:

> '(1) The benefit and burden must be conferred in or by the same transaction. In the case of benefits and burdens in relation to land it is almost inevitable that the transaction in question will be effected by one or more deeds or other documents.
> (2) The receipt or enjoyment of the benefit must be relevant to the imposition of the burden in the sense that the former must be conditional on or reciprocal to the latter. Whether that requirement is satisfied is a question of construction of the deeds or other documents where the question arises in the case of land or the terms of the transaction, if not reduced to writing, in other cases. In each case it will depend on the express terms of the transaction and any implications to be derived from them.
> (3) The person on whom the burden is alleged to have been imposed must have or have had the opportunity of rejecting or disclaiming the benefit, not merely the right to receive the benefit'.[839]

The test involved three limbs. The second and third limbs are, in effect, the same as established in *Rhone v Stephens*. The first limb added an addition limb, requiring the benefit and burden to be effected by deed.

[836] The purchaser 'deliberately chose to take the benefit of the caravan site (...) and the income stream that it represented (…) it could not have done so without accepting the burden of the licences entered into by the claimants with the former owner'. *Baybut v Eccle Riggs Country Park Ltd 2006* WL 3206169, 59.
[837] *Davies v Jones* [2009] EWCA Civ 1164, [2010] 2 All ER (Comm) 755.
[838] ibid 27
[839] ibid 27

In *Davies v Jones*,[840] a contract for the sale of land had been assigned by a deed of assignment and the question for the Court of Appeal was whether the assignee was bound by the positive covenants in the contract. The Court of Appeal held that, based on the facts in the case, the positive covenants were unenforceable. In terms of the first limb of the test noted above at (1), Sir Andrew Morritt C held that what was required was a deed or, alternatively, a document which was able to impose burdens and confer benefits arising from land. Sir Andrew Morritt C held further that, in his judgement, the completion of the deed of assignment was not conditional on the assignee undertaking the burdens of the obligations.[841] The deed of assignment did not contain a provision that the assignee would observe and perform such obligation and Sir Andrew Morritt C could find no evidence, either express or by implication, which could be treated as imposing the burden of the obligations on the assignee.[842] The second limb referred to above was therefore not satisfied and the covenant was not binding.

In *Elwood v Goodman* and others, in 2013,[843] the transferor (Dobson) sold part of an industrial estate. The transfer reserved a right of way over the estate for the benefit of the transferor. The transferor covenanted in the transfer that the transferor and its successors in title would contribute towards the cost of the maintenance of the estate road.[844] The transferee (Elwood) covenanted to maintain the estate road.[845] Part of the transferor's property (benefiting from the earlier reservation of a right of way) was subsequently carved out of Dobson's title and sold to Goodman.[846] Elwood sought to enforce the positive covenant to pay a contribution towards the cost of the maintenance of the estate roadway. The Court of Appeal applied the test in *Davies v Jones* to ascertain whether the positive covenants were enforceable against Dobson and Goodman. The transfer from Dobson to Goodman contained positive covenants

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[840] ibid 27.
[841] ibid 30.
[842] ibid 30.
[843] *Elwood v Goodman* [2013] EWCA Civ 1103, [2014] Ch 442.
[844] ibid 9.
[845] ibid 12.
[846] ibid 12.

by Goodman to Dobson (the Vendor). Goodman covenanted to pay a fair proportion of the cost of maintaining an estate road. It stated:

> 'that he and his successors in title will pay to the Vendor or as the Vendor shall direct such sums as shall from time to time be certified by the Vendors Surveyor (whose certificate except in the case of manifest error shall be final and binding on the parties) as being a fair and reasonable proportion of the expenses incurred by the Vendor and its successors in the maintenance of Roadway 4 on the Estate by reference to user thereof by the Purchaser and his successors in title and by the owners and occupiers of other land and premises for the time being served thereby'.[847]

The parties agreed that, because the covenant provided by Goodman (to contribute to the cost of the maintenance of the roadways) was not provided in connection with the right of way in the transfer to Goodman, it did not satisfy the second limb of the above criteria in *Davies v Jones*.[848] Patten LJ held:

> 'the covenant in cl 3(a) was not given in return for or in relation to the grant of the rights of way. They had been created under the reservation in favour of Dobson in the September Transfer (earlier transfer) and simply passed to Mr Goodman under the December Transfer (later transfer) as rights appurtenant to the freehold title he thereby acquired.[849]

Counsel for Elwood argued that a correlation could be established by looking at the source deed.[850] He argued that a proper connection could be established by identifying the source of the obligation as the earlier transfer (the transfer from Dobson to Elwood) and identifying a correlation between the rights granted and the obligation to pay based on the fact that they were derived from the same transaction. Patten LJ agreed and held that the burden could run in equity, based on this argument.[851] The point is that equity can force the burden of a positive

[847] ibid 16.
[848] *Davies v Jones* [2009] EWCA Civ 1164, [2010] 2 All ER (Comm) 755, 25.
[849] Elwood v Goodman [2013] EWCA Civ 1103, [2014] Ch 442, 25.
[850] ibid 25.
[851] ibid 25-26.

covenant in a transfer even when the correlation between the benefit and burden arouse in an earlier deed.[852]

The first and third limbs were also satisfied. In this case, the third limb was held satisfied (as well as the first limb) as Goodman could, in theory, have given up his right.[853] It was possible for him to do so (unlike in *Rhone v Stevens*, where 'the owners of Walford House could not in theory or in practice be deprived of the benefit of the mutual rights of support if they failed to repair the roof').[854]

<u>Registration</u>

The case of *Elwood v Goodman*[855] also addressed the need for registration of a positive covenant with the Land Registry, specifically the burden of the positive covenant. This is an important question, in particular regarding the characterisation of chancel repair liability as a positive covenant because the burden of chancel repair liability is potentially binding on third parties without the need for registration (in the case of unregistered land).[856] It was argued in this case for the defendant that the burden did not fall within s70(1) of the Land Registration Act 1925[857] and therefore should have been registered on the title. However, Patten LJ noted that the burden of whether a positive covenant requires registration was free of authority.[858] He referred to commentators' writings on the point and noted that there was no strict requirement for the burden to be registered. He referred to Barnsley's Conveyancing Law and Practice,[859] which notes that there is a voluntary procedure for notification with the Land

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[852] A number of challenges were made by counsel to try and defeat the point which resulted in the Patten LJ concluding that the point in respect of the second limb was a matter of substance rather than form and further the size of the burden was proportional to the legal estate acquired.
[853] *Elwood v Goodman* [2013] EWCA Civ 1103, [2014] Ch 442, 25.
[854] *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65.
[855] *Elwood v Goodman* [2013] EWCA Civ 1103, [2014] Ch 442.
[856] See Chapter 6.
[857] The act is now repealed. Land Registration Act 1925, s70(1) stated those interests which were overriding prior to the Land Registration Act 2002 coming into force.
[858] *Elwood v Goodman* [2013] EWCA Civ 1103, [2014] Ch 442, 34.
[859] Thompson, *Barnsleys Conveyancing Law and Practice* (4th edn, OUP 2005), 497.

Registry by way of an annex to assist in a conveyancing process. Other commentators agree on this point. The editors of Ruoff and Roper note that, as the burden of a positive covenant is not a proprietary interest, it should not be registered.[860] The editors note, 'the burden of a positive covenant gives the third party nothing more than a personal right to enforce the covenant in equity against the registered proprietor'.[861] Pattern LJ held that, to be registered on a Land Registry title, the incumbrance must be capable of creating an estate or interest in land. The burden of a positive covenant does not and should not therefore be registered, the result of which is that it does not need to be registered in order to bind successors in title. As Pattern LJ concluded a positive covenant 'does not, in my judgment, require to be registered in order to bind successors in title of the original covenantor'.[862]

The above analysis shows a potential mechanism for the enforcement of positive covenants which is discussed below in the context of chancel repair liability.

(iii) Applying the test in *Davis v Jones* to Chancel Repair Liability

The history and development of the enforcement of positive covenants is noted above and it is apparent that the courts have sought, from time to time, to find clever ways to enforce positive covenants. The test in *Davis v Jones*[863] may be applied to the characterisation of chancel repair liability as a positive covenant attached to the right to attend a parish church for divine worship.

First Limb applied to Chancel Repair Liability

[860] Darren Cavill, Sarah Wheeler, Martin Dixon, David Rees, Stephen Coveney, Patrick Timothy, *Ruoff & Roper, Registered Conveyancing* (Sweet & Maxwell, 2015) para 42.024.
[861] ibid.
[862] *Elwood v Goodman* [2013] EWCA Civ 1103, [2014] Ch 442, 34.
[863] *Davies v Jones* [2009] EWCA Civ 1164, [2010] 2 All ER (Comm) 755.

The first limb of the test requires the benefit and burden to be conferred in the same transaction. As stated in *Davis v Jones*,[864] 'The benefit and burden must be conferred in or by the same transaction. In the case of benefits and burdens in relation to land it is almost inevitable that the transaction in question will be effected by one or more deeds or other documents'. There is little difficulty in the chancel repair liability characterisation in this chapter meeting this requirement, as what is required is a deed or, alternatively, a document which is able to impose burdens and confer benefits arising from land. There is not a requirement for the benefit and burden to be expressly stated in the deed. Constructive knowledge or imputed knowledge is sufficient, as was determined in *Thamesmead Town Ltd v Allotey*.[865] The analysis is supported generally by commentators. In Christine Davis' paper, 'The Principle of Benefit and Burden',[866] it was accepted that this benefit and burden arrangement can potentially make positive covenants enforceable. Further, as noted above, the right of worship may be characterised as a right which will not necessarily be expressly stated in the transfer (it can exist as an implied right) and attached to the right is the burden of chancel repair liability. On this basis, the first limb is satisfied in this characterisation of chancel repair liability as a positive covenant attached to a right.

Second Limb

The second limb may also be applied to the characterisation adopted. The right to attend a parish church for the purpose of divine worship must be relevant to imposing the burden on parishioners to repair the church chancel in the sense that the right to attend for worship must be conditional on or reciprocal to the parishioners paying to repair the church chancel. The requirement of the extent to which the right to attend a parish church for the purpose of divine worship must be conditional on imposing the burden on parishioners to repair the

[864] ibid 27.
[865] *Thamesmead Town Ltd v Allotey* (1998) 76 P & CR D20, 79 P & CR 557, 98.
[866] Christine Davis 'The Principle of Benefit and Burden' (1998) 57 *The Cambridge Law Journal* 522.

church chancel[867] is indicated in the earlier cases of *Tito v Waddell (No 2)*[868] and Rhone v Stephens,[869] in that it must not be 'minimal' or 'technical'[870] and must be 'real' and 'substantial'.[871] In *Rhone v Stephens*,[872] it was stated a benefit which was technical or minimal,[873] could not be a sufficient basis for invoking the principle. Both benefits relied on by Mr Virgo were of that character, the easement of support was both 'technical and minimal' and that of eavesdrop, 'if not technical, was certainly minimal'.[874]

Further, in *Tito v Waddell (No 2)*,[875] it was stated 'I do not think that the pure benefit and burden principle is a technical doctrine, to be satisfied by what is technical and minimal. I regard it as being a broad principle of justice, to be satisfied by what is real and substantial'.[876]

In essence, one cannot exist without the other or, in other words, there is no right for a lay rector to attend a parish church for the purpose of divine worship without the lay parishioners paying to repair the church chancel. For those parishioners under a chancel repair obligation to repair the church, their right to attend the church for divine worship is conditional on payment of chancel repair liability. At first sight, it appears unlikely that they will be prevented from worship in cases where a chancel repair claim is levied; however, the ultimate conclusion must be that, should the lay rectors refuse to pay, then the chancel can fall into disrepair and the lay rectors can be prevented from divine worship. There is, therefore, a practical argument that is both 'real' and 'substantial' and not 'technical' and 'minimal' to support the argument.

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[867] *Thamesmead Town Ltd v Allotey* (1998) 76 P & CR D20, 79 P & CR 557, 98, 100
[868] *Tito v Waddell (No 2); Tito v A-G* [1977] Ch 106, [1977] 3 All ER 129
[869] *Rhone v Stephens* (1993) 67 P & CR 9.
[870] *Rhone v Stephens* (1993) 67 P & CR 9, 15-16 (Nourse LJ).
[871] *Tito v Waddell (No 2); Tito v A-G* [1977] Ch 106, [1977] 3 All ER 129, 305.
[872] *Rhone v Stephens* (1993) 67 P & CR 9, affd [1994] 2 AC 310, [1994] 2 All ER 65.
[873] *Rhone v Stephens* (1993) 67 P & CR 9, 15-16.
[874] ibid 15-16.
[875] *Tito v Waddell (No 2); Tito v A-G* [1977] Ch 106, [1977] 3 All ER 129.
[876] *Tito v Waddell* was overruled in part by *Rhone v Stephens* however in determining the benefit of the rights and connection understanding the decision in *Tito v Waddell* shed light on this point.

There is a further argument in respect of the second limb in support of the characterisation of chancel repair liability in this chapter satisfying the requirements in *Davis v Jones*.[877] From a historical perspective, the sanction of the court for the failure to pay the church chancel was excommunication. There are a number of authorities on this point.[878] Richard Burn, in his work 'Ecclesiastical Law', notes the risk of excommunication for failure to pay chancel repair liability. He states that, when chancel repair liability is not paid by parishioners:

> 'the vestry do make an order for the churchwardens to prosecute the impropriators at the parish expense. In which prosecution the Court will not settle the proportion amongst the impropriators, but admonish all who are made parties to the suit to repair the chancel, under pain of excommunication'.[879]

Based on the above analysis, the right to worship, in the case of lay rectors, being conditional on payment of chancel repair liability, provides a modern day model of a key historic element of the nature of chancel repair liability.[880] The characterisation of chancel repair liability as a positive covenant satisfies the second limb of the test in *Davies v Jones*,[881] based on the above analysis.

Third limb

The third limb in *Davies v Jones*[882] requires 'The person on whom the burden is alleged to have been imposed must have or have had the opportunity of rejecting or disclaiming the benefit, not merely the right to receive the benefit'. In other words, it must be possible to (have or have had) the option to opt out of the rights if a covenantor is unwilling to be bound (in theory

[877] *Davies v Jones* [2009] EWCA Civ 1164, [2010] 2 All ER (Comm) 755.
[878] *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, 104 LJKB 635.
[879] Burn, *Ecclesiastical Law,* vol 1 (H Woodfall and W Straham 1763), 352. Further Burn's Ecclesiastical Law describes lesser excommunication to be where persons are guilty of 'obstinacy or disobedience in not appearing upon a citation or not submitting to penance or other injunction of the court'. Richard Burn, *Ecclesiastical Law*, vol 1 (H Woodfall and W Straham 1763) 545. Accordingly church doctrine dictates that failure to repair chancel repair liability would result in public condemnation resulting in excommunication, an ecclesiastical censure.
[880] As noted in *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, 104 LJKB 635.
[881] *Davies v Jones* [2009] EWCA Civ 1164, [2010] 2 All ER (Comm) 755, 27.
[882] ibid 27.

or in practice)[883] by the covenant.[884] The effect of this is that it must be possible for the benefit of the right to be deprived from the covenantor or their successor in title if they fail to take on the burden.[885]

If chancel repair liability is not paid or the chancel is not repaired, then it must be possible for the church to remove the benefit from the parishioner. As noted in *Thamesmead Town Ltd v Allotey*,[886] referring to *Hasell v Brizell*, Upjohn J. stated that whether the person on whom the burden is alleged to have been imposed has had the opportunity of rejecting or disclaiming the benefit is 'dependent on the choice of the defendants, so that if they did not desire to take the benefit of the deed they could not be made liable'.

Accordingly, if the chancel repair is not paid or the buyer opts out, then there will be no positive covenant. It must, therefore, be possible for the church to remove the right should the covenantor opt out of the benefit of the covenant in theory or in practice.[887]

As noted above, the sanction for failing to pay chancel repair liability was excommunication, unlike in *Rhone v Stephenson*, where it was impossible for the benefit of the right of support to be removed, so there is a mechanism and process for the excommunication of parishioners. Historically, the court had the power to excommunicate parishioners. Phillimore noted there are two types of excommunication: greater and lesser excommunication.[888] Lesser excommunication deprived the parishioner from divine worship and the sacrament. Greater excommunication meant that the parishioner was shunned from society. The old procedure for excommunication involved a bishop executing a 'significant' in response to which the civil courts issued a 'writ de excommunicato capiendo',[889] resulting in the individual being

[883] See *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65, 323. 'The owners of Walford House could not in theory or in practice be deprived of the benefit of the mutual rights of support if they failed to repair the roof'.
[884] Recognised in *Thamesmead Town Ltd v Allotey* (1998) 3 EGLR 97, 100.
[885] *Rhone v Stephens* [1994] 2 AC 310, 323.
[886] *Thamesmead Town Ltd v Allotey* (2000) 79 P. & C.R. 557, 562.
[887] See *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65.
[888] Phillimore R, *Ecclesiastical Law,* vol 2 (London: H Sweet, 1895) 1417.
[889] An ancient writ ordering the imprisonment of an excommunicated person.

imprisoned. Later, the ecclesiastical courts, on their formation, had the power to order greater and lesser excommunication. The ecclesiastical court would issue an admonition (a fine and warning). If the admonition was ignored, an order for excommunication would be made by the ecclesiastical court (or proceedings could be transferred to the High Court for imprisonment due to contempt of court).[890]

The principle of removing the right of worship is a principle enshrined in the ancient doctrine of the Church of England. The Articles of Religion of the Church of England, the ancient rules of the church state, state at Article 33:

> 'That person which by open denunciation of the Church is rightly cut off from the unity of the Church, and excommunicated, ought to be taken of the whole multitude of the faithful, as a Heathen and Publican, until he be openly reconciled by penance, and received into the Church by a Judge that hath authority thereunto'.[891]

The articles of religion of the Church of England comprise the church's doctrine requiring its 'subjects' to follow the same.[892] The point is that the above analysis reveals powers for the right to worship, historically, to be removed, which is consistent with the third limb in *Davies v Jones*,[893] noted above.

The powers of the ecclesiastical court were, however, curtailed[894] pursuant to the Ecclesiastical Jurisdiction Measure 1963 from 1st March 1965. The Ecclesiastical Jurisdiction Measure 1963 was a 'Measure passed by The National Assembly of the Church of England to reform and reconstruct the system of ecclesiastical courts of the Church of England, to replace

[890] *Hauxton Parochial Church Council v Stevens* (1929) P 240.
[891] Thomas Cranmer, 'The Articles of Religion of the Church of England' (1563/71) (commonly called the Thirty-Nine Articles)
[892] See Church of England 'Articles of Religion' </www.churchofengland.org/prayer-worship/worship/book-of-common-prayer/articles-of-religion.aspx> accessed 1 March 2016 which states 'That the Articles of the Church of England (which have been allowed and authorized heretofore, and which Our Clergy generally have subscribed unto) do contain the true Doctrine of the Church of England agreeable to God's Word: which we do therefore ratify and confirm, requiring all Our loving Subjects to continue in the uniform Profession thereof, and prohibiting the least difference from the said Articles; which to that End We command to be new printed, and this Our Declaration to be published therewith'.
[893] *Davies v Jones* [2009] EWCA Civ 1164, [2010] 2 All ER (Comm) 755, 27.
[894] Brawling Act 1551, s2; The Ecclesiastical Courts Act 1813 ss2 and 3; Canons Ecclesiastical 1603, ss139–141.

with new provisions the existing enactments relating to ecclesiastical discipline, to abolish certain obsolete jurisdictions and fees, and for purposes connected therewith'.[895] However, it should be noted that the Ecclesiastical Jurisdiction Measure 1963 did not deal with excommunication in respect of lesser excommunication but required, at s82(4), that 'No person shall be liable to suffer imprisonment in consequence of being excommunicated'.[896] Accordingly, in the absence of anything further, S82(4) leaves open the argument that a sanction of lesser excommunication is still capable of having legal force. The current jurisdiction of the ecclesiastical court, pursuant to S6(1)(b)(i) of the Ecclesiastical Jurisdiction Measure 1963, entitles it to hear and determine any matter not expressly abolished by the measure.[897] As lesser excommunication was not abolished, therefore there is a technical power for the church to excommunicate a parishioner. The sanction of lesser excommunication is still capable of having legal force. The Chancel Repairs Act 1932 states, however, at S1,[898] that the ecclesiastical courts do not have jurisdiction to enforce chancel repair liability since the enactment of the act however this does not defeat the ecclesiastical courts' jurisdiction to hear and determine proceedings for excommunication. On this basis, it has been shown that it is arguably possible for the benefit of the right to worship to be deprived from the covenantor or their successor in title if they fail to take on the burden of chancel repair liability. Accordingly, the third limb in the *Davies v Jones*[899] requirements, noted above, can be shown to be satisfied, based on the above analysis.

In summary, based on the above analysis, an argument can be constructed that chancel repair liability can be characterised as a positive covenant capable of meeting the requirements,

[895] Ecclesiastical Jurisdiction Measure 1963.
[896] Ecclesiastical Jurisdiction Measure 1963, s82(4).
[897] The Ecclesiastical Jurisdiction Measure 1963, s6(1)(b)(i) states: 'Subject to the provisions of the following subsection the consistory court of a diocese has original jurisdiction to hear and determine (b) a cause of faculty for authorising (i) any act relating to land within the diocese, or to anything on or in such land, being an act for the doing of which the decree of a faculty is requisite'.
[898] Chancel Repair Act 1932, s1 states: 'Abolition of jurisdiction of ecclesiastical courts to enforce repair of chancels. After the commencement of this Act no proceedings to enforce liability to repair a chancel shall be brought in any ecclesiastical court, and any such proceedings as aforesaid which, but for the provisions of this Act, could only have been brought in an ecclesiastical court, shall be brought under and in accordance with the provisions of this Act'.
[899] *Davies v Jones* [2009] EWCA Civ 1164, [2010] 2 All ER (Comm) 755, 27.

determined in *Davies v Jones*[900] (which need to be satisfied for a positive covenant to be enforced and binding on third parties). The above analysis addressed the second question identified at the start of this chapter (specifically, in what circumstances is a covenant enforceable and whether this is analogous with chancel repair liability) and the third question raised at the outset of this chapter (specifically, is the covenant binding on third parties and whether this is analogous with chancel repair liability). The above analysis has shown that positive covenants can be both enforceable and binding on third parties and chancel repair liability can be shown to be characterised, on the basis of the above analysis, as such a covenant.[901]

It has been argued above that chancel repair liability may be characterised as a covenant attached to a right to worship. However, such an analysis is not without potential criticism and limitation. The next section considers a potential weakness in the above analysis and the *Halsall v Brizell* line of argument in the identification of a benefit for the owner of the land burdened with chancel repair liability. Generally, in order for burdens and benefits to run with the land under the law of covenants, there has long been a requirement that the right 'touches and concerns' the land and the right to worship is arguably a personal right only and would not run with the land. This section addresses these issues by first considering the benefit and burden doctrine in more detail before considering a link between attendance at church services and the burden of chancel repair and addressing the touch and concern requirement.

(iv) The doctrine of mutual benefit and burden

[900] ibid 27.

[901] There is however a problem arising from this analysis found in the dicta in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [64]. As Lord Hope of Craighead stated 'It is also true that the liability to repair the chancel rests on persons who need not be members of the church and that there is (…) no surviving element of mutuality or mutual governance between the church and the impropriator'.

The above analysis relies on the doctrine of mutual benefit and burden to provide an indirect method for the enforcement of positive freehold covenants. This indirect means of enforcement can result in the burden of a positive freehold covenant being binding on a successor in title of the covenantor. The doctrine gives effect to the principle that 'he who takes the benefit must bear the burden'[902] and gives effect to the equitable maxim 'qui sentit commondum sentire debet et onus'.[903]

Authority for the principle was stated in *Halsall v Brizell*.[904] Upjohn J said:

> 'it is conceded that it is ancient law that a man cannot take benefit under a deed without subscribing to the obligations there under. If authority is required for that proposition, I need but refer to one sentence during the argument in *Elliston v Reacher*, where Lord Cozens-Hardy M.R. observed: "It is laid down in Co. Litt. 230b, that a man who takes the benefit of a deed is bound by a condition contained in it, though he does not execute it"'.[905]

The point in *Halsall v Brizell* and later developed by Megarry V-C. in *Tito v Waddell (No. 2)* is that a person may, in appropriate circumstances, be bound by an obligation which is imposed by the same transaction that grants a benefit of which he wishes to take advantage which is a condition of that benefit.

In Tito,[906] it was said that one form of the doctrine is that it is a technical rule relating to deeds.[907] The point made in Tito is that, if a party to a deed had not signed the same, then they would be held to be bound by the deed if they knowingly take the benefit of it. As

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[902] See *Tito v Waddell (No2)* [1977] Ch 106, 289.

[903] Herbert Broom, *A selection of Legal Maxims* (T. & J. W. Johnson, 1923) para 552 (Broom's Legal Maxims) cases of burdens annexed to property binding those who take the property are given as examples of the maxim. Further Megarry VC noted in *Tito v Waddell (No2)* [1977] Ch 106, 289 'In the case of burdens attached to land, such as mortgages or easements, it hardly seems necessary to resort to any doctrine about benefit and burden: if you take something that has a burden annexed to it, you have to take it as it is, burden and all (…) The only essential difference seems to be that where there is a burden which in its nature is annexed to property there will be no initial question of determining whether or not the burden is a condition of the benefit'.

[904] *Halsall v Brizell* [1957] Ch. 169.

[905] ibid 182.

[906] *Tito v Waddell (No2)* [1977] Ch 106, 289

[907] As noted in an early edition of Megarry and Wade the editors describe the principle as a technical rule relating to deeds. See Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade The Law of Real Property* (8th edn, Sweet & Maxwell & Thomson Reuters, 2012), 750.

Megarry V-C said in *Tito v Waddell (No2)*, underlying this principle was the simple principle of ordinary fairness. Megarry VC said, in other words, 'you can't have it both ways', 'you can't have your cake and have it too', 'you can't blow hot and cold'.[908] [909] However, the principle has clearly expanded into a number of difference forms.

A key aspect of the doctrine identified in Tito is a distinction between conditional benefits and independent obligations. Megarry VC, in his judgment in *Tito v Waddell (No2)*, provided an analysis of a distinction between the same, conditional benefits being where the benefit is subject to a condition that the burden is accepted; in other words, the 'benefit and the burden have been annexed to each other ab initio',[910] and so the benefit is only a conditional benefit. Independent obligations, on the other hand, are where the right and obligation are not interdependent even though granted by the same deed. This is termed the 'pure benefit and burden principle' by Megarry. The pure benefit and burden principle was later rejected by Lord Templeman in *Rhone v Stephens* however approved that conditions may be attached to rights.

In *Rhone v Stephens*,[911] Lord Templeman said:

> 'Conditions can be attached to the exercise of a power in express terms or by implication. *Halsall v Brizell* was just such a case and I have no difficulty in wholeheartedly agreeing with the decision. It does not follow that any condition can be rendered enforceable by attaching it to a right nor does it follow that every burden imposed by a conveyance may be enforced by depriving the covenantor's successor in title of every benefit which he enjoyed thereunder. The condition must be relevant to the exercise of the right. In *Halsall v Brizell* there were reciprocal benefits and burdens enjoyed by the users of the roads and sewers …. In *Halsall v Brizell* the defendant could, at least in theory, choose between enjoying the right and paying his proportion of the cost or alternatively giving up the right and saving his money'.[912]

[908] Megarry VC also held that the doctrine covers successors in title and anybody 'whose connection with the transaction creating the benefit and burden is sufficient to show that he has some claim to the benefit whether or not he has a valid title to it'. See *Tito v Waddell* (No2) [1977] Ch 106, 289.
[909] See *Tito v Waddell (No2)* [1977] Ch 106, 289.
[910] ibid 289.
[911] *Rhone v Stephens* [1994] 2 AC 310, 322
[912] ibid 322.

The parameters of the benefit and burden doctrine are not precisely defined. However, the above authorities indicate that a party cannot take the benefit under a deed without subscribing to the obligations thereunder. Further, as Megarry VC notes in Tito, this includes successors in title. He states:

> 'who falls within the benefit and burden principle?... Plainly this is wider than merely those named in the original instrument, but equally plainly it cannot sensibly mean anyone in the world. In *Halsall v Brizell* and in *E. R. Ives Investment Ltd. v High* the doctrine was applied to successors in title to land which one of the original parties had taken; and plainly such persons should be within the principle'.[913]

Kevin Gray in Elements of Land Law summaries the position. He says 'the benefit and burden principle seems to prescribe that any successor in title who claims the benefit of a freehold grant must also take subject to burdens associated with that grant'.[914]

Other cases applying this point are noted below. In each case, a correlative burden is attached to the benefit of a right.[915] However, it is important to clarify what such benefiting rights are and whether they must be rights relating to land? As noted by C Davis, in respect of the benefit and burden principle:

> 'Although in a large number of the cases the benefit was a right relating to land, there has been no indication in any of the cases that the principle is limited to real property and there are a number of cases where the benefit was personal property … or a contractual right'.[916]

Referring to cases such as *Halsall v Brizel*, commentators note however that these cases 'have notably concerned only rights over another's land which could easily be given up at any time'.[917] However, these do not necessarily constitute legal estates or interests.[918] In *Hopgood v Brown*,[919] the rights concerned licences. However, the majority of successful cases

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[913] *Tito v Waddell (No2)* [1977] Ch 106.
[914] Kevin Gray and Susan Francis Gray, *Elements of Land Law* (OUP 2009) para 3.3.36.
[915] Such rights include right to discharge water into a common drainage system, a right to use a bridge.
[916] Christine Davis, 'The Principle of Benefit and Burden' (1998) 57 *The Cambridge Law Journal* 522, 544.
[917] ibid. For example see *Hopgood v Brown* [1955] 1 WLR 213.
[918] *Hopgood v Brown* [1955] 1 WLR 213.
[919] ibid.

relate to rights in land, for example a right of way or a right to mine, and therefore the question regarding whether the right to worship is such a successful right must be considered in more detail.

C Davis states, further referring to cases where the benefit and burden doctrine applies:

> 'The cases require some kind of arrangement between the parties that includes both the grant of a benefit and the imposition of a burden. The principle seems to apply equally to oral or written arrangements or those set out in a deed. In every case in which the principle has been successfully relied on there has been the grant of a continuing benefit over another's land, for example, a right of way, or a right to mine. Whereas the burdens have been mostly of a continuing nature, for example an obligation to make regular payments for maintenance of the right, or a reciprocal right over land, a unitary burden, to restore land at the end of mining operations, has also been enforced'.[920]

The point is that, in this characterisation, there is a right to worship attached to which is an obligation to repair the church chancel pursuant to the doctrine of mutual benefit and burden. The right to worship does not technically appear to need to be a property right; however, in cases where the benefit and burden principle has been successfully relied on, there has been the grant of a continuing benefit over another's land. It appears very unlikely that the doctrine will be applicable unless the right to worship is a property right. Given that the above analysis suggests that the right to worship may be interpreted as an implied easement, it is appropriate to consider whether the benefit and burden may be transmitted.

The next section discusses the transmission of the burden of a positive freehold covenant in law and equity and the transition of the benefit of a covenant at common law. This issue has been discussed in order to address potential criticism in the line of argument used in this chapter; specifically, whether there is a weakness in the *Halsall v Brizell* line of argument. Typically, in order for burdens and benefits to run with the land under the law of covenants. it may be said that the right must 'touch and concerns' the land. What this means in this

[920] Christine Davis, 'The Principle of Benefit and Burden' (1998) 57 *The Cambridge Law Journal* 522, 422.

context and the issues this creates have been addressed below. (There must be a link between attendance at church services and the burden of chancel repair. This issue has been addressed below.)

<u>Transmission of the burden of a positive freehold covenant in law and equity</u>

The case *of Austerberry v Oldham Corporation*[921] established the orthodox principle that the burden of freehold covenants does not run with the land at law.[922] This fixed position led to a need in the 19th century for equity to establish a means for, at the very least, the burden of restrictive covenants to bind successors in title following *Tulk v Moxhay* and subsequent case curtailing the decision.[923]

It is clearly in the public interest to ensure that land does not become 'clogged up' with encumbrances to avoid land becoming unworkable and unmarketable. It is for this reason that the courts have been careful to set out the criteria for the recognition of enforceable covenants.[924]

The law of equity in the 19th century facilitated the passing of the benefit and burden of covenants which were negative and restrictive in character. In *Haywood v Brunswick Permanent Benefit Building Society*,[925] it was made clear that the scope of the decision only applied to restrictive covenants and would have no application to positive covenants. In this case, Brett LJ stated that the equity would only enforce those covenants restricting the mode of using the land:

[921] *Austerberry v Oldham Corporation* (1885) 29 Ch D 750, 781.
[922] ibid. Lindley LJ said that the burden of a positive covenants would only run if it amounted to an easement or other interest in land, he said 'I am not prepared to say that any covenant which imposes a burden upon land does run with the land, unless the covenant does, upon the true construction of the deed containing the covenant, amount to either a grant of an easement, or a rent-charge, or some estate or interest in the land'.
[923] *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143.
[924] See HWR Wade 'Licences and Third Parties' (1952) 68 LQR 337, 347. Rights which are binding on third parties should be of a familiar kind.
[925] *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403.

> 'Now the equitable doctrine was brought to a focus in *Tulk v Moxhay* , which is the leading case on this subject. It seems to me that that case decided that an assignee taking land subject to a certain class of covenants is bound by such covenants if he has notice of them, and that the class of covenants comprehended within the rule is that covenants restricting the mode of using the land only will be enforced'. It may be also, but it is not necessary to decide here, that all covenants also which impose such a burden on the land as can be enforced against the land would be enforced. Be that as it may, a covenant to repair is not restrictive and could not be enforced against the land; therefore, such a covenant is within neither rule'. [926]

In relation to the burden of restrictive covenants, equity intervenes. In *Tulk v Moxhay*, it was held that the burden of a covenant would, in some circumstances, be enforced in equity against a successor in title of the original covenantor. This equitable doctrine applies only to restrictive covenants and not to positive covenants. Further, equity allows the benefit of a covenant to run in circumstances where the common law will not (for example, where the covenantee or the successor does not have a legal estate in land).

Generally speaking, therefore, the benefit of a covenant will automatically run with the land at law if the following conditions are met: (1) the covenant 'touches and concerns' the benefited land;[927] and (2) the covenantee and the successor in title both have a legal estate in the benefited land.[928] In law, the burden of a positive covenant will not bind a successor in title (however there are workarounds, discussed below).[929]

However, the law of equity allows for the benefit and burden of covenants which were negative in character to bind successors. In *Tulk v Moxhay*, it was held that the burden of a covenant would, in some circumstances, be enforced in equity against a successor in title of the original covenantor. Equity allows the benefit of a covenant to run in circumstances where

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[926] ibid 408.
[927] *Rogers v Hosegood* [1900] 2 Ch 388, 395.
[928] *Webb v Russell* (1789) 3 Term Rep 393. See also Law Commission, *Easements, Covenants and Profits a Prendre Consultation* (Law Com CP No 186, 2008) para 7.21.
[929] *Keppell v Bailey* (1834) 2 My and K 517; *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750; *Rhone v Stephens* [1994] 2 AC 310.

the common law will not (for example, where the covenantee or the successor does not have a legal estate in land).

The requirements for the burden of a covenant to run in equity are: '(1) the covenant must be restrictive in nature;[930] (2) there must be land benefited ("touched and concerned") by the covenant;[931] (3) the burden of the covenant must have been intended to run;[932] and (4) the successor in title to the covenantor must have notice of the covenant'.[933] The requirements were recognised by the Law Commission.[934] [935]

Chancel repair liability has been characterised in this chapter as a positive covenant binding on lay rectors to repair the church chancel. The burden of an ostensible chancel repair liability covenant binds successors in title pursuant to the mutual benefit and burden doctrine. The right to which the burden attaches is the right to worship, which is discussed above. However, generally, as noted above, in order for burdens and benefits to run with the land, under the law of covenants, there has long been a requirement that the right 'touches and concerns' the land. The touch and concern requirement is discussed in further detail below.

Transition of the benefit of a covenant at common law

In the transmission of the benefit of a covenant at common law, as noted above, there is a requirement that the covenant touches and concerns the benefited land. In the

[930] *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403.
[931] *Formby v Barker* [1903] 2 Ch 539.
[932] Law of Property Act 1925, s79 creates a statutory presumption that it was the parties' intention that the burden of the covenant should run with the land. The presumption can be rebutted by showing contrary intention in the deed that created the covenant.
[933] For covenants created on or after 1 January 1926, registration has taken the place of notice. In the case of unregistered land, a restrictive covenant entered into after 1925 must be registered as a land charge under the Land Charges Act 1972, s2(5)(ii). In the case of registered land, the burden of the covenant may be entered as a notice on the title of the burdened land under the Land Registration Act 2002, s32.
[934] Law Commission, *Easements, Covenants and Profits a Prendre Consultation* (Law Com CP No 186, 2008) para 7.28.
[935] In equity, 'the benefit of a covenant that "touches and concerns" land can run in three ways: (1) by annexation; (2) by means of a chain of equitable assignments; or (3) as part of a scheme of development'. See Law Commission, *Easements, Covenants and Profits a Prendre Consultation* (Law Com CP No 186, 2008) para 7.30.

characterisation in this chapter, the benefit of the covenant is the benefit of chancel repairs. The benefit of the covenant will be vested in the church. It is assumed to remain vested in the church in the characterisation in this thesis.[936]

The common law rule for the passing of the benefit of a covenant, whether positive or negative, in law, to successors in title was noted in the House of Lords case *P & A Swift Investments v Combined English Stoes Group Plc*. Lord Oliver of Aylmerton stated:

> 'His claim to enforce rests upon the common law rule, under which the benefit of the covenant would run with the land if, but only if, the assignee had the legal estate in the land and the covenant was one which "touched and concerned" the land. There is no question but that the first of these conditions is complied with in the instant case, but it is said, first, that a reversion on a lease is not "land" for the purposes of the application of the common law rule and, secondly, and in any event, that the covenant of a surety is no more than a covenant to pay a sum of money which is entirely collateral and does not therefore touch and concern the land'.[937]

As noted above, there is a criterion that the covenant must 'touch and concern the land'; in other words, there is a requirement that the land owned by the covenantee (the church) be entered into the covenant for the benefit of the covenantees' land (the rectors' land) and not for their personal benefit.

In *P & A Swift Investments v Combined English Stoes Group Plc.*, Lord Oliver of Aylmerton described a working test to determine whether a covenant touches and concerns the land:

> 'Formulations of definitive tests are always dangerous, but it seems to me that, without claiming to expound an exhaustive guide, the following provides a satisfactory working test for whether, in any given case, a covenant touches and concerns the land: (1) the covenant benefits only the reversioner for time being, and if separated from the reversion ceases to be of benefit to the covenantee; (2) the covenant affects the nature, quality, mode of user or value of the land of the reversioner; (3) the covenant is not expressed to be personal (that is to say neither being given only to a specific reversioner nor in respect of the obligations only of a

[936] This is a fair assumption given that dispositions of churches and the fact that cases dealing with the transfer of church chancel are limited.
[937] *P & A Swift Investments v Combined English Stoes Group Plc* [1989] A.C. 632, 640.

specific tenant); (4) the fact that a covenant is to pay a sum of money will not prevent it from touching and concerning the land so long as the three foregoing conditions are satisfied and the covenant is connected with something to be done on to or in relation to the land'.[938]

An analysis of the benefit of a chancel repair liability covenant may satisfy the above criteria; however, this is unnecessary for the purpose of this thesis. The characterisation in this thesis is considering the binding and third-party impact of the burden of chancel repair liability and not the benefit. The benefit is assumed to remain vested in the church as the owner of the church property including the chancel. Accordingly, the long-standing principle that covenants must touch and concern the land for the transmission for the benefit of a chancel repair liability covenant is not a particular difficulty in this analysis. What is relevant is whether the principle that the burden of a positive covenant does not run at law is circumvented by the workarounds, discussed below.

Transmission of the benefit and burden in equity – restrictive covenants

As noted above, there are circumstances in which the benefit and burden of a restrictive covenant can be transmitted to a successor in title. It is a requirement of a restrictive covenant, in order for it be enforced, that it is for the benefit of the land of the covenantee or, as said, that a restrictive covenant must touch and concern the land of the covenantee (the church land). As stated in *Rogers v Hosegood*,[939] 'Covenants which run with the land must … concern or touch the land'. Further it was stated in Re Ballards Conveyance: 'Is the covenant one which, in the circumstances of the case, comes within the category of a covenant the

[938] ibid 640.
[939] Covenants which run with the land must have the following characteristics: '(1.) They must be made with a covenantee who has an interest in the land to which they refer. (2.) They must concern or touch the land (…) No covenant can run with the land which has not the two characteristics above mentioned, but every covenant which has those two characteristics does not necessarily run with the land'. *Rogers v Hosegood* [1900] 2 ch 388, 395.

benefit of which is capable of running with the land for the benefit of which it was taken? A necessary qualification in order that the covenant may come within that category is that it concerns or touches the land with which it is to run'.[940]

In *Formby v Barker*, Vaughan William LJ moved towards a test regarding whether the restrictive covenant benefits the covenantees land and away from whether the restrictive covenant touches and concerns the land. He said 'the covenant in the present case is merely personal and collateral; it has not been entered into for the benefit of any land of the vendor, or of any land designated in the conveyance; it is a covenant which, in my judgment, would not pass to the heirs of the vendor'.[941]

The benefit to the covenantees' land is something which, as stated in Gadd's Land Transfer,[942] 'affects either the value of the land or the method of its occupation or enjoyment'.[943] However, whilst there is evidence to suggest that the benefit to the covenantees' land of chancel repair liability is something which would increase the value of the land, as accordingly the liability to repair is met by a rector and not the covenantee (the church), this is not a question which needs to be addressed further. As noted above, the equitable decision in *Tulk v Moxhay* was curtailed to the law of negative easements and a positive covenant was not enforceable against a successor in title both in law and equity. The above requirement that covenants touch and concern the covenantees' land arises out of later decisions referring to the context of restrictive covenants. Accordingly, they do not necessarily provide authority that the same requirement is applicable in respect of the burden of positive covenants

[940] *Re Ballards Conveyance* [1937] CH 473, 480.

[941] In *Formby v Barker* [1903] 2 Ch 539, 552 it was stated by Vaughan William LJ that 'It seems to me that in the passage I have just read, Collins L.J. assumes that the doctrine of *Tulk v Moxhay* will not apply to a contract which is merely personal and collateral. In my judgment the covenant in the present case is merely personal and collateral; it has not been entered into for the benefit of any land of the vendor, or of any land designated in the conveyance; it is a covenant which, in my judgment, would not pass to the heirs of the vendor (…) There is no land designated to which the word "heirs" can be applied (…) There is no contractual privity and no relation of "dominancy" and "serviency" of lands which will enable an action to be brought against a person not a party to the original contract, nor do I think that the benefit of this covenant could be dealt with by a devise'.

[942] Gadd's Land Tranfer [1966] CH 56.

[943] ibid 66.

(because the orthodox position is that positive covenants do not run). T Merrill and H Smith, in Optimal Standardization in the Law of Property: The Numerus Clausus Principle, referring to the decisions in *Tulk v Moxhay*, state:

> 'The innovation brought by the Court of Chancery was quickly limited, as subsequent decisions held that equity would enforce promises as property only if the promise benefits an appurtenant interest in land, only if the party to be bound had notice of the promise, and only if the promise 'touches and concerns' the land'.[944]

Indeed, further evidence of this point can be found in the Law Commission report, Easements, covenants and Profits a Prendre, which states that the touch and concern requirement relates to restrictive covenants and one way to control positive covenants would to impose a touch and concern requirement, the clear inference being that the touch and concern requirement does not clearly apply to positive covenants.[945] [946] The Law Commission states:

> 'First, most common law countries have a requirement that restrictive covenants must "touch and concern" the land of the covenantee if they are to bind the covenantor's land; that is to say, they must benefit the covenantee's land, rather than the covenantee personally. Another way to express this is to say that the covenant must be of benefit to the covenantee while the covenantee is the owner of the benefited land, and irrelevant to that covenantee otherwise. A way to control the permissible range of positive obligations would be to impose a touch and concern requirement, thus permitting, for example, an obligation to mend a fence but not an obligation to walk the covenantee's dog'.[947]

It is accepted that positive covenants do not meet all of the requirements for enforcement or restrictive covenants. Clearly, the characterisation of chancel repair liability in this chapter,

[944] T Merrill and H Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 *Yale Law Journal* 1, 17. The authors also note that this amounts to a significant breach of numerus clausus. They state 'In English common law, negative easements were sharply limited in number, and the burden of covenants respecting land could be enforced against successors only in the landlord-tenant context'. In response to demand for a more flexible instrument that would allow the burden of promises to run in planned residential developments, the English Court of Chancery, in *Tulk v Moxhay,* in effect created a new interest-the equitable servitude. This was pure judicial entrepreneurship, as the court was well aware, since it had to limit the holding in *Keppell v Bailey,* the leading English case holding that courts lack authority to transform contract rights into new forms of property rights.

[945] Law Commission, *Easements, Covenants and Profits a Prendre Consultation* (Law Com CP No 186, 2008); Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011).

[946] In *Haywood v Brunswick Permanent Benefit Building Society* the scope of the decision in *Tulk v Moxhay* was curtailed to only restrictive covenants. In this case Brett LJ stated that the equity would only enforce those covenants restricting the mode of using the land. See *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403, 408.

[947] Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011) para 5.50.

as a positive covenant, will not meet the above requirements for the enforcement of a restrictive covenant. However, it is not made out on the above analysis that there is a failure to meet the above criteria for lack of identification of land benefited ('touched and concerned') by the chancel repair covenant because this criterion applies to restrictive covenants, not positive covenants. Therefore, a weakness in the above *Halsall v Brizell* line of argument for this reason is not fully supported. Accordingly, in the circumstances discussed above, the requirement that a covenant 'touch and concerns' in the circumstance described above does not affect the characterisation in this thesis.

There are complex common law and equitable rules which govern whether a covenant can run with the land. The Law Commission identify that the common theme of these different rules is the need for the covenant to 'relate to' or 'touch and concern' or be for the benefit of dominant land. It is important to note that, if such a requirement, for an obligation to be for the benefit of dominant land, did not apply, the risk is that any kind of obligation would be capable of binding successors in title. As noted by the Law Commission, the requirement that the dominant land be benefited is not limited to this jurisdiction;[948] for example, the French Civil Code and German Civil Code.[949] They note 'a requirement of utility to the dominant tenement exists in civil law jurisdictions'. They note further that, in Scotland, the functional equivalent of the requirement is called the 'praedial rule'. This rule was recently examined by the Scottish Law Commission. They provided the following reasoning:

> 'Real burdens must concern land. That is their whole justification. If real burdens were about persons and not about land, their purpose could be achieved under the ordinary laws of contract. If A wants to bind B he need only make a contract. But if A wants to bind B's land a contract will not do, because B may sell and B's successors would then be free of the obligation. The privilege accorded to the real burden is that it runs with the land, but in exchange for that privilege it must concern the land. An

[948] ibid 8.72.
[949] French Civil Code, art 637; German Civil Code, arts 1018 and 1019.

obligation to repair a car or pay an annuity or write a song cannot be created as a real burden. An incoming purchaser should not be bound by obligations like that'.[950]

Therefore, whilst the analysis above is not conclusive that the burden of a positive covenant must satisfy the touch and concern requirement, it must be concluded that any argument seeking to rely on same would be particularly strained. If such a requirement were abandoned, then, as stated by the Law Commission in their 1984 report and restated in 2008, it would allow a landowner to impose an obligation of any kind which might happen to take his fancy.[951] The same reasoning has been suggested in respect of a Land Obligation. The Law Commission state 'if a Land Obligation has the privilege of running with the land, it must (in exchange for that privilege) relate to the land'.[952] The point that, despite uncertainty as to authority as to a touch and concern requirement in respect of the burden of positive covenant, any argument which diverted away from such a requirement is unlikely to succeed. Notwithstanding this, there are various workarounds which provide for the enforcement of positive covenants, which are considered in the next section.

Transmission of the burden of a covenant - workarounds

There are various workarounds and indirect methods for enforcing positive covenants. These include a number of devices in addition to the doctrine of mutual benefit and burden. These are discussed in further detail below.

The scope of the mutual benefit and burden doctrine has and must be limited as otherwise it has the potential to be dangerously wide, resulting in the entire circumvention of the rule in *Austerberry v Oldham Corporation*[953] (the rule in *Austerberry v Oldham Corporation*

[950] Scottish Law Commission, *Report on Real Burdens* (Scot Law Com No 181, 2000) para 2.9.
[951] The Law Commission states: 'If, for example, a garage owner sold part of the garden attached to his house, he should not be allowed to impose on the purchaser a land obligation – enforceable in perpetuity against the purchaser's successors in title – to buy a certain quantity of petrol from his garage every month. The old rule that a covenant must "touch and concern" (or be for the benefit of) the dominant land was established for good reason and we wish to reproduce it in our scheme'. Law Commission, *Easements, Covenants and Profits a Prendre Consultation* (Law Com CP No 186, 2008) para 8.71.
[952] ibid para 8.73.
[953] *Austerberry v Oldham Corporation* (1885) 29 Ch D 750, 781.

specifically states that the burden of a covenant between freeholders cannot run with the land).[954] As stated in *Rhone v Stephens*, if the doctrine of mutual benefit and burden is applied to every transaction, it has the scope to be 'dangerously expansive'.[955]

Where, however, preconditions are met, the benefit and burden principle results in a successor in title being bound by a positive covenant. The decision in *Rhone v Stephens*,[956] *Thamesmead and Town Ltd v Allotey*[957] and subsequent case law has identified a handful of key requirements which must be satisfied before this can occur. What is clear from these cases is that the benefit and burden principle provides an indirect means for the enforcement of positive covenants. Further, and more importantly, this indirect mechanism for the enforcement of positive covenants is not subject to the same requirements regarding the enforcement of restrictive covenants.

As noted above, the courts have formulated a test to establish whether a covenant falls with the mutual benefit and burden principle. As noted above, in *David v Jones*, the test was summarised as below and applied above.

> '(1) The benefit and burden must be conferred in or by the same transaction. In the case of benefits and burdens in relation to land it is almost inevitable that the transaction in question will be effected by one or more deeds or other documents.
> (2) The receipt or enjoyment of the benefit must be relevant to the imposition of the burden in the sense that the former must be conditional on or reciprocal to the latter. Whether that requirement is satisfied is a question of construction of the deeds or other documents where the question arises in the case of land or the terms of the transaction, if not reduced to writing, in other cases. In each case it will depend on the express terms of the transaction and any implications to be derived from them.
> (3) The person on whom the burden is alleged to have been imposed must have or have had the opportunity of rejecting or disclaiming the benefit, not merely the right to receive the benefit'.[958]

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[954] Note whilst at law covenants were not enforceable, equity devised a means for the enforcement of the burden of restrictive covenants in the mid 19th century. See *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143.
[955] *Rhone v Stephens* (1993) 67 P & CR 9, 15.
[956] ibid.
[957] *Thamesmead and Town Ltd v Allotey* (2000) 79 P & CR 557, 563.
[958] *Davies v Jones* [2009] EWCA Civ 1164, [2010] 2 All ER (Comm) 755, 27.

It is noted that, in order for burdens and benefits to run with the land under the law of covenants, there has long been a requirement that the covenant 'touches and concerns' the covenantees' land. However, it has been shown that it is not directly relevant in the context of positive covenants enforced under the benefit and burden principle. A positive covenant can be enforced under the benefit and burden principle if it fails to meet the touch and concern requirements.

As noted above, there are various indirect means for the enforcement of positive covenants in addition to relying on the benefit and burden principle, as noted by the Law Commission in their report, Easements, covenants and Profits a Prendre.[959] These include, for example, a chain of indemnity covenants. The result of using indemnity covenants has the effect of making the burden of a freehold covenant binding on successors in title by way of a chain of indemnity covenants by successive purchases of the covenantors' land. The original covenantor is liable for any breach of the covenant once he has disposed of the land and may claim on the indemnity covenant if the covenant is breached by a subsequent purchaser.[960]

Having established that potentially analogous features exist between chancel repair liability and positive covenants, it is appropriate to consider the significance of this in terms of whether chancel repair liability may be classified as a proprietary right. The principle of numerus clausus is considered in further detail below to address this point.

(v) Numerus clausus

[959] Law Commission, *Easements, Covenants and Profits a Prendre Consultation* (Law Com CP No 186, 2008); Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011).
[960] Other methods include the use of leasehold title and Estate Rentcharges.

A key principle of numerus clausus, suggested by academics, is that an agreement between the parties cannot bind a successor in title. Any exception to such a principle requires justification in order to create a legal or equitable property right.[961] Numerus clausus, as discussed above, is clearly relevant to restrictive covenants. Positive covenants do not fall with the list of property entitlements that are incorporated on the established list however.[962]

Having discussed in more detail the rationale regarding why positive covenants are not caught by numerus clausus, the workarounds may be considered in more detail, which allow, in certain circumstances, positive covenants to be binding on third parties.

Rudden explored this point in his article.[963] He noted the difficulties and risk that positive covenants can create if they are allowed to fall within numerus clausus; specifically, the risk of overburdening the land and making it unworkable and unmarketable. However, Rudden noted that these difficulties can be overcome if the obligations are carefully defined and integrated. This is a point recognised by the Law Commission, who noted:

> 'Rudden explored the practical, economic and philosophical arguments for the exclusion of positive obligations, such as the protection of purchasers (so that they have only a fixed list of property rights to check when buying), the need to facilitate development by resisting the overburdening of property, and the difficulty of ensuring that rights can be discharged or varied. He argued that these points can be overcome if obligations are carefully defined and are integrated within a registration system. He concluded that the reasons generally given for the fact that the burden of a positive covenant does not run are not particularly strong. He noted that the existence of the "workarounds" described above'.[964]

[961] Ben McFarlane, 'The Numerus Clausus principle and covenants relating to land' in Susan Bright (eds), *Modern Studies in Property Law* (Hart Publishing, 2011), 330.
[962] Care must be taken when referring to the established list as this is not judicially defined and this has been considered in the above chapters.
[963] Bernard Rudden, 'Economic Theory v Property Law: The Numerus Clausus Problem' in J Eekelaar and JS Bell (eds), *Oxford Essays in Jurisprudence (Third Series)* (Clarendon 1987).
[964] Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011) para 5.30.

The above analysis emphasises that the existence of workarounds adds weight to the argument that numerus clausus does not apply to covenants and is not particular strong. Further, in certain circumstances, numerus clausus should arguably be expanded to include positive covenants, where the benefit of doing so would outweigh the detriment of not doing so. This is accepted by other jurisdictions and should arguably be the case in England. For example, as stated by the Law Commission:

> 'More recent academic analysis has sought to find a principled reason why the law should allow, or prevent, the creation of new property rights. It has been argued that such rights are desired and permitted in cases where it is better (cheaper, or 'fairer') to create a right that will last, so that future owners do not have the cost of re-creating it, than to create a transient right that future owners will want to re-make. That balance can be explained in terms of economic efficiency, or of mutual benefit'.[965]

The economic argument regarding why the law should allow the creation of new proprietary rights was elucidated in B W F Depoorter and R Parisi, 'Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes'.[966] The authors state:

> 'The treatment of certain land-related promises as enforceable contracts between parties rather than real rights that run with the land in perpetuity, can be explained as an attempt to minimize the transaction and strategic costs resulting from dysfunctional property arrangements'.

The same point is noted by academics. Ben McFarlane, in Modern studies in Property Law. accepts that this is a consequential argument. He states:

> 'Nonetheless it may be that the problems with these devises and the inconvenience caused to A and B (the parties to the covenant) by employing them can be used as part of a consequential argument that the benefit of allowing A and B by entering into a positive covenant to impose a liability on X (the third party) outweigh the disadvantage of giving A and B such power…… this calculation must be the ultimate

[965] ibid. See also B W F Depoorter and R Parisi, 'Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes' (2003) 3(1) *Global Jurist Frontiers* 2, 40. See also B Akkermans, *The Principle of Numerus Clausus in European Property Law* (Intersentia Publishers 2008), 440.
[966] B W F Depoorter and R Parisi, 'Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes' (2003) 3(1) *Global Jurist Frontiers* 2, 40.

> test of the Law Commissions suggestion that certain forms of positive covenant should count as legal property rights in land'.[967]

However, there is no winning argument on either side regarding whether a positive covenant should be proprietary. Evidence to support the fact that great work can be performed to enforce a positive covenant, using an indirect method, is noted by contributors to the Law Commission's consultation report.

Herbert Smith LLP, for example, said:

> 'It is clearly wrong in concept that parties should be required to adopt some, often complicated, mechanism or, worse, a legal estate structure which would not otherwise be adopted, in order to achieve security on positive covenants'.

The Chancery Bar Association noted:

> 'We agree that it is a serious practical problem and injustice that positive covenants cannot be enforced directly between the successors in title to the original land owning contracting parties, in particular in the case of fencing and maintenance covenants'.

However, simply because indirect methods are available for enforcing positive covenants which can be argued from an economic or consequential perspective, this does not mean that they should be adopted. Policy factors should also be considered. J Snape, in his article 'The Benefit and Burden of Covenants – Now Where Are We?',[968] argues that 'there is a clear recognition of the need to respect the orthodox position in *Rhone v Stephens*'.[969]

He states further, referring to the workarounds 'As long as these methods (...) are well known then, artificial as they may seem, they can stand'.[970]

However, such a position has been criticised by other commentators. Turano, in his article 'Intention, interpretation and the "mystery" of section 79 of the Law of Property Act 1925',[971]

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[967] Ben McFarlane 'The Numerus Clausus principle and covenants relating to land' in Susan Bright (eds), *Modern Studies in Property Law* (Hart Publishing, 2011), 327.
[968] J Snape, 'The Benefit and Burden of Covenants – Now Where Are We?' (1994) 3 *Nottingham Law Journal* 68.
[969] ibid 75.
[970] ibid 86.
[971] L Turano, 'Intention, interpretation and the "mystery" of section 79 of the Law of Property Act 1925' [2000] *Conveyancer and Property Lawyer* 377.

referring to Snapes' article states that simply because it is technically possible, it does not mean that it is good policy to reach that decision.[972] This is a point which the Law Commission noted and added that the fact that the law permits these indirect methods of enforcement is evidence that there is no consistent policy that positive covenants should not be binding on successors in title. The Law Commission notes:

> 'The existence of these indirect methods of enforcing positive obligations shows the desire for and practical importance of positive obligations; and the fact that the law permits these methods shows that there is no consistent policy that positive obligations should not be attached to land'.[973]

As noted above, the numerus clausus principle clearly applies to positive covenants in the sense that positive covenants do not fall within numerus clausus and therefore are not proprietary rights. Such an all-encompassing statement fails to take account of a number of workarounds where positive covenants are enforced. The above analysis indicates that adopting a consequential analysis can provide an argument that a positive covenant should count as a legal proprietary right. This is based on the fact that, that such rights are 'permitted in cases where it is better (cheaper, or fairer) to create a right that will last, so that future owners do not have the cost of re-creating it'. This is rather than creating a 'transient right that future owners will want to re-make'.

Further, if such an approach were to be adopted, concerns would be raised regarding how such a regime would be controlled. One limitation associated with allowing positive

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[972] Turano states 'Snape (…) argues that as long as there are methods to circumvent the prohibition on the running of positive burdens, then the basic rule should stay. But surely it is undesirable that people be encouraged to take circuitous routes to avoid the effect of a legal rule … Snape sees no reason why, if the methods are well known, they should not stand. But this is to say that a Victorian rule which no longer has relevance to modern conditions should remain since there are artificial ways of getting around it. The view that the existence of other means of making a burden bind renders pointless any attempt to streamline the law was held by Lindley L.J. in Austerberry. 'If the parties had intended to charge this land for ever (…) all that would have been necessary would have been to create a rentcharge (…) and the thing would be done'. But this is unsatisfactory. Their Lordships in that case purported to base their rejection on the general idea that it would be bad policy to force successors in title to pay under an agreement to which they were not party: yet that is just what happens when parties to a covenant annexe the burden to a rentcharge'. L Turano, 'Intention, interpretation and the "mystery" of section 79 of the Law of Property Act 1925' [2000] *Conveyancer and Property Lawyer* 377, 385.

[973] Law Commission, *Easements, Covenants and Profits a Prendre Report* (Law Com No 327, 2011) para 5.37.

covenants to run with the land, and thereby removing the need for indirect methods of enforcement of a positive covenant, would be for a requirement that such a positive covenant touches and concerns the land of the covenantee, which then takes us back to the touch and concern requirement, noted above.

In the context of chancel repair liability

A consequential approach can be applied in the context of chancel repair liability. The question is whether chancel repair liability is a case where it is better (cheaper, or fairer) to create a right that will last, so that future owners do not have the cost of re-creating it. Applying this analysis and the analysis of Ben McFarlane raises the following question. The question is whether the inconvenience caused to the church and the lay rector by employing devices (to enforce a positive chancel repair liability covenant) can be used as part of a consequential argument that the benefit of allowing the church and the lay rector entering into a positive covenant to impose a liability on a successor in title (the third party) outweigh the disadvantage of giving the church and the lay rector such power.

The device, which arguably is applicable on the above analysis, is the benefit and burden principle. Pursuant to this device, an argument can be constructed that chancel repair liability manifests itself as a positive covenant. The advantage of the benefit and burden device is that it potentially, in certain circumstances, allows chancel repair liability to be binding on a lay rector. However, as discussed above, applying the criteria established from the above cases is not unequivocally clear.

The parameters of the consequential approach and how it would operate are insufficiently clear; however, if such an approach were to be adopted, it seems to suggest that a positive

chancel repair liability covenant should be imposed on the lay rectors' successor in title if it is fairer to do this than rely on a device. Clearly, it would be beneficial for the church to allow for a positive covenant to be imposed on a successor in title of the lay rector; however, for obvious reasons, this would not be mutually agreed by the lay rectors (as it would affect the value of their property). As far as the successor in title were concerned, a consequential approach would have the potential benefit of provide greater certainty regarding a positive covenant to which they would be subject to prior to the acquisition of a property rather than being subject to a positive covenant pursuant to the benefit and burden principle.

The consequential approach, whilst meritorious in principle, would not be better, cheaper, or fairer in the context of chancel repair liability. The device of benefit and burden is untested in a chancel repair liability context and therefore, arguably, of limited application. Further, the consequential approach appears to require mutual agreement by the parties to the covenant that it binds successors in title which would not be agreed in the chancel repair liability context.

(vi) Conclusion

The purpose of this chapter is to seek to characterise chancel repair liability as a covenant. The criteria for the existence of a covenant have been analysed and it has been submitted that chancel repair liability has the makings of a successful characterisation as a positive freehold covenant as it can be articulated as a promise by a covenantor to repair the church chancel. In order successfully to characterise chancel repair liability as a covenant, three questions identified at the start of this chapter have been addressed (specifically, what is the nature of a covenant and is this analogous with the nature of chancel repair liability; in other words, can

chancel repair liability exist as a covenant?; in what circumstances is a covenant enforceable and is this analogous with chancel repair liability; and is a covenant binding on third parties and is this analogous with chancel repair liability?

It has been shown that the characterisation of chancel repair liability as a covenant requires the covenantor to do something, specifically to pay chancel repair liability rather than simply be passive. The positive requirement on a parishioner to pay for chancel repairs means that it can only be characterised as a positive covenant rather than a restrictive covenant. This causes difficulties in terms of the enforcement of the covenant. Positive covenants are typically not binding and enforceable against third parties at law. Chancel repair liability is enforceable against third parties (either by way of registration or potentially under loopholes in the existing law regarding whether the Land Registry will continue to register a chancel repair liability interest, which have yet to be tested). It is on this basis that it has been determined that chancel repair liability cannot be successfully characterised as a positive covenant.

Chancel repair liability has been considered as a covenant attached to a right and the development of the doctrine of 'mutual benefit and burden' has been considered to determine whether this principle can provide an indirect mechanism for the enforcement of a chancel repair liability positive covenant. Building on this idea, arguably, chancel repair liability can be characterised as a concept which manifests itself in a way which requires parishioners to repair the church chancel as if bound by a positive covenant attached to a right for the parishioners to attend their parish church for divine worship. Arguable, chancel repair liability can be characterised as a positive covenant to repair the church chancel attached to a right to attend the church for divine worship.

Circumventing the requirement that positive covenants are not binding on successors in title (and indirectly enforcing a positive covenant pursuant to the doctrine of benefit and burden) does not make chancel repair liability a property right (even if it can be shown to be analogous to a positive covenant attached to a right pursuant to the doctrine of mutual benefit and burden) when the definition of a property right adopted in this thesis is one that falls within numerus clausus. The analysis demonstrates that a positive obligation attached to an easement may potentially exhibit a hallmark of a proprietary right, since the effect is to impose a positive burden on a successor in title (when circumventing the usual rules). However, because positive covenants do not currently fall within numerus clausus, then chancel repair liability is not a proprietary right, based on this analysis.

A further point is that the binding effect of chancel repair liability is now heavy governed by Land Registration rules and whether the land in question is registered or unregistered land. Chancel repair liability has a binding effect dependent on whether it is protected by notice and the land is registered or unregistered. The characterisation in this chapter is, therefore, limited to those circumstances in which chancel repair liability is enforceable but not pursuant to the Land Registration Act 2002. Specifically, in the case of registered land, where a notice has not been entered on the register before 13 October 2013 and until a registrable disposition made for valuable consideration is completed by registration, or further in the case of unregistered land.

The above analysis provides a characterisation of chancel repair liability which shows, on some level, that chancel repair liability is analogous with a positive covenant; however, the analysis is strained. The analysis does, however, demonstrate concerns in English land law. In particular, there is a mechanism for the enforcement of positive obligations (whether or not

this works for chancel repair liability) which has the potential for exposing buyers inadvertently to unknown and unexpected incumbrances.

Why is this conclusion relevant?

Ferris J said, 'in principle I do not find it possible to distinguish [chancel repair liability] from the liability which would attach to the owner of land which is purchased subject to a … restrictive covenant or other incumbrance created by a predecessor in title'.[974]

Clearly, the above analysis makes the point that chancel repair liability is functionally different to and distinguishable from a 'restrictive covenant' because, as has been shown above, chancel repair liability imposes a positive duty whereas a restrictive covenant does not. Chancel repair can be distinguished 'from the liability which would attach to the owner of land which is purchased subject to a restrictive covenant' because such liability would not amount to a positive duty obligation. A positive duty obligation cannot be a restrictive covenant and chancel repair liability is a positive duty obligation. Chancel repair can be distinguished from one incumbrance, to which Ferris J refers.

It is this key facet (the fact that chancel repair imposes a positive duty) that means that it falls outside of being able to be constituted as a restrictive covenant and, in turn, does not fall within numerus clausus (having not been successfully characterised as a restrictive covenant).

It was noted in Chapter 1 of this thesis how the proprietary status of chancel repair liability was uncertain and one of the aims of this thesis was to make it less elusive, particularly in

[974] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, [171]; *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* (2000) 81 P & CR 165, [2000] 2 EGLR 149, 152.

relation to its property non-proprietary status. The conclusion is that chancel repair liability cannot constitute a restrictive covenant, based on the above analysis. This analysis does not therefore support an argument that chancel repair liability is a proprietary right however this does not mean that chancel repair liability it is not a proprietary right. The scope of the conclusion is limited by the fact that the analysis in this chapter analyses chancel repair by way of analogy with only one proprietary right falling within numerus clausus. There are, of course, other property rights within numerus clausus.

Wider Issues and limitations

Chancel repair is, arguably, located close to the interface between proprietary and non-proprietary rights. The fact that chancel repair liability shares similar characteristics to a positive covenant is suggestive of this. The analysis in this chapter is supportive of the argument that the rigid formality of numerus clausus is softening, with rights close to the interface of proprietary and non-proprietary rights demonstrating characteristics unfamiliar with their classification. For example, the analysis reveals scope for positive covenants to be recognised as proprietary rights rather than as something falling within numerus clausus. The point is of significance because numerus clausus is a fundamental cornerstone of land law. Calls for the relaxation of numerus clausus have been growing louder[975] and the above analysis is supportive of this point.

A caveat regarding the relevance of characterising chancel repair liability must also be identified, given the analysis of the effect of Land Registration on the third-party impact of chancel repair liability. Specifically, based on the above analysis, the binding effect of chancel repair liability is determined by whether or not it is registered at the Land Registry and whether the land in question is registered or unregistered land. Chancel repair does not

[975] J H Dalhuisen 'Moving from a Closed to an Open System of Proprietary Rights' (2001) 5 Edinburgh L Rev 273.

appear specifically in numerus clausus, which comprises proprietary rights (which traditionally have the potential to bind a purchaser of land (personal rights do not),[976] yet chancel repair liability does have the potential to bind purchasers despite not expressly appearing within numerus clausus and not being a restrictive covenant. Given this, the rigidity of numerus clausus again appears somewhat shaky.

The key points arising out of the analysis in this chapter which, in turn, have made chancel repair liability less elusive are noted below.

1) Chancel repair liability cannot be characterised successfully as a positive covenant and supports an argument it is not a proprietary right based on the analysis in this thesis.
2) Chancel repair liability exhibits similarities to the characteristics of a positive covenant attached to a right. An argument can be constructed that chancel repair liability manifests itself as a positive covenant attached to a right to worship by circumventing the orthodox rule that positive covenants do not bind successors in title. Ultimately, such an argument has not been tested and is likely to fail for a number of potential reasons (including the touch and concern requirement).
3) The binding effect of chancel repair liability is heavily governed by Land Registration rules. The characterisation of chancel repair liability as a positive covenant attached to a right is limited only to cases where a notice has not been entered on the register before 13 October 2013 and until a registrable disposition made for valuable consideration is completed by registration, or further in the case of unregistered land.
4) Uncertainty and problems associated with establishing the binding nature of chancel repair liability are reduced pursuant to the registration requirements under the Land Registration Act 2002.

[976] *Edlington Properties Ltd v J H Fenner & Co Ltd* [2006] 1 WLR 1583, 21.

The conclusion revealed by the characterisation provided in this chapter is that chancel repair cannot be successfully characterised as a positive covenant.

Chapter 6

Chancel repair liability and disclosure

Many of the issues in this thesis are affected by the discoverability of chancel repair liability and it is appropriate that a chapter dealing specifically with this issue should appear in this thesis.

The purpose of this chapter is to determine the extent to which chancel repair liability is discoverable by reasonable inquires and inspections. Further, the obligation on the buyer to discover chancel repair liability and the seller to disclose the same has also been analysed. This chapter focuses on the question of whether chancel repair liability is discoverable and what obligation exists (if any) for a buyer to discover it in the purchase of freehold property (having appropriate regard to whether or not the property is registered at the Land Registry or not) and this question has arisen throughout this thesis. A distinction is made between the registered and unregistered land context, where appropriate.

Further, the discoverability of chancel repair liability is important regarding the ascertainment of whether chancel repair liability is a proprietary right. As noted throughout this thesis, questions have been addressed regarding the existence, enforcement and third party impact of chancel repair liability when characterised as an existing proprietary right (specifically, as an easement and covenant) to determine whether chancel repair liability is a proprietary right.

The determination as to whether chancel repair liability is a proprietary right is in part dependent on the discoverability of chancel repair liability. Accordingly, therefore, determining whether chancel repair liability is discoverable by reasonable inquiries, inspection and the obligation on the buyer to discover and the seller to disclose the same is of great importance in determining whether chancel repair liability is a proprietary right.

This chapter is divided in to the following subsections:

i. Problems with discovering chancel repair liability
ii. Discoverability of Chancel Repair Liability
iii. Case law in support of the analysis
iv. Disclosure of Chancel repair liability
v. Conclusion

(i) Problems with discovering chancel repair liability

There are many practicable problems associated with seeking to discover chancel repair liability. As noted by their Lordships in *Aston Cantlow v Wallbank*, discovering chancel repair liability is not a straightforward task.[977] Typically, conveyancers rely on a handful of resources, including obtaining searches from commercial search providers or by performing a search at the National Achieves at Kew. The option of covering the risk by way of insurance is also available.

As noted above the Law Society Conveyancing Handbook 25th edition states 'where the liability is not recorded in the deeds consideration should be given as to whether it is appropriate to make specific enquires'[978] and notes that it is not easy to define with certainty those properties which are affected by liability since public records are incomplete.[979] In terms of guidance on the search process, the handbook states:

> 'Enquires may be made using a screening service available from a commercial provider. The results will state whether according to information in the possession of

[977] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [73].
[978] France Silverman, *Conveyancers Handbook* (25th edn, Law Society Sept 2018) para B10.6.11.
[979] ibid para B10.6.11.

> the provider the property is located in an area where the remains a potential to enforce chancel repair liability. The results are therefore not specific to the property. Property specific enquires may be made by conduction a person search or relevant records (such as Records of Ascertainment) held by the National Achieves. It is understood these records are incomplete'.[980]

The various search methods are discussed below.

Records of Ascertainment

As noted throughout this thesis, the records of ascertainment held at the National Archives provide a source of evidence of chancel repair liability. The extent to which chancel repair liability is discoverable from records of ascertainment is considered in this section.

As noted in Chapter 1, records of ascertainment are held at the National Achieve and will reveal evidence of a chancel repair liability attributed to land as a result of the release of tithe rent charges. Further, and as noted above, the Law Society Conveyancing Handbook states that 'where the liability is not recorded in the title deeds, consideration should be given as to whether it is appropriate to make enquiries'.[981] The point is that industry practice dictates that it is reasonable to expect a buyer (via their lawyer) to search the records. Searching the National Archives records to determine a chancel repair liability can prove a complex process. The National Archives produces guidance on the search procedure; however, this guidance is not comprehensive and provides limited details of the search process.[982] The process for determining the chancel repair liability for a target property as recorded in records of ascertainment involves a number of steps, which are set out below.

[980] ibid para B10.6.11.
[981] ibid para B10.6.11.
[982] National Archives, 'Chancel repair liabilities in England and Wales' (*Legal Records Information Leaflet 33*, 2016) <http://www.nationalarchives.gov.uk/help-with-your-research/research-guides/chancel-repair-liabilities-england-wales/> accessed 1 February 2015.

(i) Firstly, the name of the Church of England parish in which the property is situated at the time tithes/tithe rentcharges were extinguished needs to be identified.[983]

(ii) The name of the parish can then be used to search for the record of ascertainment relating to that parish using the National Achieves Website.

(iii) The record of ascertainment shows the tithe rent charge apportioned between the different classes of tithe rent charge; i.e. between Classes (a) to (d).[984] The schedules attached to the relevant records of ascertainment reveal a number of entries arranged in columns. Various plot numbers are listed under the heading 'Number in Instrument of Apportionment' and the corresponding chancel repair liability charge for each plot is noted in the neighbouring column.

(iv) The plot number of a target property must be identified. Tithe maps can be used to ascertain the plot number of a target property. Once the plot number has been determined, then the corresponding chancel repair liability for that plot can be read off the schedule. Tithe maps can also be viewed at the National Achieves.

(v) The calculation of chancel repair liability can then be performed. The total tithe rentcharge is shown at the top of the record of ascertainment in addition to the number of (old) pence in the total tithe rent chance. For each penny's worth of total tithe rent charged owed, a contribution of 1/(total tithe rent charge in old pence) is the amount that each holder of tithe rent charge has to pay in respect to the repair of the church chancel. The chancel repair liability is then split between the tithe rent charge classes which appear in the record of ascertainment (see Annex 1 for a worked example and example record of ascertainment).

[983] As in 1836. This is likely to have not changed.
[984] See Chapter 1 for the different types of tithe rentcharge.

The above process can be hampered with difficulties in identifying plot numbers on tithe maps and complexities in calculating the liability.

Searches

Another potential source of evidence for chancel repair liability which is relied upon is the results of chancel repair liability searches undertaken through specialist chancel repair liability search companies. The main problem with the search results of such companies is, however, that the search results are only able to confirm whether a property has a risk of chancel repair liability and are not conclusive regarding whether a property is affected. The search result will only show whether a property is in a parish which has a potential chancel repair liability 'based upon historical parish boundaries, third party data and the relevant Inland Revenue Indices'.[985] The extent of the material the search covers and, therefore, how exhaustive the results are and, further, how up-to-date the records are which are searched are also not revealed by the search providers. Further, such a search does not confirm either way conclusively whether property is subject to chancel repair liability; only whether there is a history in the parish of the liability. Clearly, simply because the search fails to reveal any history of chancel repair liability does not mean that a property is unaffected by chancel repair liability. Further, by the same token, a search result that returns recording no risk does not mean that the property is free from chancel repair liability.[986] There are further weaknesses regarding the search since it will only provide a result in respect of a specific point, specifically the postal address of the property. If a property spans a number of parish boundaries and comprises many acres of land, the search result will not accurate reflect the chancel repair liability for the full extent of the property.[987]

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[985] CLS Property Insight 'Buying and Selling Solutions, Chancel Repair Liability' (*CLSL*, 2016) <https://www.clsl.co.uk/buying-and-selling/chancel-repair-liability#risk> 1 March 2016.
[986] See J Naylor, 'The Law is an apse' (2007) 157 *New Law Journal* 7294.
[987] CLS Property Insight 'Buying and Selling Solutions, Chancel Repair Liability' (n 985).

Whilst the commercial search provided fails to produce sufficient conclusive evidence of whether a property is affected by chancel repair liability, the National Archives records show, as demonstrated in the above analysis and example, that chancel repair liability, as recorded within the records of ascertainment, is within the constructive knowledge of a seller and actual knowledge of a buyer. As industry guidance indicates a search at the National Archives is appropriate and a buyer can be deemed to have constructive knowledge of the matters referred to in their records because, as the example demonstrates, such matters are discoverable through reasonably inquiry and investigation.

Literature Review

There are a number of commentaries and articles on the discovery of chancel repair liability; however, many of these focus on the frustrations of practitioners in dealing with chancel repair liability rather than seeking to determine the exact disclosure obligations. The Law Society Conveyancers Handbook provides details of the steps that practitioners should take to discover chancel repair liability yet the same is lacking in judicial authority. The text by Derriman, 'Chancel Repair Liability; How to research it',[988] provides a basic, practical account of how to research chancel repair liability but stops short of listing the practical steps and key details in respect of determining chancel repair liability at the National Archive. Further, the Standard Condition of Sale (pre-printed standard conditions of sale incorporated into standard contracts for the sale of property)[989] is also relevant in many modern transactions as there are specific obligations on incumbrances to be disclosed which potentially include chancel repair liability. This chapter seeks to clarify the disclosure and discovery obligations on the parties to a transaction on the transfer of land. In doing this, the chapters will assist in

[988] Derriman, *Chancel Repair Liability: How to research it?* (Wildy, Simmonds & Hill Publishing 2006).
[989] The Standard Conditions of Sale are a set of conditions typically incorporated into contracts for sale for residential property.

determining the success of the elements of the characterisation of chancel repair liability which rest on the discoverability of chancel repair liability.

The registered/unregistered land factor

Whether the property is registered or not at the Land Registry is also relevant in the discussion of the significance of the discoverability of chancel repair liability.

As noted above from 13 October 2013, a right relating to the repair of the chancel of a church is no longer an interest which overrides first registration and the disposition of a registered title.[990] A buyer will only generally be bound by liability if it has been protected by an entry on the register of title or, in the case of unregistered land, a caution against first registration has been registered or the liability is mentioned in the title deeds.[991]

For registered land, where a notice has not been entered on the register before 13 October 2013, liability for chancel repair will continue until a registrable disposition made for valuable consideration is completed by registration (pursuant to s.29 Land Registration Act 2002).[992] Accordingly, a purchaser for the value of registered land should not be bound by chancel repair liability and, therefore, discovering whether chancel repair liability exists should not require anything further than considering the registers of title of the property to see whether a notice has been entered as part of a conveyancer's usual due diligence and title checks.

[990] See the Land Registration Act 2002, s117, schs 1 and 3.
[991] Land Registry, 'Overriding interests that lost automatic protection in 2013' (Practice Guide 66, Land Registry April 2018).
[992] ibid para 5; France Silverman, *Conveyancers Handbook* (25th edn, Law Society Sept 2018) para B10.6.11.

In the case of unregistered land, on first registration after 12 October 2013, the estate owner will hold free from chancel repair liability unless notice of the liability is entered on the register at the time of first registration.

The Land Registry states that, where the land was registered after 12 October 2013: 'Prior to first registration the legal owner of the land will be bound by any such interests (i.e. chancel repair liability) because each of them (i.e. including chancel repair liability) is a legal interest. On first registration they will hold the estate free of such interests unless they are protected by notice at the time of first registration' and where the land was registered before 13 October 2013: 'When an application is made for first registration, the registrar will enter the burden of such an interest (i.e. chancel repair liability) which appears from their examination of the title to affect the registered estate (rule 35 of the Land Registration Rules 2003)'.[993]

The point is that the discoverability of chancel repair liability is relevant, given the above uncertainty. Although not tested by the courts, the scope for chancel repair liability remains binding. The courts have, however, yet to consider whether it may be possible for an application to be made to alter the register to enter a notice where the proprietor has taken free of the interest on first registration or following the registration of a disposition for valuable consideration.

The Land Registry state, in their practice guide 66, referring to chancel repair liability, that, where it is not protected by notice or caution against first registration before 13 October 2013, it will not 'automatically cease to exist on that date'. It states further:

> 'The courts have still to consider if and when it may be possible after 12 October 2013 for the holder of the interest to have the register altered so that a notice is entered where the registered proprietor has taken free of the interest following first registration or following the registration of a disposition for valuable consideration. They have also still to consider whether indemnity may ever be payable where the

[993] Land Registry, 'Overriding interests that lost automatic protection in 2013' (Practice Guide 66, Land Registry April 2018) para 5.

> register cannot be altered in this way. HM Land Registry will still accept applications for the registration of notices to protect overriding interests that lost their automatic protection after 13 October 2013 and will not check whether the registered proprietor has changed since this date before proceeding with the application'.[994]

Given the Land Registry approach and untested technical argument[995] that a holder of a chancel repair liability interest may claim (to have the register altered so that a notice is entered where the registered proprietor has taken free of the interest following first registration or following the registration of a disposition for valuable consideration), establishing the chancel repair liability position and disclosure obligation is relevant.

(ii) Discoverability of Chancel Repair Liability

The obligation on a seller to disclose chancel repair liability and the obligation on a buyer to discover the same are discussed below; however, first, a brief discussion of the doctrine of notice is appropriate. The doctrine of notice is one element of unregistered conveyancing as it has operated since 1925.[996]

The doctrine of notice

Under the doctrine of notice, a bona fide purchaser of a legal estate for value takes priority over any pre-existing equitable interest (which is not registrable as a land charge), provided they did not have actual, constructive or imputed notice of their existence.[997]

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[994] ibid para 5.
[995] Referred to below as the 'untested technical argument'.
[996] Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade The Law of Real Property* (8th edn, Sweet & Maxwell & Thomson Reuters 2012) para 8-004.
[997] In many conveyances, the doctrine of notice will not be relevant, as overreaching will generally transfer the beneficiaries' interest in the land to the proceeds of sale. *City of London Building Society v Flegg* [1988] AC 54.

As noted by the Law Commission, as 'a general principle, the doctrine of notice, which still has a residual role in relation to the priority of certain interests in unregistered land, has no application whatever in determining the priority of interests in registered land'.[998] Whether or not a disponee of an interest in registered land is bound by a prior interest is determined by the principles set out in the Land Registration Act 2002. As the Law Commission note further, 'Under those rules … issues as to whether that disponee had knowledge or notice of a prior interest, or whether he or she acted in good faith, are irrelevant'.[999]

In unregistered conveyancing, however, notice is still relevant 'on an application for first registration following a conveyance that is required to be registered'.[1000] The question as to whether the purchase took free of a right over the land because he was a *bona fide* purchaser will have to be determined by the Land Registry when the registrar registers the title. This is because it 'will affect the entries he makes on the title'.[1001] Issues of priority are settled on first registration, pursuant to unregistered conveyancing principles.

A purchaser of a legal estate for value without notice is 'an absolute unqualified unanswerable defence' against the claims of any prior equitable owner of incumbrancer.[1002] Under the doctrine of notice, a *bona fide* purchaser of a legal estate for value takes priority over any pre-existing equitable interest (which is not registrable as a land charge), provided that they did not have actual, constructive or imputed notice of their existence.[1003] [1004] In short, for the

[998] Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No. 271, 2001) para 5.16; Charles Harpum, *Megarry & Wade's The Law of Real Property* (6th edn, Sweet & Maxwell 1999) para 6-105 (where the authorities are collected); Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade The Law of Real Property* (8th edn, Sweet & Maxwell & Thomson Reuters 2012).
[999] Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No. 271, 2001) para 5.16 (Subject to a handful of exceptions).
[1000] Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade The Law of Real Property* (8th edn, Sweet & Maxwell & Thomson Reuters, 2012) para 8-006.
[1001] ibid para 8-006.
[1002] *Pilcher v Rawlins* (1872) 7 Ch App 259, 269 (James LJ); Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade The Law of Real Property* (8th edn, Sweet & Maxwell & Thomson Reuters, 2012) para 8-005.
[1003] In many conveyances, the doctrine of notice will not be relevant, as overreaching will generally transfer the beneficiaries' interest in the land to the proceeds of sale. *City of London Building Society v Flegg* [1988] AC 54.
[1004] As noted above the doctrine of notice has no application in registered land where priority is determined by a separate regime. For a purchaser to acquire the land free of the pre-existing equitable interest they must prove that they are a bona fide purchaser of a legal estate for value without notice.

purchaser to take the legal estate free from the equitable interest, they must not have notice (knowledge) of the interest. Where a purchaser is aware, or should have been, of the equitable interest, this affects their conscience and they are then bound by the interest. There are three types of notice: actual notice, constructive notice and imputed notice.[1005]

The above analysis however only applies to transactions prior to 13 October 2013 because, after this date, unless protected by a caution against first registration, at the time of first registration, the buyer will hold the estate free of such interests. Knowledge will be irrelevant.

Doctrine of Notice does not apply to registered land

The discussion of the question of notice of chancel repair liability is relevant only to unregistered land and not to registered land. Notice is not relevant in the purchase of registered land. Reference to s199 of the Law Property Act 1925 relates only to purchase of land with unregistered title.

As the Law Commission state in Land Registration for the Twenty-First Century: A Consultative Document:[1006]

> '… issues of good faith and notice are, subject to certain statutory exceptions, irrelevant in relation to registered land … However, we consider that the matter should be placed beyond doubt by a statement in the Act of the general principle that the doctrine of notice should have no application in dealings with registered land except where the Act expressly provides to the contrary'.

[1005] Actual notice is where the purchaser was consciously aware of the existence of the equitable interest. Constructive notice - Constructive notice is concerned with what the purchaser or mortgagee ought to be aware of or what they would have discovered by making reasonable inquiries. Constructive notice is set out in Law of Property Act 1925, s199(1)(ii) which provides that a purchaser will be fixed with notice if 'it is within his own knowledge or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him'. Imputed notice is where a purchaser is deemed to know all that his agent knows or has constructive notice of under Law of Property Act 1925, s199 (1)(ii)(b).

[1006] Law Commission, *Land Registration for the Twenty-First Century*: *A Consultative Document* (Law Com No 254, 1998) para 3.44.

The Law Commission's view is that there is no place for concepts of knowledge or notice in registered land. This is because, in legal practice, if it were provided that unregistered rights in or over registered land were binding because a purchaser had actual knowledge of them, it would be very difficult to prevent the introduction by judicial interpretation of doctrines of constructive notice. In other words, if actual knowledge sufficed, 'the question would inevitably be asked: why not wilful blindness as well? Further they note that the boundary between actual knowledge and constructive notice is not sufficiently to clear and 'incapable of precise definition'.[1007]

The Law Commission states further:

> 'We do however acknowledge that there is a need for some form of "safety valve" in the registration system, for cases where parties cannot reasonably be expected to register their rights. This requirement is substantially met by the category of overriding interests'.[1008]

The buyer of registered land will take subject to all rights in existence at the time of purchase as stated in s29 LRA 2002, which include overriding rights and rights which have been entered on the register. S.29(2)(a)(ii) Land Registration Act 2002 gives priority to overriding interests even though they are not protected on the register. The categories of overriding interests are set out in Schedule 3 of the Act (which replaced the overriding interests which existed under s.70 Land Registration Act 1925). Overriding interests included chancel repair liability until it lost its overriding status in 2013.[1009]

As stated in S29(1) LRA 2002, if:

> 'a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the

[1007] ibid paras 143-144
[1008] ibid para 3.47. Overriding interest many bind without being registered.
[1009] Overriding interest include leases under 7 years, legal easements and profits a prendres, public rights of way, local land charges, mines and minerals, franchises, manorial rights, a right to rent reserved to the Crown, non statutory rights in respect of an embankment or sea or river wall, right to payment in lieu of a tithe, a right in respect to the repair of a church. In addition, under, Land Registration Act 2002, sch 3, para 2 any interest belonging to a person in actual occupation.

> interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration'.

Accordingly, pursuant to S29(2), for the purposes of subsection (1), the priority of an interest is protected in any case, if the interest is (i) a registered charge or the subject of a notice in the register, or (ii) falls within any of the paragraphs of Schedule 3, or (iii) appears from the register to be excepted from the effect of registration.

In short, if chancel repair is not on the registered title, the buyer will not be bound by it (subject to the point noted above, which has yet to be tested). The seller will not be obligated to disclose (as is the case for unregistered land prior to October 2013).

Chancel repair liability did fall within the paragraphs of Schedule 3; however, Section 29(2)(a) was modified in 2008 by the Land Registration Rules 2003,[1010] such that Sch. 3 paras. 10-14 ceased to have effect at the end of the decade beginning on the day on which Schedule 3 (as well as schedule 1) of the Act come into force; in other words, October 2013. A key question is the issue of whether chancel repair liability constitutes a right that overrides the register and is, therefore, binding without being noted on the register. It is, however, clear that chancel repair liability is no longer an overriding interest (however, it may effectively have this effect, based on the 'untested' argument referred to above).

<u>Summary</u>

As noted above, from 13 October 2013, a right relating to the repair of the chancel of a church is no longer an interest which overrides first registration and the disposition of a registered title.[1011] A buyer will only generally be bound by liability if it has been protected by an entry

[1010] Land Registration Rules 2003, SI 2003/1417, r196B (as inserted by The Land Registration (Amendment) Rules 2008 SI 2008/1919, rr 2(1) and 4(1), sch 1, para 63).
[1011] See the Land Registration Act 2002, s117, schs 1 and 3.

on the register of title or, in the case of unregistered land, a caution against first registration has been registered, or the liability is mentioned in the title deeds.[1012]

As noted above, the doctrine of notice is only relevant in respect of unregistered land. In the context of chancel repair liability, however, to protect the interest (after Oct 2013) requires a caution against first registration to be registered.[1013] If a caution is not registered, then the buyer of unregistered land takes free from chancel repair liability (chancel repair liability has now lost its overriding status).

Notice of chancel repair liability (in terms of the notice of a *bona fide* purchase for value after Oct 2013 when chancel repair liability lost its overriding status) is, therefore, irrelevant in the unregistered land context. Its binding effect is determined by whether it is protected by way of a caution against first registration.

There are, therefore, very limited circumstances where the doctrine of notice may be applicable. One exception is potentially in respect of the untested technical argument referred to above.[1014] If this finds favour with the court, chancel repair will, in effect, not require protection by way of a caution to be binding.

The seller's duty to disclose chancel repair liability is discussed in further detail below.

[1012] Land Registry, 'Overriding interests that lost automatic protection in 2013' (Practice Guide 66, Land Registry April 2018).
[1013] The effect of a caution against first registration is very limited. It entitles the cautioner to be given notice by the registrar when there is any application for first registration affecting the land comprised in the caution against first registration (Land Registration Act 2002, s16) or when the owner of the legal estate to which the caution relates applies to cancel the caution (Land Registration Act 2002, s18(3))). On receipt of the notice, the cautioner must then, within the prescribed notice period (Land Registration Rules 2003, r197), decide whether to object to the application for first registration.
[1014] Specifically that 'The courts have still to consider if and when it may be possible after 12 October 2013 for the holder of the interest to have the register altered so that a notice is entered where the registered proprietor has taken free of the interest following first registration or following the registration of a disposition for valuable consideration'. Land Registry, 'Overriding interests that lost automatic protection in 2013' (Practice Guide 66, Land Registry April 2018) para 5.

Seller's duty to disclose

The starting point for a meaningful discussion of the seller's duty to disclose is *caveat emptor*: 'let the buyer beware'. *Caveat Emptor* is a contract law principle which requires the buyer to find out as much about a property as they need before proceeding, the onus being on the buyer. There are, however, exceptions to the doctrine and these include an obligation on the seller to disclose the latent defects with the property.[1015] A latent defect is a defect with the property which is not apparent.[1016] For example, in *Yandle & Sons v Sutton*,[1017] it was held that if, on inspection of a property, a right of way was not discoverable, then this would constitute a latent defect. It was held, in this case, that what constitutes a latent defect is a matter which does not 'arises either to the eye, or by necessary implication from something which is visible to the eye'.[1018]

There is some uncertainty regarding whether a seller will not need to disclose a defect, however, if the buyer has constructive notice of the defect.[1019] The Law Society conveyancing handbook states 'A defect is not latent if the buyer has constructive notice of it under Law of Property Act 1925, s198'.[1020]

However, S198 of the Law of Property Act 1925 applies to instruments or matters in any register kept under the Land Charges Act 1972 or the local land charges register. These are not applicable to chancel repair liability, which are not recorded in these registers.

[1015] *Peyman v Lanjani* [1985] Ch 457, [1984] 3 All ER 703, 496, 497; *Reeve v Berridge* (1888) 20 QBD 523, 52 JP 549. If the seller's duty to disclose was excluded this would means that if chancel repair liability is a latent defect the obligation on the buyer to discover should be easy because all the buyer has to do is to ask the seller. However, the sellers can exclude their liability to disclose latent defects they don't know about or ought not to know about.

[1016] *Halsbury's Laws of England* (5th edition, Lexis Nexis, 2012) vol 23, para 61.

[1017] *Yandle & Sons v Sutton* [1922] 2 Ch 199, 91 LJ Ch 567.

[1018] ibid 210.

[1019] If the buyer has constructive notice of the defect then it will not be a latent defect pursuant to Law of Property Act 1969, s24.

[1020] France Silverman, *Conveyancers Handbook* (24th edn, Law Society Sept 2018) para 5.2.4. A buyer who enters into a contract knowing of an irremovable incumbrance impliedly agrees to take subject to that incumbrance (i.e. cannot rescind because of it) but the effect of s24 is that mere registration under Land Charges Act 1972 is not knowledge for this purpose.

The Law Commission note:

> 'The courts have long rejected any equation between the patency of a defect in title and the fact that the buyer might have constructive notice of it. Liability to disclose latent defects is apparently strict and is not confined to defects known to the seller, though a seller can exclude his or her liability for defects in title but only if they are ones of which he or she neither knows nor ought to have known. The precise nature of the seller's obligation to disclose irremovable latent defects in title prior to contracting has never been definitively settled'.[1021]

As noted above, in the Law Commission's view, liability to disclose latent defects is apparently strict and not confined to defects known to the seller, although a seller can exclude his or her liability for defects in title but only if they are ones of which he or she neither knows nor ought to have known.[1022] The precise nature of the seller's obligation to disclose irremovable latent defects is subject to debate. The Law Commission noted 'it is probably best regarded as an open contract obligation that the property is either free of such defects, or that they have been disclosed. If a seller fails to make such disclosure, the buyer may terminate the contract'. The Law Commission reference Charles Harpum's article, 'Selling without Title: A Vendor's Duty of Disclosure?', in which he states 'it is suggested that the vendor's duty to disclose latent defects in title is an open contract obligation'.[1023] In other words, over time, as a result of common law or statute, the position is that the property is either free of such defects, or that they have been disclosed. If a seller fails to make such disclosure, the buyer may terminate the contract.[1024]

The Law Commission's view is that the obligation to disclose latent defects in title applies as much to registered land as it does to unregistered land.[1025] The Law Commission state:

[1021] Law Commission, *Land Registration for the Twenty-First Century*: *A Consultative Document* (Law Com No 254, 1998) para 11.32.
[1022] *Caballero v Henty* (1874) LR 9 Ch App 447.90; *Becker v Partridge* [1966] 2 QB 155, 171, 172.
[1023] Charles Harpum, 'Selling without Title: a Vendor's Duty of Disclosure?' (1992) 108 LQR93 280, 332.
[1024] Law Commission, *Land Registration for the Twenty-First Century*: *A Consultative Document* (Law Com No 254, 1998) para 11.32.
[1025] ibid 11.32.

> 'There is no intrinsic reason why it should not. In practice, a purchaser will normally see an office copy of the register of the seller's title prior to the exchange of contracts, and this will amount to disclosure of any irremovable incumbrances (such as easements or restrictive covenants) which are entered on the register. Where the registered estate is a lease, a copy of the lease itself will also invariably be produced for inspection by the intending assignee prior to any contract'.[1026]

The Law Commission state: 'Where the property is subject to any overriding interests, they must be disclosed unless the buyer already knows of them or they are patent'.[1027] As the law Commission stated 'We can see no reason to change the rules which govern a seller's obligations of pre-contractual disclosure as they apply to registered land, and we therefore make no recommendations for reform'.[1028]

Accordingly, on this basis, the seller is under an obligation to disclose chancel repair liability if it is a latent defect (whether the land is registered or unregistered). As has been discussed above, complying with the obligation to disclose chancel repair liability is difficult for a buyer. As the Law Commission state: 'to ascertain whether a property is subject to a liability to pay for chancel repairs, it may be necessary to search the tithe records which are kept in several different branches of the Public Record Office. As those records are incomplete, there is in fact no certainty that a property is free from liability even when such a search has been made'.[1029]

Remedies for the non-disclosure of latest defects

As the Law Commission state, 'a seller can exclude his or her liability for defects in title but only if they are ones of which he or she neither knows nor ought to have known'.[1030] A sale

[1026] ibid 11.32.
[1027] ibid 11.33.
[1028] ibid 11.33.
[1029] ibid para 4.13.
[1030] ibid para 11.32; *Rignall Developments Ltd v Halil* [1988] Ch 190. For a discussion of the authorities, see Charles Harpum, 'Exclusion Clauses and Contracts for the Sale of Land' [1992] CLJ 263, 298.

contract may provide that the seller is not liable for any latent defects of which the seller is unaware or could not reasonably be aware. The contract cannot, however, absolve the seller from liability for the non-disclosure of latent defects of which the seller is, or ought reasonably to have been, aware. Even if the seller's failure to disclose is without fault, the buyer may have a remedy.[1031]

In a standard sale contract (adopting Law Society standard conditions of sale), if the defect is discovered between exchange of contracts and completion, the buyer has a number of options. He may refuse to complete - if the defect is substantial, the defect may mean the buyer will not be getting what the buyer had contracted to buy. In this case, the seller may be unable to enforce the contract. If the defect is not substantial, either party may be able to get an order for the specific performance of the contract, forcing the other to complete, but this may be subject to an abatement of the purchase price to reflect the effect of the defect on the value of the property. Further, it is open to the buyer to claim for damages for breach of the implied term that good title will be given (including implied covenants of title).

The effect of the non-disclosure of latest defects post-sale is that the seller may be liable for failing to disclose the latent defect. The sale contract may provide that the seller is not liable for any latent defects of which the seller is unaware or could not reasonably be aware. The contract, however, cannot exclude the seller from liability for the non-disclosure of latent defects of which they are or ought reasonably to have been aware. Even if the seller's omission to disclose is without fault, the buyer may have a remedy for: 1) Compensation if the failure to disclose is not substantial. In such a case, the buyer must still complete; however, the price may be reduced as compensation for the defect; 2) Rescission for substantial non-disclosure if the failure to disclose has the effect of substantially depriving the buyer of getting

[1031] Pursuant to the Standard Conditions of Sale being incorporated into the sale contract.

what the buyer contracted to buy; and/or 3) Action for misrepresentation: if a statement or conduct conveys a false/wrong impression, the buyer may have an action in misrepresentation. The court has the power to award damages to a party that has been induced to enter into a contract by a misrepresentation made by the other party, and has consequently suffered loss.[1032] There will, however, be no action if the party that made the misrepresentation can prove (i) that it had reasonable grounds to believe, and (ii) that it did believe, up until the time when the contract was made, that the facts represented were true.[1033]

The binding effect of chancel repair liability is now heavy determined by whether it is registered by a notice of caution pursuant to the Land Registration Act 2002. The above analysis in relation to latent defects is, therefore, only relevant in respect of liability for chancel repairs in connection with transactions which were completed prior to 13 October 2013.

The next section considers some of the key case law in support of the points and analysis presented in the above sections.

(iii) Caselaw in support of the analysis

The above points and analysis are supported by the following case law. In *Rignall Developments Ltd v Halil*,[1034] it was affirmed that a latent defect was one which was not

[1032] Misrepresentation Act 1967, s2(1).
[1033] Jonathan Witt, 'Caveat emptor – buyer, solicitor and surveyor beware' (*Lexology*, November 2011).
<https://www.lexology.com/library/detail.aspx?g=2f5abd59-2ccf-4695-863b-d2c75d749f5a> accessed Feb 2019.
[1034] *Rignall Developments Ltd v Halil* [1988] Ch 190, [1987] 3 All ER 170.

removable; in other words, it was something which could not be discharged by way of payment. As stated in *Rignall Developments Ltd v Halil* by Millett J:

> 'In the case of an open contract for the sale of land, a purchaser cannot object to an irremovable encumbrance of which he was aware at the date of the contract. An encumbrance is irremovable if the owner of the land is not entitled as of right to procure its discharge by the payment of money'.[1035]

Or in other words, based on this analysis, a buyer can object to an irremovable encumbrance if they were unaware of it. A latent defect is an incumbrance of which a buyer was unaware (otherwise just a defect) and the buyer can therefore, based on this analysis, arguably object to it if the latent defect is irremovable or, in other words, cannot be discharged by a financial payment. In effect, based on this analysis, the requirement to object to a latent defect requires that it is irremovable or, in other words, cannot be discharged by way of a financial payment.[1036] The question of whether chancel repair liability is a latent defect and can be discharged by way of a financial payment is analysed in the next section.

<u>Chancel repair liability discharged by payment</u>

It should be noted that it is possible for a parishioner to buy out their chancel repair liability from the church.[1037] The result of this is that chancel repair liability could not be classified as a latent defect, based on the analysis in *Rignall Developments Ltd v Halil*.[1038] However, whether or not a parishioner has the right to compound chancel repair liability turns on the view, decision and policy of each diocese.[1039] On this basis, chancel repair liability has been analysed in this chapter from the perspective of both a latent and non-latent defect.

[1035] ibid 196.
[1036] ibid 200.
[1037] Diocese of Guildford 'Notes of Guidance by the Registrar of the Diocese' Chancel Repair Liability' (2016) <www.coeguidford.org.uk> 1 March 2016.
[1038] Rignall Developments Ltd v Halil [1988] Ch 190, [1987] 3 All ER 170.
[1039] A diocese is an administrative area of the Church of England in England. There are 42 in England each governed by a Bishop.

Evidence for the fact that chancel repair liability may be compounded is found in Section 52 of the Ecclesiastical Dilapidations Measure 1923. As noted in Wallbank, it was stated:

> 'Section 52 of the Ecclesiastical Dilapidations Measure 1923 provided a procedure whereby lay rectors liable for chancel repairs could compound their liability and thereby obtain a release from it. The procedure required there to be consultation with the PCC of the parish, the obtaining of approval from the Diocesan Dilapidations Board and payment of the requisite sum to the Diocesan Authority'.[1040]

Section 52 of the Ecclesiastical Dilapidations Measure 1923 requires that the sum required for compounding chancel repair liability is the cost of the existing repairs plus future annual maintenance costs plus the cost for insurance for repair.[1041] The parochial church council and the Diocesan Dilapidations Board (now the Diocesan Board of Finance) may not necessarily, however, approve the compound of the chancel repair liability.[1042] It therefore cannot be determined that chancel repair liability can unequivocally be discharged by way of payment and there is scope for chancel repair liability existing potentially as a latent defect. It is arguably more likely, however, provided that a figure can be agreed, that chancel repair liability would be compounded and, in these circumstances, chancel repair liability will not be a latent defect.

<u>Is the seller liable for latent defects of which they are unaware? And buyer's reciprocal exclusion</u>

As noted above, the Law Commission stated:

> 'The courts have long rejected any equation between the patency of a defect in title and the fact that the buyer might have constructive notice of it. Liability to disclose latent defects is apparently strict and is not confined to defects known to the seller, though a seller can exclude his or her liability for defects in title but only if they are

[1040] Representative Body of the Church in Wales v Tithe Redemption Commission; Plymouth Estates Ltd v Tithe Redemption Commission [1944] AC 228, [1944] 1 All ER 710, 240; Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37, [2004] 1 AC 546 [131].

[1041] Ecclesiastical Dilapidations Measure 1923, s52(2). See also The Church of England, Archbishops Council 'Compounding Chancel Repair Liability (2016) <https://www.churchofengland.org/clergy-office-holders/pastoralandclosedchurches/chancel-repair-liability/compounding-chancel-repair-liability.aspx> 1 March 2016.

[1042] Depending on the policy and agreeing a figure.

> ones of which he or she neither knows nor ought to have known. The precise nature of the seller's obligation to disclose irremovable latent defects in title prior to contracting has never been definitively settled'.[1043]

In circumstances where chancel repair liability is a latent defect, a seller will be liable to disclose chancel repair liability even if they were unaware that it affected their property; however, there are some exceptions, which are noted below.

In short, the seller is liable for latent defects regarding the property of which they are unaware; however, their liability may be excluded pursuant to an exclusion provided in the contract. In *Becker v Partridge*,[1044] it was held that liability to disclose latent defects was not limited to those known to the seller. Liability can, however, be excluded by the seller for latent defects but only when the latent defects are ones which the seller did not know about and provided that they should not have known about them.[1045]

The principle was further recognised by the Law Commission in their report, Conveyancing in the 21st Century. They state:

> 'Liability to disclose latent defects is apparently strict and is not confined to defects known to the seller, Becker v Partridge. Though a seller can exclude his or her liability for defects in title but only if they are *ones* of which he or she neither knows nor ought to have known'.[1046]

In other words, the latent defects which the seller is required to disclose are ones discoverable through reasonably inquiry and inspection. These are not necessarily the latent defects which the seller has actual knowledge of but include those which the seller has constructive knowledge of (this point is supported by the case of *Nottingham Patent Brick and*

[1043] Law Commission, *Land Registration for the Twenty-First Century*: *A Consultative Document* (Law Com No 254, 1998) para 11.32.
[1044] *Becker v Partridge* [1966] 2 QB 155, [1966] 2 All ER 266.
[1045] ibid 172; *Rignall Developments Ltd v Halil* [1988] Ch 190, [1987] 3 All ER 170.
[1046] Law Commission, *Land Registration for the Twenty-First Century*: *A Consultative Document* (Law Com No 254, 1998) para 11.32.

Tile Co v Butler, discussed below). The point is that, in circumstances in which chancel repair liability is recorded in the records of ascertainment, based on the above analysis, it is within the constructive knowledge of the seller and, therefore, the seller cannot exclude liability in the contract for failing to disclose the same.

There is a reciprocal exclusion available in respect of the buyer. Specifically, there is no obligation on the seller to disclose latent defects of which the buyer is aware.[1047] As Megarry notes, in the Law of Real Property:[1048]

> 'A purchaser under an open contact is held to have waived his right to object to an incumbrance if (1) he knew it was irremovable and (ii) despite this he contracted to purchase the property or took some other step inconsistent with his right to terminate the contract such as entering into possession (*Re Gloag and Millers Contract*[1049]) or exercising some other right under the contract (*Aquis Estates Ltd v Minton*)'[1050]

The question is: is the buyer equipped with actual or constructive knowledge of chancel repair liability?

In respect of unregistered land, pursuant to s199 of the Law of Property Act 1925, the buyer effectively has notice of those matters he would have discovered if he had made reasonable inspections and inquires (or his solicitor had done the same) and this applied to purchases before and after the act came into force.[1051] As noted above, however, it is important to be clear that the above discussion (and analysis of knowledge referred to in the caselaw below) is relevant only to unregistered land and not to registered land. Notice is not relevant in the purchase of registered land. Reference to s199 of the Law Property Act 1925 relates only to the purchase of land with unregistered title. The buyer of registered land will take subject to

[1047] The above statement also needs to be reconciled with the decision in *Re Gloag and Millers Contract* (1883) 23 Ch D 320, 327 and *McGrory v Alderdale Estate Co Ltd* [1918] AC 503, 87 LJ Ch 435.
[1048] Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade The Law of Real Property* (8th edn, Sweet & Maxwell & Thomson Reuters, 2012) para 15.083.
[1049] *Re Gloag and Millers Contract* (1883) 23 Ch D 320, 327.
[1050] *Aquis Estates Ltd v Minton* [1975] 1 WLR 1452.
[1051] Law of Property Act 1925, s199.

all rights in existence at the time of purchase as stated in s29 LRA 2002, which include overriding rights and rights which have been entered on the register.

If chancel repair liability is not a latent defect

If chancel repair liability is not a latent defect, then *caveat emptor* will apply and a seller will not be required to disclose any incumbrances affecting the property. However, the effect of *caveat emptor* has been softened. The seller and buyer's knowledge is relevant to both the effect of latent defects and incumbrances generally. Some of the key cases dealing with the buyers and sellers' knowledge and notice of incumbrances are referred to below. This case of *Nottingham Patent Brick and Tile Co v Butler* discusses the seller's knowledge of incumbrances. The cases of *Forsey and Hollebone's Contract* (1927) and *Rignall Developments Ltd v Halil* (1988)[1052] deal with the buyer's knowledge.

Nottingham Patent Brick and Tile Co v Butler (1885)

In *Nottingham Patent Brick and Tile Co v Butler*,[1053] a property was transferred subject to a condition that it was sold subject to 'any matter or thing affecting the same [the transfer], whether disclosed at the time of sale or not'.

The property was subject to restrictive covenants which were not disclosed to the buyer and one of the questions for the court was whether the above provision in the contract precluded objection to the covenants. The court held that the provision did not preclude the seller from

[1052] *Forsey and Hollebone's Contract, Re* [1927] 2 Ch 379, 25 LGR 442; *Rignall Developments Ltd v Halil* [1988] Ch 190, [1987] 3 All ER 170.
[1053] *Nottingham Patent Brick and Tile Co v Butler* (1885) 15 QBD 261.

disclosing the encumbrance 'of which he is aware', only those of which he is 'unaware', citing Dart on Vendors and Purchasers,[1054] as their authority.

The decision was supported further by Wills J, who stated that it would be in conflict with equity if the seller were aware of the property being subject to incumbrances and the incumbrances were not disclosed to the buyer. As stated by Wills J:

> 'It would be nothing short of a direct encouragement to fraud if a vendor were at liberty by a condition of this kind to sell to a purchaser as an absolute and unburdened freehold a property which he knew to be subject to liabilities which would materially reduce its market value'.[1055]

Wills J stated further that a solicitor could not better his client's position by being ignorant of the information which was available to him. Wills J stated:

> 'I cannot help believing (in reference to the Defendants solicitor he) was under the mistaken impression that he could better the position of the vendor by abstaining from making himself acquainted with the contents of the earlier deeds in his possession, and open to his perusal'.[1056]

It is, therefore, clear that, even in the case of non-latent defects, the degree of knowledge expected of the seller was greater than that actual knowledge and, arguably, of a constructive nature. In other words, it is the knowledge available from reasonable enquiry and inspection and what the seller ought reasonably to have known about. Further, the knowledge of the seller's solicitor was treated as the same as the seller's.

Forsey and Hollebone's Contract (1927)

In *Forsey and Hollebone's Contract* (1927),[1057] a purchaser bought a property. It was a term of the property contract that it was bought 'free from incumbrances', except as mentioned therein. Following the exchange of contracts, but prior to completion, an encumbrance was

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[1054] Joseph Henry, *Dart's Treatise on the Law and Practice Relating to Vendors and Purchasers of Real Estate* (5th Edition, London: Stevens and Sons 1905) 156.
[1055] *Brick and Tile Co v Butler* (1885) 15 QBD 261, 271.
[1056] ibid 271.
[1057] *Forsey and Hollebone's Contract, Re* [1927] 2 Ch 379, 25 LGR 442.

revealed in the local land changes register. Neither the seller nor the buyers were aware of the encumbrance at the time when the contracts were exchanged. The question for the court was whether the buyer could avoid the contract on the basis that the incumbrance was not disclosed and the contract stated that the property was sold free from encumbrances.

In Lord Hanworth's judgment, the legal position was governed by s198 of the Law of Property Act 1925, which stated that the registration of any matter or instrument in a local land charges register provided 'actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected'.[1058] Pursuant to this section, both parties must be deemed to have entered into the contract with actual notice of the encumbrances affecting the same. Further, it was necessary for the actual notice referred to in this section to be equated with actual knowledge. This took place and therefore the buyer could not avoid the contract and was bound by the incumbrance in the local land charges register because they had actual notice of it.[1059] However it was disputed in the later case of *Rignall Developments Ltd v Halil* (1988)[1060] whether it was correct to equate actual knowledge with actual notice.

Rignall Developments Ltd v Halil (1988)[1061]

In *Rignall Developments Ltd v Halil*,[1062] a property was sold at auction. The contract incorporated the National Conditions of Sale as well as other general and special conditions. The conditions included a condition that the purchaser was deemed to purchase the property with knowledge of 'any matter which might be disclosed by a Search and/or Enquiries of the relevant Local Authority' either at the date of contract exchange or completion. The purchaser did not complete the transaction after the exchange of contracts, as they

[1058] Law of Property Act 1925, s198.
[1059] *Forsey and Hollebone's Contract, Re* [1927] 2 Ch 379, 25 LGR 442, 387.
[1060] *Rignall Developments Ltd v Halil* [1988] Ch 190, [1987] 3 All ER 170.
[1061] ibid.
[1062] ibid.

subsequently discovered an objectionable entry in the local land charges register. The key question for the court was whether the buyer was obligated by these provisions.

The court criticised the equating of actual notice with actual knowledge as had taken place in *Forsey*; however, the decision was not overruled. In *Rignall Developments Ltd v Halil* [1988] Ch 190, it was stated:

> 'If a purchaser knows, or even mistakenly believes, that he cannot expect to obtain a title free from incumbrances, and yet enters into a contract of purchase on that basis, the inference is obvious. But the inference depends on his state of mind, which may be affected by error, or ignorance, or forgetfulness. Notice (even actual notice), however, has nothing to do with the person's state of mind, and is not affected by such matters. In the absence of knowledge, notice cannot support the necessary inference'.[1063]

The point is that the judgment in *Rignall* criticised the decision in *Forsey*, that equating actual notice with actual knowledge did not accommodate the state of mind of a buyer in all circumstances. Arguably, this criticism can, however, be rejected. Certainty as to knowledge can be achieved by way of reference to fixed and objective criteria, which can be actual notice. It is because notice (even actual notice), has nothing to do with the person's state of mind, and is unaffected by such matters that it provides objective criteria through which to establish an individual's knowledge. It is on this basis that equating notice with knowledge remains a sound argument.

The undesirability of uncertainty surrounding the seller's knowledge is a point recognised by commentators. In the explanatory notes accompanying the latest edition of the standard conditions of sale, the change to the Standard Conditions of Sale (providing that the incumbrances to which a property is sold are those which the buyer knows about) has been criticised for creating a position which creates uncertainly. Commentators note that the ability of the seller to sell what he contracts to sell is dependent on the 'state of knowledge'

[1063] ibid 201.

of the seller at the time of the contract and this is a highly undesirable position.[1064] The objective method of linking actual knowledge to actual notice provides a more certain mechanism for determining the seller's knowledge.

(iv) Disclosure of Chancel repair liability

The above cases demonstrate that the seller and buyer's knowledge is relevant regarding the effect of incumbrances. Applying the above cases to chancel repair liability (when not a latent defect), they reveal that a seller is, arguably, required to disclose chancel repair liability should they have constructive notice of it (in relation to unregistered land).[1065] However, the buyer also has constructive knowledge of matters in the public records, particularly chancel repair liability recorded in records of ascertainment.[1066] A buyer's lawyer risks being negligent for failing to tell their client/buyer of a chancel repair liability recorded in a record of ascertainment.

The next section considers the National Conveyancing Protocol to access the use of standard conditions of sale in sale contracts before concluding the points analysed in this chapter.

National Conveyancing Protocol

The Law Society introduced the National Conveyancing Protocol (Protocol) in 1990 with the aim of improving the speed at which transactions proceeded. The adoption of the protocol is

[1064] Malcom Waters QC and Elizabeth Ovey 'Changes made by the Firth Edition of the Standard Conditions of Sale' (2011) <http://www.radcliffechambers.com/media/Handout_merged_Handout.pdf> 1 March 2016 states: 'There is a small but significant change to SCS 3.1.2, which sets out the incumbrances subject to which the property is sold. By virtue of the new paragraph (d), these now include incumbrances, other than mortgages, —which the buyer knows about. This is in line with the open contract position as per Millett J. in *Rignall Developments Ltd v Halil* [1988] Ch. 190, 200 D-E. The Explanatory Notes to the fifth edition say that this change has been made because it would be unfair for the buyer to be able to take action against the seller for a matter which the buyer knew about, albeit that the sale was not expressly made subject to it. Arguably, however, the change creates undesirable uncertainty by making the question whether the seller is able to transfer the title he has contracted to sell depend in part on an investigation into the buyer's state of knowledge at the date of the contract'.
[1065] *Nottingham Patent Brick and Tile Co v Butler* (1885) 15 QBD 261. In other words the notice that a reasonable person would have in the sellers shoes.
[1066] *Forsey and Hollebone's Contract, Re* [1927] 2 Ch 379, 25 LGR 442.

not mandatory; however, it must be adopted by those law firms which are part of the Law Society Conveyancing Quality Scheme in certain transactions unless there is a good reason to depart from the same. A requirement of the protocol is that the latest edition of the Standard Conditions of Sale is incorporated in sale contracts, with any amendments discouraged. As the standard terms and conditions relate to the disclosure of incumbrances, regard should be paid to these provisions in any analysis of the discoverability of chancel repair liability.

Under the open contract principles, a property is transferred subject to the incumbrances[1067] affecting the property and free from the standard conditions of sale. The standard conditions of sale are the conditions which apply to residential property and there are similar provisions which apply to commercial property. Unlike residential property, the protocol does not apply to commercial property and, therefore, there is a reduced requirement regarding the incorporation of the standard conditions.

The point is, in a modern conveyancing process, the terms of the standard conditions of sale in many cases will be adopted. This is an important point because the standard conditions of sale amend the open contract principle and, further, make specific provision for the incumbrances affecting the property. The standard conditions of sale 5th edition states, in paragraph 3.1.2: 'The incumbrances subject to which the property is sold' include 'Those the seller does not and could not reasonably know about'.[1068]

In respect of incumbrances generally, and specifically in respect of chancel repair liability, the above conditions are relevant. In the case where the property owner is unaware of chancel

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[1067] Clearly chancel repair liability is an encumbrance. An encumbrance is a term which includes all third party rights. Charles Harpum, Stuart Bridge & Martin Dixon, Megarry & Wade The Law of Real Property (8th edn, Sweet & Maxwell & Thomson Reuters, 2012) para15-082.

[1068] The Standard Conditions of Sale (Fifth Edition) (The Law Society, London 2011).states:
'3.1 Freedom from incumbrances
3.1.1 The seller is selling the property free from incumbrances, other than those mentioned in condition 3.1.2.
3.1.2 The incumbrances subject to which the property is sold are:
(c)Those the seller does not and could not reasonably know about'
Further Section 3.1.2(e) of the standard conditions of sale state that the property is sold subject to those matters which are in Public Records. Public records are defined by Public Records Act 1958, s10(1) of the which includes those records held at the National Archives including records of ascertainment'.

repair liability affecting their property, the question regarding whether the property is sold subject to chancel repair liability, when the standard conditions of sale are adopted, depends on simply whether or not the seller could reasonably have known about it. However, the same argument would still apply, therefore, as noted above, in respect of chancel repair liability recorded in records of ascertainment.

(v) Conclusion

Many of the issues in this thesis turn on the discoverability of chancel repair liability. The question of whether chancel repair liability is discoverable and what obligation there is (if any) on a buyer to discover it in the purchase of freehold property that has been addressed in this chapter is heavily dictated by the effect of the Land Registration Act 2002. Applying the above analysis to chancel repair liability reveals the following points.

Based on the above analysis, the outcome of the need for a seller to disclose chancel repair liability depends on the seller and the buyer's knowledge and exclusions in the contracts and whether chancel repair liability is a latent defect (which is governed by the policy of the parochial church council) and also whether the land is registered or unregistered. However, the binding effect of chancel repair liability is governed by the Land Registration Act (which have been discussed above) and, therefore, the only circumstances where the above analysis is relevant is in relation to determining the binding effect of transactions not governed by the Land Registration Act 2002; specifically, where a notice has not been entered on the register before 13 October 2013 and until a registrable disposition made for valuable consideration is completed by registration, or further in the case of unregistered land (until first registration). This is still relevant, as a large percentage of property has not changed hands since this date. There are various scenarios, which are considered below:

1. If chancel repair liability is a latent defect and the property was sold without standard conditions of sale being adopted and without exclusions, then the seller is liable for the latent defects with the property (however, their liability may be excluded pursuant to an exclusion provided in the contract, see below, unless the buyer has knowledge actual or constructive of the same.
2. If the property were sold subject to the standard conditions of sale and/or exclusions, then the seller can exclude their liability for latent defects which they do not know about or could not reasonably have known about. In other words, the seller must disclose those latent defects of which he has constructive notice. The chancel repair liability recorded in the records of ascertainment has been determined as lying within the seller's constructive knowledge.
3. If chancel repair is not a latent defect, then *caveat emptor* will apply. The seller is not liable for chancel repair liability that is undisclosed (unless they had constructive notice and, therefore, knowledge of the same and did not disclose it). The buyer also, however, will be deemed to have constructive knowledge of matters recorded in the public records.
4. The binding effect of chancel repair liability is now heavy determined by whether it is registered by a notice of caution pursuant to the Land Registration Act 2002. The above analysis in relation to latent defects is, therefore, only relevant where a notice has not been entered on the register before 13 October 2013 and until a registrable disposition made for valuable consideration is completed by registration, or further in the case of unregistered land (until first registration).

The significance of these points is that there was no obligation on a seller to disclose chancel repair liability of which they are unaware except when chancel repair liability is a latent defect

or they ought to have known about it.[1069] Whether or not chancel repair liability is a latent defect is determined by the parish in terms of whether or not it can be discharged.[1070]

There is no obligation on the buyer to discover chancel repair liability; however, the buyer must beware because there is no requirement on the seller (in respect of unregistered land) to disclose chancel repair liability (except when a latent defect exists), unless the seller has constructive notice of the same. The buyer is bound by what they have actual and constructive notice of and this equates to actual knowledge. Chancel repair liability recorded at the National Archive would constitute actual notice, based on the above analysis, and the buyer would have actual notice of this chancel repair liability.

The above analysis is, however, relevant to unregistered land and not registered land post 13 October 2013. The effect of s29 of the Land Registration Act 2002 is that the buyer of registered land will take subject to all the rights in existence at the time of purchase as stated in this section. The effect is that the completion of a transfer has the effect of postponing to the interest under the disposition any interest (including chancel repair liability) affecting the property immediately before the disposition whose priority is not protected at the time of registration. If the priority of chancel repair liability is protected, it is irrelevant whether or not the seller or buyer has knowledge of chancel repair liability. If the priority is not protected, the buyer takes free from chancel repair liability. The priority of an interest is protected if the interest is 'the subject of a notice in the register'[1071] or 'appears from the register to be excepted from the effect of registration'.[1072] Further, if the interest falls within any of the (overriding) interests in Schedule 3 of The Land Registration Act 2002, then the priority will be protected.[1073] Chancel repair, as noted above, was an overriding interest in Schedule 3 of the

[1069] *Becker v Partridge* [1966] 2 QB 155, [1966] 2 All ER 266.
[1070] *Rignall Developments Ltd v Halil* [1988] Ch 190, [1987] 3 All ER 170.
[1071] Land Registration Act 2002, S29(2)(a)(i).
[1072] Land Registration Act 2002, S29(2)(a)(iii).
[1073] Land Registration Act 2002, S29(2)(a)(ii).

Land Registration Act 2002 until a decade from the date on which the Act came into force. In other words, chancel repair liability lost its overriding status in October 2013 and, accordingly, the priority of the interest is unprotected, unless the subject of the notice. The above analysis is subject further to the untested technical argument referred to in the above chapters.

The significance of this conclusion and this chapter is that chancel repair liability is discoverable (insofar as revealed by the records at the National Archive and relevant to unregistered land) and satisfies the requirement of discoverability within the characterisations identified at the outset of this chapter.

Chapter 7

Conclusions

Chancel repair liability is a concept devoid of legal certainty and has been described by the judiciary as capricious. This thesis has analysed chancel repair liability by way of analogy to existing property rights. In doing so, chancel repair liability is made more understandable and less elusive. As chancel repair liability has powerful practical implications, (including, for example, exposing parties to high chancel repair bills and increasing the cost of conveyancing by way of insurance products), understanding the nature of the chancel repair liability as a legal concept has important consequences and is of immediate and important significance. This thesis provides a contribution to knowledge because, despite the murky nature of chancel repair liability, little has been written about chancel repair liability in order to explain it as a legal concept. This thesis sought to explain whether chancel repair liability is a proprietary right or not by characterising it as an easement, a covenant and a customary right and, in doing so, make chancel repair liability less elusive.

As noted at the outset of this thesis, there is a lack of clarity regarding whether chancel repair liability is a personal or a property right and this is significant because traditional property rights are binding on successors in title in contrast to personal rights, which are not. Accordingly, in order to test the characteristics of chancel repair liability to show whether it is proprietary, questions have been addressed in the context of chancel repair liability by characterising it as an existing and established 'target' proprietary right. Specifically, chancel repair liability has been characterised as a customary right, an easement and covenant. Specifically, the questions which have been addressed are: what is the nature of the target right? In what circumstances is the target right enforceable? Is the target right binding on third parties? And is this analogous with the nature of chancel repair liability? In addressing

these questions, chancel repair liability has been analysed by reference to property rights which fall within numerus clausus (as the theory of property adhered to in this thesis is the doctrine of numerus clausus), the uncertainty in the concept has been clarified and, in doing so, an attempt has been made to make the concept less elusive.

This chapter is subdivided into the following sections:

i. Aims achieved and research questions answered
ii. Problems with chancel repair liability
iii. Limitations of the methodology
iv. Why is this conclusion important? What are the wider Issues and limitations?

(i) Aims achieved and research questions answered

This thesis seeks to explain whether chancel repair liability is a proprietary right or not by considering whether it could be characterised as an easement, a covenant and a customary right and, in doing so, make chancel repair liability less elusive.[1074]

From the analogy made between chancel repair liability and customary rights in this thesis, it has been determined that chancel repair liability is not a customary right. It has been shown that parishioners can, pursuant to custom, be required to repair a church, apart from the

[1074] Leading land law texts of Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade: The Law of Real Property* (8th edn, Sweet & Maxwell & Thomson Reuters, 2012) and Kevin Gray and Susan Francis Gray, *Elements of Land Law*, (5th edn, OUP 2009) and Martin Dixon, *Modern Land Law* (8th edn, Routledge 2012) have been useful in identifying and discussing key elements of established legal concepts and formulating ideas. Key Law Commission reports include Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985); Law Commission, *Transfer of Land - Liability for Chancel Repairs* (Law Com CP 86, 1983) and Law Commission, *Land Registration for the Twenty-First Century*: *A Consultative Document* (Law Com No 254, 1998) have been used in understanding many of the issues with chancel repair liability. Further, the leading case of *Aston Cantlow v Wallbank* provides impetus for research on chancel repair liability given this high-level decision enforcing the concept. Many cases, articles and journal publications have been used in the analysis and reaching the conclusion of this thesis.

chancel (subject to sufficient evidence of a custom). However, for two reasons, it cannot be characterised as a custom. First, the obligation to repair the chancel of the church, imposed on a rector, does not arise by custom but instead arises out of the historical source of payment to rectors from rectorial property. Accordingly, it has been shown that chancel repair liability is not analogous with a customary right. Secondly, chancel repair liability has been shown to be incapable of existing as a customary right because any presumption of immemorial use can be rebutted. A custom must be immemorial or, in other words, must have been in existence in the year 1189, which is not the case in the context of chancel repair liability.[1075]

Accordingly, the aims of the thesis have been achieved in establishing whether chancel repair liability could be characterised as a customary or non-customary right. This aim was motivated by uncertainty in the law and commentary on this point, as highlighted in chapter 3, and therefore, by determining the position on this point, chancel repair liability has been made less uncertain.

Further, the research question that this thesis asked was: what is chancel repair liability? A proprietary or non-proprietary right? This thesis determined that chancel repair liability cannot be characterised as an easement or a covenant and does not fall within numerus clausus, based on the analysis in the thesis. The outcomes of the analysis may be summarised as noted below.

1) Chancel repair liability cannot be characterised successfully as an easement or a covenant and is not a proprietary right based on the analysis in this thesis. It is also not a customary right.

[1075] Time extending beyond the reach of memory.

2) Chancel repair liability exhibits similarities with the characteristics of a positive duty easement and a positive covenant. An argument that chancel repair liability manifests itself as either will ultimately fail, however, as positive easements are limited to highly specific, limited circumstances and there is little evidence that chancel repair will be dealt with in the same way. Further positive covenants are not proprietary rights. An argument can be constructed that chancel repair liability may manifest itself as a positive covenant attached to a right to worship by circumventing the orthodox rule that positive covenants do not bind successors in title. Ultimately, such an argument has not been tested and is likely to fail for a number of potential reasons (including the touch and concern requirement).

3) The binding effect of chancel repair liability is heavily governed by the Land Registration Act 2002. From 13 October 2013, a right relating to the repair of the chancel of a church is no longer an interest which overrides first registration and the disposition of a registered title.[1076] A buyer will only generally be bound by liability if it has been protected by an entry on the register of title or, in the case of unregistered land, a caution against first registration has been registered or the liability is mentioned in the title deeds.[1077] For registered land, where a notice has not been entered against the property title, liability for chancel repair will continue and parochial church councils may still apply for a notice to register chancel repair liability until the first transaction for value after 13 October 2013. In the case of unregistered land, chancel repair liability will continue to exist in the same way. If any chancel repair liability is not protected by a notice or caution at the time of first registration, the new owner will take the estate free from this liability.

[1076] Land Registration Act 2002, s117, schs 1 and 3.
[1077] Land Registry, 'Overriding interests that lost automatic protection in 2013' (Practice Guide 66, Land Registry April 2018).

The characterisation of chancel repair liability as an easement and a covenant attached to a right is, therefore, limited only to the cases where chancel repair liability applies and the binding effect is not dictated by the Land Registration Act 2013;[1078] specifically, where a notice has not been entered on the register before 13 October 2013 and until a registrable disposition made for valuable consideration is completed by registration, or further in the case of unregistered land (until first registration). In other cases, where the binding effect of chancel repair liability is governed by the Land Registration Act 2002, the characterisation simply does not work. This is because easement covenants and chancel repair liability are dealt with differently under the Land Registration Act 2002.

4) Uncertainty and problems in establishing the binding nature of chancel repair liability are reduced pursuant to registration requirements under the Land Registration Act 2002.

Accordingly, the aims of the thesis have been achieved in determining that chancel repair liability cannot be successfully characterised as an easement or covenant by way of analogy. The theory of property adopted in this thesis is the doctrine of numerus clausus. As covenants (restrictive) and easement fall within numerus clausus, it has been concluded that chancel repair, based on the analysis in this thesis, is not able to constitute these types of proprietary rights. Despite the analysis being subject to a number of limitations, referred to below, determining the position on this point has made chancel repair liability less uncertain in terms of its proprietary non-proprietary status.

Where a notice has not been entered on the register before 13 October 2013 and until a registrable disposition made for valuable consideration is completed by registration, or

[1078] In other words an overriding interest.

further in the case of unregistered land (until first registration), whether chancel repair liability is binding on an existing property owner will turn on the discoverability of chancel repair liability at the time when the property was acquired. The question of whether chancel repair liability is discoverable and what obligation there was (if any) on a buyer to discover it in the purchase of freehold property has been addressed. The need for a seller to disclose chancel repair liability depends on the seller and the buyer's knowledge, the exclusions in the contracts and whether chancel repair liability is a latent defect (which is governed by the policy of the parochial church council) have been considered. The significance of the analysis is that there is no obligation on a seller to disclose chancel repair liability of which they are unaware except when chancel repair liability is a latent defect or they ought to have known about it.[1079] Whether chancel repair liability is a latent defect is determined by the parish in terms of whether or not it can be discharged.[1080]

The aim of the thesis was to make chancel repair liability less elusive. In explaining the discoverability arrangements in relation to chancel repair liability, the aims of the thesis have been achieved since chancel repair liability is less uncertain.

(ii) Problems with chancel repair liability

The problems with chancel repair liability identified in this thesis include the fact that the liability may not have been recorded in the title deeds to the land and there is no single central register that identifies all chancel repair liabilities. In short, it can be difficult to discover. There are issues which follow from this, as has been noted in this thesis, in connection with

[1079] *Becker v Partridge* [1966] 2 QB 155, [1966] 2 All ER 266.
[1080] *Rignall Developments Ltd v Halil* [1988] Ch 190, [1987] 3 All ER 170.

insurance and search products. The obligation on a seller to disclose chancel repair liability and a buyer to discover the same are, therefore, particularly important.

However, from 13 October 2013, a right relating to the repair of the chancel of a church is no longer an interest which overrides first registration and the disposition of a registered title.[1081] Accordingly, a buyer will only generally be bound by liability if it has been protected by an entry on the register of title or, in the case of unregistered land, a caution against first registration has been registered or the liability is mentioned in the title deeds.[1082] Therefore, the Land Registration Act added certainty regarding when chancel repair liability was binding and reduced the need to research or insure against chancel repair liability. Arguably, therefore, based on this, a buyer would only now need to be advised to take the following steps when buying a property in connection with chancel repair liability:

> If purchasing an interest where ownership has changed since October 2013 and nothing is noted on the title regarding chancel repair liability, then the buyer does not need to take any further steps in respect of chancel repair liability.
>
> If purchasing an interest where there has been no change of ownership since October 2013, the buyer should consider insurance (or further steps even where no reference to chancel liability appears on the title).

The reduction in uncertainty created by Land Registration Act 2002 means that the criticism of chancel repair liability outlined at the start of this thesis carried less weight than at the time it was made. For example, when Lord Nicholls of Birkenhead referred to chancel repair liability[1083] as 'one of the more arcane and unsatisfactory areas of property law' and noted

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[1081] Land Registration Act 2002 s117, schs 1 and 3.
[1082] Land Registry, 'Overriding interests that lost automatic protection in 2013' (Practice Guide 66, Land Registry April 2018).
[1083] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [2].

that the Law Commission had previously recognised the anachronistic, and capricious, nature of chancel repair liability in their report, Liability for Chancel Repairs, which stated 'this relic of the past is … no longer acceptable',[1084] these comments were made prior to the reforms brought about by the Land Registration Act 2002.

There is still uncertainty, however, particularly because the Land Registry will accept an application for an entry on the register of a notice to protect a claim to chancel repair liability after a transfer for value has been registered. As HM Land Registry Practice Guide 66 states,[1085] the courts must still consider if and when it may be possible after 12 October 2013 for the holder of the interest to have the register altered so that a notice is entered where the registered proprietor has taken free of the interest following first registration, or following the registration of a disposition for valuable consideration. The courts must also consider whether indemnity may be payable where the register cannot be altered in this way. A 'belt and braces' approach, given this, may, therefore, be still to seek an insurance policy and to take steps to discover chancel repair liability if purchasing an interest where ownership has changed since October 2013 and nothing is noted on the title regarding chancel repair liability.

(iii) Limitations of the methodology

The analogical method adopted in this thesis was to explain the nature and scope of chancel repair liability and classify it in a modern legal system by characterising it as established legal concepts. The methodology used identified the cornerstones of established proprietary rights and determined whether these are analogous with the key principles of chancel repair liability. The legal nature of chancel repair liability has been determined and this has been possible

[1084] Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985) para 3.1; Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Com No 254, 1998) para 5.37.
[1085] Land Registry, 'Overriding interests that lost automatic protection in 2013' (Practice Guide 66, Land Registry April 2018).

pursuant to the analogical method adopted in this thesis, allowing for a close and thorough examination of the attributes of an elusive concept.

The thesis has made an analogy with two proprietary rights. Chancel repair liability was shown not to be analogous with these rights and non-proprietary, based on the analysis. This does not mean that chancel repair liability it is not a proprietary right. The scope of the conclusion is limited by the fact that the above analysis analyses chancel repair by way of analogy, with only a limited number of proprietary rights falling within numerus clauses. There are, of course, other property rights within numerus clauses against which chancel repair liability has not been analysed.

Initial support for the view that an easement and covenant are suitable candidates for analysis, by way of an analogy, with chancel repair liability was found in the dicta of Ferris J in the divisional court. Ferris J said: 'in principle I do not find it possible to distinguish [chancel repair liability] from the liability which would attach to the owner of land which is purchased subject to a … restrictive covenant or other incumbrance created by a predecessor in title.'[1086] However, chancel repair liability has been shown to be functionally different to and distinguishable from an easement and covenant (or, to use Ferris J's wording, 'other incumbrance created by a predecessor in title') because, as has been shown above, chancel repair liability imposes a positive duty whereas an easement and restrictive covenant do not, apart from fencing easements or by 'workarounds'. Chancel repair can be distinguished 'from the liability which would attach to the owner of land which is purchased subject to an' easement or restrictive covenant because such liability would not amount to a positive duty obligation. A positive duty obligation cannot be an easement (except in the case of a fencing

[1086] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [171]; *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* (2000) 81 P & CR 165, [2000] 2 EGLR 149, 152.

easement) or restrictive covenant. Chancel repair can be distinguished from two of the incumbrances to which Ferris J refers.

Further, the choice of target property rights and the analogy method were selected in part because they are located close to the apparent proprietary/non-proprietary boundary.
One key reason why chancel repair liability failed to be an easement was because of the positive duty nature of chancel repair liability. Further, a key reason why the characterisation of chancel repair liability failed as a covenant, which was a property right, was because positive covenants are not binding on successors in title. What the analysis has shown is that, despite chancel repair not being characterised as a property right (as not an easement or covenant that falls within numerus clauses), it makes numerus clausus look unstable because, whilst chancel repair liability is not a proprietary right, based on the analysis in this thesis, it is binding on successors in title,[1087] which is a traditional hallmark, as has been noted above, of a property right.

<u>(iv) Why is this conclusion important? What are the wider Issues and limitations?</u>

From 13 October 2013 a right relating to the repair of the chancel of a church is no longer an interest which overrides first registration and on the disposition of a registered title[1088] a buyer will only generally be bound by liability if it has been protected by an entry on the register of title or, in the case of unregistered land, a caution against first registration has been registered or the liability is mentioned in the title deeds.[1089]

[1087] As an overriding interest and then pursuant to registration under the Land Registration Act 2002.
[1088] Land Registration Act 2002, s117, schs 1 and 3.
[1089] Land Registry, 'Overriding interests that lost automatic protection in 2013' (Practice Guide 66, Land Registry April 2018).

The main continuing problem and controversial cases are: in respect of registered land, where a notice has not been entered, liability for chancel repair will continue and parochial church councils may still apply for a notice to register chancel repair liability until the first transaction for value after 13 October 2013. In the case of unregistered land, chancel repair liability will continue to exist in the same way (until registered). It was noted at the outset of this thesis that as many as 4 million acres of land may be affected by chancel repair liability; however, the scope of the continuing problem cases will reduce as further post October 2013 transactions take place and the amount of unregistered land decreases.[1090] This means that, ultimately, the binding nature of chancel repair liability should be entirely governed by its registered status under the Land Registration Act 2002 and the continuing problem cases phased out.

Chancel repair is, arguably, located close to the interface between proprietary and non-proprietary rights. The fact that chancel repair liability has similar characteristics to a fencing easement is suggestive of this. The rigid formality of numerus clausus is softening, with rights close to the interface of proprietary and non-proprietary rights demonstrating characteristics unfamiliar with their classification. Given this, the rigidity of numerus clausus appears somewhat shaky. We have noted above that numerus clausus has been described by commentators as not unequivocally static and rigid but, rather, dynamic. The dynamism demonstrated and evidenced in the analysis of the nature of chancel repair liability described above, adds weight to the fact, that the strict rigidity of numerus clausus is loosening up.

[1090] Law Commission, *Liability for Chancel Repairs report* (Law Com No 152, 1985) para 1.2.

The thesis has sought to make chancel repair liability less uncertain and this is an important task as chancel repair liability has existed for hundreds of years and it is likely that it will continue to exist and remain topical for quite some time to come.

Annex 1

In the 1935 case of *Wickhambrook Parochial Church Council v Croxford*[1091] the cost of the chancel repair liability was 123l. 12s. 6d. (this equates to 29670 new pence[1092] or £296.70) and this equates in today's money[1093] to a sum of approximately £7,800.

Calculation of chancel repair liability

Calculation of class A tithe rentcharge:

37. 18. 11. (in £ s d) is 9107 new pence

If the chancel repair liability repair costs were assessed in the case as £7,800

Then 9107/11159 = 0.816

0.816 x £7800 = £6365

£6365 would be the chancel repair liability of Class A tithe rent charge.

Calculation of chancel repair liability

Calculation of class D tithe rentcharge:

46. 9. 11 (in £ s d) is 11159new pence

8.11. (in £ s) is 2052 new pence

If the chancel repair liability repair costs were assessed in the case as £7,800

Then 2052/11159 = 0.183

0.183 x £7800 = £1434

£1434 would be the chancel repair liability of Class D tithe rent charge.

[1091] *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, 104 LJKB 635.
[1092] Using a conversion chart. See Neil Younger 'Conversion chart for £ s. d.' </www.sp12.hull.ac.uk/tools/table.htm> accessed 1 March 2016.
[1093] Using a historic inflation calculator.

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TITHE ACT, 1936.

Section 31 and Seventh Schedule.

Record of Ascertainments.

COUNTY: Suffolk

CHANCEL: Wickhambrook

	£	s.	d.
1. The Tithe Redemption Commission have ascertained in relation to the chancel above-mentioned, that the apportionable amount of rentcharge liability is	46	9	11
2. The Commission have also ascertained in relation to the chancel above-mentioned, that the residue mentioned in paragraph 1 (c) of Part I of the Seventh Schedule to the Act comprises two or more rentcharges and consists of:			
(*a*) rentcharges in respect of which stock is to be issued under the Act and which were not vested immediately before the second day of October, 1936, for an interest in fee simple in possession in any of the corporations or bodies mentioned in the proviso to sub-section (2) of Section 31 of the Act, amounting in all to	37	18	11
(*b*) certain rentcharges in respect of which stock is to be issued under the Act and which were vested immediately before the second day of October, 1936, for an interest in fee simple in possession in the corporations or bodies following (being among those mentioned in the proviso to sub-section (2) of Section 31 of the Act) to the aggregate amounts mentioned opposite the name of each:		NIL	
(*c*) certain rentcharges specified in the First Schedule hereto and so vested between the twenty-sixth day of February, 1936, and the second day of October, 1936, as to render the provisions of Section 21 of the Act applicable thereto, amounting in all to		NIL	
(*d*) certain rentcharges specified in the Second Schedule hereto and merged or extinguished under the Tithe Acts, 1836 to 1925, in land to which the provisions of Section 1 of the Tithe Act, 1839, apply, amounting in all to	8	11	-
	£ 46	9	11

FORM No. 250.

(B.O.5019) Wt.P.2650/287 5,000 11/36 O.T. Gp.680

3. In respect of each tithe rentcharge mentioned in paragraph 2 hereof, the Commission have ascertained that the appropriate proportion of the liability for the repair of the above chancel is 1/11159 for a tithe rentcharge of 1d. (par value) and proportionately for any other amounts.

IN WITNESS whereof the Official Seal of the Tithe Redemption Commission has been hereunto affixed this Seventh day of January, nineteen hundred and forty-two.

H. S. Richardson

AUTHORISED BY THE COMMISSION.

First Schedule.

Particulars of the rentcharges comprised in class (c) of paragraph 2 of this Record are given below :—

COUNTY Suffolk CHANCEL Wickhambrook.

1. Name of Tithe District.	2. Number in Instrument of Apportionment in force immediately before 2nd October, 1936, referring to plan.	3. Amount of Rentcharge. £ s. d.	4.
Wickhambrook	-	NIL.	

Second Schedule.

Particulars of the rentcharges comprised in class (d) of paragraph 2 of this Record are given below :—

COUNTY Suffolk CHANCEL Wickhambrook

1. Name of Tithe District.	2. Number in Instrument of Apportionment referring to plan or (if no apportionment was made) description of lands.	3. Amount of Rentcharge. £	s.	d.	4.
Wickhambrook	343		7	-	
	340		18	-	
	340a		2	-	
	352		18	6	
	351	1	3	6	
	350		16	6	
	287		8	-	
	286	1	5	6	
	288		12	-	
	264		3	4	
	52		6	8	
	93		12	-	
	101		5	-	
	110		5	6	
	111a		7	6	
		£8	11	-	

Catalogue Reference:IR/104/65

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