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# THE PRINCIPLE OF BENEFIT AND BURDEN

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## I. INTRODUCTION

OVER the years there seem to have been a number of cases based ultimately on a general principle that a person who takes the benefit of an arrangement[1] will be bound by any associated burden contained in it despite the fact that he was not a party to the original arrangement.[2] Potentially the most extreme application of this principle, and the most controversial, has been in *Halsall* v. *Brizell*[3] and cases which followed it. The idea introduced in *Halsall* v. *Brizell* and later developed by Megarry V.-C. in *Tito* v. *Waddell (No. 2)*[4] 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 but is not a condition of that benefit. Megarry V.-C. referred to this as an application of a pure principle of benefit and burden to contrast the situation with the application of a principle of benefit and burden in the case of a conditional or qualified right.[5] In this article the term "pure principle" will be used to refer to the application of a principle of benefit and burden in *Halsall* v. *Brizell* and the cases which have followed it. Since the decision in *Halsall* v. *Brizell*, there has been controversy as to this most recent application of a principle of benefit and burden, the perceived problems being the lack of clarity and certainty as to the necessary requirements for its application and its potentially far-reaching effects. Such problems clearly influenced the House of Lords when deciding the case of *Rhone* v. *Stephens*[6] and, since that decision, there has been some doubt as to whether the principle of benefit and burden can have the effect that has been suggested.[7] A principle

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[1] A deliberately vague term that can include gifts, wills, deeds, contracts and other agreements and grants, whether in writing or oral.

[2] This principle is sometimes expressed in the latin maxim *qui sentit commodum sentire debet et onus* (or that a man cannot approbate and reprobate or accept and reject the same transaction).

[3] [1957] Ch. 169.

[4] [1977] 1 Ch. 106.

[5] At p. 290.

[6] [1994] A.C. 310.

[7] See N.P. Gravells (1994) 110 L.Q.R. 346, 349; J. Snape [1994] Conv. 477, 482. The doctrine has already been rejected by the Supreme Courts of Victoria and the Northern Territory in *Government Insurance Office (N.S.W.)* v. *K.A. Reed Services Pty. Ltd.* [1988] V.R. 829 and *Calabar Pty. Ltd.* v. *Ampol Pty. Ltd.* (1990) 71 N.T.R. 1 respectively.


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whereby a person can be forced to comply with obligations that would not otherwise bind him has undoubted attractions but will be unacceptable if it directly contradicts clearly established rules which prevent obligations binding non-contracting parties.

This article considers alongside each other a number of cases that seem ultimately to be based on some notion of benefit and burden. It will be argued that there is an established principle of benefit and burden operative in English law[8] and that the requirements for its application and its effect are reasonably clear. This principle is potentially extremely useful and, it will be argued, objections based on its possible effect are in part not entirely justifiable and in part avoidable.

## II. Applications of a Principle of Benefit and Burden

The following consideration of the relevant cases deals with them in separate categories which can be identified from the cases themselves. There has been no real cross reference between the cases in the various categories. However, there may well be factual overlaps between the categories.

### *A. The Rules applying to Deeds*

In *Tito* v. *Waddell (No. 2)*[9] Megarry V.-C. referred to two technical rules relating to deeds as, at least in part, the origin of the principle that he who takes the benefit of a transaction must also bear the burden. Reference to both rules can be found in Co.Litt. 230b[10] where the maxim *qui sentit commodum sentire debet et onus* is also cited.[11]

#### *The rule binding a non-executing party*

The first rule is that a named party to a deed who does not execute it will nevertheless be bound by any conditions contained in that deed if he knowingly takes the benefit of it.[12] The terms of a deed will be enforced because they are the terms on which the benefit has been provided[13] and, by accepting the benefit with knowledge of these

[8] Due regard must be given to the warning given by Lord Wright in *Lissenden* v. *C.A.V. Bosch, Ltd.* [1940] A.C. 412, 435 about the indiscriminate use of maxims such as those referred to in note 2 above: ". . . general formulae are found in experience often to distract the Court's mind from the actual exigencies of the case, and to induce the Court to quote them as offering a ready made solution. But it is not safe to act upon them unless and to the extent that they have received definition and limitation from judicial determination".

[9] [1977] 1 Ch. 106, 289. See also *Halsall* v. *Brizell* [1957] 1 Ch. 169, 182.

[10] The reference to the first rule is actually in note 1.

[11] At p. 231a.

[12] See further *Norton on Deeds*, 2nd ed., by Robert J.A. Morrison and Hugh J. Goolden (London 1928) at pp. 26–27 and the cases cited therein.

[13] *The Mayor and Burgesses of Lyme Regis* v. *Henley* (1834) 1 Bing. N.C. 222, 236, Buckley L.J.; *Duke* v. *Bellamie* [1905] 2 Ch. 605, 612. See also Lord Wright, *Lady Naas* v. *Westminster Bank, Ltd.* [1940] A.C. 366, 406, who referred to a reciprocal burden.

terms, the non-executing party is taken to have accepted and agreed to them.[14]

The terms need not be expressly stated to be conditions of the benefit. The courts have enforced the terms of a contract of employment,[15] an obligation to repair contained in the Royal Charter of the town and cob of Lyme Regis,[16] the reservation of an easement[17] and the creation of a lease[18] contained in a conveyance of a fee simple of land, and a clause whereby, in consideration of benefits under a settlement, the beneficiary agreed to release rights under a separate deed of covenant.[19] From the last case it seems there need be no intrinsic connection between the obligation and the benefit.

There is clear authority that liability arises only where the benefit is accepted with knowledge of the terms contained in the deed.[20] Although there was no discussion of this point in many of the cases, there seems little doubt that on the facts such knowledge was always present.

For all practical purposes, by accepting the benefit the party will be in the same position as if he had executed the deed.[21] The terms can be directly enforced and, where appropriate, the courts will also compel the non-executing party to do something further to comply with the obligation, such as grant an easement.[22] The doctrine can be used as a cause of action[23] and there is authority in favour of liability both at law[24] and in equity.[25]

The position in relation to successors of the original parties is less clear. In one case personal representatives of the executing party successfully sued;[26] in another case the action failed precisely because

[14] Holroyd J., *R.* v. *Houghton-le-Spring* (1819) 2 B. & Ald. 375, 378; Lord Wright, *Lady Naas* v. *Westminster Bank, Ltd.* [1940] A.C. 366, 406.

[15] *R.* v. *Houghton-le-Spring* (1819) 2 B. & Ald. 375. See also *McDonald* v. *John Twiname Ltd.* [1953] 2 Q.B. 304, CA.

[16] *The Mayor and Burgesses of Lyme Regis* v. *Henley* (1834) 1 Bing. N.C. 222.

[17] *May* v. *Belleville* [1905] 2 Ch. 605.

[18] The fee simple was conveyed subject to and with the benefit of a lease which may have technically merged with the freehold; a new lease would have been created had the purchaser executed the deed: *Thellusson* v. *Liddard* [1900] 2 Ch. 635. See also *Formby* v. *Barker* [1903] 2 Ch. 539, CA where an action to enforce a restrictive covenant seemingly failed only because the action was between successors in title of the original parties.

[19] *Lady Naas* v. *Westminster Bank, Ltd.* [1940] A.C. 366. See also *Webb* v. *Spicer* (1849) 13 Q.B. 886.

[20] *R.* v. *Houghton-le-Spring* (1819) 2 B. & Ald. 375; Viscount Maugham, *Lady Naas* v. *Westminster Bank, Ltd.* [1940] A.C. 366, 373.

[21] *The Mayor and Burgesses of Lyme Regis* v. *Henley* (1834) 1 Bing. N.C. 222; Lord Wright, *Lady Naas* v. *Westminster Bank, Ltd.* [1940] A.C. 366, 406; Evershed M.R., *McDonald* v. *John Twiname Ltd.* [1953] 2 Q.B. 304, 314, CA.

[22] *May* v. *Belleville* [1905] 2 Ch. 605, 612.

[23] *E.g. May* v. *Belleville* [1905] 2 Ch. 605. It can be used by the non-executing party if necessary, although this will be rare: *Lady Naas* v. *Westminster Bank, Ltd.* [1940] A.C. 366.

[24] *E.g. R.* v. *Houghton-le-Spring* (1819) 2 B. & Ald. 375; *Webb* v. *Spicer* (1849) 13 Q.B. 886.

[25] *Wilson* v. *Leonard* (1840) 3 Beav. 373; *Formby* v. *Barker* [1903] 2 Ch. 539, 553, CA; *May* v. *Belleville* [1905] 2 Ch. 605; *Thellusson* v. *Liddard* [1900] 2 Ch. 635.

[26] *Brett* v. *Cumberland* (1619) 2 Rolle. 83.

it was brought by personal representatives.[27] By contrast, the cases do seem to be strongly supportive of successors in title of the non-executing party being bound.[28] Successors who provide consideration may only be bound if they have notice,[29] but constructive notice may be sufficient.[30]

*The rule binding a grantee*

The second rule is that a person who is expressly granted an estate in a deed subject to certain conditions will be bound by those conditions if he accepts the estate. There is, in fact, little authority concerning this rule. However, in many ways it is little different from the previous one: in both cases liability is imposed on someone who is expressly intended to take a benefit under a deed and who would not otherwise be bound by the obligations contained in it. What little authority there is suggests liability at law based on acceptance of and agreement to the grant on the terms set out in the deed.[31]

### *B. Conditional Benefits*

The cases considered here were discussed in some detail by Megarry V.-C. in *Tito* v. *Waddell (No. 2)*.[32] As he said:

> An instrument may be framed so that it confers only a conditional or qualified right, the condition or qualification being that certain restrictions shall be observed or certain burdens assumed, such as an obligation to make certain payments. Such restrictions or qualifications are an intrinsic part of the right: you take the right as it stands, and you cannot pick out the good and reject the bad. In such cases it is not only the original grantee who is bound by the burden: his successors in title are unable to take the right without also assuming the burden. The benefit and burden have been annexed to each other ab initio, and so the benefit is only a conditional benefit.[33]

There are few cases that fall within this category and they all concern the grant of a right over land. The claim of a conditional right has succeeded only where there was a grant of a right to mine under land and an obligation to remedy, or pay compensation for,

[27] *Formby* v. *Barker* [1903] 2 Ch. 539, CA.

[28] *Brett* v. *Cumberland* (1619) 2 Rolle. 63 (personal representatives); *Willson* v. *Leonard* (1840) 3 Beav. 373 (personal representatives); *Thellusson* v. *Liddard* [1900] 2 Ch. 635 (purchasers); Stirling L.J., *Formby* v. *Barker* [1903] 2 Ch. 539, 556, as interpreted in *Chambers* v. *Randall* [1923] 1 Ch. 149; *May* v. *Belleville* [1905] 2 Ch. 605 (transferee from mortgagee of original party).

[29] *May* v. *Belleville* [1905] 2 Ch. 605. N.B. *Thellusson* v. *Liddard* [1900] 2 Ch. 635, where the successors bought expressly subject to the terms of the original deed.

[30] See Buckley J., *May* v. *Belleville* [1905] 2 Ch. 605, 612.

[31] Co.Litt. 230b, Abbott C.J. and Bayley J.: *Burnett* v. *Lynch* (1826) 5 B. & C. 589, 601, 606; [1977] 1 Ch. 106, 296–297.

[32] At p. 290.


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damage caused to the land or buildings on it.[34] There are also dicta suggesting that an obligation to contribute to the costs of repair could be a condition of the exercise of a right of way.[35] It is not clear whether this category is limited to conditions which can be said to "qualify" or be an intrinsic part of the right or whether something totally unconnected with the right could be imposed as a condition. Whereas some of the judgments certainly refer to a qualification of the right,[36] other judges refer simply to the terms or conditions on which the right has been granted.[37] If the category is limited to "qualified" rights it is arguable that only obligations to repair or restore land after use or to pay compensation for such a purpose or generally for the use of the right would be covered.

The courts will construe the instrument as a whole to determine whether the obligation can be said to be a condition of the right. No particular words seem to be necessary. An obligation to remedy, or pay compensation for, damage to land or buildings has been found to be a condition of a right to mine where they both appeared in the same clause[38] and where there was an express reference in the clause granting the right to mine to the clause imposing the obligation.[39] In one case the necessary link was found where the right and obligation were in separate, unconnected clauses, although the reason for this is unclear.[40] There must be something more than the obligation and right appearing in the same instrument or relating to the same subject matter.[41]

It is not clear whether liability depends on exercise of the right with knowledge that it is conditional or qualified. Megarry V.-C. in

[34] *Aspden* v. *Seddon* (1876) 1 Ex. D. 496, CA; *Chamber Colliery Co. Ltd.* v. *Twyerould* (1893) [1915] 1 Ch. 268n, HL; *Westhoughton U.D.C.* v. *Wigan Coal and Iron Co., Ltd.* [1919] 1 Ch. 159, CA.

[35] *Duncan* v. *Louch* (1845) 6 Q.B. 904, 912, 914. See also *Re Ellenborough Park* [1956] Ch. 131, 167, 169, CA. In Queensland an obligation to make a one-off payment for the use of an extension to a party wall was treated as a qualification of the right to use it: *Rufa Pty. Ltd.* v. *Cross* [1981] Qd.R. 365.

[36] *E.g.* James L.J., *Aspden* v. *Seddon* (1876) 1 Ex. D. 496, 509; Lord Watson, *Chamber Colliery Co. Ltd.* v. *Twyerould* (1893) [1915] 1 Ch. 268n, 273; Megarry V.-C., *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 290, 297.

[37] Bramwell B. and Mellish L.J., *Aspden* v. *Seddon* (1876) 1 Ex. D. 496, 503, 509; Swinfen Eady M.R. and Duke L.J., *Westhoughton U.D.C.* v. *Wigan Coal and Iron Co., Ltd.* [1919] 1 Ch. 159, 168, 171, 172, 174.

[38] *Aspden* v. *Seddon* (1876) 1 Ex. D. 496.

[39] *Westhoughton U.D.C.* v. *Wigan Coal and Iron Co., Ltd.* [1919] 1 Ch. 159

[40] Lord Watson found the connection "from the whole of the provisions of the instrument": *Chamber Colliery Co. Ltd.* v. *Twyerould* (1893) [1915] 1 Ch. 268n, 273. The right to mine was expressly made conditional on an obligation to pay compensation for damage to the surface; a separate clause contained an obligation to pay compensation for damage to buildings. In *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 298 Megarry V.-C. expressed the view that the decision could be justified on the grounds (a) that it would be odd if the right were qualified in relation to one type of damage and not the other and (b) that the payment for damage to buildings was said to be over and above payments required under the express condition.

[41] *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 303. See *Radstock Co-operative and Industrial Society* v. *Norton-Radstock U.D.C.* [1967] Ch. 1094, [1968] Ch. 605.

*Tito* v. *Waddell (No. 2)*[42] seems to discuss the cases on the basis that liability arises simply because there is a burden which is a part of the right rather than because of some conscious acceptance of the burden. The cases themselves contain no clear statement either way and no express discussion of the issue. However, in all the cases the successor was relying on a document to show that he had a particular right[43] so there would have been actual or constructive knowledge of the obligation contained in that document. Moreover, there would also have been actual or constructive knowledge of the fact that the obligation was a condition of the benefit, except perhaps in the one case where the right and obligation were contained in separate clauses, not expressly connected, so that connection between the two was not so obvious on the face of the document.[44]

Personal liability to comply with the obligation is imposed on successors in title to the original grantee because they have chosen to exercise a right which authorises otherwise unlawful acts and that right is a qualified right.[45] All the cases have involved liability arising as a consequence of exercise of the right in the past and the courts have ordered the payment of compensation, which in two of the three cases amounted to direct enforcement of the obligation.[46] If there is a risk of future non-compliance a court will be prepared to grant an injunction preventing exercise of the right except on its terms.[47] The principle can be used as a cause of action and has justified the grant of a remedy at law[48] and in equity.[49]

The obligation will be enforceable by successors in title of the original grantor. The successors need not have the same estate as the grantor and need not have any right to enforce the obligation directly; a derivative interest such as a lease will be sufficient[50] and it has been said that the person suing need only have a right to sue for unauthorised acts.[51]

[42] [1977] 1 Ch. 106 at pp. 290 (where he compares the cases to burdens annexed to land) and 309.
[43] In the cases a right to let down the surface of the land.
[44] *Chamber Colliery Co. Ltd.* v. *Twyerould* (1893) [1915] 1 Ch. 268n.
[45] *Aspden* v. *Seddon* (1876) 1 Ex. D. 496, 509; *Chamber Colliery Co. Ltd.* v. *Twyerould* (1893) [1915] 1 Ch. 268n, 270; *Westhoughton U.D.C.* v. *Wigan Coal and Iron Co., Ltd.* [1919] 1 Ch. 159, 168, 171, 174. It seems from *Westhoughton U.D.C.* v. *Wigan Coal and Iron Co., Ltd.* at pp. 171–172 that anyone who wished to avoid the obligation could instead choose to be liable as a wrongdoer.
[46] *Aspden* v. *Seddon* (1876) 1 Ex. D. 496, CA; *Chamber Colliery Co. Ltd.* v. *Twyerould* (1893) [1915] 1 Ch. 268n, HL. In *Westhoughton U.D.C.* v. *Wigan Coal and Iron Co., Ltd.* [1919] 1 Ch. 159, CA the obligation was actually to make good any damage caused.
[47] *Westhoughton U.D.C.* v. *Wigan Coal and Iron Co., Ltd.* [1919] 1 Ch. 159, 171 and see the order at p. 177.
[48] *Aspden* v. *Seddon* (1876) 1 Ex. D. 496.
[49] *Chamber Colliery Co. Ltd.* v. *Twyerould* (1893) [1915] 1 Ch. 268n; *Westhoughton U.D.C.* v. *Wigan Coal and Iron Co., Ltd.* [1919] 1 Ch. 159.
[50] *Chamber Colliery Co. Ltd.* v. *Twyerould* (1893) [1915] 1 Ch. 268n; *Westhoughton U.D.C.* v. *Wigan Coal and Iron Co., Ltd.* [1919] 1 Ch. 159.
[51] See *Westhoughton U.D.C.* v. *Wigan Coal and Iron Co., Ltd.* [1919] 1 Ch. 159, 171-172, 175-176.

### *C. Conditional Testamentary Gifts*

There is a line of cases in which the attachment of a condition to a gift by a testator has had the effect of imposing on the beneficiary a personal obligation to comply with the condition. In these cases there has again been reference to having to take the burden with the benefit[52] and to the maxim *qui sentit commodum sentire debet et onus.*[53] Liability undoubtedly arises because of acceptance of a conditional gift. It has on occasion been suggested that the courts are enforcing an implied contract,[54] but it has also, perhaps more authoritatively, been argued that liability does not rest on such a basis and is rather imposed by equity.[55]

The cases have involved a variety of obligations. For example, buildings have been devised on condition that they be kept in repair,[56] a legacy has been given to a church on condition that the clergyman wear a black gown in the pulpit,[57] and property has been given on condition either that money be paid to a third party[58] or that potential claims against the estate[59] or third parties[60] be released. Only some of these conditions are intrinsically connected with the subject-matter of the gift; others could at most be regarded as indirect payment for the gifts rather than as qualifying the property gifted.[61] It has never been suggested that there is any limitation on what can be imposed by way of condition.

It is a question of construction whether the condition imposes a burden incidental to the gift, and consequently a personal obligation, rather than creating a charge, trust or condition precedent or subsequent or merely expressing the motive for the gift.[62] Most cases have involved a gift expressed to be "on condition" or "subject to" a particular obligation. However, the lack of such words is not fatal if

[52] *E.g. Re Williames* (1885) 54 L.T. 105, 106; *Jay* v. *Jay* [1924] 1 K.B. 826, 829, 831.

[53] *The Earl of Northumberland* v. *The Marquis of Granby* (1760) 1 Eden 489, 499; *Jay* v. *Jay* [1924] 1 K.B. 826, 829. See also *Broom's Legal Maxims*, 10th ed. by R.H. Kersley (London 1939) at p. 485, where *Messenger* v. *Andrews* (1828) 4 Russ. 478 is cited as an example of the application of this maxim.

[54] *Gregg* v. *Coates* (1856) 23 Beav. 33, 38; *Re Williames* (1884) 52 L.T. 41, (1885) 54 L.T. 105, 106, CA.

[55] *Re Williames* (1885) 54 L.T. 105, 107, CA; Jay v. *Jay* [1924] 1 K.B. 826, 830–831.

[56] *Hickling* v. *Boyer* (1851) 3 Mac. & G. 635; *Gregg* v. *Coates* (1856) 23 Beav. 33; *Re Williames* (1885) 54 L.T. 105, CA; *Dingle* v. *Coppen* [1899] 1 Ch. 726; *In re Loom. Fulford* v. *Reversionary Interest Society, Ltd.* [1910] 2 Ch. 230; *Jay* v. *Jay* [1924] 1 K.B. 826. See also *Re Skingley* (1851) 3 Mac. & G. 221, where there was also an obligation not to commit waste.

[57] *Re Robinson* [1892] 1 Ch. 95.

[58] *A.-G.* v. *Christ's Hospital* (1790) 3 Bro. C.C. 165; *Messenger* v. *Andrews* (1828) 4 Russ. 478; *Welby* v. *Rockcliffe* (1830) 1 Russ. & M. 571; *Rees* v. *Engleback* (1871) L.R. 12 Eq. 225; *Re Hodge* [1940] Ch. 260; *Re Lester* [1942] Ch. 324.

[59] *The Earl of Northumberland* v. *The Marquis of Granby* (1760) 1 Eden. 489, (1768) Amb. 657.

[60] *Egg* v. *Devey* (1847) 10 Beav. 444.

[61] In fact the donee may have to pay out or lose more in financial terms than he actually receives and the payment is not in any way calculated by reference to the benefit received. *Re Lester* [1942] Ch. 324. See further T.C. Thomas, "Conditions in Favour of Third Parties" (1951) 11 C.L.J. 240.

the intention is clear.[63] Moreover, in one case the condition of a gift in a will was found in a codicil to it in which a testatrix "prohibited" all beneficiaries from complaining of any maladministration of her father's will.[64]

In most cases the court simply said that liability arose because the beneficiary had chosen to accept the conditional gift.[65] However, there are dicta which suggest that the beneficiary will only be bound if he accepts the gift with knowledge of the condition[66] and of other facts relevant to his decision.[67] A beneficiary will have at least constructive knowledge of the terms of the will and the fact that the gift is conditional will usually be apparent on the face of the will.

Once the beneficiary accepts the gift he comes under an equitable personal obligation to comply with the condition, which can therefore be directly enforced.[68] Forfeiture of the gift (and consequently indirect enforcement because of the threat of forfeiture) is not an option[69] even in relation to future liability under a continuing obligation,[70] except perhaps where the condition is incapable of performance.[71] The condition is directly enforceable not only by the testator's personal representatives but also by the person intended to benefit from the condition.[72]

[63] *Dingle* v. *Coppen* [1899] 1 Ch. 726 (the testator's wife was given the rents and profits of certain properties "she . . . out of such rents and profits keeping the buildings . . . fully insured . . . and . . . in good tenantable repair"); *Re Loom* [1910] 2 Ch. 230 (a woman was left leasehold property for life "she paying the ground rent and performing all the covenants").

[64] *Egg* v. *Devey* (1847) 10 Beav. 444.

[65] An express refusal to accept the conditions is ineffective: *The Earl of Northumberland* v. *The Marquis of Granby* (1760) 1 Eden. 489, 501.

[66] *Re Skingley* (1851) 3 Mac. & G. 221, 229; *Re Loom* [1910] 2 Ch. 230, 233.

[67] *Messenger* v. *Andrews* (1828) 4 Russ. 478, 482–483. Knowledge of the legal position is irrelevant: *Re Hodge* [1940] Ch. 260.

[68] *Rees* v. *Engelback* (1871) L.R. 12 Eq. 225, 237; *Re Williames* (1885) 54 L.T. 105, 106, 107; *Re Loom* [1910] 2 Ch. 230, 233; *Jay* v. *Jay* [1924] 1 K.B. 826, 831; *Re Hodge* [1940] Ch. 260, 264. See also the court orders in *The Earl of Northumberland* v. *The Marquis of Granby* (1760) 1 Eden. 489, (1768) Amb. 657; *Bennett* v. *Colley* (1833) 2 My. & K. 225; *Egg* v. *Devey* (1847) 10 Beav. 444; *Gregg* v. *Coates* (1856) 23 Beav. 33; *Dingle* v. *Coppen* [1899] 1 Ch. 726.

[69] *Gregg* v. *Coates* (1856) 23 Beav. 33, 38.

[70] *The Earl of Northumberland* v. *The Marquis of Granby* (1760) 1 Eden. 489, (1768) Amb. 657; *A.-G.* v. *Christ's Hospital* (1790) 3 Bro. C.C. 165; *Rees* v. *Engelback* (1871) L.R. 12 Eq. 225; *Re Hodge* [1940] Ch. 260. Cf. *Re Robinson* [1892] 1 Ch. 95, where it was held that a clergyman would receive the income from an endowment while he complied with the condition of wearing a black gown. It was not clear whether failure to comply would simply mean non-payment for a particular period or forfeiture of the legacy: arguably it was only the former. See also *Hickling* v. *Boyer* (1851) 3 Mac. & G. 635, where the order seemed to be somewhere between forfeiture and enforcement in that possession of the devised property should be delivered up until the condition was complied with. Forfeiture can never be an adequate remedy in respect of any liability already incurred, whether under a continuing obligation or where there is a unitary burden or one-off obligation.

[71] If performance is clearly impossible from the outset the gift will not take effect: *Robinson* v. *Wheelwright* (1856) 6 De G.M. & G. 535. If it becomes impossible later the only option may be to forfeit the gift, effectively treating the condition as a condition subsequent: *Vernon* v. *Bethell* (1762) 2 Eden. 110, where the donee brought an action to enforce claims against the estate in contravention of the condition.

*Wellbye* v. *Ratcliffe* (1830) 1 Russ. & M. 571; *Bennett* v. *Colley* (1833) 2 My. & K. 225; *Rees* v. *Engelback* (1871) L.R. 12 Eq. 225; *Jay* v. *Jay* [1924] 1 K.B. 826. See also *Egg* v. *Devey* (1847) 10

The question whether the obligation can be enforced against successors in title of the original beneficiary who do not acquire their title under the original will has arisen clearly only once in *Re Loom*.[73] In many cases the issue does not arise because the obligation is such that it can be enforced against the original beneficiary or his estate with no need to sue successors, for example an obligation to pay a legacy or debt.[74] In other cases the wording of the obligation was such as to impose an obligation on the original beneficiary only.[75] However, in *Re Loom* an attempt was made to make the mortgagee of a life interest in leasehold property liable to repair the property pursuant to a condition in a will. On the facts the mortgagee was held not to be liable but it was suggested that there could have been personal liability, had the mortgagee actually taken the benefit of the estate granted.[76]

### *D. Linked Testamentary Gifts*

A will may include two gifts in favour of the same person, one being beneficial, the other being burdensome. The beneficiary may wish to accept the former and reject the latter. In a number of Chancery cases the courts have drawn a distinction between two independent gifts, where one can be accepted and the other rejected, and an aggregate gift, where the beneficiary must accept all or none.[77] Liability has been said to arise because there is an implied condition to submit to the burden,[78] that one gift is the condition of the other,[79] or that the gift is only of the net benefit.[80]

The relevant factor is the testator's intention: whether he intended to impose a burden in connection with a benefit—in which case the gifts will be regarded as aggregate—or to confer two benefits—in which case the gifts will be regarded as independent.[81] Prima facie

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Beav. 444 and *Dingle* v. *Coppen* [1899] 1 Ch. 726, in which the condition was used defensively by the person intended to benefit from it.

[73] [1910] 2 Ch. 230.

[74] *E.g. The Earl of Northumberland* v. *The Marquis of Granby* (1760) 1 Eden. 489, (1768) Amb. 657.

[75] *E.g. Rees* v. *Engelback* (1871) L.R. 12 Eq. 225; *Re Hodge* [1940] Ch. 260; *Re Lester* [1942] Ch. 324. This seemed to be the case in *Re Loom* [1910] 2 Ch. 230, but the clause did not appear in full in the report. In fact, it is arguable that in other cases if the wording of the obligation does not clearly impose only a personal obligation on the donee then the court will be likely to construe the will as imposing a charge, *e.g. Re Cowley* (1885) 53 L.T. 494 (although that case concerned a one-off obligation). Cf. *Hickling* v. *Boyer* (1851) 3 Mac. & G. 635.

[76] [1910] 2 Ch. 230, 234, 235.

[77] The donee must take the benefit with the burden imposed: *Talbot* v. *The Earl of Radnor* (1834) 3 My. & K. 252; *Re Kensington* [1902] 1 Ch. 203, 213. *Talbot* v. *The Earl of Radnor* is cited as an example of the application of the maxim *qui sentit commodum sentire debet et onus* in *Broom's Legal Maxims* 10th ed., at p. 485.

[78] *Andrew* v. *Trinity Hall, Cambridge* (1804) 9 Ves. 525, 534.

[79] *Warren* v. *Rudall* (1860) 1 John. & H. 1, 13.

[80] *Re Kensington* [1902] 1 Ch. 203, 213; *Andrew* v. *Trinity Hall, Cambridge* (1804) 9 Ves. 525, 534; *Warren* v. *Rudall* (1860) 1 John. & H. 1, 12–13.

the inclusion of two separate properties in the same words of gift indicates an aggregate gift. Clear examples include a gift of "all my real and personal estate"[82] and the bequest of a leasehold house "together with its contents".[83] On the other hand, if the properties are gifted separately, usually in separate clauses in the will, they will prima facie be regarded as independent gifts.[84] However, the precise wording of the will is not conclusive: gifts of shares and land[85] and of shares in various companies[86] have been construed as independent even though they were contained in the same clause[87] and a connection has been found between two apparently independent gifts of a leasehold and an annuity in separate clauses.[88] It is not clear from the cases themselves why the prima facie inference from the wording of the will was displaced, although it is arguable that the relevant factors were whether the property was burdensome when the testator made his will[89] and whether the testator knew, or could be taken to have known, that fact.[90] There is no need for the properties to be intrinsically connected in any way before an aggregate gift will be found: interests in two entirely separate properties can be linked.[91]

There has been no discussion as to whether or not the beneficiary can be bound without knowledge of the relevant facts. However, there has been no case in which the burdensome property was forced on an unwilling beneficiary: the beneficiary either accepted[92] or

[82] *Re Hotchkys* (1886) 32 Ch.D. 408. See also *Frewen* v. *Law Life Assurance Society* [1896] 2 Ch. 511.

[83] *Re Joel* [1943] Ch. 311. See also *Green* v. *Britten* (1872) 42 L.J. Ch. 187.

[84] *Andrew* v. *Trinity Hall, Cambridge* (1804) 9 Ves. 525; *Warren* v. *Rudall* (1860) 1 John. & H. 1; *Re Loom* [1910] 2 Ch. 230.

[85] *Moffett* v. *Bates* (1857) 3 Sm. & G. 468.

[86] *Aston* v. *Wood* (1874) 43 L.J. Ch. 715.

[87] This would perhaps be possible only where the different properties are specifically described, rather than included in a general description: see, for example, *Frewen* v. *Law Life Assurance Society* [1896] 2 Ch. 511. However, in *Guthrie* v. *Walrond* (1883) 22 Ch. D. 573 Fry J. did not automatically dismiss the possibility of being able to take only a part of a gift of "all my estate and effects in Mauritius". A gift of residue seems to be undoubtedly a gift of the net benefit: *e.g. Hawkins* v. *Hawkins* (1880) 13 Ch. D. 470, 474.

[88] This has actually been the outcome in only one case—*Talbot* v. *The Earl of Radnor* (1834) 3 My. & K. 252—a not entirely satisfactory decision which has been better discussed and explained elsewhere, *e.g.* in *Warren* v. *Rudall* (1860) 1 John. & H. 1, 11–12. However, the possibility has been adverted to in other cases, *e.g. Warren* v. *Rudall; Guthrie* v. *Walrond* (1883) 22 Ch. D. 573, 577.

[89] The leasehold in *Talbot* v. *The Earl of Radnor* (1834) 3 My. & K. 252 was burdensome because of the rent payable and this had not changed from the time the will was made. By contrast, in *Moffett* v. *Bates* (1857) 3 Sm. & G. 468, where the gifts were regarded as independent, shares in a bank only became burdensome after the testator's death when the bank became insolvent.

[90] Arguably there is support for this in the interpretation of *Talbot* v. *The Earl of Radnor* (1834) 3 My. & K. 252 in *Warren* v. *Rudall* (1860) 1 John. & H. 1, 12 and *Fairtlough* v. *Johnstone* (1865) 16 Ir. Ch. Rep. 442. See also *Re Pearce* [1926] N.Z.L.R. 698, 707. If the courts are not just looking for an intention by the testator to link two gifts but to link a burdensome gift with a beneficial one then surely he must know that one is burdensome. Cf. *Re Kensington* [1902] 1 Ch. 203, 209–210.

[91] See the cases in note 82, above.

[92] *Guthrie* v. *Walrond* (1883) 22 Ch.D. 573; *Re Joel* [1943] Ch. 311.

confirmed acceptance[93] of the aggregate gift after knowledge was acquired or lost the beneficial property because of a refusal to accept the burdensome property.[94] It would be difficult to assume knowledge in this situation, not only because it may not be clear on the face of the will that two gifts are linked but also because it will not necessarily be obvious that one of the properties is burdensome.

Undoubtedly the beneficiary cannot take the beneficial property without also taking the burdensome property. Although most cases have been concerned solely with construing the will rather than enforcement, in one case the burden was directly enforced.[95]

An action can be brought either by the testator's personal representatives or by those who would benefit if the gifts were held to be linked,[96] and the doctrine can also be used defensively by such persons.[97] There have been no cases in which the beneficiary died before the properties were accepted but presumably his successors would also have to accept all or none. It seems that a link between the properties will continue to bind the beneficiary and his successors if to hold otherwise would defeat the testator's intention.[98] Arguably in most situations the testator's intention will have been achieved once both properties have passed to the beneficiary and the burdensome property removed from his estate.

### *E. Equitable Election*

The doctrine of equitable election applies where there are two gifts in the same instrument, whether a deed or will, one gift being of the donor's property to a beneficiary, and the other gift being of that beneficiary's property to another. The beneficiary must elect whether to take under the deed, which will necessitate his giving effect to the gift of his own property so far as he is able, or to take against the deed, which will have the consequence that he must compensate the intended recipient of his property, primarily out of, and only up to the value of, the gift in his favour.[99] A similar principle applies where

[93] *Re Hotchkys* (1886) 32 Ch.D. 408; *Frewen* v. *Law Life Assurance Society* [1896] 2 Ch. 511; *Re Kensington* [1902] 1 Ch. 203.

[94] *Talbot* v. *The Earl of Radnor* (1834) 3 My. & K. 252.

[95] *Frewen* v. *Law Life Assurance Society* [1896] 2 Ch. 511.

[96] *Guthrie* v. *Walrond* (1883) 22 Ch.D. 573; *Frewen* v. *Law Life Assurance Society* [1896] 2 Ch. 511.

[97] *Hawkins* v. *Hawkins* (1880) 13 Ch.D. 470

[98] *Frewen* v. *Law Life Assurance Society* [1896] 2 Ch. 511, where there was a settlement by will of a number of mortgaged estates. The tenant for life and the mortgagee of his life interest were obliged to treat the properties as a whole and use the surplus income from any to pay the mortgage interest on the others. See also *Re Loom* [1910] 2 Ch. 230, 234–235, where Parker J. arguably appears to suggest something similar.

[99] For a recent formulation of the doctrine, see *In re Gordon's Will Trusts* [1978] 1 Ch. 145, 153, CA.

a deed giving a person a benefit under a settlement also provides for that beneficiary to bring property into the settlement.[100]

The doctrine has, over the years, become very technical, particularly in its application to wills,[101] and, as will be seen, in some respects it is not directly comparable with the other cases considered here. However, it does ultimately seem to rest on a similar basis, and arguably a comparison is useful, not least because equitable election has been further developed with clear answers on some of the issues that are still unclear in the other categories of cases. At its most basic level the doctrine provides that a person taking under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. Alongside statements referring to the need to take the burden with the benefit[102] and that a person cannot "approbate and reprobate" or accept and reject the same instrument,[103] are references to the maxim *qui sentit commodum sentire debet et onus*,[104] all of which support the argument that the doctrine is based on a principle of benefit and burden.

All that is necessary for the application of the doctrine is that a donor purports to make a gift of property that is not his to give while, in the same instrument, he makes an effective gift to the owner of that property. It is irrelevant whether or not the donor knows that the property is not his; he need not intend that the true owner be put to his election; and there need be no specific link in the instrument between the two purported gifts. As such the doctrine is clearly far wider in its application than any of the others considered in this article. It is simply presumed that the donor intended that all parts of the instrument be equally effective.[105] The doctrine will not apply if the instrument shows a contrary intention.[106] Practical considerations may also render the doctrine inapplicable so that the beneficiary takes the gift free of any obligation. The beneficiary's own property must be capable of alienation so that he can, if he wishes, comply with the obligation[107] and the gift to the beneficiary must be

[100] *E.g. Codrington* v. *Lindsay* (1873) L.R. 8 Ch. App. 578; *Codrington* v. *Codrington* (1875) L.R. 7 H.L. 854.

[101] It has been subjected to criticism: see Crago, "Mistakes in Wills and Election in Equity" (1990) 106 L.Q.R. 487. Objections to the doctrine relate primarily to when it is applicable, on the basis that it should not apply where a testator has made a genuine mistake. Its usefulness as a comparison stems more from how, rather than when, it operates.

[102] *E.g.* Lord O'Hagan in *Cooper* v. *Cooper* (1874) L.R. 7 H.L. 53, 73 and *Codrington* v. *Codrington* (1875) L.R. 7 H.L. 854, 867.

[103] *E.g.* Lord Eldon, *Ker* v. *Wauchope* (1819) 1 Bli. 1, 21, HL; Lord Selborne L.C., *Codrington* v. *Lindsay* (1873) L.R. 8 Ch. App. 578, 587; Lord O'Hagan, *Codrington* v. *Codrington* (1875) L.R. 7 H.L. 854.

[104] *E.g. Pickersgill* v. *Rodger* (1876) 5 Ch.D. 163, 173. See also *Broom's Legal Maxims*, 10th ed. at p. 485.

[105] See, for example, the discussion of the doctrine by the House of Lords in *Cooper* v. *Cooper* (1874) L.R. 7 H.L. 53.

[106] *Re Fenton's Trusts* (1885) 31 Ch.D. 279, 279.

[107] *Re Lord Chesham* (1886) 31 Ch.D. 466 (the relevant property was chattels which were included

such that it would be available for compensation if the beneficiary elected against the instrument.[108]

It is clear that the beneficiary will only be bound once he has made a conscious choice. He must know of the obligation to elect[109] and of all the relevant circumstances that would affect the decision.[110] Since the obligation to elect is one imposed by law, rather than a condition clear on the face of the instrument, knowledge of it cannot be assumed. If the beneficiary has received benefits under the instrument before acquiring the relevant knowledge and then decides to elect against the instrument there is an obligation to return or make good anything received.[111]

If the beneficiary chooses to take under the instrument, he comes under an equitable obligation to give full effect to the instrument and, consequently, must give effect to the gift of his property.[112] The obligation is directly enforceable. Where the doctrine of equitable election substantially differs from the other cases considered in this article is in relation to the outcome if the beneficiary refuses to give away his own property. Rather than forfeiting the gift in his favour, he will lose it only in so far as it is required to compensate the intended recipient of his property. This principle of compensation was engrafted onto the primary doctrine of election[113] to ensure that the ultimate remedy "does not go beyond what substantial justice requires".[114] There is no question of contradicting the testator's actual

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in a settlement and could not be enjoyed apart from the mansion house that was also settled); *Brown* v. *Gregson* [1920] A.C. 860 (the testator purported to make land in Argentina subject to a trust, but no trust of land was recognised in Argentina). It is sufficient that partial effect can be given to the purported gift: *In re Dicey* [1957] 1 Ch. 145, CA (the beneficiary owned a half share in the property). Contrast the position in relation to conditional gifts in wills, discussed above, where inability to comply with the condition may mean the benefit is lost.

[108] *In re Gordon's Will Trusts* [1978] 1 Ch. 145 (where the doctrine was inapplicable in relation to a determinable life interest under a protective trust which was inalienable). See pp. 160–161: otherwise the aim of the doctrine, which is one of compensation, not punishment, could not practically be achieved.

[109] *Dillon* v. *Parker* (1833) 1 Cl. & F. 303, 315, HL; *Spread* v. *Morgan* (1865) 11 H.L. Cas. 588.

[110] This includes, for example, that one of the properties is his (*Wilson* v. *Thornbury* (1875) L.R. 10 Ch. App. 239) and the relative value of the properties (*Pusey* v. *Desbouvrie* (1734) 3 P. Wms. 315; *Kidney* v. *Coussmaker* (1806) 12 Ves. 136).

[111] An equity to repay may attach to the beneficiary's own property that he decides to keep: see Lord Selborne L.C. and the decree in *Codrington* v. *Lindsay* (1873) L.R. 8 Ch. App. 578, 584, 594. The decree was not altered by the House of Lords in *Codrington* v. *Codrington* (1875) L.R. 7 H.L. 854 and was taken as settled at first instance in *Carter* v. *Silber* [1891] 3 Ch. 553 (appealed on other grounds). What is not clear from the cases is what the position would be if (a) the property received were something other than money and it had been disposed of, or (b) if, since the instrument became effective, the beneficiary had disposed of his own property and now wished to take under the instrument. The beneficiary would probably only have to pay compensation.

[112] There are numerous dicta to this effect, *e.g.* *Cooper* v. *Cooper* (1874) L.R. 7 H.L. 53, 70, 73. In *Blake* v. *Bunbury* (1792) 1 Ves. Jun. 514 the court ordered the beneficiary to execute a conveyance of his property and in *Whitley* v. *Whitley* (1862) 31 Beav. 173 the court said the beneficiary's property must pass as if it were the testator's.

[113] Lord Eldon, *Ker* v. *Wauchope* (1819) 1 Bli. 1, 25, HL.

[114] Viscount Haldane, *Brown* v. *Gregson* [1920] A.C. 860, 869.

intention and allowing the beneficiary to benefit without complying with a condition and forfeiture of the gift might simply punish the beneficiary without in any way benefiting the intended recipient of the beneficiary's property.[115]

An action can be brought not only by the disappointed intended recipient of the beneficiary's property, but also by his successor.[116] In appropriate circumstances, the obligation to elect can bind the beneficiary's successors. If, before an election has been made, both of the properties notionally pass via the beneficiary to the same person, or class of persons, the successor(s) will be bound to make an election.[117] If, however, the properties pass to different people no election is then possible and there will be a charge over the property gifted to the beneficiary for compensation.[118] The latter point seems to be best explicable on the grounds that election is impossible because there is no one person who can be said to have to make it.[119]

Crago[120] has discussed in some detail the apparent justification for the existence of the doctrine in the context of wills. The authorities seem to support an equitable obligation to elect imposed by the courts for reasons of fairness, perhaps to ensure a just distribution of the testator's estate.[121] The early basis propounded, that of an implied condition based on the testator's perceived intention, has been dismissed.[122] However, instead the courts seem effectively to be imposing a condition on the gift based on a presumed intention by the testator that he intends all of his will to be equally effective.[123] The beneficiary seems to be liable because he has consciously chosen to take a benefit that in the eyes of the law comes with certain obligations attached.

### *F. Burdens Annexed to Land*

It is necessary to refer to burdens annexed to land in passing because of the reference by Megarry V.-C. in *Tito* v. *Waddell (No. 2)*.[124]

[115] Unless he were also the residuary beneficiary under a will.
[116] *Rogers* v. *Jones* (1876) 3 Ch.D. 688.
[117] *Cooper* v. *Cooper* (1874) L.R. 7 H.L. 53. In the case of a class of persons they each have a separate right of election: *Fytche* v. *Fytche* (1868) L.R. 7 Eq. 494.
[118] *Pickersgill* v. *Rodger* (1876) 5 Ch.D. 163.
[119] See *Pickersgill* v. *Rodger* (1876) 5 Ch.D. 163, 174. The alternative explanation put forward, that the beneficiary will be presumed to have made an election, is surely a fiction since the beneficiary's property may have passed under a will made before any obligation to elect arose.
[120] "Mistakes in Wills and Election in Equity" (1990) 106 L.Q.R. 487.
[121] See, for example, Lord Cairns, *Cooper* v. *Cooper* (1874) L.R. 7 H.L. 53, 67; Viscount Haldane and Viscount Cave, *Brown* v. *Gregson* [1920] A.C. 860, 868, 883.
[122] *Cooper* v. *Cooper* (1874) L.R. 7 H.L. 53.
[123] See *Cooper* v. *Cooper* (1874) L.R. 7 H.L. 53, 70–71, 73, 78; *Codrington* v. *Codrington* (1875) L.R. 7 H.L. 854, 861–862, 866, 867; *Re Menger's W.T.* [1962] Ch. 791, 797; *In re Gordon's W.T.* [1949] Ch. 145, 154; CA.
[124] [1977] 1 Ch. 106, 290.


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Although this is a situation where, having taken a benefit (the land) a person is subject to an attached burden (an adverse interest in the land) it is not a situation where there can necessarily be said to be one particular transaction which grants the benefit and imposes the burden. The burden may have been created by a previous owner of the land during his ownership with no reference to it in later conveyances. The law determines which burdens can be interests in the land and in what circumstances they bind successors in title to that land; transactions between the relevant parties are of peripheral relevance. As such there can be no useful comparisons drawn with other applications of a principle of benefit and burden considered in this article.

### *G. Miscellaneous Cases*

There are other cases which seem to be examples of the application of a principle of benefit and burden. Many are to be found in *Broom's Legal Maxims* alongside situations that have already been dealt with. However, the cases are haphazard, often stand alone and are of little help in determining the details of a principle of benefit and burden, so only a few cases will be referred to. A notion of benefit and burden has been used to justify holding the persons who had use of a private chapel liable to repair it;[125] to make the assignees of a lease liable at law on the covenants contained in it;[126] to make an equitable assignee of a lease bound by the covenants in it;[127] and to make a tenant for life who collected the rents of leasehold properties despite having no right to do so liable to perform repairing obligations affecting the rent.[128] In the last case there was specific reference to the fact that the person held bound had knowledge.[129] Finally Lord Denning M.R. sought to use the principle to make persons bound by conditions in a planning permission, although he was overruled in the House of Lords on the basis that such a principle should not be effective in public law.[130]

[125] 2 Co.Inst. 489.

[126] *The Dean and Chapter of Windsor's case* (1601) 5 Co. Rep. 24a. See also *Burnett* v. *Lynch* (1826) 5 B. & C. 589, 607, 608, 609–610 (though it was actually concerned with the position between the assignor and assignee) as explained in *Wolveridge* v. *Steward* (1833) 1 C. & M. 644. Thereafter liability was seen to be based on privity of estate as in *Spencer's Case* (1583) 5 Co. Rep. 16a.

[127] *Lucas* v. *Comerford* (1790) 3 Bro. C.C. 166, 8 Sim. 499. This was later overruled: *Moore* v. *Greg* (1848) 2 Ph. 717.

[128] *In re Field* [1925] 1 Ch. 636.

[129] *In re Field* [1925] 1 Ch. 636, 641.

[130] *Newbury D.C.* v. *Secretary of State for the Environment* [1978] 1 W.L.R. 1241, [1981] A.C. 578.


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### *H. The Pure Principle of Benefit and Burden*

It will be recalled that the "pure principle" is simply a specific application of a principle of benefit and burden in the situations envisaged in *Halsall* v. *Brizell* and later cases. Under the pure principle of benefit and burden, as defined by Megarry V.-C. in *Tito* v. *Waddell (No. 2)*, an obligation imposed by a deed or other arrangement that also grants a benefit may bind a person taking the benefit. According to Megarry V.-C. the pure principle deals with cases where it is not possible to construe the burden as a condition of the benefit.[131] The pure principle may also be necessary for cases where, although expressly made the condition of a benefit, the burden cannot be said to qualify the benefit in the sense discussed in relation to conditional rights. As Megarry V.-C. recognised in *Tito* v. *Waddell (No. 2)*, this is a developing branch of the law and, inevitably, much about the principle is, as yet, unresolved.[132] There has, however, been more detailed discussion, both in the courts and in journals, of this application of a principle of benefit and burden than there has of other applications considered above. All the cases in which the pure principle has been successfully invoked have concerned the grant of rights over land and some associated obligation, which may or may not be an interest in land, and the following discussion will necessarily reflect that. Nevertheless, the principle has been regarded as of potential use in relation to personal property.[133]

The cases require some kind of arrangement between the parties that includes both the grant of a benefit and the imposition of a burden.[134] The principle seems to apply equally to oral[135] or written arrangements[136] or those set out in a deed.[137] In every case in which the principle has been successfully relied on there has been the grant

[131] [1977] 1 Ch. 106, 302.

[132] [1977] 1 Ch. 106, 310–311.

[133] See *Law Debenture Corporation* v. *Ural Caspian Oil Corporation Ltd.* [1993] 1 W.L.R. 138, which concerned shares and a covenant relating to them and where application of the doctrine failed only on the facts. See also *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 300, where its use was suggested for copyright agreements containing terms relating to royalties.

[134] The principle was consequently inapplicable in *Four Oaks Estate Ltd.* v. *Hadley* (1986) The Times, 2 July, where it could not be shown that a benefit had been granted under an arrangement which also imposed the obligation of which enforcement was sought. Similarly, in *Thamesmead Town Ltd.* v. *Allotey* (1998) 13 January (unreported) the Court of Appeal held the principle to be inapplicable because although the defendant may have benefited from landscaped and communal areas in a housing development he was granted no right over them. See also *Law Debenture Corporation* v. *Ural Caspian Oil Corporation Ltd.* [1993] 1 W.L.R. 138, where the principle was held to be inapplicable because the benefit and burden did not arise under the same instrument.

[135] *E.R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379, CA (the agreement was actually evidenced in writing, but that did not seem to be relevant). It is not clear whether the agreement in *Hopgood* v. *Brown* [1955] 1 W.L.R. 213 was oral but there was no mention of any document.

[136] *Mundleigh* v. *Luna* (1972) 24 P. & C.R. 240.

[137] *Halsall* v. *Brizell* [1957] Ch. 169; *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106.

of a continuing benefit over another's land, for example, a right of way,[138] or a right to mine.[139] Whereas the burdens have been mostly of a continuing nature, for example an obligation to make regular payments for maintenance of the right,[140] or a reciprocal right over land,[141] a unitary burden, to restore land at the end of mining operations, has also been enforced.[142]

Liability will be imposed on non-contracting parties only if the benefit of the arrangement is taken;[143] consequently there must be no other right to the benefit.[144] The benefit must be real and substantial, not technical or minimal.[145] The benefit must be taken voluntarily: there must be, at least in theory, a choice as to whether or not to take it.[146] If the benefit cannot physically be avoided, for example a right to support from neighbouring property, the doctrine is inapplicable.[147] By contrast, provided that the benefit can in theory be declined, for example a right of way, it is irrelevant that in reality it could or would not be.[148] Dicta in *Rhone* v. *Stephens*[149] suggest that the benefit must also remain one that can be given up at any time. The fact that the application of the principle depends on the availability of a choice has been held to restrict the principle to the situation where there has been actual exercise of any right, not merely the existence of a right to exercise it.[150] However, although this is

[138] *Halsall* v. *Brizell* [1957] Ch. 169. See also *Hopgood* v. *Brown* [1955] 1 W.L.R. 213 (a right to use drains); *E.R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379 (a right to keep foundations of a building trespassing on neighbouring land).

[139] *Tito* v. *Waddell (No. 2)* [1977] Ch. 106.

[140] *Halsall* v. *Brizell* [1957] Ch. 169; *Montague* v. *Long* (1972) 24 P. & C.R. 240.

[141] *E.R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379 (a right of way); *Hopgood* v. *Brown* [1955] 1 W.L.R. 213 (a right of drainage). Whether or not the obligation is also an interest in land is irrelevant for the purposes of the principle under consideration, as are issues of registration.

[142] *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106.

[143] *Halsall* v. *Brizell* [1957] Ch. 169, 182.

[144] For this reason Lord Denning M.R. was wrong to try and use the doctrine in *Newbury D.C.* v. *Secretary of State for the Environment* [1978] 1 W.L.R. 1241 to enforce a condition in a planning permission because the landowners had existing use rights for the land and therefore no need to rely on the planning permission.

[145] Megarry V.-C., *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 305 (where he considered that no real benefit had been taken under one agreement relied on) as applied by the Court of Appeal in *Rhone* v. *Stephens* (1993) 47 P. & C.R. 9 (who considered that the benefit from an easement of support, matched by a cross-easement of the same kind, was technical and minimal and the benefit of an easement of eavesdrop was, if not technical, certainly minimal). In the case of a unitary burden Aughterson queries whether the benefit must be real or substantial in the context of the burden: "Enforcement of positive burdens—a new viability" [1985] Conv. 12, 16.

[146] *Rhone* v. *Stephens* [1994] A.C. 310, 322–323.

[147] *Rhone* v. *Stephens* [1994] 2 A.C. 310. However, it could be argued that the defendants exercised their right to choose when purchasing property to which such a benefit attached.

[148] *Halsall* v. *Brizell* [1957] Ch. 169. The absence of a right of way would obviously mean that there was no access to the land. In theory, the owner of the land could choose not to get to it, to negotiate for different terms with the other party or another neighbour, or even risk liability in trespass.

[149] [1994] A.C. 310, 322–323.

[150] *Thamesmead Town Ltd.* v. *Allotey* (1998) 13 January, CA (unreported). Megarry V.-C. suggested otherwise in *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 307: in that case the assignees were held to be subject to the burden in respect of a number of separate plots of land even though a benefit had been taken in relation only to some of them. However, this was not so much

undoubtedly correct in relation to a right which passes automatically on the sale of land, such as the right to use the roads and sewers in *Halsall* v. *Brizell*, it is arguable it is possible to distinguish the situation where a person takes an express assignment of the specific benefit, such as in *Tito* v. *Waddell (No. 2)* where what was assigned was the right to mine, since he is there exercising a choice in taking the assignment.

Megarry V.-C. refers to a right and burden that are independent of each other[151] but it is arguable that he uses "independent" as a contrast with "conditional" where the condition qualifies the right. It is arguably not enough that the benefit and burden are contained in the same instrument or arrangement;[152] there must be something more in the circumstances to show a connection or link between the benefit and burden.[153] In most of the cases the judges looked at the original agreement for the link. They referred to the condition or terms on which the benefit was granted,[154] and reciprocal rights.[155] The link may well be express,[156] but could be inferred from the nature of the benefit and burden[157] or other circumstances, such as the fact that the arrangement in question granted just one benefit and imposed one burden which were therefore obviously intended to be reciprocal.[158] It has been said that the condition must be relevant to the exercise of the right, apparently regardless of whether the connection has to be implied or is express,[159] but this is inconsistent

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because they had available the possibility of taking the benefit, but because the plots were effectively pooled by them: see pp. 306–307. See also Evershed M.R. and Jenkins L.J., *Hopgood* v. *Brown* [1955] 1 W.L.R. 213, 226, 229. The approach of Megarry V.-C. avoids a potential problem he adverted to at p. 291 as to whether the exercise of a right could be resumed once it had been discontinued.

[151] *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 290.

[152] Such a result would be undoubtedly unacceptable: see *Rhone* v. *Stephens* [1994] 2 A.C. 310, 322.

[153] In *Four Oaks Estate Ltd.* v. *Hadley* (1986) The Times, 2 July, Fox L.J. said that the burden should be in some way attached to the benefit.

[154] Upjohn J., *Halsall* v. *Brizell* [1957] Ch. 169, 182-183; Lord Denning M.R. and Danckwerts L.J., *E.R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379, 394, 399–400. See also *Rhone* v. *Stephens* [1994] 2 A.C. 310, 322.

[155] Evershed M.R. and Jenkins L.J., *Hopgood* v. *Brown* [1955] 1 W.L.R. 213, 226, 229; Graham J., *Montague* v. *Long* (1972) 24 P. & C.R. 240, 247–248.

[156] Although an express link prima facie suggests a conditional right this may not be the case if the condition must qualify the right. It seems unlikely that a conditional right would have been found in *E.R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379 even if the benefit had been expressly conditional on the burden (a point not clear from the report).

[157] *E.g.* a right of way and an obligation to contribute to its repair (*Halsall* v. *Brizell* [1957] Ch. 169; *Montague* v. *Long* (1972) 24 P. & C.R. 240) or a right to mine and an obligation to restore the land afterwards (*Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106).

[158] *E.R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379. See also *Hopgood* v. *Brown* [1955] 1 W.L.R. 213 where the parties linked mutual rights of drainage, although possibly a connection could have been inferred.

[159] *Rhone* v. *Stephens* [1994] A.C. 310, 322. This has been cited in a number of later cases in which it did not affect the decision because in none of them could a link be found: *Chattey* v. *Farndale Holdings Inc.* (1996) 24 May (unreported); *Allied London Industrial Properties Ltd.* v. *Castlegard Properties Ltd.* (1997) 24 July (unreported); *Amsprop Trading Ltd.* v. *Harris Distribution Ltd.* [1997] 1 W.L.R. 1025. In *Thamesmead Town Ltd.* v. *Allotey* (1998) 13 January (unreported) the

with earlier cases, such as *E.R. Ives Investments Ltd.* v. *High* in which there was a link between foundations which encroached on neighbouring land and a right of way,[160] and seems to be an unduly restrictive approach.[161] In conclusion it is difficult to see any real distinction between looking for a link and implying a condition[162] and the pure principle may simply allow the enforcement of conditions without any restrictions on their content.[163]

Despite the fact that most of the cases looked for the link in the original arrangement, Megarry V.-C. took a different approach in *Tito* v. *Waddell (No. 2)*. He suggested that whether a successor is bound by a burden depends on the circumstances of the assignment to him: it should be asked whether the circumstances of the assignment showed that the assignor would continue to undertake the burden or whether it passed with the benefit.[164] As the sole relevant factor to the passing of the burden, this approach can be subject to some criticism. First, if no link between the benefit and burden can be found in the original agreement, why should one party to the original agreement get a right to sue directly the assignee of the other party through a transaction in which he was not involved, where the burden is not otherwise directly enforceable and where he had not linked the benefit and burden himself. Secondly, if there is no express agreement on the point, should the prima facie inference be that the burden passes or not? Thirdly, the original party is most likely to want the burden to pass with the benefit where only the present landowner can comply with the burden. However, if the assignor will not otherwise remain liable he is less likely to deal with the point expressly and it may be difficult to infer an agreement. It is therefore arguable that an assignment should not be able to link the

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Court of Appeal, in reliance on the same dicta, was only prepared to link an obligation to contribute to the costs of maintenance of landscaped and communal areas to a right relating to the same of which there was none. However, there was no express link and no justification for inferring a link with any other right granted.

[160] [1967] 2 Q.B. 379. See also *Hopgood* v. *Brown* [1955] 1 W.L.R. 213 (mutual rights of drainage). The Court of Appeal in *Rhone* v. *Stephens* (1993) 47 P. & C.R. 9, 15 seemed to accept that the benefit and burden could arise out of the same subject-matter *or* be in exchange for each other.

[161] Though some restriction may be necessary to deal with the objections discussed in Part IV below.

[162] On the facts it is difficult to distinguish *Halsall* v. *Brizell* [1957] Ch. 169 (probably decided on the pure principle) from *Chamber Colliery Co. Ltd.* v. *Twyerould* (1893) [1915] 1 Ch. 268n (the one conditional benefits case where the condition was implied from the document as a whole). In *Rhone* v. *Stephens* [1994] 2 A.C. 310, 322 Lord Templeman seemed to say that *Halsall* v. *Brizell* was an example of an implied condition. On the other hand, in *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 303 Megarry V.-C. remarked of *Halsall* v. *Brizell* that there was nothing in the document showing the intention for a condition.

[163] Perhaps Megarry V.-C. only found it necessary to actually call this a new principle because of the restrictive approach he took in relation to conditional rights. It is also worth noting that only one conditional rights case concerned an implied condition. The pure principle makes it clear that implication is possible.

[164] At pp. 302–303. Applied in *Lake Delemere Corporation* v. *Oral Caspian Oil Corporation Ltd.* [1993] 1 W.L.R. 138, 147.

benefit and burden where they were not linked by the original arrangement, but that it could, perhaps, expressly break the link and leave the burden with the assignor. The courts will need to consider whether this should be possible.

There has been no discussion in the cases as to whether liability is automatic on acceptance of the benefit or whether there can only be liability where the benefit is accepted with knowledge that it comes with an attached burden. This issue is intrinsically connected with the underlying basis of the principle. In *Tito* v. *Waddell (No. 2)* Megarry V.-C. was unsure whether the principle ultimately rests on acceptance or whether it is a rule of law:[165] there cannot be true acceptance unless knowledge of the consequences of taking the benefit is required. The results of the cases suggest that full knowledge may be unnecessary. In the cases in which the principle was applied and the arrangement was in writing it is clear that the successor knew not only of the existence of the document giving the benefit but also of its terms.[166] Since in all the cases the burden was related to the benefit by its very nature, it might be possible to argue that there was at least constructive knowledge of the link between the two. There is authority that constructive and imputed knowledge of the terms of a document will be sufficient.[167] In one of the cases where the arrangement was oral there was knowledge of the burden, a right of access, but apparently no knowledge that it arose under a mutual arrangement[168] and in the other case there was no indication that there was even knowledge of the burden, a right of drainage, itself.[169] However, it may be worth pointing out that in these latter cases no positive obligation was enforced; the principle operated solely as a defence to actions for trespass and nuisance. The courts might have acted differently had they been required to demand money.

The principle has been used solely to make successors of the original parties bound.[170] The principle can be relied on as a cause of

[165] [1977] 1 Ch. 106, 308–309. He expressed the view that acceptance was easier to justify in the case of a conditional benefit.

[166] *Halsall* v. *Brizell* [1957] Ch. 169 (right to use roads and sewers and obligation to contribute to the cost of their repair); *Montague* v. *Long* (1972) 24 P. & C.R. 240, 248 (the case dealt with the ownership of a bridge, the right to use it and an obligation to repair it); *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 306 (a right to mine and an obligation to restore land at the end of operations).

[167] *Thamesmead Town Ltd.* v. *Allotey* (1998) 13 January, CA (unreported). There was no reference to knowledge of the connection between the benefit and burden, but that was not surprising because the action failed on the ground that there was no relevant benefit.

[168] Danckwerts L.J. in *E.R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379, 400 refers to the plaintiffs having "full knowledge of the situation", but the facts as given by Lord Denning M.R. at p. 393 suggest that though there was knowledge of the burden there was no knowledge that it arose under a mutual arrangement.

[169] *Hopgood* v. *Brown* [1955] 1 W.L.R. 213. However, this case was not clearly decided on the basis of a principle of benefit and burden.

[170] The original parties will be bound as a matter of contract law.

action[171] and liability is personal. The precise effect of the principle will apparently vary with the circumstances. It is necessary to distinguish between continuing burdens, such as an obligation to pay an annual sum, and unitary burdens, such as an obligation to pay compensation for damage or restore land at the end of operations.[172] Where there is a continuing obligation, liability for the future can be avoided by not exercising the right[173] but the right can only be exercised for the future if the burden is complied with.[174] If the right is relied on to justify acts done in the past, the burden may simply justify conduct of the other party.[175] However, if the burden requires a positive act there are contradictory dicta[176] as to whether it is directly[177] or only indirectly enforceable.[178] Only *Tito* v. *Waddell (No. 2)* has concerned a unitary burden, an obligation to restore land at the end of mining operations, and it was held that liability arises once a benefit has been taken and it cannot be avoided by giving up the benefit for the future.[179] It was further suggested that anyone who has taken a sufficient benefit will be liable for the whole burden with possible implied rights of indemnity against others who have had a benefit.[180] In *Tito* v. *Waddell (No. 2)* the assignee was held liable for replanting obligations. Specific performance was considered to be inappropriate in the circumstances, but damages were awarded for breach of the obligations.

Although it is not entirely clear from the cases, it does seem likely that this principle, depending on the circumstances, simply provides

[171] *Halsall* v. *Brizell* [1957] Ch. 169; *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106.

[172] Megarry V.-C., *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 291–292. In either case liability may depend on the defendant actually relying on the right to justify his actions; it may be that he could instead claim that his actions were unauthorised and accept liability to pay common law damages. This is the position in relation to conditional rights, but may not be financially beneficial.

[173] It may be that the burden must also be complied with if the assignee wishes to retain the possibility of resuming exercise of the benefit at some time in the future. A person who "gave up" a right of way could hardly complain of a building subsequently erected there and, in fact, he and his assignees would almost certainly be estopped from complaining.

[174] *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 291–292, 295–296, relying on inferences from the judgments in *E.R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379 and on the decision of the Supreme Court of Canada in *Parkinson* v. *Reid* (1966) 56 D.L.R. (2nd) 315. See also *Halsall* v. *Brizell* [1957] Ch. 169, 182.

[175] *Hopgood* v. *Brown* [1955] 1 W.L.R. 213; *E.R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379.

[176] There has been no case. In *Halsall* v. *Brizell* [1957] Ch. 169 the actual sums requested were refused on the grounds that they were *ultra vires.*

[177] Megarry V.-C., *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 292.

[178] By threatening to take away the benefit for the future: *IDC Group Ltd.* v. *Clark* [1992] 1 E.G.L.R. 187, 190; *Rhone* v. *Stephens* [1994] 2 A.C. 310, 323. This threat would be useless if the benefit had been further assigned or was now worthless, unnecessary or unavailable.

[179] *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 307–308.

[180] [1977] 1 Ch. 106, 308. Of course, the purchase price of the assignment may well reflect an agreement between the parties that the obligation has been fully passed on. Megarry V.-C. made it clear that in the case of terminal liability it will usually be appropriate, and expected by all relevant persons, that it be borne by the person liable when the burden accrues, *i.e.* the last in the chain. He gave no definition of "a sufficient benefit" and whether it differs from a "real and substantial benefit".

another person to be sued rather than relieving the original contracting party from liability. This seems to be clearest in the case of a unitary burden where, as already pointed out, it has been suggested that everyone who has taken a benefit is liable for the whole of the burden, subject to any implied rights of indemnity.[181] In other cases, depending on the wording of the original agreement and the facts,[182] there seems to be no reason why the original party should be released from a contractual obligation and many reasons why he should remain liable.[183] Any intermediate takers of a benefit could at most be liable for such of the burden as relates to any benefit they have taken.

It remains unclear whether the pure principle is a legal or equitable principle. The point was discussed by Megarry V.-C. in *Tito* v. *Waddell (No. 2)*[184] where he was reluctant to assume that it is a purely equitable principle and expressed the view that even if it is it could be used to impose legal liability indirectly on the person concerned where the burden was originally legal.[185] On the facts the defendants were held liable at law but it is not clear by what means.

The principle can be relied upon not only by the original contracting party but also by successors in title to the land over which the benefit is or was exercisable.[186] It can be used to enforce the burden against anyone with a right to claim the benefit which would obviously include express assignees of the benefit and successors in title to land or other property to which the benefit relates.[187] According to Megarry V.-C. in *Tito* v. *Waddell (No. 2)* the principle goes even further. His view was that "the principle ought to embrace anyone 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".[188] In the case

[181] Interpreted in *Government Insurance Office (N.S.W.)* v. *K.A. Reed Services Pty. Ltd.* [1988] V.R. 829, 831 as suggesting earlier liability is not extinguished.

[182] A person who had disposed of the relevant land could obviously not be subject to an obligation to allow an easement to be exercised over that land.

[183] N.B. in *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106 the principle of benefit and burden was treated separately from novation which would excuse the original party from further liability but which would need the consent of the other contracting party.

[184] [1977] 1 Ch. 106, 308–309. Danckwerts L.J. in *E.R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379, 399 was of the view that it is an equitable principle.

[185] Possibly by means of an injunction, declaratory relief, the principle that equity treats as done that which ought to be done, or damages in substitute for specific performance under *Lord Cairns Act*. The problems with such an approach and the suggested means of achieving the desired result are discussed in *Government Insurance Office* v. *K.A. Reed Services Pty. Ltd.* [1988] V.R. 829, 833.

[186] *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 309–310.

[187] *Halsall* v. *Brizell* [1957] Ch. 169; *E.R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379.

[188] [1977] 1 Ch. 106, 303. This would not include strangers. However, a squatter who takes advantage of a benefit which is subject to a burden could perhaps in appropriate circumstances find himself estopped from denying liability: see *Ashe* v. *Hogan* [1920] 1 I.R. 159 (where a squatter who took advantage of a clause in a lease was held to be estopped from denying liability on the covenants in the lease).

itself although there had been an express assignment of the benefit and burden from the original party to particular individuals known as the British Phosphate Commissioners, there had been no such assignment to the present Commissioners.[189] Megarry V.-C. was of the view that there was sufficient connection between the defendants and the original agreement; it was clear from the circumstances that the present Commissioners were intended to step into the shoes of their predecessors, taking on both assets and liabilities.[190] Otherwise Megarry V.-C. refused to draw any lines.

## III. Is There a Principle of Benefit and Burden?

Having looked at numerous cases involving the application of a notion of benefit and burden in specific situations, it is now necessary to compare briefly the requirements and effects of the principle in its various applications to see whether there could be said to be a principle of benefit and burden which has been consistently applied.

The cases have all involved what may loosely be termed an "arrangement". The arrangement may take various forms: a gift, whether inter vivos or by will; an agreement, whether by deed, writing or oral; or a grant. What is common to the arrangements is that they confer a benefit and also impose a burden.[191] The burden only binds persons who accept or exercise the benefit, have no other right to do so other than by relying on the arrangement, and have a choice whether or not they accept it. 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,[192] money[193] or a contractual right.[194] The cases classified under conditional rights and the pure principle have notably concerned only rights over another's land which could easily be given up at any time. There may be less need for such a limitation where

[189] It was suggested that there may have been an equitable assignment inferrable from the circumstances but this was not followed up on.

[190] At pp. 304–305.

[191] If the burden is imposed in a separate document it is unlikely to pass with the benefit unless the documents were linked in some way: see *Law Debenture Corporation* v. *Ural Caspian Oil Corporation Ltd.* [1993] 1 W.L.R. 138, 147 and *Egg* v. *Devey* (1847) 10 Beav. 444 (where the benefit was in a will and the condition in a codicil).

[192] *E.g. Webb* v. *Spicer* (1849) 13 Q.B. 886 (deeds: a promissory note); *Lady Naas* v. *Westminster Bank, Ltd.* [1940] A.C. 366 (deeds: settlement of funds); *Re Lester* [1942] Ch. 324 (conditional gifts in wills: shares); *In re Gordon's W.T.* [1978] 1 Ch. 145 (equitable election: chattels and money). See also *Law Debenture Corporation* v. *Ural Caspian Oil Corporation Ltd.* [1993] 1 W.L.R. 138 (pure principle: shares but failed on the facts).

[193] *E.g. The Earl of Northumberland* v. *The Marquis of Granby* (1760) 1 Eden. 489, (1768) Amb. 65 (conditional gifts in wills).

[194] *R.* v. *Hodgkinson-le-Spring* (1819) 2 B. & Ald. 375 (deeds: employment contract).

the burden is a unitary one because a person who has taken any benefit may be, and remain, liable for the entire burden, subject to any possible implied rights of indemnity: such a person would only be adversely affected by being unable to give up the benefit if this in some way increased his liability under the burden. There is more justification for limiting the doctrine to such a benefit where the burden is also a continuing one, so that liability can be avoided for the future, although there are cases concerning conditional gifts in wills where the burden has been a continuing one and the benefit has been beneficial ownership of land.[195]

The burden must be linked to the benefit, or made a condition of it, by the original arrangement.[196] This link may be express, implied or even presumed. If it is clear that the burden is personal to the original party or separate from the benefit then the principle will be inapplicable. The burden may be a continuing or unitary obligation. In many of the situations there seems to be no restriction on the nature of the burden that can be linked with a benefit, although, in the absence of an express link, a link is most likely to be found with a burden which is intrinsically connected with, and probably qualifies, the benefit. There are dicta which suggest there may be a limitation on the burdens that can be enforced in the context of conditional rights and the pure principle, but they are only dicta and are arguably neither consistent with authority nor justifiable.

It is impossible to find adequate discussion of the issue whether a person needs to have knowledge of the burden and the fact that it is linked to the benefit before being bound. In only two areas are there any clear statements: full knowledge is required to bind a non-executing party to a deed and in cases of equitable election. There are also dicta requiring knowledge in relation to conditional gifts in wills. In nearly all cases there will be at least constructive knowledge of the burden itself. This will only be absent in cases under the pure principle where there is no available documentary evidence of the arrangement. Furthermore there has only been one case in which there may have been neither actual nor constructive knowledge of the existence of the burden.[197] There will also be constructive knowledge of the link where there is constructive knowledge of the existence of the burden and the link is express. However, the link may also be implied. It is only in relation to equitable election, where the link is clearly not obvious on the face of the will, that there has

[195] *E.g. Rees* v. *Engleback* (1871) L.R. 12 Eq. 225 (received business on trust provided he paid an annuity); *Re Williames* (1884) 52 L.T. 41 (real estate left on a succession of interests; each tenant in tail to keep the buildings in repair); *Re Hodge* [1940] Ch. 260 (gift of freeholds on condition of paying a weekly sum for life).

[196] Though see *Tulk* v. *Moxhay* (1848) 2 Ph. 774 discussed under the pure principle.

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

been discussion of the issue. In fact there have been few other cases where the link was not obvious. However, the pure principle is a situation where there may be no constructive knowledge of the link and it is necessary for the courts to consider the issue. There are undoubtedly a number of relevant factors: whether there should be a difference between a case involving a unitary obligation and one involving a continuing obligation;[198] whether it is essential that the benefit can effectively be given back or given up without loss to the other party where it was initially accepted before knowledge;[199] and whether the principle is ultimately based on acceptance or unconscionability—both of which would point to a need for knowledge—or is simply a rule of law.

There is almost unanimous agreement to the effect that the burden is directly enforceable. The only possible exception is in relation to continuing obligations under the pure principle. Elsewhere continuing obligations are directly enforced[200] even where indirect enforceability would be an option.[201] Not only should there be consistency,[202] but also indirect enforceability may be ineffective and gives rise to other potential problems, such as whether the benefit is lost permanently or only suspended and whether the rule against perpetuities applies.[203] A linked issue, which has not often arisen because of the nature of the benefits involved, is whether a person can avoid future liability by giving up the benefit for the future. This has only been relevant in the case of conditional benefits and the pure principle where it seems to be possible provided that there is both a continuing benefit and a continuing obligation. Liability can, of course, be avoided altogether by not taking the benefit in the first place.

[198] The burden imposed in the latter case may not be so extensive.

[199] In relation to equitable election the gift can be given back (there seems to be no case where it was impossible) with no real loss to the other party. In many respects a right of way can be given up with no consequent loss. But what about a right to mine which has been exercised? It is clearly necessary to weigh up the position of the surface owner, who may suffer loss without compensation if knowledge is required, against the position of the other party who, if knowledge is not required, could be faced with a choice of complying with the burden or paying compensation in tort for having exercised a right he did not know was in any way qualified.

[200] Deeds, conditional rights, conditional gifts in wills.

[201] This is especially so in relation to conditional rights.

[202] Although indirect enforceability is used in relation to a conditional fee simple and conditional leases.

[203] This problem was referred to in *Halsall* v. *Brizell* [1957] Ch. 169, 182 and *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 293. Both cases suggest that the rule is irrelevant but the discussion is very brief. See also E.P. Aughterson, "Enforcement of positive burdens—a new viability" [1985] Conv. 12, 22–23. The rule does apply to a conditional fee simple (Law of Property Act 1925, s. 4(3)) but not to a conditional lease (*Keppell* v. *Bailey* (1834) 2 My. & K. 517, 528–529). This is explained on the basis that in relation to a lease no-one has an interest after re-entry he did not have before; the right of re-entry is merely an incident of the reversion: J.H.C. Morris and W.B. Leach, *The Rule Against Perpetuities*, 2nd ed. (London 1962) at p. 210 n. 61. Were the pure principle to constitute to operate only in situations similar to the ones in which it has so far been applied, it would be comparable with a conditional lease.

The principle seems to operate both at law and in equity and imposes a personal obligation on the person who seeks to use the benefit without affecting the liability of the original party.[204] It can be used as a cause of action, not only by the original party, but also by his successors. In many of the cases the principle has simply been used to impose liability on an original grantee who has not contracted to be liable. However, there is authority in all of the areas in support of the principle also binding successors in title. Arguably, there is in essence no distinction in this context between an original grantee and a successor as they are both people who are not contractually bound but nevertheless claim a benefit through the document. The only difference is whether they are actually named in the document.

Arguably the cases show remarkable consistency considering that the principle has been applied in many of the situations with no reference to its use elsewhere. There are undoubtedly some issues that still need resolving and a few (minor) inconsistencies that need ironing out, but there is arguably enough to establish that there is a principle of benefit and burden. It is arguable that the application of the principle in the "pure principle" cases does not go substantially further than previous applications; the principle is simply applied more generally rather than in particular fact situations. In many respects the pure principle seems simply an extension of conditional benefits: in other applications of the principle the cases allow for an implied connection between the benefit and burden and for the connection of otherwise unrelated benefits and burdens. It is arguable that the principle of benefit and burden should be applicable generally, although it remains necessary to consider whether its effects would be unacceptable in any situation such as to require some refinement or restriction of it. This is the subject of the next section.

## IV. Objections to the Pure Principle and Its Possible Applications

In the forty years since *Halsall* v. *Brizell* was decided the principle "given birth to" in that case has been surprisingly little used. It has been applied in four cases,[205] found to be inapplicable on the facts in

[204] See further the discussion in relation to the pure principle. There is no help in the other cases as the point seems never to have arisen: in the few cases that have involved successors there was either no contractual right to sue or no point in suing the original party. However, such an approach would be consistent with the position in relation to freehold and leasehold covenants relating to land.

[205] *E.R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379; *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106; by Lord Denning M.R. in *Newbury* v. *S.S.E.* [1978] 1 W.L.R. 1241, 1250–1251 (overruled by the House of Lords: [1981] A.C. 378); *Montague* v. *Long* (1972) 24 P. & C.R. 240. See also Sir Richard Scott V-C., *Schiffahrtsgesellschaft Detlef von Appen GmbH* v. *Wiener Allianz Versichnings AG* (1997) 16 April (unreported).

eight cases,[206] and referred to in passing in two cases.[207] It has been clearly accepted at first instance and in the Court of Appeal. Doubt was expressed in the House of Lords but only in so far as acceptance of any benefit in a conveyance means any burdens are enforceable,[208] which is arguably not the law.[209] There have been strong criticisms of the pure principle in Australia.[210] The criticisms of the pure principle relate largely to the fact that its limits are unclear and that it has potentially far-reaching effects. Some lack of clarity in the requirements for and limits of a principle are inevitable when it is still developing and help can be found in a comparison of other applications of the principle. Equally other applications provide support for the pure principle, which will offset the alleged weakness of the authority relied on by Upjohn J. in *Halsall* v. *Brizell*.[211] However, it is necessary to consider whether the pure principle is as far-reaching as is feared and to look further at the potentially unacceptable consequences of its wider application.

The main objections to the pure principle are based on a fear that it renders ineffective a number of fundamental rules of law. These will be discussed in turn.

### *A. The Burden of a Positive Covenant Does Not Run with the Land*[212]

Only interests in land are directly enforceable against successive owners of the land. Undoubtedly the pure principle could be used to assert against a landowner something that would not otherwise bind him, such as a positive covenant, contractual licence, unregistered

[206] *Gordon* v. *Selico Company Ltd.* [1986] 1 E.G.L.R. 219 (burden not enforceable for other reasons); *Four Oaks Estate Ltd.* v. *Hadley* (1986) The Times, 2 July (no benefit to which burden attached); *Law Debenture Corporation* v. *Ural Caspian Oil Corporation Ltd.* [1993] 1 W.L.R. 138 (no connection between benefit and burden; separate instruments); *Rhone* v. *Stephens* (1993) 67 P. & C.R. 9 (Court of Appeal found the benefit technical and minimal) [1994] 2 A.C. 310 (House of Lords said it was inapplicable because the benefit was not optional); *Chattey* v. *Farndale Holdings Inc.* (1996) 24 May (unreported) (no connection between a mortgagee's security over property and obligations in flat purchase contracts where deposits paid under those contracts had been spent on the property); *Allied London Industrial Properties Ltd.* v. *Castleguard Properties Ltd.* (1997) 24 July (unreported) (on construction of the deed an obligation imposed on a purchaser to provide parking facilities if it redeveloped the property was not related to mutual rights of way); *Amsprop Trading Ltd.* v. *Harris Distribution Ltd.* [1997] 1 W.L.R. 1025, 1034–1035 (no linked benefit and burden); *Thamesmead Town Ltd.* v. *Allotey* (1998) 13 January (unreported) (an obligation to contribute to the maintenance costs of landscaped and communal areas of land was not enforced because no rights were granted over those areas; at first instance the principle was successfully applied to enforce the same obligation in relation to other areas, such as roads, in relation to which rights had been granted).

[207] *Lyus* v. *Prowsa Developments* [1982] 1 W.L.R. 1044, 1053–1054; *IDC Group Ltd.* v. *Clark* [1992] 1 E.G.L.R. 187, 190.

[208] *Rhone* v. *Stephens* [1994] 2 A.C. 310, 322.

[209] See further, at p. 549 below.

[210] *Government Insurance Office (N.S.W.)* v. *K.A. Reid Services Pty. Ltd.* [1988] V.R. 829.

[211] See *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 289, 294–295; *Government Insurance Office (N.S.W.)* v. *K.A. Reed Services Pty. Ltd.* [1988] V.R. 829, 838–839, 841; *Ashberry* v. *Ockham Confirmator* (1885) 29 Ch. D. 750, 781–783, CA as endorsed by the House of Lords in *Rhone* v. *Stephens* [1994] 2 A.C. 310.

registrable interest, or even a restrictive covenant where the conditions for the passing of the burden in equity have not been satisfied. This discussion will concentrate on positive covenants, but the points made are relevant in all situations.

The pure principle cannot make all positive covenants enforceable; neither will they be directly enforceable as such. The covenant needs to be linked with a benefit and it is only the person who chooses to take that benefit, perhaps with knowledge of the associated burden, who will be bound by the burden. In addition, the burden can be avoided if the benefit is given up.

The fear most often expressed is that if a positive covenant were contained in a conveyance of the fee simple, the pure principle would make the covenant enforceable against any owner of that fee simple. However, that assumes that it is possible to find the necessary link between the benefit and burden. The link may be express or implied. It is arguable that a link is unlikely to be implied unless the covenant is intrinsically connected with the benefit or the benefit and burden are the only two issues dealt with in an arrangement in such a way that they are obviously given in consideration for each other. A conveyance of the fee simple would contain a number of clauses, any positive covenant is likely to be of only minimal importance in the light of any consideration payable, and it is arguable that only an interest in land can be said to be intrinsically connected to an estate in land.[213] Therefore it seems unlikely that a link between the fee simple and a positive covenant would be implied. There might, of course, be an express link. In principle there seems to be no reason why this should not be effective: covenants can be rendered indirectly enforceable by creating a conditional fee simple,[214] why should they not be directly enforceable when linked with a fee simple in a way that does not create a conditional fee simple.[215] If this is unacceptable, it is not necessary to limit the pure principle to conditions which intrinsically qualify the benefit in order to avoid such an outcome; less draconian restrictions would be equally as effective. It could be a requirement that the benefit be a right which can easily be given up

[213] This might even be limited to a legal interest in land.

[214] *Re Hollis's Hospital Trustees and Hague's Contract* [1899] 2 Ch. 540 (restrictive covenants); *Re Da Costa* [1912] 1 Ch. 337 (positive covenants). These are subject to the rule against perpetuities (Law of Property Act 1925, s. 4(3)) and relief against forfeiture (*Shiloh Spinners Ltd.* v. *Harding* [1973] A.C. 691).

[215] It might, of course, be difficult not to construe an express link as creating a conditional fee simple. In practice, either method is going to lead to compliance with the condition. If a conditional fee simple is not created, it has been suggested that the owner of land need not rely on a conveyance to establish title to an estate and may thus not be bound by any obligations in the conveyance: *Emmet on Title*, 16th ed. by J.T. Farrand and J. Gilchrist Smith (London 1974) at pp. 554–555 (this assertion does not appear in later editions); contrast J.T. Farrand, *Contract and Conveyance*, 2nd ed. (London, 1973) at p. 425.

at any time, for example an easement rather than a fee simple.[216] Alternatively, it could be a requirement that the benefit is one that authorises interference with another's rights.[217] In relation to land, this would limit the benefit to a right over another's land; if the benefit were the conveyance of the fee simple the transferor would retain no interest in the land and would thus have no rights that were interfered with. Such a restriction could prevent the pure principle operating at all in relation to personal property.[218] Neither of these restrictions would prevent artificial arrangements aimed at ensuring successors comply with a positive covenant. For example, it has been suggested that a vendor of land could retain a narrow strip of land between the land sold and any highway from the conveyance and impose obligations in connection with a right to cross it.[219] If this is unacceptable, it could be dealt with by allowing the courts to ignore clearly artificial arrangements.

### *B. The Burden of a Contract Cannot be Assigned*

Although the benefit of a contract is assignable, the burden is not. This seems to rest on the basic idea that a person contracts specifically with the other party and therefore should not suddenly find that any obligations under the contract are imposed on, or transferred to, a third party (the assignee) instead. Replacement of the original party is only possible in the case of a novation;[220] a party to a contract cannot discharge himself from his obligations without the consent of the other party. In theory, the pure principle of benefit and burden could operate so as to impose the burden of the contract on an assignee of the benefit. It is arguable that this would not directly contradict the rule that the burden is not assignable on the basis that the pure principle of benefit and burden seemingly does not operate so as to replace one obligee with another but effectively imposes concurrent liability. Rather than releasing the assignor from his obligations, it adds the assignee as an alternative person to sue. If the obligation is such that performance by anyone other than the original party would be unacceptable, it is likely to be clear from the original agreement (in the circumstances) that there was no link between the benefit and burden. The pure principle would then be inapplicable. It is difficult to see why, in any other case, performance

[216] This seems to be supported by *Rhone* v. *Stephens* [1994] 2 A.C. 310, 322–323.

[217] Such a restriction can be applied to conditional rights, but perhaps not to all of the other cases considered in this article.

[218] A restriction attached to a licence of copyright or a patent could be covered, but not one attached to an outright assignment.

[219] See J.T. Farrand, *Contract and Conveyance*, 2nd ed. at p. 425.

[220] See Lord Browne-Wilkinson, *Linden Gardens Trust Ltd* v. *Lenesta Sludge Disposals Ltd.* [1994] 1 A.C. 85, 103.

by the assignee should be unacceptable. Surely the introduction of a principle of benefit and burden in this situation can only be beneficial to the person seeking to enforce the obligation.

### *C. Restrictions Do Not Run with Personal Property*

It has been suggested that the pure principle would enable restrictive conditions to run with choses in action or chattels.[221] This might be particularly useful in allowing royalties clauses in an assignment of copyright to be effective against later assignees of the copyright. There has been a limited acceptance of a similar principle where a patent has effectively been regarded as qualified,[222] although the cases have elsewhere been explained as based on a charge or incumbrance.[223] The notion of benefit and burden operating in such an area also seems to have been rejected[224] although Megarry V.-C. in *Tito* v. *Waddell (No 2)* considered the authority to be weak.[225] Since it is possible to impose an express condition, it should arguably be possible to imply one. However, the pure principle will not allow all equities to run with chattels and choses in action: any burden must be linked to a benefit, and not merely be the result of a separate contract by a previous owner: the principle enforces the benefit and burden of an arrangement, not the benefit of and burden related to certain property. Finally, if one of the restrictions discussed above in relation to positive covenants were to be invoked the doctrine would not apply here at all anyway.

### *D. An Equitable Assignee is Not Liable on the Covenants in a Lease*

The liability of assignees of leases clearly rests on privity of estate, not on a principle of benefit and burden, although there are early cases which seemingly apply some notion of benefit and burden.[226] Privity of estate, as developed, precludes liability of an equitable assignee. The pure principle of benefit and burden could clearly make the equitable assignee of a lease liable on the covenants in it, to some degree or another. The benefit would be taking possession pursuant to the lease. There are dicta to the effect that possession alone is insufficient for liability.[227] Nevertheless, it has been argued that there is nothing in the authorities which prevents the use of the pure

[221] *Tito* v. *Waddell (No. 2)*, [1977] 1 Ch. 106, 300, 303.

[222] *E.g. Werderman* v. *Societe Generale d'Electricite* (1881) 19 Ch. D. 246 where the court construed the agreement and considered that certain payment liabilities attached to a patent and bound an assignee with knowledge.

[223] *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* [1902] 1 Ch. 146, 157.

[224] *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* [1902] 1 Ch. 146, 156.

[225] [1977] 1 Ch. 106, 301.

[226] See note 126 above.

[227] *Moore* v. *Greg* (1848) 2 Ph. 717, 722; *Cox* v. *Bishop* (1857) 8 De G.M. & G. 815, 822.


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principle of benefit and burden in this area because the issue has not been expressly dealt with.[228] To apply the pure principle would not make equitable assignees always liable: they would have to have taken possession; they could choose liability in trespass over compliance for the past; they could choose not to take possession for the future; and only covenants which could be said to qualify the right to possession would be enforceable. Moreover, that equitable assignees should be liable, at least in some situations, is surely shown by the fact that the law has now been altered for future leases in the Landlord and Tenant (Covenants) Act 1995.

### *E. Conclusion*

Although the pure principle of benefit and burden would allow enforcement in apparent contradiction to the rules discussed above, it is arguable that none of the rules would thereby be rendered otiose. Enforcement is only possible in certain circumstances, not generally. There are other situations where a doctrine may partially relieve the consequences of a rule of law without this being considered unacceptable. For example, an interest in land can only be created if the requisite formalities have been complied with, but gratuitous promises are enforceable if the doctrine of proprietary estoppel applies; and although neither a contractual licence nor an unregistered registrable interest will bind a purchaser of land, the courts may be prepared to impose a constructive trust to achieve that effect.

## V. Conclusion

It is arguable that "benefit and burden" is a principle, reasonably clear in its application, that promotes fairness[229] and, consequently, far greater use should be made of it. It seems only fair that a right or benefit originally granted subject to a condition or linked with a reciprocal right or obligation should remain conditional or linked. In recent years the courts have been keen to make use of other principles that can be seen to achieve fairness in the circumstances and in the light of the conduct of the parties, such as constructive trusts and proprietary estoppel. For example, a purchaser of land may be bound by means of a constructive trust by a contractual licence or unregistered registrable interest where his conscience is affected

[228] Megarry V.-C., *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 300 commenting on *Cox* v. *Bishop* (1857) 8 De G.M. & G. 815. Cf. *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* [1902] 1 Ch. 146, 156, where it was said that *Cox* v. *Bishop* decided that benefit and burden was inapplicable, and *Government Insurance Office (N.S.W.)* v. *K.A. Reed Services Pty. Ltd.* [1988] V.R. 829, 836, where it is suggested that *Cox* v. *Bishop* is a strong case against the doctrine of benefit and burden because the Judges could find no ground on which to find liability.

[229] *Hopgood* v. *Brown* [1955] 1 W.L.R. 213, 226; *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 289, 295.

because of the circumstances surrounding the assignment.[230] Why should his conscience not also be affected by the circumstances of the grant, at least where he has knowledge of them,[231] combined with his later conduct in taking the benefit? Perhaps the only justifiable distinction between the principle of benefit and burden on the one hand and the constructive trust and doctrine of proprietary estoppel on the other hand is that the latter are discretionary in their application or effects whereas the former is not. Nevertheless, provided that the courts reach a satisfactory conclusion in relation to issues such as the need for knowledge so as to ensure that the principle of benefit and burden is fair to all concerned, it is arguable that the principle of benefit and burden is a useful doctrine which should be invoked by the courts whenever the circumstances permit.

[230] If he can be said to have expressly or impliedly agreed to be bound: *Ashburn Anstalt* v. *Arnold* [1989] Ch. 1. A constructive trust could not be imposed on the facts of *Halsall* v. *Brizell* [1957] Ch. 169 as there is nothing on which an agreement to be bound could be inferred. The facts of *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106 may lend themselves to such an inference.

[231] This seems to suggest that knowledge should be a requirement.