

S.62 LPA 1925. Restating the case for reform.

Abstract

Purpose

- This paper explores how S.62 *LPA 1925* and its equivalent provisions in other jurisdictions have been interpreted as having the capacity to create new easements. It is intended to identify that the theoretical justification for this interpretation can be viewed as flawed, and that the practical implications of it are unsatisfactory. It intends to restate the need for reform and to challenge arguments that this interpretation is correct and justified.

Design/methodology/approach

- This paper examines and analyses the origins of the principle that S.62 *LPA 1925* can create new legal rights, considers similar provisions from other jurisdictions, examines recent attempts to justify the creative effect of the section, and offers observations on proposals for reform.

Findings

- It is found that the ability of S.62 *LPA* to create legal easements from precarious rights is replicated in many jurisdictions, has been widely criticised as both incorrect in principle and problematic in practice and has been the subject of well-reasoned and workable proposals for reform for more than 40 years.

Originality/value

- From both theoretical and from property practitioner perspectives, this paper highlights the lack of justification for the principle that S.62 *LPA* can create easements from precarious rights, challenges the arguments for retaining the

principle, and offers practical proposals drawn from several jurisdictions as to how the section and its equivalent provisions abroad could be reformed.

Keywords: Easements, Reform, Licences, S.62 *LPA 1925*, Implied easements,

Creation of Easements,

Background

A common land transaction is the transfer of part of a larger title. In the last three months of 2016, the Land Registry for England and Wales received over 40,000 applications to register transfers of part^[1]. In each case, consideration will need to have been given to whether easements, for example, rights of way, rights of drainage and rights to run services, were required over the land retained in favour of the land transferred, and if so, on what terms.

In the case of a professionally drafted transfer, those rights are likely to have been discussed in detail by the parties to the transfer and their advisers, and appropriate provisions granting those rights will have been included in the transfer deed. The Law Society's *Conveyancing Handbook* advises that on a transfer of part, 'It will ... usually be necessary to grant new express easements to the buyer e.g. for a right of way or drainage.'^[2]

On any transfer of land, including a transfer of part of a larger title, section 62 *Law of Property Act 1925* ('S.62') will also apply, unless contrary intention is expressed in the conveyance. The heading for S.62 is (significantly, it is argued) 'General words implied in conveyances'. S.62(1) provides:

'A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all ... ways...easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of the conveyance, demised, occupied or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land...'

^[1] Land Registry transaction data <www.gov.uk/guidance/land-registry-transaction-data> accessed 25 January 2017. The figure for the same period in 2015 was similar.

^[2] The Law Society, *Conveyancing Handbook* (22nd edn, The Law Society 2015) 664

This is a 'word-saving' provision. It removes the need to set out in full all the existing rights benefitting a piece of land in a conveyance of that land. However, on a transfer of part of a larger title, it has another effect which has been described variously as 'surprising'^[3], 'startling'^[4] and perhaps most worryingly for practitioners conscious of the risks inherent in transactional property work, and aspiring to offer clear advice, 'capricious' and having the capacity to lead to 'pernicious results'^[5]. It has been held to have the ability to transform a right over the retained land which before the conveyance to which S.62 applies was purely permissive into one which, after that conveyance, is a legal easement and therefore irrevocable.

Gale on Easements^[6] describes it as 'settled' that 'general words', i.e. words generally used in conveyances before the statutory provisions of which S.62 is a re-enactment, in, for example, a conveyance of the freehold of property to a sitting tenant, will grant to him as easements rights exercised by him as tenant over other land of the grantor 'including rights exercised by permission'^[7]. Because the right arising from the permissive use is deemed to be granted by the conveyance, it is a legal easement, and will pass to the successors in title to the transferred land, notwithstanding the lack of any express reference to it in the transfer deed. What began as a permission granted to a specific party becomes an irrevocable right transferrable to and capable of being enjoyed by third parties, the identity of whom the original licensor, and the licensor's successors in title, cannot control.

This article does not seek to address the additional complexities arising from the decision in *Wood v. Waddington*^[8] that S.62 can have this transformative effect even where there is no diversity of occupation prior to the conveyance to which it applies, and the logical conclusion

^[3] Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, Oxford University Press 2009) 659

^[4] Louise Tee, 'Metamorphoses and Section 62 Law of Property Act 1925' [1998] 62 Conv 115,115

^[5] The Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327, 2011) para 3.61

^[6] Jonathan Gaunt QC and The Honourable Mr Justice Morgan, *Gale on Easements* (18th edn, Sweet & Maxwell 2008) 185

^[7] *ibid*

^[8] [2015] EWCA Civ 538

that in this respect S.62 overlaps considerably with the rule in *Wheeldon v. Burrows*^[9]. Two reasons are given for this: Firstly, if the creative effect of S.62 were abolished, a reform which this article supports, the question of whether or not the land sold and retained were separately occupied prior to the conveyance would become immaterial. Secondly, it is suggested that the finding in *Wood* that prior use made of the land subsequently retained in favour of the land subsequently sold could 'attract the operation of section 62'^[10] results, as has happened before, from a confusion of the fact of user with the existence of a right. It is argued that this confusion has led to the view that S.62 can reasonably be construed as having a creative effect^[11], a view which this article seeks to challenge.

Many jurisdictions have provisions similar or identical to S. 62. Northern Ireland is governed by S.6(1) *Conveyancing Act 1881*, which S. 62(1) *LPA* re-enacts. In Victoria, Tasmania and Trinidad and Tobago, S. 62(1) *Property Law Act 1958 (Vic)*, S. 6(1) *Conveyancing and Property Law Act 1884* and S.16(1) *Conveyancing and Law of Property Act 1939* respectively reproduce S. 62 *LPA* or S. 6(1) *Conveyancing Act 1881*. In Ontario, S.15 (1) *Conveyancing and Law of Property Act 1990* is worded slightly differently, omitting the words 'reputed to appertain', but including reference to rights 'taken or known as part or parcel thereof'. In all cases, the relevant statutory provisions have been held to be capable of having the same effect of converting what had previously been a permissive right into a legal easement^[12].

^[9] (1879) 12 Ch D 31. See Kester Lees '*Wood v. Waddington*: section 62 and apparently continuous easements...' (2015) 79 Conv 423 which also discusses the Court of Appeal's interpretation of 'continuous and apparent'.

^[10] *Gale on Easements* (n6) 186

^[11] See Simon Douglas, 'How to reform section 62 of the Law of Property Act 1925' (2015) 79 Conv 13

^[12] As evidenced by reports of law reform bodies in these jurisdictions (Northern Ireland Law Commission, *Report Land Law*, NILC 8 (2010), Victorian Law Reform Commission, *Review of the Property Law Act 1958, Final Report 20* (2010), Tasmania Law Reform Institute, *Law of Easements in Tasmania Final Report No 12* (2010) and Ontario Law Reform Commission, *Report on Basic Principles of Land Law* (1996)) in which the general absence of jurisdiction specific authority (an exception being *National Trustees, Executor & Agency Co. v. Long* [1939] VLR 33) and universal reference to authority from England and Wales indicates the latter's prevalence in this area.

This ability of S.62 and its predecessor to enlarge a permissive user into an easement appears to originate in *International Tea Stores v. Hobbs*^[13]. Tee^[14] notes that before this, for example in *Bayley v. Great Western Railway Co.*^[15], courts were prepared to construe general words as granting *new* rights 'if the surrounding circumstances were such that this must have represented the true intention of the parties'^[16]. In this respect the right granted is essentially one implied on the basis of common intention.

International Tea Stores demonstrates a significant departure from this position, in that the issue of intention appears to have been disregarded. Mr Hobbs owned a forge and adjacent shop. He let the shop to the plaintiff for occupation by its managers. Demonstrating a 'neighbourly spirit'^[17] he gave each successive occupier of the shop verbal permission to use an accessway, which passed from the shop over the rear yard of the forge to the highway. The plaintiff then bought the freehold of the shop. The conveyance did not refer to the accessway, and contained no general words, but did not exclude s.6 *Conveyancing and Law of Property Act 1881* (the statute's original title). Following the conveyance, the plaintiff successfully claimed an irrevocable right of way over the accessway.

The Court of Appeal cited *International Tea Stores* with approval in *Wright v. Macadam*^[18]. Tee argues that this led to 'a general acceptance of the metamorphic powers of section 62'^[19]. In *Wright*, a pre-existing permission to use a coal shed granted in connection with a weekly tenancy was held, on the subsequent grant of a one-year lease, to become an irrevocable right to use the shed for the duration of the one-year lease. Tucker L.J.^[20] noted the detriment incurred by defendant 'through his act of kindness' and identified that the decision 'may tend to discourage landlords from [such] acts... to their tenants', but, with

[13] [1903] 2 Ch. 165

[14] Tee (n4) 118

[15] (1884) L.R. 26

[16] Tee (n4) 118

[17] Tee (n4) 120

[18] [1949] 2 KB 744 (CA) 754

[19] Tee (n4) 120

[20] *Wright* (n18) 755

otherwise little apparent regard for the Landlord's position, concluded, 'But there it is: that is the law.'^[21]

In *Green v. Ashco Horticulturalist Ltd*^[22], Cross J. stated that he shared the doubts of Tucker L.J. in *Wright* as to the justice of the law in this regard, but concluded, in a similar vein, 'But there it is: there is no doubt what the law is'^[23]. Chadwick L.J. demonstrated a similar sentiment in *Hair v. Gillman*^[24], in which he held that an 'act of kindness' on the part of the claimant's predecessor in allowing Mrs Gillman to park her car on a forecourt and then conveying property to her had 'inadvertently created an easement which [bound] his own property in the hands of his successors.'^[25]

If this transformation of an arrangement from a permissive right to an irrevocable right appears mysterious and inexplicable, it is suggested that that is because it is. There is a logical inconsistency in Farwell J.'s judgment in *International Tea Stores*, which has not gone unchallenged. He stated that because of the 1881 Act, he was,

'thrown back on the enquiry whether it is or is not the fact that at the date of the conveyance the way in question was a way used and enjoyed with the property conveyed. If it was in fact so used and enjoyed, then it passed to the plaintiffs by the very words of the grant.'^[26]

Finding that the plaintiff had, before the conveyance, used the accessway for the purposes of its business, he apparently concluded from this that;

'the way granted is that enjoyed... The right of the plaintiffs is to use this roadway for the purposes of their business and for the purposes of the person who resided there.'^[27]

The logical inconsistency is evident. As Tee states, before the conveyance, the plaintiff had *used* the way, but had no *right* to do so^[28]. The plaintiff merely had permission – 'a defence

^[21] *Wright* (n18) 755

^[22] [1966] 1 WLR 889

^[23] *Green* (n22) 897

^[24] (2000) 80 P & CR 108

^[25] *Hair* (n24) 116

^[26] *International Tea Stores* (n13) 169

^[27] *International Tea Stores* (n13) 173

^[28] Tee (n4) 120

to a claim in trespass^[29]. In his judgment, Farwell J appears to have confused the existence of use with the existence of an easement, concluding that the existence of the former led automatically to the existence of the latter.

The conclusion raises several objections: Firstly, on a purely logical basis, the principle that a precarious right should, irrespective of the parties' intentions, be converted into an irrevocable right, simply because a land transaction to which S. 62 applies has occurred appears to be, and it is argued is, incorrect. A right which is merely permissive the day before the conveyance should not by some unexplained process fundamentally alter its status to become an irrevocable right the day after.

Secondly, the judgment appears to adopt a flawed approach towards the question of the right having previously been enjoyed by licence, both acknowledging that the right had been enjoyed as such, and disregarding its significance. In *International Tea Stores*, Farwell J referred to his own judgment in *Burrows v. Lang*^[30], in which he had held that as the right in that case (to take water to fill a pond) could not exist as a legal easement, the right therefore remained as precarious after the relevant conveyance as it had been before. It is suggested that it is difficult to see what other conclusion might have been reached.

In *International Tea Stores*, however, he held that the 'fact of licence [in the latter case] makes no difference'^[31]. He appears to have taken the view that because a right of way 'is well known to the law'^[32], in contrast to a right to take water, it should exist as such, an approach which might be construed either as simply erroneous, or more cynically, as a judicial sleight of hand: It does not follow that a right which *can* exist both as a permissive right and as an easement (of which there are as many variations as there are variations of easements) should be converted from the former to the latter on a conveyance to which S.62 applies. Had he stated more explicitly his view that because a right can exist as an

^[29] Tee (n4) 120

^[30] [1901] 2 Ch. 502

^[31] *International Tea Stores* (n13) 169

^[32] *International Tea Stores* (n13) 172

easement, it should, and from the date on which the conveyance is completed, will exist as an easement, the logical fallacy in the argument, and possibly his enthusiasm for reaching a particular outcome, might be more apparent.

Thirdly, if S.62 was intended to have this transformative effect, why does it not provide for that effect expressly? Taken at face value, neither its title nor its provisions give any indication that it was intended to have this effect, and, it is suggested that in fact they indicate the opposite: The section states that it shall 'operate to convey', in the sense of transferring an interest which already exists, rather than 'operate to grant', in the sense of creating an interest which is new. The preamble to the 1881 Act describes it as 'An Act for simplifying and improving the practice of Conveyancing', a purpose which cannot realistically be argued is served by construing a 'General words' provision as having the power to create a legal easement from a permissive right. S.62 and its predecessor are intended to remove or reduce uncertainty from the conveyancing process by ensuring that the land conveyed will be conveyed with its appurtenant rights, whether or not those are expressly set out, thus reducing the time spent by practitioners, the risk that rights will be transcribed incorrectly and potentially the cost to clients. It seems wholly inconsistent with that purpose that the section should also have a creative effect: A piece of land conveyed with the benefit of easements x and y (whether created expressly at the point of the conveyance, or already appertaining to the land and therefore caught by the 'word saving' feature of S.62) should not also include the grant of easement z, the existence and extent of which may not have been fully identified and discussed by the parties, with the consequent risk of costly litigation. Moreover, on the question of what the section is intended to achieve, it might be argued that if the metamorphic effect of S. 6 of the 1881 Act is correct, it is perhaps surprising that that it took more than twenty years to become apparent^[33].

^[33] Perhaps less so in light of the decision in *Federated Homes Ltd. v. Mill Lodge Properties Ltd* [1980] 1 WLR 594 relating to freehold covenants, and s.78 LPA 1925.

From a practical perspective, the transformative effect of s.62 exposes parties to a conveyance who are unaware of its effect to the risk that an irrevocable right will arise which one (or possibly even both) did not intend. The likelihood of the parties being unaware of this risk is, it is suggested, compounded by the inexplicable way in which the section operates. If parties to a proposed transfer were asked immediately before the completion of that transfer what rights the transferee will have over the transferor's land after the transfer date, and on what basis those rights would be enjoyed, it is suggested that they would identify the rights which are contained in the transfer deed and possibly any permissive rights which are exercised at that time by the land to be transferred over the land retained. They are, it is suggested, much less likely to appreciate, and would be surprised to be told, that a permissive right exercised over the land retained in favour of the land to be sold would become irrevocable. Tee notes that that 'a friendly landlord who generously allows a tenant to do something which could amount to an easement may find that he has *'unwittingly granted an irrevocable...right'*^[34] (emphasis added), and it is this ability of the section to create rights immediately, unexpectedly and irrevocably which attracts the strongest criticism.

An associated problem is that a precarious right is unlikely to be granted with the same formality, precision and detail as would be employed on the express grant of an easement. It has been suggested that S.62 'can carry only the level of intensity of user appropriate to the quasi dominant tenement at the date of the relevant conveyance'^[35], but it is argued that this is potentially difficult to apply in practice. A friendly landlord allowing a permissive right of access, parking or storage is, it is suggested, much less likely to specify precisely the dimensions of the way, or of the parking or storage area subject to the right, who may use it, when, and in what manner, than they would if they were contemplating the grant of a legal easement.

^[34] Tee (n4) 116

^[35] Gray (n3) 662

Nor is that friendly landlord likely to record precisely the intensity of the subsequent user, unless it far exceeds what was contemplated when the permission was granted. While the right remains precarious that imprecision is unlikely to be problematic, since a licensor dissatisfied with the way in which the licence is used can revoke it at any time. When that same imprecision becomes 'crystallised' as the right, by virtue of S.62, becomes an irrevocable easement, it is suggested that the risk of dispute over what precisely the dominant tenement holder may then do significantly increases.

The creative effect of S.62 cannot apply where it is 'difficult to define satisfactorily the precise ambit of the right'^[36], but the abundance of caselaw on the scope of rights of way, irrespective of whether they are created expressly, by implication or by prescription indicates that this reassurance provides only limited comfort. Neither in *International Tea Stores*, in which there was 'a conflict of evidence' as to the use of the accessway^[37] nor in *Wright v. Macadam* in which the coal shed 'was not used under any sufficiently definite agreement'^[38] do the permissive rights appear to have been defined with any great precision, but they were held to become easements under S.62 nonetheless.

Dewsbury v. Davies^[39] provides further evidence that the transformative effect of S.62 is illogical and poorly defined, and that its application can be both inconsistent and unpredictable. In that case, the Court of Appeal held that a personal licence to cross neighbouring land to a bus stop became an easement under S.62 because it appertained specifically to the cottage in which the licensee lived. A licence to park his car on the same neighbouring land was held, however to remain a licence because it was conferred on him personally, rather than as an occupier of the land, a conclusion justifiably described as 'incoherent'^[40].

^[36] *Dewsbury v. Davies* (Unreported, May 21, 1992, CA)(Fox LJ)

^[37] *International Tea Stores* (n13) 176

^[38] *Wright* (n18) 745

^[39] *Dewsbury* (n36)

^[40] *Tee* (n4) 116

In an attempt to control the creative effect of S.62, it has been held only to apply to rights 'which could readily be included in a lease or conveyance by the insertion of appropriate words'^[41]. The court in *Green* held that a licence to use an accessway only at times convenient to the landlord did not fall under S.62 on the basis that it was extremely precarious. The point at which a precarious right becomes too precarious to be caught by S.62 does not appear to have been clarified, and it is argued that it is incapable of such.

To be caught by S.62 a right need not be exercised at the specific time the conveyance is completed, but there must be 'a pattern of regular user' during a 'reasonable period of time before the grant in question'^[42]. It appears that non-use of the precarious right for four months prior to the conveyance will not prevent S.62 operating^[43], but a period of many years will: In *Re: Broxhead Common, Whitehill, Hampshire*^[44] a period of non-use of over 20 years meant, unsurprisingly, that S.62 could no longer operate in respect of that right. There is undoubtedly logic to the principle that a certain level of use is required prior to the conveyance to allow S.62 to operate, but the requirements for a 'pattern' of regular use during a 'reasonable' period defy clear definition; the suggestion that S.62 *can* have an immediate and, for the transferor, highly disadvantageous effect, but that there is no certainty as to the circumstances in which that effect will or will not occur does little to commend it.

Support for the Creative Effect of S.62

The ability of S.62 to create new easements from permissive rights is not without support. Particular attention has been given to the words 'reputed to appertain to' and to their evident distinction from 'Appertaining...or appurtenant to'^[45]. It is suggested that what precisely

^[41] *Wright* (n18) 752 (Jenkins LJ)

^[42] *Green* (n22) 898

^[43] *Pretoria Warehousing v. Shelton* [1993] EGCS 120

^[44] (1977) 33 P&CR 451, 463-4

^[45] *Douglas* (n11)

'reputed to appertain to' is intended to be a reference to is unclear. The words appear to include rights which are believed, although the section does not specify to what degree or by whom, to appertain to the land, but over which there is some uncertainty as to whether, and to what extent they do so. It is suggested that an example of a right which is 'reputed to appertain to' land might be a right in the course of being acquired by prescription, where the precise date on which the use started is unknown, or subject to dispute. What does not follow from the uncertainty as to what a right 'reputed to appertain to' land is, however, is that a right which is 'reputed' to appertain to the land immediately before the transfer should become one which *does* appertain to that land immediately after. It should be no less and no more 'reputed to appertain to' the land (with the uncertainty that surrounds that phrase still intact) as much after the conveyance as before.

The transformative effect of S. 62, based on its inclusion of rights which are 'reputed to appertain to' land, has been argued assists purchasers, in that a potential purchaser who believes erroneously that the land being sold to him has the benefit of an easement (when in fact there is only a licence) has a 'reasonable expectation'^[46] that he will, following the transfer, have that easement. According to this analysis, the transformative effect of S.62 ensures that that expectation is met, and that on this basis, there is a good reason why a buyer's conveyancer would either insert the words 'reputed to appertain to' into a conveyance, or allow S.62 to have its transformative effect, by not excluding its operation, thereby achieving the same outcome.

It is submitted that this approach is open to challenge. While there might, in the buyer's eyes, be a good reason for a buyer's conveyancer to allow the words 'reputed to appertain to' to operate on the conveyance, whether by expressly including that wording or by allowing S.62 to apply to the conveyance, there are more compelling reasons why a seller's adviser

^[46] Douglas (n11) 19

would swiftly reject this proposal, not least the risk already identified of inadvertently creating an unwanted (by the transferor) and irrevocable right over the retained land.

Nor, it is suggested, does or should the concept of a 'reasonable expectation' play a significant part in conveyancing practice. A well advised purchaser who is expecting, following completion of the transfer, to have the benefit of an easement will ensure either that the right in question already exists (and in cases of doubt ensure that appropriate indemnity insurance is put in place) or that the easement in question is expressly granted in the transfer. The Law Society's Conveyancing Handbook, in its section headed 'Checking Easements' states that, 'During the pre-contract stage, the buyer's solicitor must check the title and all the other documents in his file to ensure that the buyer will have the benefit of all the easements necessary for the enjoyment of the property.'^[47]

And that to discover easements the buyer's solicitor should:

'(a) Inspect the official copy of the register or the title deeds;

...

(d) ... instruct the buyer to make a personal inspection of the property to look for evidence of any easements, e.g. rights of way, rights to light, drainage, right to park...enjoyed by the property.'^[48]

The requisite duty on the buyer and the buyer's adviser is that of careful checking and inspection to identify whether a right does or will exist. It is suggested that an option for the buyer to assert an easement beyond those already existing or expressly negotiated does not sit comfortably with the duty the buyer has to satisfy himself as to the position before the transaction is completed.

A second argument made in support of retaining the transformative effect of S.62 is that under S.62(4) this effect can easily be excluded by appropriate and simple wording and that any competent conveyancer will appreciate the effect of the section and include such wording^[49]. While this is correct, it might be asked whether transactional property work,

^[47] The Law Society (n2) 428

^[48] The Law Society (n2) 429

^[49] Lees (n9) 431

which already presents a degree of complexity and risk for practitioners disproportionate to the level of fees recoverable, which is often carried out to tight time deadlines, should in addition to its many unavoidable complexities, also contain unnecessary and inexplicable traps.

It might also be asked whether ensuring the routine exclusion of a statutory provision is the best use of property practitioners' time and expertise, given the number of transfers of part routinely completed, as identified above. The exclusion of S.62 itself creates further work for the practitioner, for which they may or may not be rewarded, as consideration must be given to whether the entire section, or merely its creative effect is to be excluded, and whether it should be excluded in relation to all or merely selected easements. It might also be argued that simply because a potentially unsatisfactory outcome can be avoided by inclusion of appropriate wording, this does not of itself render that potential outcome any less unsatisfactory – It has merely been sidestepped by the insertion of wording designed to avoid a trap.

Moreover, the argument that S.62 LPA can easily be excluded does not sit well with the suggestion that the transformative effect of S.62 serves an important function of ensuring that the purchaser's reasonable expectation that the land benefits from an easement will be met^[50]. If the transformative effect does indeed serve an important function, logically that effect should be retained within as many land transactions as possible in order to maximise that beneficial function. That the exclusion of that effect can easily be done, and in accordance with professional guidance, routinely is done, points to the suggestion that such exclusion is in fact more desirable, or at least safer for practitioners and their clients, than retention.

It cannot, however, be said that guidance from professional bodies towards excluding S.62 is wholly consistent: Of the two main sets of standard conditions of sale published by the Law

^[50] Douglas (n11) 19

Society and widely used in England and Wales, the Standard Commercial Property Conditions (2nd ed.) exclude the effect of S.62 in relation to rights of light and air, but make limited and imprecise provision for the mutual grant and reservation of other easements on sale of part, which practitioners would normally displace by express provision. The Standard Conditions of Sale (5th ed.), generally used for residential purchases, contain no equivalent provision, and as such S.62 still applies to these transactions in the absence of provision to the contrary. The transformative effect of S.62 has already been identified as a trap for the unwary. The inconsistency between the two sets of standard conditions is, it is suggested, simply adds to the risk that that trap is not avoided.

Practitioner guidance tends to favour exclusion: *The Encyclopedia of Forms and Precedents* advises those drafting sales or leases of part to 'ensure that any rights or privileges over the retained land at the time of sale... are excluded in the contract unless the seller or landlord wishes them to pass to the buyer or tenant in which case they should be expressly provided for.'^[51] It then states unequivocally that 'If a draftsman neglects to include appropriate exclusion provisions, he may find that an informal and revocable right inadvertently attains the status of a permanent easement as a consequence of the conveyance.'^[52]

The argument that exclusion by property practitioners should be routine and straightforward also fails adequately to take into account the variety of transactions to which S.62 can apply. Its application is not limited to formal transfers of part by deed (which would normally be drafted by appropriately qualified practitioners), nor to land transactions where professional advice will routinely be sought. Under S. 205 (1)(ii) *LPA 1925*, it applies to 'any assurance of property or of an interest therein by any instrument, except a will'. S. 205 (1)(ii) includes by way of illustration 'a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer [and] release'. The equivalent provision in *The Conveyancing and Law of Property Act 1881*, as originally drafted, was broader still, as it included wills and

^[51] *The Encyclopaedia of Forms and Precedents* (5th edn, 2011) vol 13(1) para 2084

^[52] *ibid*

extended to 'any other dealing with or for any property'. Many such documents, particularly short leases (e.g. the one year lease in *Wright v. Macadam*) can be, and are prepared relatively informally^[53] by parties, for example estate managers or letting agents, who might reasonably consider themselves competent in preparing simple legal documents without legal advice, but who are unlikely to be aware of a logically doubtful judicial decision from the early years of the twentieth century.

Nor is the routine exclusion of S.62 without judicial criticism. In *Squarey v. Harris-Smith*^[54], Oliver L.J. stated that with 'very considerable regret'^[55] he was 'driven' to find that the plaintiff could not claim an easement by virtue of S.62 because the standard conditions of sale incorporated into the contract pursuant to which the transfer was made (a previous edition of those described above) had the effect of ousting the section. He drew particular attention to the fact that the relevant contractual condition was 'one of a number of printed conditions which the parties may well not actually have read'^[56]. His displeasure that the parties should be bound by the provision in such circumstances is evident. He also expressed surprise that a condition of that nature should have formed part of the common form Conditions of Sale for many years without the fact having attracted some attention in textbooks or reported decisions^[57]. Current practitioner guidance on excluding S.62, although available as indicated above, is neither as prominent nor as comprehensive or consistent as one might perhaps expect it to be. Accordingly, what arises is an unsatisfactory combination of significant risk of a costly error for the seller and their adviser by leaving S.62 in place on the one hand, and limited and not wholly consistent assistance with its exclusion on the other.

^[53] The Law Commission, *Published Working Paper No 36* (1971) para 91

^[54] (1981) 42 P& CR 118

^[55] *Squarey* (n54) 130

^[56] *Squarey* (n54) 128

^[57] *Squarey* (n54) 128

Proposals for Reform

Proposals for reform of S.62 are not new. Reviewing the 12th edition of *Gale on Easements* in 1950, A. D. Hargreaves argued that contractual amendments were an unsatisfactory means with which to cure defects in the law and concluded that; 'The time has surely come when the legislature should intervene.'^[58] Nor is this an area in which reforms have remained at the proposal stage. In Trinidad and Tobago, S. 94(5) *Land Law and Conveyancing Act 1981*^[59] provides, in relation to the provision equivalent to S.62:

'It is hereby declared that, from the commencement of this Act, this section does not operate to create in respect of, or impose on any other land any easements... or similar rights and obligations.'

While this provision has not been brought into force, it is evidence that reforming legislation in this area is not beyond reach.

In England and Wales, the Law Commission proposed in 1971^[60] that a 'drastic'^[61] solution might be to provide that a conveyance should not operate to pass any rights which were not expressly granted or reserved, and that a court or tribunal would be given jurisdiction to award any additional rights which were in fact required. It did not think this solution justifiable, arguing that contracting parties were entitled to expect the law to give contracts business efficacy, and that the proposal could lead to 'real injustice' in the case of informal tenancies. It proposed instead a statutory formula which would confer on each party 'the appropriate rights which he would reasonably expect to have in respect of the other party's land' and would contain 'no element of a trap for the unwary, by conferring more than the parties contemplated'^[62]. While no doubt addressing the problems associated with S.62, this solution is elaborate, relying as it does on an accurate construction of the 'appropriate' rights which the parties would 'reasonably' expect to have in order to be effective.

^[58] 15 MLR 265

^[59] Statutes of Trinidad and Tobago, 1981, No.20

^[60] The Law Commission (n53) para 91

^[61] *ibid*

^[62] *ibid*

More recently^[63], The Law Commission has recommended with specific reference to the transformative effect of S.62 that the section should 'no longer operate to transform precarious benefits into legal easements...on a conveyance of land'^[64]. Its draft *Law of Property Bill* at s21(1) states simply:

'21. Restriction of effect of section 62 Law of Property Act 1925

(1) The words implied by section 62... (general words implied in conveyances) are not to have effect

(a) to create an easement...'

There is an attractive simplicity to this approach, avoiding as it does the need to redraft S.62 and merely dealing with its unsatisfactory effects, much as the law in Trinidad and Tobago does, by way of an additional statutory provision. It is suggested that this simplicity might increase the chances of the provision being successfully brought into force.

Likewise the Victorian Law Reform Commission^[65] has proposed that S.62 *Property Law Act 1958* be retained and an amendment to the Act be made 'to make it clear that the section does not operate to create...or impose on any other land any easements...not previously subsisting.'^[66]

In Tasmania, S. 6(1) *Conveyancing and Law of Property Act 1884* applies only to land governed by 'general law' or 'old system' title, and not to land administered under the Torrens system and the *Land Titles Act 1980*, which cover the majority of land^[67].

Demonstrating an enthusiasm for reform, the Law Reform Institute of Tasmania contended, however, that this was not a valid argument for not amending the section. It proposed that

^[63] The Law Commission (n5)

^[64] The Law Commission (n5) para 3.64

^[65] Victorian Law Reform Commission, *Review of the Property Law Act 1958 Final Report 20* (2010)

^[66] Victorian Law Reform Commission (n65) Appendix A

^[67] Tasmania Law Reform Institute, *Law of Easements in Tasmania Final Report No 12* (2010) para 1.13.2

the section 'be amended to remove the possibility of easements being established through this provision.'^[68]

It noted a consultee's recommendation that s.6 could be redrafted to avoid the possibility that an easement could be created by the section^[69], or '...otherwise amended by omission of the words 'or reputed to appertain to the land'^[70]. If it is assumed that smaller revisions to statute are more likely than major revisions to withstand the pressures of legislative processes, the second approach has its appeal. It is suggested, however, that simple omission of 'reputed to appertain to the land' may not adequately address the problem. The current Ontario provision omits this wording but has still been held to have the undesirable transformative effect, with 'unforeseen and inappropriate results'^[71]. What, it is suggested, is required is an express statutory provision negating the creative effect, of the type proposed in Victoria, or ideally a complete repeal of S.62 accompanied by its replacement with a new section which better aids conveyancing practice.

Proposals for reform in Northern Ireland have embraced the latter approach. In 2010, The Northern Ireland Law Commission^[72] proposed replacing S.6 *Conveyancing Act 1881*. Section 95 of its Draft *Land Law Reform Bill* sets out the proposed replacement section which provides:

'95(1) A conveyance of land includes, and conveys with the land, all-
...
Advantages, easements...and rights appertaining or annexed to the land
...
(3) This section-
(a) does not on a conveyance of land...
(i) create any new interest or right or convert any quasi interest or right existing prior to the conveyance into a full easement or right; or
(ii) extend the scope of, or convert into a new interest any licence, privilege or other interest or right existing before the conveyance.'^[73]

^[68] Tasmania Law Reform Institute (n67) 22

^[69] Tasmania Law Reform Institute (n67) para 1.13.5

^[70] Tasmania Law Reform Institute (n67) para 1.13.4

^[71] Ontario Law Reform Commission, *Report on Basic Principles of Land Law* (1996) 146

^[72] Northern Ireland Law Commission, *Report Land Law*, NILC 8 (2010)

^[73] Northern Ireland Law Commission (n72) 201

It is suggested that this type of substantial revision of S.62 to clarify its effect is the most desirable option. The comprehensive revision of, and deletion of superfluous wording from the section, as proposed in Northern Ireland indicates a clear legislative intention that there is to be no doubt as to the effect the section. Compared with this, the approach of England and Wales and of other jurisdictions of retaining the section, and particularly the problematic words 'reputed to appertain to' un-amended, while providing elsewhere in the relevant act that S.62 or its equivalent will no longer have any transformative effect, seems pragmatic, but cautious. It also leaves unanswered the question of what a section purporting to convey rights which are 'reputed to appertain to' land *is* intended to achieve, if it is not the widely criticised transformation of precarious rights into easements.

Conclusion

The arguments for reform of S.62 and its equivalents elsewhere are compelling and enduring. Law Reform bodies have concluded that what should be an unremarkable statutory provision to simplify the work of transferring title to land should not have an effect beyond that which, it appears, was originally intended. Collectively they identify that where a transfer is part of a larger title, the current interpretation of the section presents a significant, yet unquantifiable, risk of the immediate, unanticipated and irrevocable creation of legal rights which is neither justified in principle nor satisfactory in practice. Hargreaves^[74] entreaty for legislative intervention is as relevant today as it was in 1950, but where the law reform bodies differ is in their views of the form the legislative intervention should take.

Particularly in England and Wales the pressing need for more housing is likely to mean that the number of transfers of part of a larger title will remain high for the foreseeable future. It is argued that relieving practitioners (and those undertaking property transactions without representation) from the unjustifiable burden of identifying, addressing and sidestepping the trap presented by S.62 is overdue. It is suggested that this relief is best provided by a

^[74] Hargreaves (n58) 266

comprehensive repeal of S.62 and its replacement with a new section, as proposed in Northern Ireland, which by stating simply and clearly that it operates to convey *existing* rights, and no more, fulfils the legislative ambition of 1881 of 'simplifying and improving' conveyancing practice.

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