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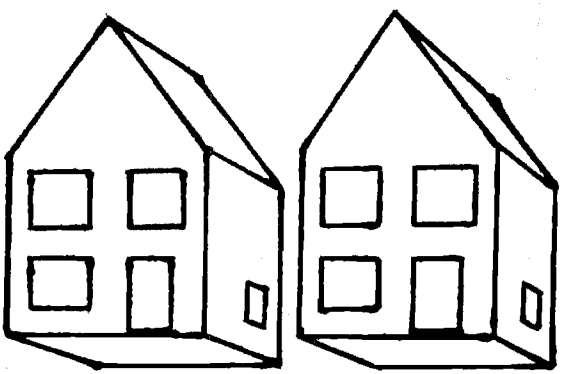
HOUSING STUDENTS DON'T NEED LAND LAW – DO THEY?



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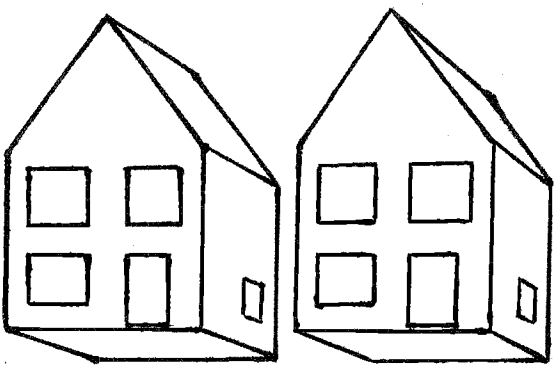

HOUSING STUDENTS DON'T NEED LAND LAW DO THEY?

by

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SUMMARY OF MAIN CONTENTS

Alphabetical List of Statutes

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Alphabetical List of Cases

HOUSING STUDENTS DON'T NEED LAND LAW, DO THEY?

This is not a law book. It is a collection of 37 anecdotes drawn together by a Land Law lecturer to suggest that anyone studying for a career in the Housing profession ought to read a book on Land Law before studying Housing Law. IT SHOULD NOT BE RELIED ON AS A SUBSTITUTE FOR PROPER LEGAL ADVICE.

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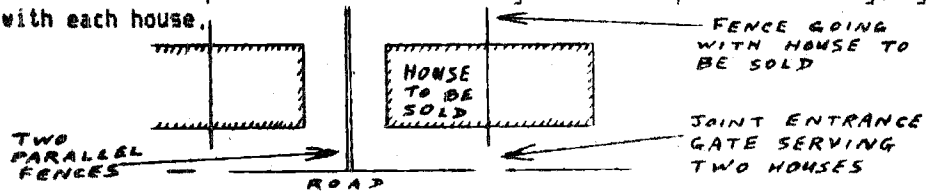
On the Housing Estate

1 I recently accompanied a junior Housing Assistant on a visit to a semi-detached council house which the tenant and his wife wished to buy in their joint names, under the right-to-buy provisions in s.118(1) - i.e. sub-section (1) of section 118 - of the 1985 Housing Act. The right-to-buy rules and the discounts available under this Act are matters of Housing Law, not Land Law, but the purpose of the Housing Assistant's visit to the house was to ascertain exactly what the purchasers were going to buy; and this involves Land Law.

1.1 The wall (one brick thick) between the sitting rooms of the two houses was the usual "party" wall, so the purchasers and the Council (which still owned the adjoining house) would be jointly responsible for the cost of any repairs to that wall.

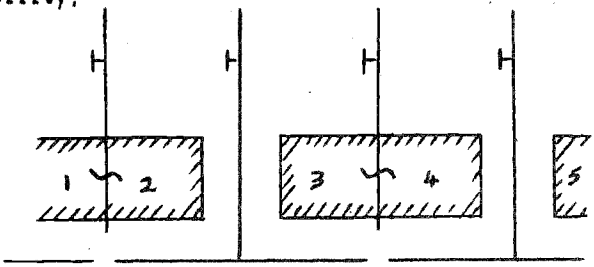
1.2 The garden fence between these two houses had always been recognised as going with this house and so was to be included in the sale; but a joint front entrance-gate serving both houses made it necessary for a legal right of way (which is a legal "easement") to be granted in the purchase-deed. (This *deed* is the legal document by which the purchase takes place.)

1.3 The boundary fence on the other side of the garden belonged to the neighbour, who had already bought his house from the Council, but he had let the fence become derelict, and so the tenant of the house now being sold had erected his own fence; and so, on this boundary, there were two parallel fences touching each other, one of them going with each house.

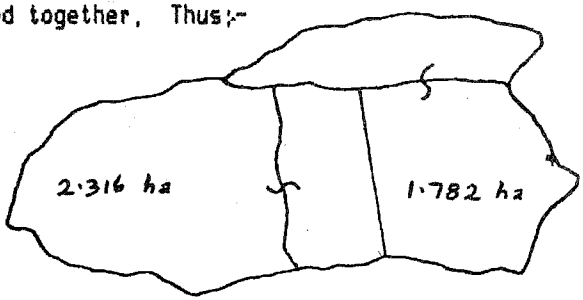


1.3.1 **Boundary walls and fences can sometimes be checked from deeds or builders' plans as shown in the illustration overleaf. An "S" mark signifies a party fence** (joint responsibility of the two house-owners)

while a "T" mark on your side of the fence means that the fence is your responsibility.



1.3.2 But on 1/2500 scale Ordnance Survey maps the "S" mark has a different significance. It does not indicate a party boundary; it shows that the *area* figure printed on the map is the total for all the plots linked together. Thus:-



In this diagram, the *straight* line is the boundary between the 2,316 and the 1,782 hectare measurements.

1.3.3 Deeds and builders' plans are not foolproof; in the example set out in unit 1.3 above, if the derelict fence had completely disintegrated, the plans (if any) would show the fence as the neighbour's, but the only fence actually standing would be the one belonging to the tenant. In other words, oral evidence of what had happened could prove that the plan was wrong.

1.3.4 If no plan is available, look at the upright posts, struts and any other supports. If they are on your side, it is (usually) your fence. This does not work with walls, but the nature of the wall may show whose wall it is; for instance, if there is a detached Victorian stone-built house and a detached 1960s brick-built house, and they are separated by a 1960s brick wall, it is fairly certain that the brick wall will go with the brick house.

1.4 The tenant's wife asks, *"What would have happened if that right of way through the joint front gate had not been put into the deed?"* There are several possible answers:-

1.4.1 One answer would be for the purchasers to cut a gap in the front hedge and make a new gateway. (This new gateway would require Planning Permission if the property fronted onto a classified road.) But this will not be necessary, because there is a precedent case *Wheeldon v. Burrows (1879)* under which this easement will be regarded as "granted by implication".

1.4.2 If this gateway had been a useful but not-strictly-necessary secondary front access, instead of being the main front entrance, no easement would have arisen under *Wheeldon v. Burrows* - but in such a situation, what is most likely to happen is that the purchasers will go on using the old gateway as they have done in the past; and if they use it for the next twenty years without anyone complaining, they will then acquire a legal easement by passage of time. (This is an easement by "prescription" - see sub-units 5.1.2 and 5.1.3 below.)

1.4.3 Another possibility in this situation is that another deed (a deed of grant of easement) could be drawn up at a later date, by agreement of all concerned, to regularise the position.

1.4.4 Or instead of a deed of grant, there could be an informal grant by writing the purchasers a letter giving permission for use of the gate in return for some small "consideration" (e.g. a payment of £10). This would be an "Equitable" easement (i.e. an easement under the rules of Equity) instead of a "legal" easement.

Equity is a second system of law. (We shall see some details of it in sub-unit 9.1.3 below.) It was created in the Middle Ages by the King's Chancellor, and, until 1873, had its own Courts with its own Judges. Today, all Judges have the power to apply both law and Equity.

Equity is based more on fairness and less on formality than the law. So, in this example of an informally-granted easement, the law (or "common law" as it is sometimes called) will not recognise the existence of the easement because it was not made by a formal legal deed; but Equity will recognise it because in all fairness an easement was intended and was paid for. Law and Equity are thus two different ways of thinking - and both are equally logical.

Common law and Equity usually work hand-in-hand together (e.g., if Tom holds property as trustee for Ben, Tom as the legal owner can sell it, but Equity will ensure that the money paid for it will go to the beneficiary Ben) but if law and Equity cannot agree, Equity prevails.

Equitable easements, and various other rights such as restrictive covenants, options to purchase and certain types of mortgage etc., formerly caused trouble because they were so difficult to discover. Often there was *no* evidence of them with the deeds for a purchaser's solicitor to see. Therefore, since 1925, there are registration systems for such matters. The Equitable easement in our example above must be entered at the Land Registry if it is to be permanent. An Equitable easement sometimes fails because the person who bought it and paid for it did not know of the registration requirements, and therefore did not register. (This is the sort of thing that can happen as a result of do-it-yourself conveyancing!)

1,5 The Housing Assistant dealing with this case knew enough Land Law to notice all these points during her inspection and to report on them so that the Council's Legal Department could ensure that any necessary provisions to protect the Council's interests were inserted into the purchase-deed. (The purchasers should be advised to have their own Solicitor or Licensed Conveyancer to protect *their* interests.)

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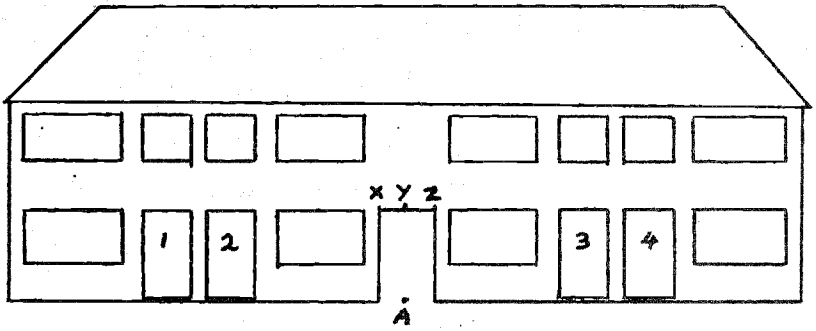
2 On another visit with the same Housing Assistant, we saw a block of four council houses, of which no.2 was being purchased by the tenant under the right-to-buy provisions.

2,1 A central "tunnel" ran to the rear of the block, as shown in the illustration below.



2,2 The boundary between houses 2 and 3 above the tunnel is not, as you might expect, at point "Y". The front bedroom of no.2 extends right across the tunnel to point "Z", and the back bedroom of no.3 extends over the tunnel to "X"; so the boundary is a zig-zag which switches from "Z" to "X" halfway through the building.

As the purchaser had his own Solicitor, the Council's Solicitor had no right to go into the house, for it would be a serious breach of legal etiquette for a Solicitor to visit another Solicitor's client. So there is no way that the Council's Legal Department would find out about the twisted boundary unless the purchaser's Solicitor or the Housing Assistant mentioned it.

If it had not been noticed and "Y" had been specified as the boundary, the purchaser would have received no proper title to a half-metre-wide strip of his own bedroom; but he might then allege that he had received a half-metre strip of his neighbour's back bedroom - much to the alarm of the neighbour's daughter who sleeps in that room.

2.3 In fact, such a claim to part of the neighbour's house would almost certainly fail; but to see why, we must notice three points, all of which are too complicated to be expanded on in this little book. (i) By the "Equitable doctrine of notice", a purchaser is assumed to know of the rights of anyone in actual occupation, and is therefore treated as knowing of the neighbour's tenancy. So the purchaser cannot claim *access* to that room, but can only claim a percentage of the rent on it - and even that claim is extremely likely to fail, because (ii) there is also an "Equitable doctrine of rectification" which enables the Court to correct mistakes in documents. (iii) Regarding the part of the purchaser's own bedroom omitted from the deed, the purchaser is likely to look to s.62(2) of the 1925 Law of Property Act, by which various items known as part or parcel of a house are treated as being sold with the house.

A further deed could be drawn up and registered at the Land Registry to correct the error - unless one of the persons chose to be awkward and refused to sign the deed without being paid a sum of money.

So the upstairs boundary in this instance should end up following the zig-zag of the internal walls - but if the purchaser is an obstinate "barrack-room lawyer" who has never heard of the above three points, there may be months of dispute and bad feeling. Far better not to let such problems arise.

2.3.1 Note that the three points in 2.3 above are all points of law (or points of Equity which is another kind of law - see sub-unit 1.4.4 above). Arguments based on common sense or social desirability or housing policy will get you nowhere in a dispute about law, because they are not *enforceable* as law.

2.3.2 And there may be other points, not mentioned here. (That is one of the problems of writing a book such as this, which states a

housing situation and leads on from it to the law, instead of stating a law and leading on to a housing-example as traditional law books do. In examples leading from housing to law, you can never be sure that a clever lawyer won't think of a legal point that has not occurred to the author, and reverse the whole point of the example!) But a clause in the purchase-deed, stating that *although the boundary at ground level is lengthwise down the centre-line of the tunnel, from the first floor upwards the boundary follows the line of the internal walls of the building*, could avoid much future disagreement.

2.4 At ground level the boundary was straight down the middle of the tunnel from point "A". So an easement was needed, because anyone pushing a pram through the tunnel would have two wheels on their own property and two on their neighbour's; and if there was no right-of-way easement the neighbour would be entitled to obstruct half the width of the tunnel - e.g. by leaving bicycles, dustbins, rubbish and sacks of coal etc. there.

2.5 The Housing Assistant dealing with this matter knew enough Land Law to recognise these difficulties and to report on them to the Council's Legal Department.

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3 The observant reader may have noticed, in the above two true anecdotes, that in the first case the house was being bought by the tenant and his wife jointly, whereas in the latter case the tenant (a happily married man) was buying in his own name alone. What difference does it make? (A tenant who is thinking of buying may well ask you.)

3.1 The answer falls into three sections:-

3.1.1 *If the purchaser dies at some later date, leaving a Will*

If it is stated in the purchase-documents that the property (i.e. the house, or flat, as the case may be) is bought in the "beneficial joint" names of husband and wife - or two unmarried cohabitees - the position is that if one of them dies, the property automatically passes by "right of survivorship" to the other one, regardless of anything the deceased person may have said in a Will.

But if the property is in the man's name alone instead of joint names, he can leave it in his Will to whoever he likes, except that if a member of his family (e.g. his wife, mistress, child, step-child etc.) is *financially dependent* on him, the 1975 Inheritance (Provision for Family and Dependants) Act states that that dependent

person is entitled to a *reasonable share* of what the deceased left, in spite of what he said in his Will.

Could a man whose wife works as a Housing Officer therefore leave a Will under which his wife gets *nothing?* Yes, he legally could, as she has a job and is not financially dependent on him; so if the matrimonial home is in his name alone, he could leave her homeless; but if the matrimonial home is in their "beneficial joint" names it goes to her regardless of the Will.

3.1.2 *If they separate*

But putting the house into "beneficial joint" names has its dangers. Imagine a couple - husband and wife or cohabitees - of whom one is hardworking and the other is a layabout. Their relationship has broken down and by mutual agreement they are separating and are selling the house for £120,000. And the hardworking one (who provided virtually all the finance to buy the house) must accept that because they are "beneficial joint" co-owners, they must divide the £120,000 *half each*.

And what happens if, on their separation, one of them wishes the house to be sold but the other wants to continue living there? The answer to this is twofold:- (a) If the property is co-owned, it cannot be sold without both their signatures (except by a Court Order under s.30 of the 1925 Law of Property Act) so she can stop him from selling their home without her consent. (b) But if it is in the man's name alone, and the woman did not substantially contribute to the purchase either financially or by heavy labour such as helping to rebuild a derelict house, the man can sell it and leave her homeless; but the woman, *as long as she is his wife and not just a cohabitee*, can prevent this by registering her "right of occupation" under the 1983 Matrimonial Homes Act - this is a simple procedure requiring her or her legal adviser to fill in a form and pay a small registration fee - and *then* her husband cannot sell without her consent. Similarly a husband can register his "right of occupation" if the matrimonial home is in the sole name of his wife.

If the property is co-owned by two (or more) persons, but the purchase deed does not say "beneficial joint" but says instead that they they are "in common", then each of them can make a Will leaving his or her own part of the proceeds of sale of the property to anyone. Or if in such a case they separate and the house is sold, they can claim the proceeds proportionately, taking into account what amount of money each of them contributed to buy the house and who paid the

mortgage interest, who paid for repairs, etc. In some cases their finances may be so confused that they themselves do not know the proportions, in which case the Court may be forced to say that 50-50 is the best solution; and if (as sometimes happens) they hold "in common *in equal shares*", they take equally in any case.

Even if the house is in the man's name alone, the woman can claim a proportion of the proceeds of sale if she has put substantial finance or heavy labour into the house; see the case of *Eves v. Eves* in unit 3.2 below.

There is no single solution that would cover all possible situations, which is why Parliament has enacted (in the 1973 Matrimonial Causes Act) that on a *divorce*, the Court will deal with the house in whatever way seems best, taking into account the needs of both parties and putting the children's interests first. But divorce is available after *two years* desertion or mutual separation, if there has been no adultery or other behaviour giving an immediate right of divorce. It may be that the sale of the house cannot wait two years, so the sale is before the divorce and so the advantages of the 1973 Matrimonial Causes Act are not available.

3.1.3 *If he dies without leaving a Will*

If the man dies *intestate* (i.e. without leaving a Will) then if the property is in the beneficial joint names of the man and the woman, it passes to her by right of survivorship as in 3.1.1 above. But if the house is in his sole name, the Intestacy Rules (based on the 1925 Administration of Estates Act plus later amendments) state that the widow takes the first £75,000 of any property; and with regard to property above that figure the widow and the children will have rights.

This can produce difficult situations. Suppose that Freddie, who bought his council house in 1982, dies intestate today, leaving a widow Annie and two children Jack aged 37 and Jill aged 35. The house today is worth £80,000, and he also leaves other property (money in the Bank, etc.) worth £10,000. Who inherits his property?

(i) If the house was in Freddie and Annie's beneficial joint names, it goes to Annie by right of survivorship, not by inheritance. This means there is only £10,000 to be dealt with under the intestacy rules, and as the widow is entitled to the first £75,000 under these rules, she takes all of it. This is hard on Jack and Jill, who both have small children and would have found the money useful. Then Annie re-marries, and when she dies the first £75,000 of her property passes

to her new husband (and when *he* dies, it goes to *his* children and not to Jack and Jill) unless Annie has stated otherwise in a Will.

(ii) But if the house was in Freddie's name alone, on his death intestate his widow Annie is only entitled to the first £75,000 to do as she likes with. The rest of the property (amounting to £15,000) is split into two equal parts (£7,500 each). One of these sums goes to Jack and Jill (£3,750 each) and the other is invested so that Annie will receive the *interest* on it (about £750 per year) and the capital (the £7,500) will be paid to Jack and Jill after Annie dies.

On those figures, if Jack and Jill are pressing for their money, Annie may have to *borrow* almost £5,000 to pay them off, if she wants to stay in the £80,000 house.

It may well be that neither the co-ownership provisions nor the intestacy rules give Freddie and Annie exactly what they want. Alternative possibilities should be considered - e.g. Freddie might leave a Will in which the house goes to two trustees on the condition that they allow Annie to live there rent-free until she either dies or re-marries, and then it shall go to Jack and Jill. But such a Will should be drawn up by an expert, or disaster can follow; the case of *Re Sinclair [1985]* is an example of what can happen:-

Mr. Sinclair made a Will saying that everything was to go to his wife if she outlived him, but was to go to the Imperial Cancer Research Fund if she died before him. Later Mr. and Mrs. Sinclair were divorced - and then he died. Mrs. Sinclair was not entitled to the property because the divorce made the gift to her ineffective; but the Imperial Cancer Research Fund was not entitled to it because the Will said that the Fund should have it if Mrs. Sinclair *died* before Mr. Sinclair. So the property had to be dealt with under the intestacy rules, by which (as the couple had no children) Mr. Sinclair's brothers and sisters were entitled to all of it.

If Freddie and Annie had been cohabitees, unmarried, with the house in Freddie's name alone, Annie would have received nothing at all of Freddie's property, except possibly something under the 1975 Inheritance (Provision for Family and Dependants) Act which we saw in sub-unit 3.1.1 above.

Different Acts of Parliament treat cohabitees differently. The inheritance rules give nothing to cohabitees (except under the 1975 Act above) whereas the Social Security Statutes treat cohabitees as man and wife for many purposes.

3.2 From the above outline we can see that a working woman cohabitee is in a very weak position if the house is in the man's name alone. (i) If he dies without leaving a Will, she gets nothing, as she is not related to him, and the 1975 Inheritance (Provision for Family and Dependants) Act will not help her as she is not financially dependent on him. (ii) If instead of dying he throws her out, she is homeless. (A *wife* could register her "right of occupation" under the 1983 Matrimonial Homes Act, but a cohabitee cannot do so.) Or (iii) if the cohabitees separate and the house which is in his name is sold for £120,000, she only receives the proportion she put in, because the property is *not* in their "beneficial joint" names. (And the 1973 Matrimonial Causes Act cannot help her because as unmarried cohabitees they cannot divorce.) This may well mean the woman receives nothing; in the 1971 House of Lords case of *Gissing v. Gissing*, the woman had paid for the family's holidays, their son's school fees and uniform, and some new kitchen fittings and a lawn. The Court decided that although she had put a lot into the family, she had put no substantial financial contribution into the *property* (and also no work beyond normal housework and painting and decorating) so she received nothing when, after their separation, the house was sold.

But in the 1975 case of *Eves v. Eves*, in which the woman had broken up concrete with a sledgehammer, her efforts were seen as more than normal housework and decorating, and the Court of Appeal awarded her a one-quarter interest in the proceeds of sale of the house.

In *Gissing v. Gissing* and in *Eves v. Eves*, if the property had been in "beneficial joint" names they would have received half the proceeds.

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Question for discussion:- How far is it true to say in Land Law that a working woman cohabitee is not disadvantaged by being a woman, but is disadvantaged because she is working and because she is a cohabitee?

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4 Another question which a Housing Officer may well be asked by a tenant is: *I have heard that all purchases of council houses under the right-to-buy scheme have to be registered at the Land Registry. What is the Land Registry? And what is it for? And what will registration cost?*

4,1 It is true that all purchases of council houses, in all parts of England and Wales, under the right-to-buy scheme have to be registered (at the purchaser's expense) at the Land Registry. The system in Scotland is different, because Scotland has a totally different type of Land Law. Nothing at all in this book applies to property in Scotland.

4,2 There are two types of documentation for land in England and Wales;- (i) the "unregistered land" or "title deeds" system, which is gradually being phased out but will be in use for some properties for the foreseeable future; and (ii) the newer and more convenient "registered land" system in which the bundle of title documents ("the deeds") is replaced with a single Title Certificate issued by H. M. Land Registry. This Certificate (known as a Charge Certificate if the property is mortgaged, and a Land Certificate otherwise) is always set out in three sections, namely the *Property Register* (which describes the land and says whether it is freehold or leasehold, and is accompanied by a scale plan) the *Proprietorship Register* (which names the present legal owner of the property) and the *Charges Register* (which lists matters to which the property is subject - such as any easements, covenants, or mortgages affecting it).

4,3 This difference in documentation affects the conveyancing (i.e. the land-transfer) process.

4,3,1 The "unregistered land" system of conveyancing, sometimes known as the "old conveyancing", has been with us in more or less its present form since 1845, and in earlier forms for several centuries before that. The "registered land" system (the "new conveyancing") in its present form dates from the 1925 Land Registration Act (which was based on the 1875 Land Registration Act plus some necessary practical improvements to that Act) though there has been *some* registered conveyancing from 1862 onwards, and indeed registered conveyancing has been compulsory for all of central London since 1902.

4,3,2 The "new conveyancing" is now applicable to most parts of England and Wales, and an extension to further areas is to take place on 1st. December 1989. After that date, certain Districts in Dorset, Wiltshire, Essex, Suffolk, Shropshire and Hereford and Worcester will still be on the "old conveyancing" system, but all other parts of England, and the whole of Wales, will be a "compulsory registration area". This means that any property in that area which until now has been transferred on the "old conveyancing" system must be brought onto the "new conveyancing" system the next time that the property changes hands.

4.3.3 By the "old conveyancing" procedure, if A sells land to B, a legal document known as a deed is drawn up. If B then raises a loan on the property, a Mortgage (another deed) is prepared. When B pays off the Mortgage and sells the land to C, another deed is necessary, and all these deeds are handed over to C. When C builds a house on the land, this does not alter C's ownership of the land and so is of no interest to Land Law and does not require a deed; but when C obtains the right to run a drain from the house across the neighbour N's land, this easement of drainage will normally be contained in a deed, although in certain circumstances Equity (see 1.4.4 above) will recognise it if there is some writing which is not a legal deed. When C sells the house to D, all these deeds and a new deed transferring the property from C to D, are handed over to D - or to his mortgagee (e.g., Building Society) if D - by yet another deed - is mortgaging the property.

If D sells *part* of the property to E, then D will not hand over these deeds as they are needed in respect of the property which D is keeping; so D will hand over a new D-E deed with a set of copies (called an "Abstract") of all the old deeds for at least the last fifteen years.

For an example of how the system works, see sub-unit 26.12.1.

4.3.4 By the "new conveyancing" method, if A sells to B who then mortgages the property (as in the example above) a Purchase Deed and a Mortgage Deed are drawn up, and these are then sent to the Land Registry with the Title Certificate. The Land Registry then updates its records and the Title Certificate, and returns the up-to-date Title Certificate to B's mortgagee. Each time a transaction takes place the Certificate is up-dated. So D's mortgagee in the example above will receive a Title Certificate (a Charge Certificate) showing D as the owner, and showing the drainage easement and D's mortgage - and making no mention of A, B, B's mortgage and C, since these are no longer relevant.

The intention is that all this information shall be in the one Title Certificate, which is all that the owner (or the mortgagee) normally needs to refer to - whereas on the "old conveyancing" in this example the necessary information was scattered through half a dozen Deeds of varying ages which were to some extent repetitious or had become no longer relevant.

4.4 The Land Registry charges fees on a sliding scale based on the price of the property. For example, on a property of between £40,000 and £45,000 the registration fee is at present £60.

4,5 Leases of 21 years or less cannot be registered, so a letting of a council house to a tenant will not be registered.

4,6 In most Districts outside London, the majority of the council houses were built before the District became a compulsory registration area, so they are on the "old conveyancing" system, with deeds; but any council house sold must be registered at the Land Registry by the purchaser to bring it onto the "new conveyancing" system, within two months after the completion of the purchase. If several dozen houses are being sold on one Council estate, the Council can save the cost of producing several dozen copies of the Abstract, by obtaining the Land Registry's approval of the Abstract and then giving purchasers a single-page "certificate of good title" to tell them that the Council's title (i.e. its entitlement to sell) is recognised as acceptable.

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In the rest of this book we shall look at some aspects of the Housing Manager's work in which Land Law may produce traps needing to be avoided, or problems which must be dealt with.

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In the Office at the Housing Department

5 *The Council by which you are employed has bought a plot of land called "Long Meadow" on which it is building elderly persons' sheltered bungalow accommodation. The builder who is excavating the trenches for the foundations telephones you to say that he has stopped work because he has uncovered a pipe (apparently serving the nearby supermarket) running across the land. Legal Department tells you that this pipe is not mentioned in the Land Registry Title Certificate and this is the first that they have heard of it. And yet the pipe looks quite a few years old.*

Will the Council have to re-route the pipe at its own expense? Or will it have to re-design its housing layout to avoid the pipe? Can the Council rip the pipe up? Or can it require the Supermarket Company to remove it or to re-route it, at the Company's expense?

Pass this problem to your Legal Department! But you will be more capable of working in co-operation with them if you understand something of the rules and arguments with which they will have to deal;-

5,1 Investigation may reveal that this pipe was originally laid in one of the following ways;-

(1) laid without permission, possibly less than 20 years ago; *or*

(2) laid without permission, definitely more than 20 years ago; *or*

(3) laid with permission which was given by word of mouth; *or*

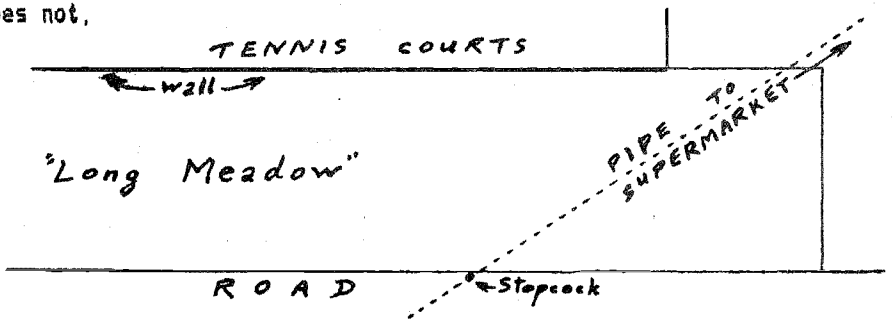
(4) laid with written permission which was set out in a sealed deed; *or*

(5) laid with written permission which was not in a deed and also was not registered.

For details of the law concerning each of these five possibilities, see a law book! But a single paragraph on each of them will serve as a pointer in the right direction;-

5.1.1 *no permission, and 20 years use of the pipe cannot be proved;*

The Supermarket Company can be told that there is no right for this pipe to be here. The pipe can be removed (even if this leaves the supermarket without water) unless the Company negotiates (and pays for) an easement from your Council to enable either this pipe or a new re-routed pipe to continue to be used. - I am assuming throughout this example that this pipe is a branch from the water mains, and not part of the mains itself. If it is part of the mains, it has a right to be there by Statute - by 1945 Water Act (as amended). Much depends on where the stopcock is. Normally the supply-pipe from the mains as far as the stopcock (or as far as the edge of the street if there is no stopcock) counts as part of the mains, and the pipe from there on does not.



5.1.2 *20 years use of the pipe, without permission, can be proved;*

Twenty years use of the pipe by the Supermarket Company and its predecessors, openly and without any known permission, and without any interruption or objection, gives the Company a legal easement by "Prescription". Your Council has left it for too long and will not be able to have the pipe removed, unless by payment or some other incentive the Council can persuade the Company to agree to terminate

the easement. - There are three types of Prescription, namely "common law prescription", "prescription by lost modern grant" and "prescription by the 1832 Prescription Act". (See a law book for details!) "Common law prescription" might not apply to this example, but the other two would.

5.1.3 *permission by word of mouth;*

When was this oral permission given? If it was given (either to the Supermarket Company or to a previous owner of the Company's land) more than forty years ago, the Company is likely to have a legal easement by Prescription. "Common law prescription" and "prescription by lost modern grant" cannot be claimed if there is oral permission, but "prescription by the 1832 Prescription Act" is available if a double period (i.e. forty years instead of twenty) is shown. The Act specifies that the use must have been without *lengthy* interruption. Interruptions of less than 365 days are ignored by the Act (this is not the case with the other two types of Prescription) so if this pipe was cut off for six months in 1984 and then re-connected, there can still be a legal right for the Company, by Prescription.

5.1.4 *permission in a deed;*

Where there is written permission, Prescription is not applicable. But if the written permission is granted by an effective deed, it is binding on everyone, by virtue of being a deed. It is a legal easement. The Council bought this land without knowing of the existence of this deed? That's difficult - but there is half a ray of hope here. The problem, as set out as Anecdote 5 on page 13, refers to the "Land Registry Title Certificate", so this land is registered land, and if the easement was made *since* the land became registered land, the deed is ineffective until it has been received at the Land Registry. So, if the Council's solicitor was unaware of this deed because it had not been entered at the Land Registry, the easement can be stopped. - *On the other hand* if the deed of easement was made *before* the land became registered land, and when the land became registered land the deed of easement was omitted - possibly because it had been made by a different solicitor, so the Land Registry and the solicitor applying for registration of the land were unaware that the deed of easement existed - it is still binding, because it is a deed. This is hard on the Council because it cannot stop the easement (except possibly by offering enough compensation to persuade the Company to remove the pipe) but it is "just one of those things" which must be endured. And the Council's solicitor has *not* been negligent, if this is something which normal conveyancing procedure would not have revealed.

5,1,5 *written permission, not in a deed, nor on the Register;*

This permission might be in a contract, or might be completely informal, as where an owner has written a letter to his neighbour saying, "You can lay a pipe across my land if you pay me £25". Any easement created in this way should have been entered in the Charges Register at the Land Registry (and if the land was unregistered land, the easement would be registered in another Registry called the Land Charges Registry, which was set up under the 1925 Land Charges Act, now replaced by the 1972 Land Charges Act) - and if the easement is not on the Register, any purchaser of the land can stop it. The problem as set out on page 13 states that the pipe is not mentioned in the Land Registry Title Certificate (which includes full details of what is in the Charges Register) so the Council, as purchaser of the land, can stop the easement. This is an Equitable easement - similar to the one we saw in sub-unit 1,4,4 above. If it had been entered in the Charges Register, the Council could not have stopped it. But note that in this example the easement was in return for a £25 payment. This is what is known in the Law of Contract as "consideration". If there had been no consideration (i,e, no payment) the agreement would not amount to an Equitable easement; it would only be a licence, which the Council could revoke at any time, *no matter how many years it had been used.* If the pipe had been used for more than twenty or even forty years this long usage would *not* help the Company, because Prescription does not apply if there has been written permission. (There is also a principle called Estoppel; and in the case of unregistered land there are yet further complications with Equitable easements. These matters are not discussed here.)

Confused? At least you have now seen the principles on which the lawyers have to deal with these matters. And the social desirability of the pipe - whether it is better for the community that it should remain or should be removed - did not enter into the discussion at all. (Nor did any question of economic desirability or expediency.)

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6 *At the rear of the land "Long Meadow" described on page 13 above, there are tennis courts which belong (freehold) to the local tennis club. Between the tennis courts and the council bungalows, there is a wall nearly four metres high. There is a deed showing that when the wall was built in 1913 a covenant was imposed on the freeholder of "Long Meadow" to keep this wall in repair. It now needs repairs which will cost several thousand pounds.*

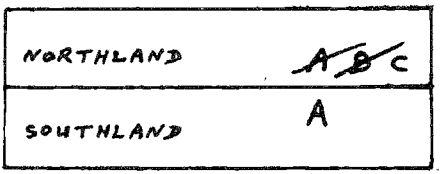
The elderly residents of the bungalows petition you to demolish the wall and erect a post-and-wire fence because the wall makes their bungalows gloomy, but the tennis club objects (because if the wall is demolished, someone will have to erect wire netting along this side of the tennis courts) and it demands that you repair the wall.

6.1 The problem here is a covenant, made in 1913.

Covenants are promises made in legal deeds. Builders and landlords often impose them to prevent unneighbourly activities. A covenant "not to keep a dog" is fairly common, especially in flats.

6.2 Covenants are of two types; "restrictive" covenants (sometimes called "negative" covenants) are promises not to do a certain thing - e.g. not to park cars on the front garden - and "positive" covenants are promises to do something - e.g. to keep the garden free from weeds. Note that a covenant not to allow cars in the garden is restrictive, but a covenant not to allow weeds is positive - because if nothing is done, the weeds will spring up by nature and positive steps must periodically be taken to clear them, whereas cars do not spring up in a garden by nature.

6.3 Concerning positive covenants, problems arise which are caused by a defect in the Land Law of England and Wales. The defect is best explained with an example:-



These two freehold properties Northland and Southland formerly both belonged to A. A then sold Northland to B, who covenanted (i) not to keep poultry on Northland (restrictive covenant) and (ii) not to let the fence between Northland and Southland fall into decay (positive covenant - to keep the fence in repair). B later sold Northland to C, subject to these covenants. C is now breaking both these covenants, and A wants to sue C.

But C bought Northland from B, not from A. So when C promised to obey the covenants, C made this promise to B, not to A. So A has no right at common law against C. Nevertheless, when A sold to B, B promised A that the covenants would be kept. So A can sue B, and B can sue C. Under common law, A cannot sue C direct. And as B has recently died, there is in this instance no-one that A can sue, and there is no-one who can sue C.

In this situation, Equity comes to the rescue on restrictive but not on positive covenants. In a famous case, *Tulk v. Moxhay (1848)*, in which a restrictive covenant not to build on Leicester Square was enforced (which is why Leicester Square is still mostly a grassy open space in central London, to this day) a principle was established in Equity whereby, in the above A-B-C example, A could sue C direct on the restrictive covenant against the keeping of poultry, and could obtain a prohibitory injunction (a Court Order - as in the example in 9,1,3(ii)*(c)* on page 24 below) against C, subject to certain conditions which are not set out in this book. (See law books - e.g. see pages 459-460 of the author's "Real Property Law for Beginners" - for details.) But the positive covenant (to repair the fence) is totally unenforceable and worthless, now that B is dead.

6,4 Applying this knowledge to the question raised as Anecdote 6 above, we see that if the Council does not repair the wall, the tennis club is very unlikely to be able to take any action against the Council. As this is a positive covenant, Equity gives the club no direct right of action against the Council; so the club would have to sue the person who originally entered into the covenant, just as A in the above example had to sue the original covenantor B. As the covenant to repair the wall was made in 1913 and would have been made by someone of full age (21 in those days, 18 today) they are looking for a covenantor born not later than 1892. If that person is dead, the positive covenant is useless and the Council can safely ignore it and demolish the wall.

6,5 Proposals have been made for covenants to be replaced by a system of "Land Obligations" to which these problems would not apply; but Parliament has passed no law to this effect as yet, and if it does so, the new provisions are likely to apply only to future agreements, leaving existing ones as they are.

6,6 These problems do not arise with covenants in Leases, because the landlord always has the right to sue the tenant. This right for the landlord to sue the tenant (and *vice-versa*) is known as "Privity of Estate". Contrast it with the system described above in which A must find B, which is "Privity of Contract".

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7 The Chairperson of the Housing Committee is on the telephone to you. "All our solicitors are in court this morning, so I'm ringing you instead. You know those houses in Victoria Street that the Council

bought fourteen years ago? The ones we were going to demolish to make way for the new road, but we never had the money to build the road? Well, now we do have the money so we want to demolish them, but one of them has got squatters in it, and they can prove they have been there for thirteen years! What can we do?"

7.1 Tell your enquirer first the bad news, that twelve years of "adverse possession" (i.e. possession adverse to the owner's rights) gives the occupiers a legal right to stay there. The Council will have lost its right, by abandonment, and the occupiers will have a possessory title (a "squatters' title"). But then refer the Councillor back to Legal Department, because "a little knowledge is dangerous".

7.2 Legal Department will find out that there are several precedent cases which make this quite a tricky point. And all cases before 1980 on this point must be treated with caution, because certain assumptions (by which some occupiers were automatically regarded as licensees instead of squatters until 1980) cannot be made since the passing of the 1980 Limitation Act.

Today, there may or may not be adverse possession, depending on the circumstances. Situations in which an intruder has used the property for some temporary purpose (e.g. dumping old boilers) or some seasonal purpose (e.g. growing vegetables) have been seen as *not* amounting to adverse possession. But living there would generally be adverse possession - though perhaps not if the circumstances were as outlined in sub-unit 7.3.2 below. In February 1989, two cases were decided by the Court of Appeal on the subject of what amounts to adverse possession:-

7.2.1 In *Buckinghamshire County Council v. Moran* (decided on 13th. Feb. 1989) a plot of land had been sold to the Council in 1955, for a proposed future road diversion. This land was not fenced off from the neighbouring land which the defendant Moran bought in 1971. Moran cultivated the Council's plot with his own land, as the previous owners of Moran's land had done since 1967. The Council began Court proceedings on 28th. Oct. 1985 to recover the plot, but it was proved that by 28th. Oct. 1973 Moran had fenced off the Council land and had annexed it to his own property.

The Court of Appeal concluded that his actions showed a clear intention of taking the Council's plot, and as more than twelve years had passed since then, he had a possessory title. The Council therefore lost the land.

7,2,2 In *Morrice v. Evans and Another* (decided on 22nd. Feb. 1989) there was similarly a plot of land which was taken over. The facts were;- In 1974 the plaintiff's predecessor in title (i.e. a previous owner of the plaintiff's property) sold a house with a garden to the defendants. Adjoining the sold property was a plot of land (which could only be reached through the garden) which was not included in the sale. The defendants (the purchasers) used this plot as part of their garden. The plaintiff raised no objection to this, except that in early 1975 her husband told the defendants not to grow tomatoes in the greenhouse on the plot; and the defendants, accepting that the plaintiff had the right to say this, stopped growing tomatoes. The greenhouse was left unused until it fell down.

In late 1987 the plaintiff began court proceedings to recover the plot. The defendants claimed that they had more than twelve years adverse possession, but the Court of Appeal's decision was that as the defendants had obeyed the order not to grow tomatoes, twelve and a half years previously, the court was entitled to conclude that there had not been, at least twelve years ago, a firm intention of establishing adverse possession. The court could not say that there was such an intention twelve years ago, if there was clearly *not* such an intention twelve and a half years ago. So the plaintiff recovered the plot.

7,3 Which of these cases applies to the situation on which the Councillor is asking your advice is for a Lawyer and not a Housing Manager to consider. The point of this example is;- Realise that the law can be tricky, and don't get out of your depth!

7,3,1 If the squatters changed the locks and have used the house as their home for 13 years it is probable that they have a possessory title, and if the Council now wants to demolish the house for road improvement, it will have to buy it back from the squatters (possibly by compulsory purchase) at full market price.

7,3,2 But I once saw a letter in the "Hackney Gazette" from someone who had been squatting in a flat in a tower-block for many months, who said that he squatted from necessity, and that if the Council allocated his flat to a tenant, he would move on elsewhere. - That squatter thus acknowledged the Council's right to the flat, and if after 13 years squatting he was told to leave so that the Council could demolish the property for road improvement or for some profit-making venture, he would have to give it up because his letter would contradict any claim that he had intended to acquire adverse possession - just as the occupiers of the plot in *Morrice v. Evans and Another* (above) had to give it up.

7,4 If a squatter cannot show 12 years adverse possession, there is a procedure by which the squatter can be removed within about seven days by a Court Order - and by bailiffs if necessary. But when the squatter and his/her large family of small children then come to the Council as a homeless family requiring accommodation (likely to be bed and breakfast in a hotel in many cases) it may be discovered that it would have been cheaper for the Council to leave them where they were, as long as it did not leave them there more than 12 years.

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8 *The Chairperson of the Housing Committee is on the telephone to you again, asking, "Are you dealing with that right-to-buy case where the tenant agreed to buy, but a fortnight later she had a breakdown after her son was killed? Well, she's been compulsorily detained in hospital under the 1983 Mental Health Act! What happens about her purchase now?"*

8,1 If she is not capable of attending to her affairs, the "Court of Protection" has jurisdiction to deal with the situation. A "Receiver" (usually a close relative) is likely to be appointed to act on her behalf under the direction of the Court of Protection which keeps a close (and sometimes time-consuming) check on everything that the Receiver does.

If there is a binding contract the transaction should go ahead, and probably the Receiver will want it to do so, because if the purchaser is not to be permanently in hospital she will need the house, and if she *is* permanently hospitalised the house is a valuable asset which can be turned into money for her benefit.

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9 *The Council by which you are employed is buying a house for use as a women's refuge. A large portable shed which stands in the garden of the house is also being bought by the Council, which intends to dismantle the shed and re-erect it elsewhere. - The purchase of the shed (which was not urgent) has been completed in less than a week. The purchase of the house (which is urgent) has so far taken two months and is still nowhere near completion.*

Your Legal Department says the purchase of a house is more complicated than the purchase of a shed. Is this true or are lawyers just slow? What complications are there?

9,1 Here are ten of them:-

9.1.1 *A shed is a chattel; a house is part of the land.*

A shed is a chattel (i.e. an item of goods, someone's personal property) which can be moved - unlike a house, which is fixed immovably to the ground and therefore counts as part of the land. (When a Housing Manager and a Solicitor look at a house, they see different things. The Housing Manager sees a house. The Solicitor sees land, which just for the time being happens to have a house on it. The house is part of the land, just as a pimple on a student's face is part of the face - and yet in a short time it may be gone, and may even have been replaced by another one. But the land is permanent.) In Land Law, the house has no existence except as part of the land. "Land" includes what is below the surface and what is above; so an upstairs flat is "land", and if the building is demolished the air-space where the flat formerly was is "land" and can be sold to the builder who wants to re-develop the site.

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9.1.2 *A shed is owned, whereas a house is "held on freehold or leasehold tenure".*

When William the Conqueror came in 1066, land was the chief form of wealth. People had few chattels beyond their clothes, furniture, and tools of their trade. William therefore declared that all land belonged to the Crown. This is still so today; so I am absolute owner of my shed, but I "hold my house from the Crown".

I can let this house to a tenant, who will "hold" it from me. Thus there are two ways of holding land:- (i) freehold, holding from the Crown, and (ii) leasehold, holding from a landlord. These are the two types of "tenure". (The word means "holding".) We may safely think of freehold as practically equivalent to absolute ownership.

Tenure sometimes confuses co-owners because in their purchase-deed they will be described not as "joint owners" but as "joint tenants" - because we are all tenants of the Crown.

It is sometimes said that there are four types of housing tenure, namely (a) ownership (b) private renting (c) Council renting, and (d) Housing Associations. But (a) is freehold and all the others are varieties of leasehold.

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9.1.3 *Trusts - and Equity.*

A lot of Land Law is not "common law" at all, but is "Equity". "Common law" (this name is often shortened to "law") and "Equity" are really two different ways of thinking, as a three-part example will show. (This particular example could apply to a shed as easily as to a house; but in fact there is more Equity in Land Law and Law of Trusts than in all other branches of the law put together.)

(i) If land was granted to Albert on the basis of his promise that he would hold it on behalf of Betty (a child) - and Albert "forgets" his promise and uses the land for his own profit, common law will not interfere, for the land was legally granted to Albert. This is the formal "letter of the law". Equity on the other hand is based on justice; it was created in the Middle Ages by the King's Chancellor who was not a lawyer but a Bishop; and as a Bishop of the Christian Church he applied principles of clear conscience rather than law. So, in our example, Equity will step in for the sake of fairness, to force Albert to hold the land as a trustee for Betty's benefit. Betty is the beneficiary of the trust. Beneficiaries' rights are always protected by Equity, never by common law. Common law sees Albert as the legal owner, but Equity recognises Betty as the true owner, the beneficial owner, and makes Albert deal with the property for Betty's benefit. (Rules for appointing trustees are laid down in the 1925 Trustee Act.)

In some cases the beneficiaries may be persons not yet born. For example, in a Will, someone may leave gifts for grandchildren who perhaps will not be born for many years.

(ii) Until 1873, common law and Equity were administered by separate Courts; but since the 1873-75 Supreme Court of Judicature Acts, both systems have been dealt with by the same Courts - normally the High Court, Court of Appeal and House of Lords. Every Judge has both systems in his or her hands. But the systems are different; common law is the fruit of firm formality, and Equity is the fruit of flexible fairness - and putting both of them under the same administration does not make them the same, just as putting gooseberries and green grapes into one fruit-dish would not make *them* the same. The student needs to keep them both in mind *separately*.

An example of this occurred in sub-unit 5.1.5 above, in which a pipe was used by written permission which was not set out in a deed;-

If the permission to use the pipe *had* been in a deed, common law would have enforced it, except that, as the pipe crosses registered land, the right is not enforceable unless the requirements as to

entering the deed at the Land Registry (set out in sub-unit 5,1,4) have been fulfilled. If the pipe ran across unregistered land, there would be no registration requirement; the mere existence of the deed is sufficient to make the easement legally binding.

But as the permission in this instance was *not* made by deed, common law will not recognise it. Equity, being more flexible, will recognise it for the sake of fairness, as long as it has been recorded *either* at the Land Registry (if it crosses registered land) *or* the Land Charges Registry (unregistered land). So we see that the requirements of common law and Equity are different and must be thought through *separately* in any situation which arises in practice.

And we must watch our terminology, for to say in this context that something is "not legal" does not imply that it is in any way illegal; it merely means it is Equitable - recognised and enforced through Equity instead of through the law.

But once the existence of this easement has been established either at law or in Equity, a landowner who blocks the easement may be faced with a Court Order *(a)* to pay compensation (this, known as "damages", is the common law remedy) and further Court Orders *(b)* to remove the obstruction forthwith (a mandatory injunction - an order to do something) and *(c)* never to obstruct the easement again (a prohibitory injunction - an order *not* to do something). Injunctions are Equitable remedies because they were invented in mediaeval times by the Chancellor, and the penalty for breaking them is imprisonment for contempt of Court. So, in these remedies, we see common law and Equity working hand-in-hand *together*.

(iii) Equitable remedies are discretionary. So, if the landowner blocked the easement because the person with the easement was deliberately using it in an unneighbourly fashion (e.g. the pipe was making noisy vibrations, and the user of the pipe had refused to adjust the water-pressure to stop this) the Court might decide that although the person with the easement *must* be awarded damages, no injunctions will be made because they are morally not deserved by the person applying for them. One result of this for the Housing Manager may be that if the Council has acted in a high-handed fashion in taking a tenant to Court, the Council may not get the injunction it seeks, even though it wins the case.

Summary of 9,1,3;-

In this sub-unit we have seen (i) trusts (ii) informal writing making Equitable (as against legal) easements, and (iii) Equitable (as

against legal) remedies. What these three have in common is that they are all matters to which the mediaeval Chancellor turned his attention, and therefore today they are dealt with according to the principles of Equity instead of the principles of the law.

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9.1.4 *A shed is owned, but regarding a house only a freehold or leasehold ESTATE is owned.*

With a portable shed there are two concepts: ownership and possession. If I paid for it or received it as a gift, I am the owner (with some exceptions, e.g. where the shed is on hire, or on hire-purchase). If I stole the shed, I have possession of it but not ownership; the person from whom I stole it is still the owner, despite having lost possession of it. Ownership continues until the worn-out shed is finally thrown away.

With a house, we have seen that the owner is the Crown. But *I can own the right to be there, and the right to use it.* These rights which I own *(which are the basis of our whole Land Law system)* are called my "estate" in the property. These rights are accompanied by duties - e.g., although I have a right to let my house fall down (as long as it is not a building of historical or architectural interest or in a conservation area) I have a duty not to let it fall onto my neighbour's land or onto the highway.

At this point the student is realising that the way the lawyer uses the word "estate" is totally different from how the Housing Manager uses that word. The estate is the collection of rights and duties - it is not something which can be touched. In response to a question, "What is a legal estate?" in a law exam, an answer describing the largest council estate in your area *does not get any marks!* The estate is the "package" of rights and duties which is owned.

If the tenure of the land is freehold, the rights and duties over that land make up a freehold estate called an "estate in fee simple absolute in possession" and are permanent. Every normal "owner-occupier" owns a "fee simple absolute in possession".

If the land is leasehold, my rights-and-duties are a leasehold estate named a "term of years absolute" which can never be permanent. It may be a Lease for ninety-nine years or even for a million years, but it cannot be perpetual. Or it may be a recurring "term of years absolute", such as a monthly tenancy recurring month by month at a monthly rent until terminated by a month's notice. All legal tenancies

are "terms of years absolute". The Housing Manager working for a Local Authority or a Housing Association spends his or her entire career working with "terms of years absolute".

Until 1925 there were also other estates, but the law on this was simplified by the 1925 Law of Property Act which reduced the number of legal estates to two, i.e. the "fee simple absolute in possession" and the "term of years absolute". We may abbreviate these rather clumsy titles to "fee simple" and "term of years".

A practical effect of this is that a legal estate "for life" cannot exist. For instance, if a man makes a Will leaving his freehold house "To my widow until she dies, then to my daughter", common law does not recognise the life estate. It would recognise the widow as having the legal fee simple, and so she could sell the house - though, if she did so, Equity would require the proceeds of sale to be invested so that the widow would receive the interest and the daughter would eventually receive the capital. (This situation is known as "settled land".) The best way for the man to avoid this (and he *should* avoid it, for "settled land" is a complex system of law designed primarily for stately homes and is not really suitable for other types of property) is to appoint a couple of trustees to hold the fee simple *for the benefit of* the wife for life and then the daughter - because Equity is quite happy to recognise life interests. The widow might even be one of the trustees - so we might find the widow and a solicitor as legal fee simple owners, but they are trustees for the benefit of *the widow for her life* and then the daughter.

Similarly there cannot be a Lease for life. If anyone mistakenly grants a Lease "until death" or "until the tenant marries" this counts as a Lease for 90 years if the tenant lives that long - or lives that long without marrying, in the case of any Lease "until marriage".

This produces an oddity in our Law. If a Lease is granted "to John for 5 years, provided he does not get married", how long can John stay there if he remains unmarried?

As long as you applied the letter of the law, as set out above, without being led astray by your own common sense, you will have come to the right answer. As the Lease would end if John got married, it counts as a Lease "until marriage"; so John can stay there for 90 years provided he does not get married.

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Legal terms of years are of two types; recurring tenancies (weekly, monthly, quarterly etc.) are "periodic terms", while tenancies or leases for a specific length of time (e.g. seven years, ninety-nine years, a million years) are "specific terms".

As a general rule, periodic terms end after one period's notice; but specific terms end as soon as their terms expire and therefore need no notice. There are exceptions to this rule, especially in the 1977 Rent Act which applies to most periodic terms (and some specific terms) made before 15th. January 1989 in the private residential sector.

A leasehold tenant may assign (i.e. sell) the leasehold, or may sublet for any length of time *shorter* than the remaining part of the Lease.

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Failure to grasp this basic concept, that Land Law is not about land but about rights in the land, leads many people to think of a house or a piece of land as a single entity, whereas legally there may be half a dozen entities. There may be a freehold, a leasehold, a sub-leasehold, a mortgage to a Building Society on the sub-leasehold and another to a Bank on the freehold; and the freeholder is a trustee for a child who will have legal rights on reaching 18. If your Housing Authority is buying *that* house, there are six estates and interests (and possibly six firms of solicitors) to deal with.

To this picture, add a student renting the spare room on a weekly basis, a neighbour whose drains run under the garden, and a boundary wall in need of repair - and you have a fairly typical Land Law situation! Don't think of that house as one entity; think of it as nine matters, each needing separate attention.

That student paying a weekly rent *owns* the rights to that room for the recurring weekly term, just as surely as the freeholder *owns* the fee simple. All the persons in this example are owners - owners not of the land but of their different rights in that land.

Freeholds are "real property", often called "realty"; whereas leaseholds are "personal property" ("personalty") just as chattels (i.e. goods) are. The reason that leaseholds are personalty is that in the Middle Ages, if someone took your land from you, you could get a Court Order returning the *real thing* to you if the land was freehold, but until the year 1499 if the land was leasehold you could only get a *personal* remedy, i.e. compensation. The practical result of this today

is that if the owner of a 999 year leasehold house makes a Will saying, "I leave all my real property to my widow and my personal property to my son", he has left his house to his son. There are also other differences in the present-day law, and in the Conveyancing procedure, between freeholds and leaseholds, stemming not from any moral or social desirability, but from the historical fact that freeholds formed part of the feudal system and leaseholds did not.

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9.1.5 *Land may be subject to covenants, and may also have the benefit of covenants.*

What I can do with my shed is unrestricted as long as I do not use it for crime (e.g. to hide stolen property) or fill it with filth so that it becomes a health hazard - a "statutory nuisance" under section 92 of the 1936 Public Health Act. The firm which sells me the shed has no right to tell me that the shed is not to be used on Sundays! But in Land Law, it is not unusual to find that a freehold or leasehold house is subject to a condition that washing must not be hung out on Sundays, or that no music teaching or Sunday-school teaching shall take place upon the premises. That last covenant is one which I as an evangelical Christian (converted at age 24) would find objectionable, but if I buy a property which is subject to such a covenant I am bound by it if the persons with the benefit of the covenant (likely to be the neighbours) take the trouble to enforce it by seeking an injunction against me. Covenants can only be enforced by people to whom the benefit has been granted. The Council, the police and members of the general public have no power to enforce them unless they happen to be the persons holding the benefit. Covenants contrast with Planning Conditions, which are enforceable by the Council.

Imagine a block of three houses. Nos.1 and 2 have been made into one unit, to form a residential home for the elderly; No.3 has been sold to an electrician. Nothing wrong with that, except that the electrician is now selling No.3 to a musician who has to practice the trombone every day. If the duration and nature of the trombone playing would be unbearable to any average neighbours, this is a Tort of Nuisance. The Equitable remedy of an injunction - a Court Order limiting or prohibiting this activity - could be applied for. But if the playing would not worry average lively neighbours but is a harrowing experience for the frail elderly neighbours who long for tranquillity, it cannot be stopped unless there is a restrictive covenant against (for example) "playing music to the annoyance of neighbours".

Other similar conditions frequently encountered are: not to keep chickens or pigeons on the premises, not to play noisy radios, musical instruments, etc. after 10.30 p.m., and (especially in flats) not to keep a dog or cat. These are examples of "restrictive covenants". There may also be "positive covenants", such as, to keep a boundary fence in repair, or (in a block of flats) to pay a certain contribution towards the cost of maintenance of the roof, the lifts, the central heating etc. Positive covenants on *freehold flats* cause a lot of trouble, due to the defect in the law which we saw in unit 6.3 above, by which these positive "repairing covenants" may become unenforceable. (This is why most Building Societies refuse to grant mortgages on freehold flats - and this makes freehold flats almost impossible to sell.)

My own freehold house *(mine jointly with my wife)* is subject to covenants not to keep pigs or chickens, and also has the benefit of covenants stating that my neighbours cannot keep pigs or chickens.

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9.1.6 *Land may be subject to easements, and may also have the benefit of easements.*

The average portable garden shed does not have mains drainage! But the house in which I live has drains which (naturally) run downhill - i.e. away from the road, and they pass under my neighbour's garden and at least three other gardens before joining the mains sewer in the lower road. On one occasion I have had to go into my neighbour's garden with a drain-rod, to clear a blocked drain. On another occasion my other neighbour (the one up the hill from my house, whose drains run under my garden) brought a JCB mechanical digger into my garden to deal with a blocked drain which could not be cleared with rods. These rights (right of drainage, and right of entry to maintain drains) which my land enjoys over several other people's land, and which my neighbour's land has over my land, are "easements".

My water and electricity supplies also come across other people's land, by easements. (But my gas pipe happens to come straight in from the gas main under the public road, so it needs no easement.)

Gas, electricity and water *mains* (and mains drainage) are laid by power contained in Acts of Parliament - e.g. the 1919 Electricity (Supply) Act - and need no easements; but the supply from the mains to my land needs an easement if it crosses another person's land.

An easement is a right to do something on someone else's land. Rather similar is a "profit à prendre", which is a right of taking something from someone else's land. (An example would be a fishing right; a right to take fish from my neighbour's stream. Incidentally a stream or a pond is land, even though it is land covered with water.)

So we must remember that a house, in contrast to a portable shed, is not just what we see on the surface; underground it may have pipes, wires and cables spreading in all directions, and the right to use all these should be included in the fee simple or the term of years. Easements may be freehold or leasehold; and it is possible, though it would be unusual, to find that a freehold property has the benefit of a leasehold easement, such as "a right of way for 99 years".

A caravan is a chattel like a portable shed, but some caravans are plumbed in to mains water and drainage and have mains electricity, and there is a statute, the 1983 Mobile Homes Act, which governs the licensing of caravan sites. A few permanently-moored boats have mains services. The services form part of the land; normally they can be disconnected so that the caravan or boat is still mobile if it needs to be moved. If a caravan is concreted to the ground it becomes part of the land; it is no longer a caravan but a building.

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9.1.7 *Immobility of land.*

A shed may be moved if it is in the way. This is generally not true of a house - or a factory, or an abattoir, or any other building forming part of land - so these cannot be built without Planning Permission from the Local Planning Authority. If a building is obstructing the development of (for example) a motorway, it may be necessary to take the property (with payment of compensation but without the owner's consent) by Compulsory Purchase.

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9.1.8 *Documentation of land.*

When a shed is sold, it can be picked up and handed over or delivered to the purchaser, but land is immovable. And it is very rare for *part* of a shed (or part of any other chattel) to be sold - have you ever bought half a teapot? - whereas to sell part of a piece of land is not unusual; farms and even gardens often change their shape and size as bits are sold off or added on. Occasionally a room is transferred from a house to an adjoining house. So some form of document is needed to describe the land and its easements and covenants and to show who is

the freeholder (or leaseholder). Details of the two types of documentation (the "registered land" and "unregistered land" systems) have been seen on page 11 above.

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9.1.9 *Cost of land*

If I buy a shed, I write a cheque. But if I buy a house, the money will come from two sources; (i) a mortgage, and (ii) the sale of my present house.

(i) The mortgagee (lender) will want to be sure of three things before lending me the money; (a) Am I financially capable of making the monthly payments? (b) If I don't pay, is the house a structurally sound property which the mortgagee could easily sell? (The house will be checked by a Valuer to ascertain this.) (c) If I don't pay, is the house a *legally* sound saleable commodity? (A Solicitor or Licensed Conveyancer will check to see that the estate is a freehold or a reasonably long leasehold, and that it is free from difficulties with regard to easements or covenants, or registration problems, planning problems, or any other sort of legal problems.)

(ii) The purchaser of my present house will probably have to arrange a mortgage and also sell his present house - he is selling it to a married couple who first have got to sell their house to someone who has first got to sell his flat... These chains of transactions cause major hold-ups which do not occur on the purchase of a shed.

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9.1.10 *Other differences*

Thieves might steal my shed, but they cannot take away my land; though they might make off with fixtures (such as pipes and radiators) which they unfix from the land. - And my land includes to some extent the air-space above, and includes the minerals beneath. My portable shed has no such rights! Except for gold, silver, oil and treasure trove which are Crown property, and coal which is nationalised, the minerals under my land are mine, down to the centre of the earth, unless it is stipulated in my deeds or Land Registry Certificate that this is not so. (In mining areas, it is quite common to find a statement that the minerals - or the minerals more than 500 feet below the surface - are not included in the house-buyer's purchase.) Nevertheless, even if the minerals are mine, I cannot dig them out without Planning Permission - and I cannot dig them out at all if there is a valid restrictive covenant against my doing so.

You may well think of other legal differences between land and a shed, which are not mentioned here.

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9.2 *Summary, based on what we have just seen:*

These various problems (ranging through history from the activities of William the Conqueror in 1066 to the need for motorways for the 1990s) are some of the reasons why Land Law is more complicated than the law of chattels - and as a house cannot exist apart from land, every house is subject to this network of complexities called Land Law before we even start to look at Housing Law.

If a couple says, "We will buy this house for our son," we must therefore bear in mind the following:-

(a) The subject-matter is not a house; it is land which for the present moment happens to have a house on it.

(b) What is purchased is not the actual land but the *estate* - the rights and duties over the land - including the right to cultivate it, to live in the house that happens to be on it, etc., and the duty not to let the condition of the building become a nuisance or danger, either to the neighbours or to the general public.

(c) These rights and duties are for a certain time, which will be a fee simple *(virtually perpetual)* if the estate is freehold, and will be a term of years *(either specific - e.g. 75 years - or periodic - e.g. monthly at a rent)* if the estate is leasehold.

(d) The property may be subject to covenants, and may have the benefit of covenants to which neighbouring land is subject.

(e) The estate may include easements over other land and may be subject to other people's easements over this land.

(f) The property may also be subject to Local Authority matters; e.g. Planning Permissions or Refusals, Building Regulation Consents, Repairs Notices, Improvement Grants etc.

(g) They are buying the property for their son; therefore, although common law will recognise them as the owners of the estate, they are only trustees; Equity will recognise their son as the true owner, the "beneficial" owner.

(h) As there are two purchasers there must be a "trust for sale". *(The meaning of this will appear on page 36 below.)*

When the solicitors talk about "the house", *that* collection of rights and duties - from (a) to (h) above - is what they have in mind. Is that what you have in mind too, or are you and they talking at cross-purposes?

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Question for discussion;- How far is it true to say that owners can do as they like on their own property?

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10 *One of your council tenants has a fetish about pink plastic. He has replaced all the door handles and light switches in his council house with pink plastic ones. He has pink plastic bathroom tiles. He has pink plastic moulded flying ducks hanging on the dining-room wall. Screwed to the wall above the pink plastic electric clock, he has a pink plastic moulding of a horse's head. It is a pre-war Derby winner, so this piece is valuable as a collector's item. He has even replaced a window-frame with a pink plastic one. Now he is moving and wants to take all the pink plastic with him. Can he do so?*

10.1 Chattels can be taken away, but fixtures must be left. But are these items chattels or fixtures? The leading case on this point is *Leigh v. Taylor [1902]* which concerned a valuable tapestry tacked to wooden battens which were nailed to a wall. The House of Lords decided that the tapestry was fixed to the wall to make the tapestry a better chattel and not to make the building a better building (in other words, it was fixed to show off the beauty of the tapestry and not to make the building a warmer or less draughty building) and so it could be unfixed and taken away as a chattel.

10.2 On this basis, the plastic ducks can be taken away, as they hang on nails by their own weight like pictures, and are not fixed at all. And the horse's head screwed to the wall is like the tapestry: it is fixed to make it a better ornament and therefore can be taken away. Similarly the clock, fixed by a single electric flex to make it an efficient clock, can be unfixed and taken away.

The window-frame and the bathroom tiles make the house a more cosy house, and also cannot be unfixed without damage either to them or to the house; so they count as part of the land and must be left there. (No compensation is payable to the tenant for them; and if he tries to remove them, *he* will have to pay for damaging the house.)

The door-handles and light switches are fixtures - part of the house - but are in a special category known as "tenant's fixtures" which the tenant can remove as long as he replaces them with others.

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11 *The Tenants' Association has just rung you to complain that the builders of the new rapid-transit rail link are tunnelling under the Council's estate, causing noise and vibration, and the tenants want this stopped. The tunnelling is about 30 metres below the houses and the builders say that the house-foundations will not be affected. Have the builders any right to be working there?*

11.1 Permission to build the rail-link may have been given by special Act of Parliament, as is the case with the ATA (Advanced Transport in Avon) system. If there is no such Statute, an estate or interest of some sort (and also Planning Permission) is necessary. The developers may have bought the legal freehold or leasehold of the subterranean land 30 metres below the surface. To re-open an existing tunnel an easement would be sufficient, or maybe a right by contract or a licence. Otherwise, the Council's land extends down to the centre of the earth, though it is likely that by the wording of the tenancy agreements the tenants' rights do not extend beneath the surface. Tenants whose properties are particularly affected by the noise, vibration or other disturbance may have a claim for damages (or possibly an injunction) for Tort of Nuisance. Tenants whose properties are particularly affected by noise or vibration on a permanent basis from passing trains after the railway is open may have rights under the 1973 Land Compensation Act, but this generally does not cover disturbance made during the construction (in contrast to the use) of the line, though if severe disturbance is caused by the construction, they may have a right to temporary accommodation elsewhere.

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12 *We have 65 people in bed & breakfast in the old Empire Hotel - and the Environmental Health Department has put a closing order on the hotel!*

12.1 Not a Land Law problem! But it would appear you will have to move the bed & breakfast people to other accommodation, and be ready to receive the very large rocket which the Council Treasurer's Department will no doubt fire at you as a result.

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13 *The Council for which you work is buying a run-down manor house which it intends to convert into single persons' accommodation. The lord of the manor tells you, "I'm tenant for life of this property; it's settled land, you know". (You don't know! - And you wonder what to do.)*

13,1 Refer this to Legal Department; details of settled land (which was a widely-used method of holding land until the first World War, and is still used by aristocracy and landed gentry today) will not be found in this book, as the Housing Manager will not often come across it. But the lord of the manor, though he is called "tenant for life", can sell the freehold estate, the fee simple absolute in possession, although the purchase-money will then be invested by trustees (as in the example concerning the widow with the life interest, on page 26) so that the capital remains in his family for future generations.

13,1,1 The Statute governing this is the 1925 Settled Land Act.

13,2 Note the date of the Act; we have now seen six Land Law Statutes made in 1925;-

1925 Law of Property Act	- *sub-unit* 9.1.4
1925 Settled Land Act	- - - 13,1,1
1925 Land Registration Act	- - - 4,3,1
1925 Land Charges Act	- - - 5,1,5
1925 Administration of Estates Act	- - - 3,1,3
1925 Trustee Act	- - - 9,1,3.

These six inter-related Acts are together referred to in Land Law as "The 1925 Legislation".

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On the Housing Advice Desk

You are on the Housing Advice desk for the morning. You don't know it yet but five people with Housing problems are on their way to seek your advice - here comes the first of them now.

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14 *A woman with a disabled child arrives and says, "My husband has gone off with his fancy woman and he has told me to get out of the house and he has told the estate agents to offer the house for sale. I shall be homeless. Can I stop him?"*

You don't have time to write a note to Legal Department on this one; she wants an answer *now*. And it's a tricky question because

there are alternative possibilities. (She *needs* a solicitor; but if you just tell her that and send her away she may telephone her local Councillor and report you.)

14.1 So you advise her ... *Work out for yourself what you will tell her! But see page 7 of this book before you give your answer!*

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15 *An angry woman who adopts a condescending tone of voice tells you her complaint. "My husband and I are buying our house, and our solicitor says we shall be trustees for sale! I told the silly solicitor, we don't want to sell it, we want to buy it and live in it; but nobody ever listens to me. So I have come to you; and you look very young and inexperienced but I want you to telephone that solicitor and stress as hard as you can that this is all wrong!*

15.1 The solicitor has not got it wrong. Under the 1925 Law of Property Act, a "trust for sale" is compulsory in all cases where there are to be co-owners. The reason for this is to avoid the complication to which co-ownership can lead - here is an example of such a complication;-

15.1.1 If two co-owners (Matthew and Mary - they may be husband and wife, or cohabitees, or even business partners) are "beneficial joint tenants", and one of them dies, the property automatically passes to the other one, as we saw in sub-units 3.1.1 and 3.1.3 above. No difficulty should arise - but a problem occurs if during their lifetime they "severed" the joint tenancy (this can be done by one of them signing a written notice of severance, or it can even happen by a word-of-mouth agreement) so that in Equity they are no longer joint tenants but tenants in common. This means that they have separate interests, which they can leave by Will. And suppose that Mary says in her Will that she leaves all her property to her four sisters - one quarter each - with a proviso that if any of her sisters dies before Mary, that sister's children shall take that sister's share. When Mary dies, her sisters Margaret, Marion and Monica are alive, but the other sister Mildred has died leaving seven children. Who are the people now entitled to benefit?

Matthew still has his half - unaffected by Mary's death, except that Matthew may now urgently want the property to be sold so that he can move elsewhere. As to the other half; Margaret, Marion in Australia and Monica each have a quarter of the half - i.e. a one eighth share - and Mildred's seven children have each an interest in one seventh of a quarter of the half - i.e. one fifty-sixth each!

There are actual cases on record which concerned one sixty-fourth and one seventieth shares!

15,1,2 Before the 1925 Law of Property Act was passed, the signatures of *all* these people (including the one in Australia) had to be obtained before the property could be sold. If one of them (e.g. Mildred's eldest son who ran away from home after a family quarrel) could not be found, the property could be totally impossible to sell.

15,2 To make it impossible for such situations as this to arise after 1925, Parliament decreed in the 1925 Law of Property Act that in *all* cases of co-ownership, trustees must be appointed, to be the legal (i.e. common law) owners. The trustees are on trust to sell the property, but can postpone the sale for as long as they like. In the example above, Matthew and Mary would probably have been named as the trustees. (But this can lead to problems as we saw on page 11.)

15,3 At this point we must carefully differentiate between the two questions, "Who can sell the property?" and "Who finally receives the money which the purchaser pays?"

15,3,1 The *legal* owners can sell, and we have seen that the legal owners are the trustees. *Trustees are always joint tenants and this never changes.*

15,3,2 Who finally receives the money? *Equity* ensures that the final result is fair. In the example above, Matthew and Mary were originally beneficial joint tenants, so if one of them had died at that time the other would have received the whole of the money from the eventual sale of the property; but the joint tenancy was severed as far as Equity was concerned, so Matthew only receives his own half (for Mary's Will left him nothing of her half) while Margaret, Marion and Monica will each receive their one eighth share of the proceeds of sale, and the children of Mildred will each receive their one fifty-sixth share. But the purchaser does not have to worry about these complications;-

15,3,3 The 1925 Law of Property Act states that as long as the money has been paid to at least two trustees, what the trustees do with it is not the payer's responsibility.

15,3,4 So Matthew appoints a second trustee - this could be Margaret, or Matthew's brother Michael or any respectable person - and the two trustees as *legal joint tenants* sell the property. The purchaser pays the money to them - but Equity ensures that they do not keep it. They pay it to the beneficiaries, as set out in 15,3,2 above. If Marion in Australia and Mildred's eldest son cannot be found, this does not delay

the sale at all, for their shares of the money are invested until such time as they are traced. Mollie (the youngest of Mildred's seven children) is not yet of full age, so her share will be invested, for her to have when she reaches 18.

15.3.5 If the trustees negligently or fraudulently misuse the money, the beneficiaries' remedy is to sue the trustees. They have no rights against the purchaser, as long as the purchaser paid the money to at least two trustees.

15.4 It is unlikely that the angry woman facing you across the Housing Advice Desk will listen to such an explanation as this, but if you can satisfy her that her solicitor has got it right, by telling her that the trust for sale is a legal technicality required by the 1925 Law of Property Act, and that she need not worry because there is a power to postpone the sale as long as is desired, you have done something worth while and have saved a solicitor from being pestered by a difficult client.

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16 *A distressed woman arrives and tells her story. "Me and my husband bought a house in 1977 - I put in £5,000 - but he put the house into his name alone at the Land Registry without telling me. He's a dirty double-dealing swine! And then (the filthy selfish pig!) he mortgaged it without telling me; and he got into arrears on the mortgage - and now the rotten Building Society says it is going to sell the house as mortgagee and I'll be homeless!"*

16.1 There is a case on this. In *Williams & Glyn's Bank Ltd. v. Boland [1981]* a house was registered at the Land Registry in the man's name alone, although his wife had financially contributed to the purchase. Later the man mortgaged the house (without telling his wife) to finance his building business, and when the business failed he was unable to pay the mortgage. The House of Lords - which is the highest Court in the English legal system - decided that the Bank could not sell the house to recover its money, because the wife had an Equitable interest in the house by virtue of her substantial financial contribution, and although her Equitable interest was not registered at the Land Registry, the fact that she lived in the house was sufficient to make her right hold good. (This is section 70(1)(g) of the 1925 Land Registration Act; rights of persons in actual occupation of registered land are good, as "overriding interests" even though not on the Register.)

It therefore appears that the distressed woman who has come to your Housing Advice Desk is not about to lose her home.

16.2 But if the Mortgage had begun after 1981 the opposite would probably be the case, because since the *Boland* case Building Societies and Banks have taken care to ask occupiers to sign a form which gives the lender priority over the occupier in such a case. (Some readers of this book may have had to sign such a form in respect of a Mortgage on their parents' house.)

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17 *And the next person in the queue has a very similar story, "My husband and I bought a house in 1977 - I put in £5,000 - but he put the house in the names of himself and a woman that he works with and I didn't know; and then they mortgaged it, and now he's gone off to Paris with her, and the Building Society says it is going to sell the house as mortgagee and I'll be homeless!"*

17.1 This appears to be just the same point as in Anecdote 16 above - but in fact the answer is exactly the opposite. This is a bad situation. As the property was purchased in the names of two persons, this is a case of co-ownership, so there is a trust for sale, and those two persons are the trustees. And we saw in paragraph 15.3.3 above that if money is paid to two trustees, the payer is not responsible for what the trustees do with it. The defrauded person's remedy is to sue the trustees.

Therefore in this case the wife has an Equitable interest but the Building Society is not bound by it. Instead of the wife's interest holding good as an "overriding interest" as in 16.1 above, it is "overreached" by the fact that the Building Society's payment was to two trustees. Her remedy is to sue the trustees - both of whom are now in Paris, outside the jurisdiction of the English Courts. This lady is going to be homeless.

A similar situation arose in *City of London Building Society v. Flegg [1988]*. Mr. and Mrs. Flegg lived in a house (towards which they had paid £18,000) which was registered not in their own names but in the names of their daughter and son-in-law. The daughter and son-in-law mortgaged it without telling the Fleggs, and failed to keep up the mortgage payments. The House of Lords concluded that as the Building Society had paid the mortgage money to two trustees, the Building Society was entitled to evict the Fleggs and sell the house. The Fleggs' remedy was against the two trustees (the daughter and son-in-law) both of whom had gone bankrupt.

17.2 The Law Commission has put forward *proposals* for a change in the law which will make the wife's rights in this case the same as in Anecdote 16 above - but this is no comfort to the person you are now advising. She will be made homeless, but if she is a priority case under 1985 Housing Act (i.e. if she has a child or a disabled or elderly person living with her) the Council must provide her with accommodation - likely to be bed and breakfast. Otherwise, the Housing Officer's duty is to advise her, which may mean that she is given the address of one of the cheaper local hotels - one that will accept DSS cheques if she is in a position where she needs DSS assistance.

17.3 A case with some similarities to the *Boland* case is *Lloyds Bank Plc v. Rosset [1988]*. An appeal against the decision in this *Rosset* case is to be heard by the House of Lords early in 1990, and is likely to throw further light on the principles applied in the *Boland* and *Flegg* cases.

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18 *The telephone rings. The caller is a Mrs. Freeman, to whom you gave advice when you were on the Housing Advice Desk last month. She pays monthly rent to Mr. Shylock who owns 20 houses locally. When she moved in (in November 1988) she signed an agreement headed, "Licence, not a Tenancy", which had been prepared by Shylock's solicitor; and six weeks ago, Shylock suddenly gave her a month's notice to quit.*

But now she is jubilant, and says, "I'm ever so grateful to you. I just <u>knew</u> you could use your influence to make that County Court Judge let me stay in the house - and now the Judge has said I can stay there <u>and</u> my rent will be reduced because I shall only have to pay a Fair Rent which will be fixed by the Rent Officer! You've done a wonderful job!"

18.1 Tell her you are glad it has worked out well for her, *and then keep quiet!* Her success is not due to anything you have done. There is a binding House of Lords precedent case on this point, which the County Court Judge has been bound to follow.

18.1.1 The case is *Street v. Mountford [1985]* in which an owner granted a flat at a monthly sum, by an agreement which expressly stated that it was a licence and not a tenancy. The owner later wanted to evict the occupant. The occupant claimed to be a protected tenant under the 1977 Rent Act, by which a tenant can remain in the property for life (provided the rent is paid and a few other conditions are complied with) unless the landlord provides suitable alternative

accommodation. - The owner alleged that the occupant was entitled to no protection under that Act, as the agreement signed was not a tenancy - in which case the occupant could be evicted after a month's notice.

The House of Lords identified three hallmarks of a tenancy, namely (i) rent (ii) a specific or periodic term (monthly in this case) and (iii) exclusive possession. Exclusive possession means that you can shut the rest of the human race out; so you have it if you rent a flat or a bed-sitter, even if you share the kitchen and bathroom with others. If two friends share a bed-sitter, they jointly have exclusive possession - but there is no exclusive possession if you have to share a bedroom with strangers.

The House of Lords decreed in *Street v. Mountford* that if the three hallmarks (rent, a term and exclusive possession) are present, there is a tenancy and the wording used in the agreement is irrelevant. So the agreement stipulating that it was a licence and not a tenancy *was* a tenancy, and the tenant could remain in the property as a protected tenant (a "regulated tenant") under the 1977 Rent Act.

18.2 Whether the County Court Judge likes this decision or not, it is a binding precedent and so the Judge *must* decide the case of Mrs. Freeman (who is now on the phone to you) in the same way. There is no choice. Even if the Judge sympathises with Mr. Shylock and regards Mrs. Freeman as a tiresome and unreasonable person, she will still win her case and can stay in the house. The Judge's hands are tied.

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19 *The telephone rings again. The caller is Mrs. Freeman's neighbour Mrs. Uhuru (another of Shylock's victims) who signed an agreement headed "Licence, not a Tenancy" when she moved in, in February 1989. Shylock has given her a month's notice to quit, and she asks you to help her in the same way that you helped her friend Mrs. Freeman.*

19.1 By the 1988 Housing Act, tenancies granted on or after 15th. January 1989 are not protected by the 1977 Rent Act. You will find that by virtue of this new Act, Mrs. Uhuru has either an "assured" tenancy or an "assured shorthold" tenancy. If it is an "assured" tenancy, Shylock cannot evict her without reason but he can charge her a full market rent which she can so ill-afford that perhaps she will leave; this rent might even be more than double the amount of Mrs. Freeman's "fair rent". If it is an "assured shorthold" tenancy, it will only last for a limited period anyway. So, if Mrs. Uhuru takes

Shylock to court, she will not receive the satisfaction that her friend Mrs, Freeman received; the Judge's hands are tied,

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20 *The next arrival at the Housing Advice Desk has two black eyes and a swollen lip, and says, "I had a row with my husband after he spent part of this month's mortgage money on booze, and he done me over,"*

20,1 Except for the reference to the mortgage, this is Family Law rather than Land Law, She can get a non-molestation order and an ouster order (excluding him from the family home, even if the property is legally in his name) from a County Court Judge, under the 1976 Domestic Violence and Matrimonial Proceedings Act, Alternatively she could obtain an order from the Magistrates' Court under the 1978 Domestic Proceedings and Magistrates Court Act, But whether her husband will obey the order is another matter,

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On the Housing Advice Desk - a month later

21 *The woman with the disabled child whom we saw in Anecdote 14 is back, She tells you, "I got a job as companion-housekeeper to an old lady aged 95, The pay isn't much but I've moved in and she says she'll leave me her house in her will, so I've let my husband sell our home, But he's kept all the money! Don't I get any of it?"*

21,1 She's not homeless, so this time you can tell her to go and see a solicitor, If she is a "beneficial joint tenant", she will in most cases be entitled to half the proceeds, If not, such cases as *Gissing v, Gissing* and *Eves v, Eves* which we saw on page 10 will affect her position,

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22 *The wife whom you advised about non-molestation and exclusion orders in Anecdote 20 has come back, saying, "I saw a solicitor and got a Court Order like you told me - and my husband blew his top and carved me up! So I've had three weeks in hospital, and he's in prison for breaking the Court Order, so he's lost his job and now we can't pay the mortgage",*

22,1 She needs protection which the law does not give, Could she have gone to a refuge or to a relative's house? Maybe it would have been better for her if you had sent her to a Marriage Guidance Counsellor or Social Worker instead of a solicitor, With regard to the

mortgage, she should immediately explain the position to the Building Society and to Social Security. Social Security, if it is satisfied that this is a matter on which it should give assistance, can pay half the mortgage payments for the next six months, and the full payments thereafter for as long as may be necessary. So the family need not lose its home, and the Court Order will eventually be effective because the man will tire of being returned to prison for ever-lengthening periods for breaking it. So the long-term prospect for the family is brighter, provided he does not murder her - which I have known to happen - in the short term.

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On the Housing Advice Desk six months later

23 . *The brother of the woman whom you advised about molestation and exclusion orders is here, shouting; "She's dead; I hold you responsible for her death". He beats his clenched fists against the security-glass and screams totally-untrue allegations against you that the whole waiting-room can hear.*

23.1 There is no legal answer to this one. Calm him down *(how you do that is not within the scope of this book!)* and determine that this setback is not going to prevent you from giving good service to the next person in the queue.

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24 *The woman with the disabled child is here again. She says, "The old woman died without making a will. Now her relatives say I can't stay in the house."*

24.1 This is to do with the oral promise, or offer, made by the old lady, to leave the house to her housekeeper in return for being cared for. The housekeeper claims to have accepted this offer - but is this enforceable as a contract?

24.2 *When* did the housekeeper accept the old lady's offer? *Was it before 27th. September 1989?*

24.3 If it was before that date, the "Equitable doctrine of part performance" should be considered.

24.3.1 This doctrine says that if all four of the following conditions are fulfilled, namely if (i) the plaintiff has done something which she would not have done if there had not been a contract (e.g. giving up her home, to become a resident housekeeper) (ii) she has altered her position irrevocably (i.e. irretrievably) for

the worse, (iii) the circumstances are such that the appropriate remedy could be the "Equitable remedy of specific performance" (which forces the continuance of a contract instead of merely awarding damages for breach of contract) and (iv) she has witnesses or other evidence to prove her case, this amounts to "part performance" of the contract, and therefore by Equity the contract can be enforceable even if it was purely oral.

24.3.2 In *Wakeham v. Mackenzie [1968]* - one of the numerous cases on part performance - a widow aged 67 gave up her council house to go and live as housekeeper in a 72 year old widower's house, where she worked (without any salary) to care for him until his death 14 months later, in reliance on an oral agreement that he would leave her his house and furniture in his Will. He left her nothing in his Will. The Court held that she had fulfilled these four conditions and could therefore enforce the oral contract and was entitled to the house and furniture.

24.3.3 But is the woman with the disabled child in this position? *She* did not work without wages; and she did not give up her house to take the job - she took the job because of her housing problem. I am in doubt as to whether she has satisfied conditions (i) and (ii) sufficiently for the Court to help her on the grounds of her part performance of an oral contract. She needs a solicitor, and will probably be entitled to Legal Aid towards her legal expenses; and as this situation could easily lead to litigation which might drag on for several years, she will need accommodation meanwhile.

24.4 But the law was changed by s.2 of the 1989 Law of Property (Miscellaneous Provisions) Act, so far as all contracts made on or after 27th. September 1989 are concerned. The purpose of the amendment was to simplify the conveyancing rules with regard to the making of contracts. The result of this alteration in the law is that all contracts for transfer of land or rights in land (e.g. sale of an easement) made on or after that date must have a written document, signed by both parties, incorporating all the terms that were agreed. Otherwise the contract is void. The doctrine of part performance has been abolished.

24.5 Therefore, if the housekeeper accepted the old lady's offer not later than 26th. September 1989, it is at least arguable that there is a contract enforceable by part performance, by which she can stay in the house as its owner. (When you are advising an eleven-year-resident housekeeper in the year 2000, remember that!) But if she accepted the offer after that date, there is no such right and she must leave the house, unless she can show (which would usually be impossible) that

before she died the old lady was no longer holding the house for her own benefit but was holding it as trustee on the housekeeper's behalf.

24.6 There is no way that a Housing Adviser or anyone else will manage to work out this answer on the grounds of common sense or justice or social policy; the only way to know points of this nature is to learn them by rote and remember the date of the change. Solicitors are expected to keep up to date on this sort of thing by reading their weekly law magazines.

24.6.1 A somewhat similar comment can be made of Mrs. Freeman and Mrs. Uhuru in Anecdotes 18 and 19 above, where the only difference in their two situations was the date their tenancies began. We saw that private sector tenants whose tenancies began before 15th. January 1989 have the protection of the 1977 Rent Act, and those whose tenancies began on or after that date have no such protection - regardless of the merits of the tenant or the landlord.

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25 *The couple who come in next ask about right-to-buy.*

25.1 Explain it to them carefully; there have been instances in which purchasers genuinely did not realise that the Council would no longer do repairs - and would no longer pay for the repairs - when the house was no longer a council house. And I once saw a case where, having bought, they got into arrears with the mortgage and had other debts - and they paid off a hire-purchase debt because the debt-collector pressurised them - and when the mortgagee evicted them the Council said this was Intentional Homelessness because they could have used their money to pay the mortgage instead of the hire-purchase, and all they got was advice (the name of a hotel) even though they were homeless with three small children. If they had been tenants in arrears with rent, they might perhaps have been treated more softly.

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26 *And then this same couple who are enquiring about right-to-buy ask you, "Please, can you explain to us what a solicitor will do on our house-purchase?"*

26.1 Do not attempt a detailed answer to this query unless the Housing Advice Desk is very quiet *indeed* that day!

26.2 The task of a conveyancer acting for a purchaser is to make sure that the purchaser obtains the legal estate (fee simple absolute in possession if freehold, term of years absolute if leasehold) free

from any unexpected incumbrances - such as rights of way and restrictive covenants that the purchaser has not been told about. The vendor's conveyancer, on the other hand, is not at all bothered about such matters (as the vendor is getting rid of the property) but is primarily concerned to see that the purchase price is paid.

26,3 By s,2 of the 1989 Law of Property (Miscellaneous Provisions) Act, a contract to buy land must be set out in a document and must be signed by both parties to the transaction as we saw in unit 24,4 above.

26,3,1 The usual procedure is for the contract to be prepared in duplicate, one copy being signed by the vendor and the other by the purchaser. Such an agreement becomes legally binding at the moment of "exchange of contracts", i,e, the moment when the copy signed by the purchaser has been sent to the vendor's conveyancer *and* the one signed by the vendor has been sent to the purchaser's conveyancer. The moment that the second copy is handed over (or posted, if exchange of contracts is by post) is the moment that the contract becomes legally binding on both parties.

26,3,2 This does not work well if there is a chain of transactions in which several contracts have to be exchanged on the same day - as in the situation where B can buy A's house *if* B can sell his present house to C, who can buy it if he can sell his bungalow to D, who is selling his flat to E. None of them will commit themselves to buying until they have sold (for fear of being left with two houses and massive interest payments) - but when E is ready they *all* want same-day action because none of them wants to sell without making on the same day a binding contract to buy, in case their purchase falls through at the last moment and they are left homeless. Therefore there is a procedure whereby exchange of contracts can be achieved by telephone, on the condition that the signed contracts will be posted later the same day.

26,4 Completion of the purchase (when the purchaser can move in) is likely to be a few days or weeks after exchange of contracts.

26,5 Problems may arise; they may be legal (e,g, a compulsory purchase order on the house) or financial (e,g, the purchaser cannot get the mortgage he wants) or structural (e,g, dry rot). If the purchaser discovers these after exchange of contracts, it is too late to withdraw from the purchase. The contract is binding at the price agreed, and if the purchaser withdraws (i,e, breaks the contract) the purchaser can expect to lose the whole of the deposit (normally ten per cent of the purchase price) which it is customary to pay on exchange of contracts.

26,6 The purchaser's conveyancer will therefore normally take five precautions before exchange of contracts:-

26,6,1 *A Local Search and Enquiries* (which at present usually cost the purchaser £22 but this price is soon to be increased) are sent to the District Council. They reveal matters of which the Council is aware - e.g. any planning permission or refusal, any compulsory purchase, demolition or closing order, tree preservation order, road widening scheme, etc., affecting the property. Some Councils take several weeks to answer these Enquiries.

26,6,2 *Enquiries before Contract* which are sent to the vendor's conveyancer to obtain information about such matters as ownership of boundary fences and whether the vendor will pass on to the purchaser the benefit of any guarantees given by woodworm and dry rot extermination firms etc.

26,6,3 *The proposed Contract* (the "draft contract") prepared by the vendor's conveyancer, is studied by the purchaser's conveyancer and checked for mistakes. (I recently saw a draft contract which would have sold the wrong property if it had not been corrected!) This document should also show the easements and covenants.

26,6,4 *Financial Arrangements.* Contracts should *never* be exchanged until these are finalised. If the purchaser cannot afford to proceed until a buyer for the purchaser's present house has been found, these arrangements can hold up the transaction (and possibly a chain of transactions) for months.

26,6,5 *Structural Survey.* Strictly this is not part of the conveyancing, but if the house is not newly-built, the conveyancer may advise the purchaser that a survey is very advisable. There are several recent cases, including the 1989 House of Lords decisions in *Smith v. Bush* and *Harris v. Wyre Forest District Council*, on the subject of how far the mortgagee's surveyor has a responsibility to the mortgagor (the purchaser). These cases form an important item in Surveyors' education but will not be considered in this book.

26,7 Provided that these five precautions do not result in revelations that frighten the purchaser off (e.g., "The surveyor says the house could collapse within five years; but don't worry; they're extending the new motorway through the house next year!") exchange of contracts is the next step in the transaction. The copy signed by the purchaser is handed to the vendor's conveyancer, who completes the exchange by handing over the one signed by the vendor to the purchaser's conveyancer.

26,8 The purchaser's conveyancer should insure the property against fire as soon as exchange of contracts has taken place, as the property is at the purchaser's risk from this moment onwards.

26,9 After exchange (both parties being now legally bound to carry the transaction through) there are a further five conveyancing steps;-

26,9,1 *Proving the title,* The purchaser's conveyancer must check that the vendor is the owner of the freehold or leasehold legal estate and is entitled to sell it. (There are special provisions if the legal owner is insane or bankrupt; the sale will then be made by a "receiver" or a "trustee in bankruptcy", acting on the owner's behalf.)

In the case of registered land, the title (i.e. the vendor's entitlement to sell) is proved by a fairly straightforward photocopy document (the "office copy entries") supplied free of charge by the Land Registry. This is an up-to-date copy of what should appear in the Title Certificate. (See unit 4,2 above.) On unregistered land a whole bundle of photocopy deeds and documents known as the "Abstract" is involved because the purchaser's conveyancer is required to check back into the history of the ownership for a period of at least fifteen years. (This is because deeds, unlike Land Registry titles, are not state-guaranteed.)

26,9,2 *Requisitions on the title,* The purchaser's conveyancer will raise any necessary questions (called "requisitions") about the title.

26,9,3 *The purchase deed,* The purchaser's conveyancer will draw up a purchase deed, first in draft for the vendor's and mortgagees' conveyancers to approve, and then a fair copy called the "engrossment". (Note; the contract is the promise that the vendor will sell and that the purchaser will buy; the purchase deed is the document by which in fulfilment of their promises the vendor sells and the purchaser buys the property.)

26,9,4 *The mortgage deed,* usually on a printed form, will be prepared at this point, if a mortgage-loan is required.

26,9,5 *A final Search* is made at the Land Registry (if the property is registered land) or Land Charges Registry (unregistered land) to check such things as whether the vendor has secretly gone bankrupt.

26,10 Then comes completion of the purchase - this is when the purchaser obtains the keys, the vendor receives the money (or such part as is left after the vendor's mortgage has been paid off) and the purchaser's mortgagee takes the title documents to hold as security until the mortgage is paid off.

26,11 Stamp Duty (a tax) of one per cent of the whole purchase price must be paid (except on purchases for £30,000 or less) within thirty days after completion of the purchase, and the change of ownership must then be registered at the Land Registry.

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26,12 That is the procedure, in theory. Now let us see what might really happen. The following example is an actual situation in which I was involved as one of the conveyancers in January 1989.

26,12,1 The prospective purchasers were buying a Welsh cottage as a second home. The Council for that particular District insists that all Local Search applications must be accompanied by a plan of the property, to avoid any possible misunderstandings of the boundaries of the property to be searched against.

So the purchasers' solicitor requested a plan from the vendors' solicitor, who said he would obtain one from the deeds as soon as the vendors' Building Society made them available.

The Building Society took three weeks to retrieve the deeds from their storage strongrooms, and the Council then took another three weeks to deal with the Search, so it was six weeks before the purchasers' solicitor got the result of his Search.

During these six weeks the vendors' solicitor drew up a contract, the purchasers' solicitor amended it slightly (to specify that a cooker and refrigerator which the vendors' solicitor had not mentioned, were to be included in the property sold) and approved it; the Enquiries before Contract were made and answered, and all the financial arrangements were made.

The Contracts were *not* exchanged at this point because the Search had not yet come back from the Council; but (to avoid delay) the vendors' solicitor sent the purchasers' solicitor the Abstract of Title.

It was a difficult Abstract; it showed that one Owen Williams took a 66 year Lease of the property in 1874 and then transferred this to William Williams; then William Williams in 1887 bought (for £10) the fee simple, except for the mines and minerals under the property, which were reserved to an Iron Mining Company; so William Williams then had both the freehold and the leasehold, and this extinguished the Lease, leaving William as the "owner-occupier". On his death in 1942, William left all his property to his widow, who gave the house as a gift (as

part of a tax-avoidance manoeuvre) to her daughter and son-in-law, who eventually sold it in 1984.

It is necessary to go back to a suitable deed more than fifteen years old, which in this instance meant the deed of 1887. The purchasers' solicitor went through all those documents, raised various questions, and drafted the Deed of Conveyance for the sale of the property from the vendors to the purchasers as beneficial joint tenants. (See sub-unit 9.1.2 as to why they were described as joint tenants instead of joint owners.)

And then the Local Search at last came back. It showed that a Grant had been paid by the Council, two years previously, for the installation of the bathroom. (The vendors should have mentioned this at the beginning, but the vendors were a plumber and his wife who did not understand the legal implications of the forms which they had signed to obtain the grant.) It is a condition of such Grants (the details are in s.500(2) of the 1985 Housing Act) that for one year after completion of the work, the owner (or a purchaser) will actually live in the house; and for a further four years the owner (or a purchaser) will either use it, as main residence, or will let it, to a genuine tenant and not for a holiday.

(And quite right too in my opinion, for there is a great difference between a Local Authority improving the local housing stock for the benefit of local residents, and improving it for wealthy city outsiders to relax in - except that I am not entitled to express an opinion, for Law is not that sort of a subject; Parliament has spoken, in the 1985 Housing Act, and that is an end of it; any discussion on whether it is good or bad is purely academic. The same applies in football; I do not particularly like the offside rule, but if I play the game I must expect to be penalised if I break the rule, and telling the referee that I don't *like* the rule is pretty pointless! - I am not saying, "Don't discuss such matters"; I am saying, "Don't discuss them in the middle of a law lecture; for it isn't the right time or place - because the law, whether good or bad, still has to be obeyed, regardless of the outcome of your discussion".)

But what was the effect of this on the purchase of that Welsh cottage? As the purchasers were buying it as a second home they could not call it their main residence. (If they had done so, their English house would have counted as their second home, and if, at a later date, they had wanted to sell the English house, they would therefore have had to pay Capital Gains Tax of more than £20,000 on it!)

So the Welsh property was not their main residence, and they would not let it to a tenant. This was after the magic date of 15th. January 1989 (see unit 19,1) so a tenant would not be a regulated tenant under the 1977 Rent Act, but letting the property would prevent them from using it at weekends themselves and would thus frustrate the whole purpose of buying it. So they were unable to fulfil the requirements of the 1985 Housing Act.

This meant that they - the purchasers - would have to pay back the whole of the Grant.

The purchasers' solicitor telephoned the Local Authority and spoke to an Assistant in the Housing Grants section of the Housing Department, who told him the Grant had been for £2,600 two years previously, and that the Council was entitled to charge compound interest for the two years. (This is correct; s.506(2) of 1985 Housing Act says so.) This would make the amount repayable not very far short of £3,500 (though, by s.506(3) of the same Act, the Council is not bound to charge the full amount in all cases).

As the purchasers were not willing to pay £3,500 extra, they asked the vendors to reduce the price by that amount. The vendors replied that they could not reduce the price *at all* without wrecking their financial arrangements for the house they were buying - and so the purchasers withdrew from the purchase (remember, contracts had not been exchanged) and the whole transaction collapsed. So the vendors were then no longer in a position to go on with the purchase of the house they wanted to buy: so the vendor of *that* house found her plans to move to a new property frustrated - and I don't know how many more links there were in this chain of transactions.

I think the Housing Assistant who quite correctly and efficiently gave the information about the Grant probably did not realise what the effect of this information would be. The effect was that the whole chain of at least three conveyancing transactions would collapse, causing a chain of heartache. (Heartache too for the Estate Agents, working on a "no-sale, no-fee" basis!)

Housing Assistants don't do conveyancing, but I hope this example shows that what may be arithmetic to the Housing Assistant may be the end of a dream to the person on the other end of the telephone. So, if they start blubbering, give them some sympathy!

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27 *The next enquiry sounds technical, "We wanted a Mortgage but the Building Society made us have a Legal Charge. When we asked our solicitor about it we were told that a Legal Charge is proper but we can't see why because we didn't understand the things our solicitor said - and when we asked the Branch Manager at the Building Society about it, we ended up even more baffled! Can you explain it in language we can understand? And is it really alright or is somebody conning us?"*

Whether you can make them understand it depends largely on your own communication-skills, but here is the explanation:-

27.1 By the 1925 Law of Property Act, there are two possible types of legal Mortgage, these being the "Legal Mortgage by Demise" and the "Legal Charge". A Legal Mortgage by Demise is legally a Lease of the property to the mortgagee (the lender) for 3,000 years. A Legal Charge does not give the lender an actual leasehold term, but gives the lender all the rights *as if* there were a 3,000 year Lease. These rights include the right to sue in the County Court for unpaid interest, and the right to sell the property if the interest payments have fallen more than two months into arrears.

The reason that there are these two types of legal Mortgage is that when the 1925 Law of Property Act was being drafted, many solicitors said they would not be willing to use the Legal Charge. English Land Law has only two legal estates (the freehold fee simple and the leasehold term of years, as we saw on page 26 - there is no special "mortgage estate" for mortgagees) and these solicitors took the attitude that a mortgagee needed to have *at least* a long leasehold legal estate; and as the Legal Charge gave no actual legal estate they could not trust it. Today, more than sixty years later, we know from experience that the Legal Charge is just as trustworthy as the Legal Mortgage by Demise.

27.2 There are at least three very practical reasons why a Legal Charge is preferable to a Legal Mortgage by Demise:-

27.2.1 Suppose that Bert (the borrower) is mortgaging his 99 year leasehold house by a Mortgage by Demise. First, the Demise cannot be 3,000 years. Bert cannot give 3,000 of anything if he only has 99 of them. And if he gives the lender the whole 99, this counts as a *sale* of the property, so Bert must give a bit less; the term must be amended from 3,000 to "99 years all but 10 days". The person drafting the Legal Mortgage by Demise must get the calculations right. But with a Legal Charge, no such calculations arise; the standard wording,

"I charge the property with repayment of the capital and interest" is all that is needed.

27.2.2 Secondly, the wording, "I charge..." is less frightening for the borrower than a statement that the property is granted to the lender for 3,000 years, or for 99 years minus 10 days.

27.2.3 The third point is the most important. Consider the above example of Bert's Legal Mortgage by Demise. (Bert has just arrived at your Housing Aid Centre with a garbled story that "The freeholder is evicting me because I've got a Mortgage" and you are trying to work out what on earth he is talking about. Can such a story be true?) Many 99 year Leases (including Bert's) include a restrictive covenant against sub-leasing. And the Legal Mortgage by Demise grants the lender a Lease, or rather a Sub-lease, for 99 years minus 10 days. So the Mortgage is a breach of that covenant. Bert's lessor (i.e. his landlord - a scheming individual who has been looking for an excuse to evict Bert so that he can sell the property in fee simple with vacant possession at a high price) gleefully points out to Bert, "You are in breach of covenant; and the Lease contains a proviso for forfeiture for breach of covenant!" - and Bert finds himself homeless and the lender finds that he no longer has any security for the Mortgage loan, for it was secured on a Lease which now no longer exists.

With a Legal Charge, this danger cannot arise. Since a Legal Charge gives no leasehold - though it gives all the rights as if there was a leasehold - Bert's Legal Charge is not a sub-leasing; and so mortgaging the property by means of a Legal Charge will not break the covenant against sub-leasing.

27.3 Bert's lessor in the example of the Legal Mortgage by Demise is taking advantage of the letter of the law to evict Bert. The lessor is not behaving honourably, so he will not receive any Equitable remedies. (Remember the difference in philosophy between the two systems; he is entitled to common law remedies as long as he is within the letter of the law, but will only receive the Equitable remedies if he has behaved Equitably himself.) But in this example he does not *need* Equitable remedies; the statutory common law remedy of eviction is what he wants, and he is legally entitled to it.

27.4 Therefore the enquirer at the Housing Advice Desk can be told that for the reasons given in sub-units 27.2.1, 27.2.2 and 27.2.3 above, a mortgage-loan granted by a Legal Charge is better for a borrower than one granted by a Legal Mortgage by Demise. Legal Mortgages by Demise are very seldom used nowadays.

27,5 There are also Equitable Mortgages by Demise, and Equitable Charges. These are not dealt with in this book.

27,6 Most mortgage-loans today are on an "endowment" basis. This means that the security for the loan is the house *and* a life assurance policy on the purchaser's life. If the purchaser dies at any time during the continuance of the loan, the Life Assurance Company will pay off the loan.

27,7 Financial arrangements for house-purchase may be complicated. There are schemes which have tax advantages, and others which are designed to help first-time buyers. Under the 1985 Housing Act it is possible for council tenants to half-buy their houses. Thus, if the price payable would be £80,000 (for example) the purchaser half-buys for £40,000 (provided mostly by way of a mortgage-loan) and continues to pay rent on the other half. There is a proviso that the purchaser can buy further proportions until the whole 100% has been bought.

27,8 By the way, did you know that if you are a first-time buyer, and have had a Building Society Savings Account for at least two years, with at least £300 in it throughout the past year, you may in certain circumstances qualify for a cash bonus? Ask at a Building Society Office for a leaflet on the "HOMELOAN" scheme; in some circumstances it can save you more than a hundred times the cost of this book. (But the Building Society must be notified that you are saving under this scheme before the *beginning* of the above-mentioned two years.)

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28 *A young couple with a crying baby arrive next, complaining that the smell from their neighbour's drain is a danger to the baby's health. This is a straightforward pollution matter which you can refer to the Environmental Health Department. But then they add, "Can we ask you something else? We're buying a house, and we're using a one-stop purchasing service. The estate agency that sold us the house belongs to the Building Society; so they sold us the house and gave us a mortgage-loan and arranged the endowment policy, and their solicitor is doing our conveyancing, so it will all be quick and easy, won't it?* [No; it might not. Dozens of problems might crop up. We have seen some of them in this book.] *But there is one thing that puzzles us. The secretary of the tennis club that we belong to says that her cousin's husband got an endowment policy six months ago about the same size as ours, but the premiums we have been quoted are more than double what he pays! Is this because of inflation?"*

28,1 The secretary gossips! There may be no truth in the gossip. But it sounds as if this might be a situation where the Building Society has a special agreement, on a commission basis, with a particular Life Assurance Company. This young couple might get a far better bargain from a different Assurance Company, and possibly also a different Building Society. It is no part of your job to give financial advice on these matters, but in their one-stop purchase the *only* independent advice they are going to get is what they receive from you. Tell them that to see an independent solicitor will cost them money, but in this case it might be well worth their while.

Alternatively they could themselves obtain information from other Building Societies, but they would still need legal advice to explain to them whether they had already entered into a binding contract with their present Building Society or Life Assurance Company, and if so, what would be the penalty (maybe forfeiture of three months' interest?) for breaking this contract.

Note; A solicitor may act for both the borrower (i.e. the purchaser) and the Building Society. A solicitor *on the Building Society's staff* is not at present permitted to act as solicitor for the borrower; but a Government White Paper published in July 1989 favours a relaxation of this rule, and it seems it is only a matter of time before the rule will be changed by Statute, though restrictions may be placed on the Building Society's solicitor in transactions where the Building Society's estate agency has acted for the vendor. A solicitor is generally not permitted to act for both purchaser and vendor.

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Question for discussion;- What (if any) are (a) the dangers, and (b) the advantages, of do-it-yourself conveyancing?

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29 *A big man with a cigar comes to your Housing Advice desk, "I've got tenants in one of my houses. They only pay £65 a week rent, I want to tip them out and sell the house with vacant possession, Nobody can stop me, can they?"*

29,1 This question cannot be answered without further information. Are they regulated tenants under the 1977 Rent Act? Assured tenants? Assured shorthold? Or mere licensees? Do they share bedrooms? Are there rent arrears, or a breach of any covenant? Is the property overcrowded? Is it fit for habitation? Is there any allegation that it was agreed as a "holiday letting"? Does the landlord provide

breakfast or any other services? All these points could affect the answer. See a book on Law of Landlord and Tenant for further details.

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30 *A worried man: "I converted a house into three flats and let them to tenants in 1987. I didn't get Planning Permission; I didn't realise I needed it. Now the Planners have said they are not satisfied with the conversion and they think it's a fire hazard. I think they're talking rubbish but they've served an Enforcement Notice on me requiring me to put the house back the way it was. So I've given my tenants Notice to Quit - but they say they are protected tenants under the 1977 Rent Act and they won't go!" If I pressurise them, they're going to take me to the Magistrates' Court under the 1977 Protection from Eviction Act, but if I don't pressurise them, the Planners are going to take me to the Magistrates' Court under the 1971 Town and Country Planning Act! What should I do?"*

30.1 He can't win. He must buy his way out of this one as cheaply as he can. If the tenants are not willing to leave voluntarily, he must provide them with suitable alternative accommodation.

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31 *The next arrival is a council tenant. "My neighbours in the council house next door keep me awake all night with their noisy dogs and radios".*

31.1 Upsetting someone in the ordinary reasonable use of their land is the Tort of Nuisance - this is not Land Law but Law of Tort - and the neighbour is probably also in breach of the tenancy agreement - so this is breach of contract. The tenant could apply to the Court for an Injunction to prevent the Nuisance, but this would be likely to lead to a confrontation; here is another golden opportunity for the Housing Manager *not* to use the law but to use diplomacy.

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32 *An owner-occupier comes. "My house is collapsing! And the Building Society valuer said it was alright when I bought it only three months ago!"*

32.1 Cases on the duties of valuers and surveyors include *Smith v. Bush [1989]*, *Harris v. Wyre Forest District Council [1989]* (mentioned in sub-unit 23.4.5 above), *Yianni v. Edwin Evans & Sons [1982]*, *Stevenson v. Nationwide Building Society [1984]* (in which the purchaser bought a property built on a bridge, and fell through the toilet floor

into the river) and various other decisions. The 1972 Defective Premises Act may also apply. This person needs to see a solicitor; and the state of the property may also be a matter requiring the attention of the Council's Environmental Health Dept.

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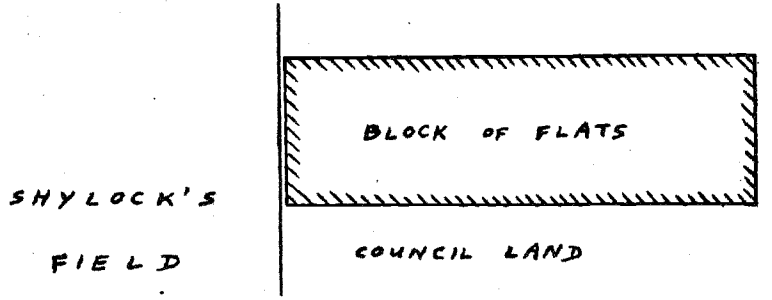
In Court

No-one can teach a person to be a successful witness. All I shall say about that is that the witness should answer questions clearly, unambiguously, and loud enough to be heard. But knowledge of the law can help the witness to avoid giving a damaging answer.

For instance:-

33 *Some blocks of low-rise council housing were built in 1967. The ends of these blocks abut against the neighbouring freehold field as shown in the diagram below, and ever since 1967 the employees of the Council and its predecessor (the pre-1974 Urban District Council) have gone onto that field whenever they wanted to carry out repairs and maintenance to these blocks. Last month Shylock bought the field, in fee simple, and he has told the Council's employees that they have no right to enter it. There is no right of way over the field in the Council's deeds so the Council is claiming a right by prescription.*



You have recently inspected the site, and are now in Court giving evidence. The barrister conducting Shylock's case suddenly shouts at you, "Your Council is just a common trespasser isn't it? And isn't that shameful?"

33.1 Everything depends now on your answer.

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Question for discussion before reading on; What are you going to answer?

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33.1.1 If you reply, "It looks that way", it's a good answer, because twenty years' user without permission is sufficient to give the Council a legal easement by prescription, as we saw in sub-unit 5.1.2 above.

33.1.2 If you leap to defend the Council's honour by saying, "I'm sure the Council must have been told it was alright or they would never have started using it", you are alleging that the Council had oral permission - which means it needs forty years' user for prescription (as in sub-unit 5.1.3 above) and you have just lost the Council's case.

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A Quiet Saturday Afternoon at Home

34 *You are buying yourself a flat. It is a third-floor 99 year leasehold flat (five years old) in a seven-storey block, for £120,000 plus a rent of £5 per year. In this morning's post you have received the draft contract, with a letter from your solicitor or licensed conveyancer asking whether it meets with your approval. What estate (including, what easements) would you expect to find in your contract, and later also in your purchase deed or Land Registry Title Certificate? And would you expect any covenants?*

34.1 You are buying the unexpired residue (i.e. the remaining 94 years) of the term of years,

TOGETHER WITH (for the same length of time) a right of way for yourself and your visitors (i.e. friends, and people delivering post and milk etc.) up and down (i) the staircase (ii) the lift and (iii) the fire escape, because none of these are public highways; and rights for gas, electricity, water and drainage services to run through the structure of the flats between yours and the ground, to reach the mains, and a right of entry to other flats to repair these services (after giving due notice except in emergency; doing as little damage as possible and paying for any damage done); and possibly a right to use a cable running up through the flats above yours to the television aerial on the roof;

SUBJECT TO rights for the services for the flats above yours to pass up and down through the pipes and wires inside the wall of your flat, and a right for the occupants of those flats to enter your flat to do repairs; and a right for those below you to be connected up to the rooftop television aerial.

Alternatively there may be a provision for the landlord or a management company to do the repairs, in which case there will be a positive covenant that you will pay your proportion of the bill.

The floor-joists on which your floor rests will normally be part of your property, but the upper joists to which your ceiling is nailed will belong to the flat above yours, so the ceiling is yours but the wood it is nailed to is not.

There will be positive covenants that you will pay the rent, water rates, fire insurance and a proportion of the cost of maintaining the structure (roof and external walls, and "common parts" such as the entrance-hall and the staircases, lifts, boiler-room etc.) - and probably restrictive covenants not to keep pets, not to cause noise or nuisance - and many other covenants.

All this (the "specific term of years absolute" together with these rights and subject to these conditions) is your legal "estate" in the flat.

There will almost certainly be a "forfeiture clause" in the Lease, by which you may perhaps be evicted from your flat if you break the covenants.

If you are buying as co-purchaser with someone else, there will be provisions as to beneficial joint tenancy or Equitable tenancy in common, as the case may be.

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35 *You are dozing in front of the television in your freehold bungalow. Suddenly you see that your neighbour has taken down the woven-wood fence between his garden and yours. On the plan on the deeds, the "T" mark is on his side, but he says, "I'd rather just have wire there; the fence blocks my view". At this moment your cousin arrives, saying, "I've left her; I'm not going back; I'm going to get a divorce; can you put me up here for a few nights?" While he is saying this, a Councillor who is on the Housing Committee telephones you, saying, "In the minutes of our last meeting there is a reference to an overriding interest. What does it mean? Is overriding the same as overreaching?",*

35.1 As to the neighbour;

35.1.1 Your neighbour can take the fence down unless there is a positive covenant to maintain it, in the deeds.

35.1.2 Even if there is such a covenant, it will probably be unenforceable, as we saw in unit 6.3 above, if your neighbour's house is freehold and he is not the first or second owner of it.

35.1.3 If you want a fence, build your own on your own land. Your neighbour has no legal right of view, though there may perhaps be a right of light.

35.2 *As to your cousin;*

35.2.1 Tell your cousin about the divorce provisions in the 1973 Matrimonial Causes Act, as amended by the 1984 Matrimonial and Family Proceedings Act; and point out to him that on an informal separation (without any Court Order) these two statutes do not apply; the 1925 Law of Property Act and other 1925 legislation (and possibly the 1983 Matrimonial Homes Act) will apply instead.

35.3 *As to the Councillor;*

35.3.1 The legal terms "overriding" and "overreaching" refer to very different matters.

"Overriding interests" are rights which hold good over registered land even though they are not on record at the Land Registry. They are rights which by their nature would be difficult to fit into any registration system. For example, easements by prescription (which are never created, but "just grow" over a period of twenty years or more) are overriding interests, enforceable even though not known to the Land Registry. Rights of any persons in actual occupation (e.g. Mrs. Boland's right in unit 16.2 above) are also overriding interests.

"Overreaching" is a doctrine by which Equitable rights in land may be transformed into rights in money. If (for example) Jack and Jill hold a house as trustees for their teenage nephew Ben, it is permissible for Jack and Jill to sell the house, at full market value, and invest the proceeds of sale in (for instance) reliable stocks and shares. Ben, the beneficiary, has thus been overreached: his rights with regard to the house have been changed into the same rights in an invested fund of money.

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In Committee

36 *Without any prior warning, the Chair of the Housing Committee demands an immediate explanation of your apparently racist attitude which has been highlighted by your evident discrimination between two tenants of a local landlord. Both of these tenants had exactly the same problem, and it has been reported to the Council that although you achieved a very satisfactory result for the white tenant, you did not*

bother to do the same for a black tenant - a Mrs. Uhuru - and indeed you did such a poor job that she is giving up her home and is going to live in overcrowded conditions with her sister. You are warned that maladministration and gross misconduct will not be tolerated, and you are invited to reply.

36.1 The reference is clearly to Mrs. Freeman and Mrs. Uhuru, who we saw in Anecdotes 18 and 19. You have done nothing illegal, and also nothing wrong. *("Wrong" and "illegal" are not synonymous!)* Therefore, what are you going to reply?

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37 *The next item on the agenda is the proposed sale of an entire Council Estate to a Housing Association. Councillors' voices are raised in hot debate. And suddenly, one of them asks, "Just what exactly is it that we are talking of selling anyway? Is it houses or land or WHAT?"*

What is being sold? or, if you are an employee of the Housing Association, what is being bought? Is it just 1,000 houses? Not in the least;-

37.1 This council estate, which has three shops, a few bungalows, several blocks of flats (including one gutted by fire and one occupied by violent squatters who refuse to leave) and more than 1,000 houses, consists of about forty hectares of land, with a railway tunnel passing under it from east to west and electricity cables on pylons crossing it from north to south. Excluded from the sale are the land occupied by various houses (and a couple of upstairs flats) which have been bought by their tenants since 1980 under the "right to buy" provisions of the 1980 and 1985 Housing Acts. The south-western corner of the estate is over the site of an unworked coalfield. The western half of the land is registered at the Land Registry, but the eastern part - the older half of the estate - has deeds. The whole of the land is freehold except a small rectangle (which in the days of Queen Anne was a separate farm, but it now contains sixteen houses and the front halves of four others) which is on a 999 years Lease dating from 1920 held from the Duke of Westminster.

Part of the north-east corner of the estate was bought by the Council's predecessor, the Urban District Council, in 1893, and the deeds of this land were left for safe keeping with a solicitor who died in 1916 and they now cannot be found. Another part of the estate is subject to a covenant not to build anything on it more than two storeys high. The centre of the estate includes an open grass "play-space",

but a track has been worn across this by the cars of nearby owner-occupiers who have been crossing this land for the last 27 years to reach the garages at the rear of their properties. One of these owner-occupiers has fenced off about ten square metres of the "play-space" and alleges that it is included in his deeds.

And *that* tangled mass of rights and liabilities, bristling with problems (most of which are not to do with the houses, but affect the land on which the houses stand) is what is being sold.

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The astute student will have noticed that in this book there is *nothing* on Housing Law, except a few scattered references to such matters as homelessness, Improvement Grants, overcrowding, and the right-to-buy provisions. Secure tenancies of Council properties (which are generally regarded as Housing Law and not Land Law) have not received even a mention. The reason for these omissions is that this book is on Land Law.

Housing students don't need Land Law do they?

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Question for discussion;- The inspiration for this book came from a comment by a Housing lecturer, who said, "Housing students need Housing Law, not Land Law". To what extent is that comment true?

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