# LAND LAW

by John Greed

A ST. TRILLO PUBLICATION

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GREED

# LAND LAW

in England and Wales

by

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# The Aim of this Book:-

By the time you reach the end of this book you should be able:-

1) to give a simple non-detailed description of what every branch of Real Property Law is about;

2) to answer straightforward problem-questions on Real Property Law;

4) to answer the questions 1 - 35 which are spread through this book;

3) to state in outline what other parts of Land Law (Conveyancing, Mortgages, and Landlord and Tenant Law) are about;

5) to describe the methods (such as the registration systems and the trust for sale) used to solve practical difficulties in land transactions, to state the principles behind these methods, and to explain and criticise the reasons for the adoption of these methods;

6) to differentiate between the roles of common law and Equity in Land Law;

7) to differentiate between freehold and leasehold estates;

8) to differentiate between registered and unregistered land;

9) to embark with increased confidence on the reading of large and detailed Land Law textbooks;

10) to begin to form an understanding of the role played by Land Law, the purpose it serves, and the difficulties it can sometimes cause, in professional practice in the Surveying profession and in other professions closely associated with land;

11) to form some idea (though only in barest outline) of some social and economic effects of Land Law;

12) to consider and criticise "real-life" situations of Land Law from a standpoint of knowledge, and to form practical opinions on them which are compatible with the principles, the constraints and the present defects of Land Law.

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## other books by this author

*legal*

Real Property Law for Beginners (1975; 2nd. edition 1985)
Property Law in Stagecoach Days *(edited)* (1976)
Housing and the Law (1987)
Housing Students don't need Land Law - do they? (1989)
Mortgagees' Rights of Sale with Vacant Possession (1990)
Land Registration Workbook (1995)

*non-legal*

Glastonbury Tales (1975)
The Next Twenty Years (1979)

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## Abbreviations

| | |
|---|---|
| AC | Law Reports, House of Lords Appeal Cases |
| Ch or ChD | Law Reports, Chancery Division |
| KB or QB | Law Reports, King's or Queen's Bench Division |
| ER | English Reports (cases before 1875) |
| LR Eq | Law Reports, Equity cases (19th. century) |
| All ER | All England Law Reports |
| P&CR | Property and Compensation Reports |
| WLR | Weekly Law Reports |

*for other abbreviations, see the list in Volume 1 of Halsbury's Statutes.*

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# Preface

This book is intended for students and others who will have dealings with land (e.g. in connection with Construction, Valuation, Housing, Planning, Surveying or some other profession or industry) but who do not study Land Law in detail. The book is particularly designed for students whose introductory study of Land Law lasts for only one semester (15 weeks).

Law students who find that in their thousand-page Land Law textbooks they "cannot see the wood for the trees" will find in this short guide an over-all picture of what Land Law is about, without the mass of detail that clouds the picture in many textbooks.

Any lecturer in a non-legal subject who wishes to know more clearly the nature of what his or her Land Law colleague teaches, will find the answer in these pages. For everyone who wishes to gain a general knowledge of this subject in a short time, this book provides the means of doing so.

It is not possible in a book of this size to give a full description of Land Law. This brief account should not be relied on as a substitute for adequate legal advice.

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Note. A vendor, purchaser or mortgagee may be "he", "she", "it" (e.g. a limited company or a Building Society) or "they" (e.g. joint purchasers). In using the word "he" as shorthand for "she, he, it or they", the author is conscious of the shortcomings of the English language in not providing an impersonal pronoun. Any sexist connotation arising from the use of "he" is not intended. In situations where only "he or she" is meant, "he or she" has been used.

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# LAND LAW

## Part 1

## Rights over Land

## Chapter 1

## LAND

1.1 Land Law is the law about rights over land in England and Wales. (A completely different system is used in Scotland.)

1.1.1 Someone who says, "I am buying a house," is in fact buying various rights to some *land* which at this moment happens to have a house on it.

1.2 Land is not only the surface of the ground. Land (for the purposes of Land Law) includes six matters:-

(1) the surface of the ground

(2) the soil, subsoil, and minerals under the surface

(With some exceptions such as coal; and any gold, silver or oil is reserved for the Crown - and the holder of the land cannot dig out any other minerals unless Planning Permission for these mining activities has been granted.)

(3) the air-space above the ground

(So a neighbour's tree-branch growing across your land amounts to a trespass and/or a nuisance on your land. But this right only extends to a "reasonable" height; the High Court decided in *Baron Bernstein of Leigh v. Skyviews and General Ltd. [1978] QB 479* that an aeroplane flying in a circle 630 feet above a property to photograph it did not amount to a trespass.)

(4) all buildings

(So houses, shops, factories etc, count as nothing more than part of the *land*. But "land" does not include structures which stand by their own weight, such as portable sheds, And no building is permanent - sooner or later it will be demolished and perhaps replaced - but land is permanent, "Land" includes whatever buildings happen to be on it at the present time.)

(5) all trees and plants growing on the land

(6) easements (such as drainage rights) etc.

(Most modern houses have the usual services - water-supply, drainage, electricity and often gas. The pipes and wires for these, running between the building and the mains, may cross someone else's land. Drains, for instance, need to run downhill and are therefore quite likely to run under a neighbour's garden on the way to the mains sewer. These rights across other people's land count as part of your land; they are part of what you buy when you buy a house.)

1.3 Estate agents refer to all this as "the property".

1.4 The above six points can be remembered as MAGPIE:-

1,4,1 M minerals - below the ground
1,4,2 A air-space - above the ground
1,4,3 G ground - the surface of the earth
1,4,4 P plants - rooted in the ground
1,4,5 I incorporeal hereditaments (i.e. easements etc.)
1,4,6 E erections - buildings, fences etc.

1.5 If you buy an upstairs flat you are buying "land".

1,5,1 (You will normally own it up to the ceiling and down to the top of the ceiling of the flat below, and there will be easements for your services to run through the structure of the building to the ground. There will also be easements for you and your visitors - including the milkman - to use the staircases and the lifts, as these are not public rights of way. If the building is destroyed by an explosion, the cube of empty space which was your flat is still your land.)

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Chapter 2

# TENURES

*how the land is held - freehold or leasehold*

2.1 There is no ownership of land in England and Wales!

2,1,1 You (or someone) will have ownership of this book, and of all other typical goods: but all *land* in England and Wales belongs to the Crown - because William the Conqueror claimed all the land as his own in 1066 and this claim still holds good today.

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## *a) Freehold Tenure*

2.2 The person who in ordinary speech would be referred to as the "owner" of the land is (in legal terminology) a "tenant of the Crown".

2,2,1 But there is no rent to pay to the Crown, and the Crown claims no rights today over the land, except that if the "tenant of the Crown" dies without leaving a will and without leaving any living relatives, the land returns to the Crown because there is no-one else for it to go to.

2.3 This "holding from the Crown" is *freehold tenure*".

2,3,1 It is what any "owner" of a house really has.

2.4 Being a "tenant of the Crown" is as near absolute ownership as makes no practical difference, from a householder's point of view.

(Note the name, "householder" rather than "houseowner". The word "tenure" comes from the French "tenir", meaning "to hold" - but from here onwards, in this book, "the tenant of the Crown" will be referred to as "the owner".)

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### *b) Leasehold Tenure*

2.5 The owner can let the property to a tenant.

2.6 This tenant has *leasehold tenure*.

2.7 Sometimes the tenant may sub-let, in which case the sub-tenant also has leasehold tenure.

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### *c) Other Tenures*

2.8 Until 1925 there were other tenures, but freehold and leasehold tenures are the only ones that exist today.

("Commonhold" and "shorthold" are not tenures - see paragraphs 20,28,7 and 26,7,2-3 below,)

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### *d) Definitions*

2.9 *Tenure*

2,9,1 Freehold tenure is a holding from the Crown, free from rent or any other similar payment.

2,9,2 Leasehold tenure is holding from a landlord, to whom the property will return at the end of the lease or tenancy. (This returning is known as the "landlord's reversion".)

2.10 *Real and Personal Property*

2,10,1 Land which is held on freehold tenure is known as "real property" or "realty".

2,10,2 Land held on leasehold tenure is "personal property" or "personalty".

2,10,3 Ownership of goods is also "personal property" or "personalty". (Goods are sometimes referred to as "pure personalty".)

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Chapter 3

# ESTATES

*what is owned - and for how long*

3.1 It is not possible to sell any land, because all land belongs to the Crown.

3,1,1 So: what are Estate Agents selling? (It cannot be the house, because the house is part of the land and therefore belongs to the Crown.)

3.2 What is being sold is not the land but the *rights to the land*. These rights are called an *estate*, which means a *status*.

3,2,1 Anyone who holds land on freehold tenure *owns* a freehold estate; and anyone who holds land on leasehold tenure *owns* a leasehold estate.

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## *a) Freehold Estate*

3.3 The owner-occupier's rights include:-

3,3,1 a right to live in the house,
3,3,2 a right to mortgage it,
3,3,3 a right to dig the garden,
3,3,4 a right not to dig the garden but leave it as jungle,
3,3,5 a right to maintain and decorate the house,
3,3,6 a right not to maintain the house but to leave it to become dilapidated (as long as it does not become a nuisance to the neighbours or to the public in general - for there is a *duty* not to cause nuisance)
3,3,7 a right to sell it,
3,3,8 a right to leave it to someone in a will,
3,3,9 a right to let it to a tenant.

3.4 This collection of rights and duties, owned by a person with freehold tenure, is *Freehold Estate*.

3.4.1 This freehold lasts for an indefinite time - to the end of the world unless it returns to the Crown in the circumstances set out in paragraph 2.2.1 above -

3.4.2 and it is known by the name of *fee simple absolute in possession*.

3.5 These packages of "rights and duties lasting for a time" are what Estate Agents are actually selling, and are the basis of what Land Law is all about.

3.6 Until 1925, legal freehold estates for other lengths of time (such as for someone's lifetime) could exist.

(Paragraphs 7.3.4 - 7.3.6 below show what happened to them.)

(Until the year 1290, sub-grants of a fee simple absolute in possession could be made; so Alan held in fee simple absolute in possession from Bernard who held in fee simple absolute in possession from the King. This is now prevented by the statute *quia emptores*, 1290 - one of the oldest statutes still in force. Its name means "with regard to purchasers". By this statute, all estates in fee simple absolute in possession created today must be held on freehold tenure *directly* from the Crown. Contrast this with leasehold estates, held on leasehold tenure, which can be sub-grants, as in paragraph 2.7 above.)

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*b) Leasehold Estate*

3.7 The rights and duties of a leasehold tenant include:-

3.7.1 a right to use the property,

3.7.2 a duty to pay the rent,

3.7.3 a duty not to cause damage or nuisance - etc.

3.8 This collection of rights and duties owned by someone with leasehold tenure, is *leasehold estate*.

3.8.1 It lasts for the length of the lease or tenancy.

3.8.2 This estate is known as a *term of years absolute*,

3.8.3 and this may be a *specific term of years absolute* (for a specific length of time, e.g. 14 years, or 99

years) or a *periodic term of years absolute* (i.e. recurring - e.g., a monthly tenancy, which continues monthly at a monthly rent until a months's notice to end it is given).

3.9 If the arrangement is so vague that the tenant is simply given the keys and told, "Pay some rent", this is a *tenancy at will.*

(But if the tenant then forms a habit of paying rent every week, or every month, and the landlord accepts it, this is likely to be regarded by the County Court as a weekly or a monthly periodic term of years absolute.)

3.10 And if there was a lease for a specific term which has expired but the tenant is still in occupation and paying rent (possibly because the landlord has not realised that the expiration date has passed) that tenant has a *tenancy on sufferance.*

(But if a rent is paid regularly, the County Court is likely to regard the tenancy as having turned into a periodic term of years absolute, the same as with tenancies at will.)

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*c) Definite and Indefinite Lengths of Time*

3.11 A leasehold estate runs for a definite length of time (as in paragraph 3.8.3 above) but a freehold estate is for an indefinite time - we can never tell the date it will end - as in paragraphs 3.4.1 and 3.6 above.

3.12 These estates (i.e. these "collections of rights and duties running for a definite or indefinite time" - for that is a definition of "estates") form the basis of what Land Law is all about.

3.13 Ownership of an estate in fee simple absolute in possession is the nearest to absolute ownership of land that it is possible to have in English Law.

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TEST QUESTIONS:-

1 What is (a) freehold estate and (b) freehold tenure?

2 What is the difference between a periodic term of years absolute and a specific term of years absolute?

3 What is a "fee simple absolute in possession"?

4 What is the basis of what Land Law is all about?

5 Debbie says she owns a freehold house called "Debbieholm". What does she really own?

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*A Note on Precedent Cases.*

When a case has been decided by the High Court, the Court of Appeal or the House of Lords, that decision is a precedent case. If the same point arises again in a later case, the Judge in the later case is *not allowed to contradict* what was decided in the precedent case. His hands are tied; he *must* decide the later case the same way as the earlier one, even if he believes that an opposite decision would do more justice. But there are the following exceptions;-

1. A High Court Judge will sometimes go against what was done by another High Court Judge: but he is absolutely bound to follow Court of Appeal and House of Lords decisions.

2. The Court of Appeal is not bound to follow decisions of the High Court, but is absolutely bound by previous Court of Appeal decisions and House of Lords decisions.

3. The House of Lords is not bound by previous decisions, though it will only rarely go against a previous House of Lords decision. (It might do so on the grounds that changes in society have made the previous decision out of date.)

An example:- *Gissing v. Gissing [1971] AC 886*, in which the wife received nothing when the husband and wife separated - see paragraph 15.13 for details - is widely regarded as being hard on the wife. But it is a House of Lords case, so, if the same point arises in a case today, the Judge has no choice but to come to the same decision. So don't call the Judge a chauvinist pig; there is nothing he can do about it, until such time as the rule in *Gissing v. Gissing* is changed either by an Act of Parliament or by a later House of Lords decision.

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Chapter 4

# EQUITY

*our second legal system - different from the common law*

## *a) Why Equity exists*

4.1 In the Middle Ages, the law had certain defects, which caused the King's Chancellor to set up a second legal system called Equity.

4.1.1 Suppose (for example) some land is granted (i.e. it is given or sold) to Adam and Alfred on the understanding that it is not for their own benefit but they are to look after it for the benefit of their two-year-old nephew Ben. The law (the "common law", as it is sometimes called) will say that this land belongs to Adam and Alfred, because it has been legally granted to them. And common law will look no further than that, even today. But Equity (which seeks to achieve fairness) will say that the land really belongs to Ben and that Adam and Alfred are holding it as trustees on Ben's behalf.

4.1.2 Note how the common law specifically states that Adam and Alfred are the owners, and Ben is not: and Equity insists equally categorically that Ben is the owner, and Adam and Alfred are not. This principle, that common law can lay down a rule and Equity can lay down a different one, will be encountered very frequently in Land Law.

4.1.3 This does not lead to conflict, because the common law rule is used today to decide who has to sign the documents to sell the property (but says nothing at all about who shall receive the purchase money) while the rule laid down in Equity says who is entitled to the money, but has nothing to do with who has to sign the documents.

4.2 The common law and Equity are still two separate legal systems today, although the old common law courts and the Chancery Court (the court of Equity) were all abolished in the 1870s, and today the Judges in our courts administer both law and Equity in the same court. (i.e. the High Court - or County Court for many smaller cases. There is a right of appeal to the Court of Appeal and in some cases to the House of Lords.)

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### *b) Equity and Trusts*

4.3 Even today, if property is held by Adam and Alfred in trust for Ben, the position is still that Adam and Alfred (as trustees) are the legal owners:

4.3.1 it is *their* signatures which are needed on documents to sell the property:

4.3.2 but when they receive the money from the purchaser, Equity requires them to place it in safe investments and to hand it over to Ben with interest when he reaches the age of 18.

4.3.3 Ben, the Equitable owner, is the "beneficiary" or "beneficial owner".

4.3.4

| *at common law* | *in Equity* |
|---|---|
| as to who can sell the land | as to who is entitled to the benefit of the land or the proceeds of the sale of the land |
| Adam and Alfred (the trustees) are the legal owners. | Ben is the beneficial owner: the trustees hold the property on his behalf. |

4.4 Land lawyers find this two-pronged system of common law and Equity very convenient.

4.4.1 For example, if twenty people wish to buy a property in which to set up a commume, two of the commune

members can be appointed as trustees, to be the legal owners of the property, on behalf of the twenty who are the beneficiaries.

4,4,2 The best way to do this is by what is called a *Trust for Sale*.

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### *c) The Trust for Sale*

4.5 By the method known as the Trust for Sale, the property is granted to two of them (Adam and Alfred) as trustees, on trust that they must eventually sell it (but with power to postpone the sale for as long as they think fit, so they may perhaps not sell it for very many years) and also on trust to hold the net proceeds of sale (and any income, such as rent received from tenants, before the property is sold) for all the beneficiaries.

4,5,1 So the two trustees have the *legal* fee simple absolute in possession, and the twenty beneficiaries all have the *Equitable* fee simple absolute in possession. Even today, beneficiaries have no rights at common law: their rights are entirely a matter of Equity.

4,5,2 If eventually the commune members split up and are scattered worldwide, it is only necessary to have the signatures of the two people who are the trustees, to sell the property - but after it has been sold, Equity ensures that all the twenty beneficiaries receive their fair shares of the proceeds of the sale.

(If any of them are missing, their shares can be invested for them until they are found.)

4,5,3

| *at common law* as to who can sell the land | *in Equity* as to who is entitled to the benefit of the land or the proceeds of the sale of the land |
|---|---|
| the trustees (Adam and Alfred) | the beneficiaries (Alfred, Adam and 18 other persons) |

### *d) The Purchase Money*

4.6 The purchase money should never be paid to one single trustee unless that trustee is a Trust Corporation (such as a Bank).

4.6.1 If the purchase money is paid to one trustee, and that trustee runs off with it, the defrauded beneficiaries may be able to sue the *purchaser*.

(An exception to this rule can apply in cases where the owner of the property has died, leaving a will in which he or she has appointed only one trustee.)

4.6.2 But if the purchase price was paid to two or more trustees, or to a Trust Corporation, defrauded beneficiaries are only entitled to sue the *trustees*. The purchaser is safe. (This is laid down in section 27 of the Law of Property Act, 1925.)

4.6.3 The maximum number of trustees allowed today is four. (This is stated in s.34(2) of the Trustee Act, 1925.)

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### *e) A General Principle for Modern Land Law:*

4.6.4

| *at common law* | *in Equity* |
|---|---|
| as to who can sell the land | as to who is entitled to the benefit of the land or the proceeds of the sale of the land |
| The aim is to keep the procedure simple. No more than 4 signatures will normally be needed to sell the property. | The aim is to make the final result fair, however complicated this may be. |

### *f) Equitable Remedies*

4.7 Equity also developed some new remedies, for use in situations where common law did not provide an adequate solution. See paragraph 4.8(3) below.

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### *g) Law and Equity compared*

4.8

| *common law* | *Equity* |
|---|---|
| (1) It was developed by the King's *Judges*. | (1) It was developed by the King's *Chancellor*. |
| (2) It asks, "Have the correct *formalities* been carried out?" | (2) It asks, "Is this *fair?*" |
| (3) It gives *damages* (i.e. financial compensation). | (3) It gives other remedies:<br>1; *a prohibitory injunction* (an order to stop something, e.g. "Do not trespass")<br>2; *a mandatory injunction* (an order to do something, e.g. "Remove that blockage which you have put on your neighbour's right of way")<br>3; *specific performance* (an order to fulfil the terms set out in a contract) |
| (4) Common law remedies are *absolute:* they are given to anyone who wins a case, regardless of what that person's own behaviour has been. | (4) Equitable remedies are *discretionary:* they are only given to those who morally deserve them. |

4.9 The penalty for disobeying an order of Equity today is imprisonment for contempt of court.

4.10 The correct formality needed for the creation of an easement is a signed deed, but under 4.8(2) above an easement made by written contract but without a deed will be upheld by Equity, if it is registered (see 8.12 - 8.13.2 below) even though the common law will not recognise it.

> (Equitable easements made by contract without a deed since 26th. September, 1989, need the signatures of both parties. A letter signed only by the grantor is no longer enough - by the Law of Property (Miscellaneous Provisions) Act, 1989.)

4.11 For the Equitable Doctrine of Notice, see page 62.

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TEST QUESTIONS:-

6 Why did Equity come into existence?

7 What (in one word) is the basic principle of Equity?

8 What is the difference between a mandatory injunction and a prohibitory injunction?

9 What is the difference between a mandatory injunction and an order for specific performance?

10 Fred wants to make a gift of some property to his newly-born grandchild. What is the best way for him to do so?

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*Answers to questions 1-5 (note: some answers in this book are in outline only: more detail is needed.)*

1 (a) a series of rights and duties, lasting indefinitely, over a piece of land which is held on feeehold tenure,

(b) holding from the Crown, free from any requirement for any payment to the Crown,

2 A periodic term recurs (e.g, a three-monthly tenancy, with rent payable every three months, continuing until it is terminated by three months' notice) but a specific term is for a set time (e.g, a tenancy for three months - it runs for three months and then ends),

3 Freehold estate likely to last to the end of the world. It is as near absolute ownership as is possible in Land Law,

4 Estates. Land Law is not about land, it is about rights (and duties) over land,

5 She owns the series of rights and duties (including the right to live there, and the duty not to cause nuisance or danger) which make up the freehold estate known as a fee simple absolute in possession, in respect of a piece of land which she holds from the Crown on freehold tenure. This land includes the minerals under it, the air-space above it, the plants and buildings on it, including the house called "Debbieholm", and the easements such as any rights of way and rights for the running of gas, electricity and other services for the benefit of this property,

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Chapter 5

# 1925

*the year of Land Law Reform*

5.1 In 1925 there was a major modernisation of our Land Law - and not many changes have been made to it since then.

5.2 In the next few pages, therefore, we shall see some of the problems that existed in 1925, and the solutions to those problems.

5.3 Some of these solutions still work well today. Others are so far behind the times that they create fresh problems.

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## *1925 and Estates*

5.4 Since 1925, only two types of estate (i.e. rights over land) are recognised by the common law.

5.4.1 One of these (the freehold one, which is as near to absolute ownership as makes no practical difference) is known as the *fee simple absolute in possession.*

5.4.2 The other one (the leasehold one) is called the *term of years absolute.*

5.4.3 Until 1925 there were others, but since 1925 common law will not accept any types of ownership of rights in land, other than these two types. This is the basic reform on which most of the other reforms of 1925 depend.

5.4.4 If you are the owner of a freehold house, what you really own is the freehold estate called *fee simple absolute in possession.* If you have a leasehold house or are renting a flat, you own a *term of years absolute.*

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Chapter 6

# ESTATES — THEIR HISTORY

## *a) Why the History Lesson?*

6.1 This is the only purely historical chapter in this book. Its purpose is to show what was the main problem which faced the Land Law reformers in 1925.

6.2 The great problem was that the law of *estates* had become almost incredibly complicated. The story begins in 1066:-

## *b) Estates "for life" and "in fee simple"*

6.3 William the Conqueror granted two types of estate:-

6.3.1 land could be granted to you for the rest of your *life*,

6.3.2 or it could be granted to you and your *heirs*. (This second estate is the *fee simple*, and today it lasts for ever unless the property returns to the Crown in the circumstances outlined in paragraph 2.2.1 above.)

6.4 The terminology must be explained:-

6.4.1 "Fee" is an old English word meaning "inheritable". (It has nothing to do with paying anything.)

6.4.2 "Simple" means it is inherited by the heirs in the normal way.

("Heirs" today are the next of kin; usually the widow - or widower - and the children; but if there is no immediate family, "heirs" includes a person's parents; or brothers and sisters, nephews and neices; or grandparents - and uncles and aunts and even cousins if there are no closer relatives. The full list is in the Administration of Estates Act, 1925. Alternatively, a person may make a will naming some other person who is to inherit the property.)

6.5 The modern name of this inheritable estate is the *fee simple absolute in possession.*

6,5,1 "Absolute" means "unconditional". (Contrast it with the conditional fees in paragraph 6.8.5 below.)

6,5,2 "In possession" means that the owner has the right to occupation, or the right to receive rent from a tenant who is in occupation, *now.*

(By this definition, "in possession" has a wider meaning than "in occupation", for a landlord can have a "fee simple absolute in possession" even if there is a tenant in occupation of the premises, as long as the landlord is entitled now, in the present, to receive any rent which may be due. But a fee simple which is not to start until a future date, as in the example for Charles in paragraphs 6,8,1 - 6,8,4 below, is not "in possession",)

### *c) 1285: grants "in tail"*

6.6 In the year 1285, a third type of estate was created. It was known as *fee tail.* Since 1925 it can no longer exist as a common law estate.

6,6,1 But it can still exist today under the rules of Equity, as an *Equitable entailed interest* - see paragraph 6.11 below for an example of this.

6,6,2 It is seldom met with today, except in connection with stately homes and the aristocracy.

6,6,3 It is inherited by the eldest son (or the property is divided among the daughters if there is no son). Other relatives have no right to inherit property which was granted in tail: it is limited to direct descendants, and if there are none it goes back to the person who granted it (or to his heirs in fee simple if he is dead).

6,6,4 Often the grant was worded so that it was limited to males only. "I grant the land to my son-in-law John in tail male, and if he dies without having a son, the property shall return to myself (or to my heirs in fee simple if I am dead by that time)."

6.6.5 Fee tail became popular with the landed gentry, who used a variation of it to make their lands very difficult to sell - and so the land (and the power which went with being a great landowner) stayed in the family for generation after generation. (See Chapter 11 for further details.)

### *d) Leaseholds*

6.7 Because of the severe shortage of agricultural labourers after the Black Death (1349) much of the land could not be cultivated.

6.7.1 Many thousands of acres were therefore let for a number of years to sheep-farmers. This was the first widespread use of leasehold estates, in English Law.

### *e) Equity*

6.8 Meanwhile, Equity was recognising beneficiaries' rights under the mediaeval equivalent of trusts: so a property might be held in fee simple at common law but for a different period of time in Equity.

6.8.1 For instance:- "The property shall be held by Adam and Alfred (trustees) in fee simple, for the benefit of Ben as long as he lives and then for Charles in fee simple".

6.8.2

| *at common law* as to who can sell the land | *in Equity* as to who is entitled to the benefit of the land or the proceeds of the sale of the land |
|---|---|
| Adam and Alfred (the trustees) in fee simple | Ben for his life; and then Charles in fee simple |

6.8.3 In that example, Charles has a *future* fee simple - it is one that will not begin until Ben dies.

6,8,4 This is a fee simple absolute in remainder - a fee simple absolute not yet in possession.

6,8,5 Equity also came to recognise conditional grants, such as, "to John in tail male if he marries my daughter Dorothy",

6,8,6 or (to get rid of an unwanted suitor) "to John in fee simple as long as he *does not* marry any daughter of mine - and if he does, he shall lose the land and it shall go to his brother".

(6,8,5 shows a "condition precedent";- fulfilling the condition *precedes* the receiving of the land. In 6,8,6 there is a "condition subsequent" - John receives the land *now*, but if he *subsequently* fulfils the condition, by marrying my daughter, he will lose the land.)

6,8,7 After the Reformation (mid 1500s) conditions such as, "to John for life, if he becomes a Roman Catholic", and "to John and his heirs in fee simple, as long as they do not cease to be members of the Church of England", were imposed, and were enforced by Courts.

### *f) King Henry VIII*

6.9 In 1535, King Henry VIII forced Parliament to pass an Act called the Statute of Uses.

6,9,1 This Act made changes which were primarily intended to enable Henry to collect taxes more effectively.

6,9,2 But one side-effect of these changes was that the common law was forced to start dealing with all these complex estates which Equity had introduced.

6,9,3 The Statute of Uses was not repealed until 1925.

### *g) The situation in 1925*

6.10 The unplanned result of this whole series of battles, plagues, accidents, intrigues and other historical events was that in 1925 there were more than forty possible types of estate recognised by the common law. They included the following:-

6,10,1 fee simple absolute in possession

6,10,2 fee simple absolute in remainder (not yet in possession)

6,10,3 fee simple conditional in possession (as in paragraph 6.8.6 above)

6,10,4 fee simple conditional in remainder

6,10,5 fee tail absolute (in possession or in remainder)

6,10,6 fee tail male absolute (in possession or remainder)

6,10,7 fee tail conditional (in possession or in remainder)

6,10,8 fee tail male conditional (in possession or in remainder)

6,10,9 life estate absolute (in possession or in remainder)

6,10,10 life estate conditional (in possession or remainder)

6,10,11 life estate for someone else's life (e.g. to *you* for the rest of *my* life, absolutely or conditionally, in possession or in remainder)

6,10,12 and numerous other types of freehold estates

6,10,13 and several types of leasehold estates.

(There is no need to understand all of these, as long as it is understood that they caused such complications that conveyancing - the sale of land - was made difficult, slow, expensive and inconvenient.)

(And before 1926 there were also other types of tenure - not just freehold and leasehold - but I'll spare you that additional complication!)

6.11 Often there were several estates recognised by common law in one piece of land.

6,11,1 For instance, a piece of land might be granted:-

to Ben for his life,

and then to Ben's son Charles (who was at that time just three months old) for his life,

and then to Charles' first son (who was of course not going to be born for several years yet) in tail male subject to a condition ... etc.

6,11,2

| *at common law* | *in Equity* |
|---|---|
| legal owners<br><br>(Prior to the Settled Land Act, 1882, this land was unsaleable. See 11,3,3 below, for details.) | as to who was entitled to the benefit of the land |
| Ben for his life<br>Charles for his life<br>Charles' son in tail male conditional | Ben for his life<br>Charles for his life<br>Charles' son in tail male conditional |

6.12 An important alternative way (still in use today) of giving the same benefits as those in paragraph 6.11.2 above, without the land becoming unsaleable, is:-

6,12,1

| *at common law* | *in Equity* |
|---|---|
| as to who can sell the land | as to who is entitled to the benefit of the land or the proceeds of the sale of the land |
| Adam and Alfred (as trustees) in fee simple absolute in possession, on trust for sale, with power to postpone the sale | Ben for his life<br>Charles for his life<br>Charles' son in tail male conditional |

6.13 There were Equitable equivalents of every one of the common law estates.

6.14 Land which was held in a certain way at common law might be held in a different way in Equity - as in paragraphs 6.8.2 and 6.12.1 above. (This is still the case today.)

6.15 The complications caused by the existence of so many types of legal estate cried out for reform.

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Chapter 7

# ESTATES TODAY

*There are only two: a freehold one and a leasehold one*

7.1 Sale of land had become too complex to be practical.

7.2 The solution to this problem, imposed by section 1 of the Law of Property Act, 1925, is: all the common law estates have been abolished, except one freehold estate, the fee simple absolute in possession, and one leasehold estate, the term of years absolute.

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## *a) How Land Law works today*

7.3 The position today is twofold:-

### *(i) at common law*

7.3.1 The only legal freehold estate which can exist today is the legal fee simple absolute in possession. It is the nearest equivalent to absolute ownership that can exist in our Land Law.

7.3.2 The only legal leasehold estate today is the legal term of years absolute, which may be either a specific term (e.g. a 99 years lease) or a periodic term (e.g. a monthly tenancy).

7.3.3 Common law recognises *only* these two types of estates today. No other types of common law estate can be created.

7.3.4 So the life estate, the fee tail, the various types of fee simple other than absolute in possession, the tenancy at will and the tenancy on sufferance are no longer recognised by the common law.

*(ii) in Equity*

7,3,5 In 1925 many people owned these other types of estates, and in many cases they had mortgaged them. It would have been unfair and unreasonable to bring financial ruin onto all these people by abolishing their rights.

7,3,6 Therefore, in the *other* legal system - the system called Equity - all these rights are still allowed to exist as Equitable interests, and new ones can still be created today.

7,3,7

| *at common law* | *in Equity* |
|---|---|
| fee simple absolute in possession<br>term of years absolute (and no other varieties) | more than forty possible varieties |

7,3,8 Remember: common law says who can sell, and Equity says who will receive the benefit.

*b) Examples:-*

7,4 Here is how the system works in practice:-

7,4,1 If Alan wishes to give a freehold bungalow to his elderly aunt Betty for the rest of her life (and for no longer than that, for Alan certainly does not want want Betty's artful son Dodger to be able to inherit it) common law will not accept such a grant, because it is not a grant in fee simple absolute in possession.

7,4,2

| *at common law* | *in Equity* |
|---|---|
| Betty for her life<br>NOT PERMITTED | Betty for her life |

7,4,3 There can be no such thing as a common law life estate, since 1925.

(Provisions of the Settled Land Act, 1925, by which Betty may become entitled to the legal fee simple absolute in possession, are not dealt with here. And if those provisions do not apply, so the deed is completely void and the property still belongs to Alan, then, depending on such matters as whether Betty had *paid* a substantial amount for her right, Alan may be holding the property as trustee for Betty. In that case Alan could sell it to someone else - and then the problem referred to in 4,6,1 above and 13,12,1 below could occur here.)

7,4,4 But it is perfectly acceptable and proper for Alan to grant the property to Adam and Alfred (as trustees on Trust for Sale) in fee simple absolute in possession, for them to hold it for the benefit of Betty for her life. (After her death, the trust ends and the trustees return the property to Alan.) What matters is that the legal owners (the trustees) have a fee simple absolute in possession (or a term of years absolute in the case of leasehold property). The beneficiary Betty has an Equitable right, which can be of any type at all. 7.4.5 shows the proper way to make this grant.

7,4,5

| *at common law* as to who can sell the land | *in Equity* as to who is entitled to the benefit of the land or the proceeds of the sale of the land |
|---|---|
| Adam and Alfred (as trustees) in fee simple absolute in possession | Betty for her life |

7,4,6 If the land in this example needs to be sold for any reason, the purchaser does not have to raise complicated questions as to what type of estate is for sale. The purchaser knows that if the land is freehold, the legal estate must *always* be a fee simple absolute in possession.

7,4,7 If there is a complicated series of rights (as in the example of Ben, Charles and Charles' son in paragraph 6.12.1 above) this causes no difficulty in the sale of

the land, for the legal owners Adam and Alfred (the trustees, on a Trust for Sale) have the fee simple absolute in possession. The complications are attached to the money, the proceeds of the sale. Adam and Alfred must see that this is invested and that the interest on it is paid to Ben, and subsequently (after Ben's death) to Charles, and then to Charles' son ... etc. - but all this happens *after* the land has been sold, and so the sale is not delayed.

7.4.8

| *at common law* as to who can sell the land | *in Equity* as to who is entitled to the benefit of the land or the proceeds of the sale of the land |
|---|---|
| Adam and Alfred (the trustees) in fee simple absolute in possession | Ben for his life<br>Charles for his life<br>Charles' son in tail male conditional |

7.4.9 Since 1925, purchasers can always be certain that whoever is entitled to sell the property will *always* be selling either a legal fee simple absolute in possession, or a legal term of years absolute. The situation shown in 6.11.2 above is no longer permitted, and must be replaced either with the situation shown in 6.12.1 (repeated in 7.4.8) or with the less common alternative given in 11.6.3 below.

### *c) Overreaching*

7.5 In all these examples in which the legal owners can sell and the Equitable owners are entitled to the money, the Equitable owners are not able to prevent the legal owners from selling unless there is a written proviso stating that their consent is needed. The Equitable owners' rights are changed from rights in the land to rights in the proceeds of sale.

7.5.1 The name given to this transformation of rights in land into rights in a fund of money is "overreaching".

(Equitable rights can be divided into two types. Those which are basically beneficiaries' interests can be overreached. The others - the Equitable easements and such like - normally need to be protected by registration; see Chapter 8.)

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### *d) Two general principles*

7.6 The rules of common law govern who can sell the property, but the rules of Equity govern who will be entitled to the purchase-money.

7.7 The rules of common law make the sale *easy* (because the purchaser knows that if the property is freehold, the estate will always be a fee simple absolute in possession which is practically equivalent to absolute ownership, and all the other types of freehold need not enter the purchaser's mind) but the rules of Equity aim to make the final distribution of the purchase-money *fair* to everyone concerned.

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### *e) And one final point*

7.8 What is the position if Alan buys a property for *himself?* Here is the answer:-

7.8.1

| *at common law* as to who can sell the land | *in Equity* as to who is entitled to the benefit of the land or the proceeds of the sale of the land |
|---|---|
| Alan: he has the legal fee simple absolute in possession | Alan: he has the Equitable fee simple absolute in possession |

7.8.2 No trustees are needed in that example because Alan holds the property for *his own* benefit.

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Chapter 8

# REGISTRATION

*Land Registry*
*Land Charges Registry*
*Local Land Charges Registries*

## *a) Registered land: and the Land Registry*

8.1 The modern way of keeping a record of entitlement to land is by requiring the ownership of the legal fee simple absolute in possession, and the ownership of any legal term of years absolute longer than 21 years, to be registered at the Land Registry.

8.2 Property for which such a registration exists is called *registered land.*

8.3 The Land Registry issues a Title Certificate to the owner of the freehold or leasehold estate - or to the lender if the property is mortgaged.

8.4 The Title Certificate is in three parts, namely:-

the Property Register,
the Proprietorship Register,
the Charges Register.

8.4.1 The *Property Register* describes the shape, size and location of the property, and is accompanied by a plan (usually at scale 1:1250 or 1:2500) based on the Ordnance Survey map. This register also states if the registered estate is freehold or leasehold, and, if leasehold, it gives brief details such as the length of the lease.

8.4.2 The *Proprietorship Register* gives the name and address of the present proprietor (the freeholder or leaseholder). It also states the type of title - see 8.6 below.

8.4.3 The *Charges Register* states the matters to which the property is subject - such as easements, restrictive covenants and mortgages.

8.5 The Land Registry will supply anyone with a printout of this information, for £5. (A copy of the plan costs a further £5.) The printout is in a standard form known as an Office Copy of the entries, and looks like this:-

OFFICE COPY

Title Number ST 00000

A. PROPERTY REGISTER

County: Somerset District: Sedgemoor

1. The freehold land shown edged with red on the plan of the above title filed at the Registry, known as Magpie Villa, 13 Yeo Road, Goresands, TOGETHER WITH a full right of way over the road coloured brown on the filed plan and rights of passage of water soil gas and electricity through pipes wires and cables thereunder.

B. PROPRIETORSHIP REGISTER

Title Absolute

1. (3 February 1993) FRED SMITH, driver and FLORENCE EMILY MIRANDA SMITH, his wife, both of 13, Yeo Road, Goresands.

C. CHARGES REGISTER

1. A Conveyance of the land in this title and other land dated 12th. October 1854 and made between (1) Bartholemew Smallweed *(vendor)* (2) William Guppy and Harold Skimpole *(trustees)* and (3) John Jarndyce *(purchaser)* contains the following covenant: "The purchaser hereby covenants for himself and his successors in title for the benefit of all the adjoining land of the vendor and every part thereof that the purchaser will not at any time permit the land to be used for any noisy or offensive occupation whatsoever".
2. (3 February 1993) CHARGE dated 20 January 1993 to secure the moneys including the further advances therein mentioned.
3. Proprietor: Lesser Troutville Permanent Building Society of 13, Lower Road, Dunwich.

8.6 When registered land is sold, a deed (usually on a printed Land Registry form) is drawn up and signed, and is sent with the Title Certificate to the Land Registry. The Land Registry then updates its records, deletes the seller's name from the Title Certificate and fills in the buyer's name, and returns the updated Certificate (which is a copy of the updated records) to the new owner, or to the mortgagee - i.e. the lender - if there is a mortgage.

8.6.1 The deed will normally not be returned, as the Title Certificate gives all the information which the Land Registry has recorded.

8.6.2 The principle of this type of registration is that the Title Certificate will contain all necessary up-to-date information, and it will not show any superseded particulars (such as paid-off mortgages or names of former owners) as those details which are no longer needed will have been deleted from the records.

8.7 The title may be registered as (i) absolute, (ii) good leasehold, (iii) qualified, or (iv) possessory.

8.7.1 *Absolute title* is the best. It is the normal title for freeholds, and also for leaseholds if the leaseholder's deeds *and also the freeholder's deeds* were inspected by the Land Registry before the land became registered land.

8.7.2 *Good leasehold title* is granted if the Land Registry is satisfied with the leasehold title but has not been shown the freeholder's deeds.

8.7.3 *Qualified title* (which is rare) may be given if the Land Registry finds some serious defect in the title.

8.6.4 *Possessory title* proves nothing except possession: even a squatter can register this type of title.

8.7.5 It is often difficult to obtain a mortgage on property registered with qualified or possessory title.

8.8 The Land Registry's records - and not the Title Certificate - are the proof of ownership. The Title Certificate is only a copy or a print-out, bound in a strong cover, showing how the records were on the date the Certificate was issued.

8,8,1 Additional unbound copies (Office Copies) can be obtained from the Land Registry at any time.

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*b) unregistered land has deeds:*

8.9 There are believed to be about five million properties which have not yet been registered at the Land Registry. These are *unregistered land.*

8.10 Ownership of the legal fee simple absolute in possession or legal term of years absolute of unregistered land is shown by a bundle of title deeds.

8,10,1 In the past, every time the property has changed hands another deed has been drawn up, so the bundle has gradually become larger and larger. Unregistered land is thus a bulky system, causing storage problems for solicitors and for Building Societies and Banks.

8,10,2 A purchaser's solicitor (or other conveyancer) has to look back through the deeds to a deed *at least* fifteen years old, to check the information that he or she needs to know. Unregistered land is thus a time-wasting system.

8.11 Unregistered land is being phased out. The next time any piece of unregistered land changes hands, either in fee simple or for a term of longer than twenty-one years, it must be recorded at the Land Registry, which then issues a Title Certificate replacing the bundle of deeds.

8,11,1 In other words, on the purchase of any land, *either* it is already registered land, in which case the change of ownership must be registered at the Land Registry; *or* it is still unregistered land, in which case the

whole bundle of deeds needs to be sent to the Land Registry within two months after completion of the purchase, for the process of First Registration.

### *c) the Land Charges Registry*

8.12 The bundle of deeds for a piece of unregistered land is rather inefficient at showing certain important matters. For instance, it sometimes will not show an Equitable easement, because Equitable easements are sometimes made (without any legal advice) by writing an informal letter or a contract instead of drawing up a deed (see 4.10 above and 18.5.2 below for details) and in such a case it is likely that no-one will have thought to put a copy of the letter into the bundle of deeds. The existence of the Equitable easement would thus not show up to anyone checking the deeds on behalf of a prospective purchaser.

8.13 Therefore, for *unregistered* land, there is a system of *registration of incumbrances*. Equitable easements, restrictive covenants and estate contracts (which include Options to Purchase) need to be registered under this system. So do puisne mortgages.

> (Puisne mortgages are mortgages for which the bundle of deeds has not been handed over to the mortgagee. For example, if a house worth £90,000 is mortgaged to a Building Society for £40,000 and then a Second Mortgage on the same house for another £20,000 is obtained fom a Bank, there is nothing improper in this but the Bank cannot have the bundle of deeds because the Building Society will not let it go.)

8.13.1 As the *land* in these cases is not registered land, the matters mentioned in 8.13 cannot be registered at the Land Registry. Therefore there is another registry - it is a computer situated in Plymouth and is known as the *Land Charges Registry* - for the registration of such incumbrances as these on all *unregistered* land in England and Wales.

8.13.2 If the land were registered land, all these matters (and several others) would be entered in the Charges

Register at the Land Registry - as shown in paragraph 8.4.3 above.

(Note, just to avoid confusion:- There is one *Land Charges Registry* for the whole of England and Wales, and it is based in Plymouth. Quite separately, the *Land Registry* has been de-centralised into 19 District Land Registry offices, and the one for south-west England happens to be in Plymouth.)

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*d) further facts on registration*

8.14 The rule with both the Land Registry and the Land Charges Registry is that if a registrable matter is not on the register, a purchaser of the land takes the land free from that incumbrance.

8.14.1 It is normally the responsibility of the person with the benefit of the right to see that the proper entry is made on the appropriate register.

8.15 But on registered land there can be various matters known as *overriding interests* which are binding without registration. Three examples of these are:-

8.15.1 leases for 21 years or less

(These *cannot* be registered, and by s.70(1)*(k)* of the Land Registration Act, 1925, they are good without registration.)

8.15.2 rights of anyone in actual occupation of the property

(These are protected by s.70(1)*(g)* of the same Act. See 15.8 and 15.10 below for cases on this point.)

8.15.3 many easements.

(Easements by prescription - see 15.5 below - are overriding interests by s.70(1)*(a)* of the same Act, and it appears from *Celsteel Ltd. v. Alton House Holdings Ltd. [1985] 1 WLR 205* that many other easements also come within the protection which s.70(1)*(a)* gives.)

(Note how the law for unregistered land differs from that for registered land. On *registered* land, the general rule is that all matters, legal or Equitable, should be put on

record at the Land Registry, but some, which are overriding interests as in 8,15 above, hold good without registration, On *unregistered* land, easements by prescription and legal easements made by deed hold good without registration, but Equitable easements - except those made before 1st, January, 1926 - need registration at the Land Charges Registry.)

8.16 The main statutes governing registration are:- the Land Registration Act, 1925, as to registered land; the Land Charges Act, 1972 (replacing the Land Charges Act, 1925) as to unregistered land; and the Local Land Charges Act, 1975, as to the Local Land Charges Registries - see 8.17 below.

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*e) other registries*

8.17 There is a third series of registries, run by District Councils and London Borough Councils. (And by the new unitary authorities, from April 1996.) These registries are the *Local Land Charges Registries*.

8,17,1 The replies given by these Councils to the standard forms of *Local Search* and additional enquiries reveal details of planning conditions, tree preservation orders, closing orders (i.e. the property has been declared unfit for human habitation) road improvement schemes, listing (i.e. a building on the property has been listed as being of architectural or historical interest) enforcement notices (i.e. something which has been built on the land in contravention of the planning laws will have to be demolished) and various other matters affecting the land. These are matters which are of interest to a purchaser, and of which the Council is aware.

8.18 There are several other registers, such as registers of mining works kept by the National Coal Board, and registers of common land, etc.

8,18,1 Local Councils also keep maps of pipe-lines, sewers, public rights of way, etc.

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*f) Summary*

8.19 There are three main types of Registry. These are the Land Registry, the Land Charges Registry, and the Local Land Charges Registries.

- - -

8.19.1 Land Registry (for registered land) shows:-

| | |
|---|---|
| *Property Register:* | what land (location; plan) |
| *Proprietorship Register:* | whose land (present owner) |
| *Charges Register:* | easements, mortgages, and restrictive covenants, etc. to which the land is subject. |

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8.19.2 Land Charges Registry (for unregistered land) shows:-

equitable easements, puisne mortgages and most equitable mortgages, and restrictive covenants, etc. to which the land is subject.

- - -

8.19.3 Local Land Charges Registries (for all land) show:-

planning matters, demolition orders, closing orders (i.e. non-habitation orders) road improvement schemes, tree preservation orders, etc. to which the land is subject.

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8.19.4 Compare particularly what is recorded in the Land Registry's Charges Register (for registered land) and the Land Charges Registry (for unregistered land).

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Chapter 9

# THE FIVE LEGAL INTERESTS

9.1 There are five legal interests listed in s.1 of the Law of Property Act, 1925. They are rights recognised by common law which someone else may have over your land. They can be memorised as METER:-

9,1,1 M mortgages
9,1,2 E easements and similar rights
9,1,3 T tithes
9,1,4 E entry rights (upon leaseholds)
9,1,5 R rentscharge (or rentcharges).

9.2 *Mortgages.* The mortgagee (the lender) has rights, such as the right to sell the property if the mortgage interest is not paid. See Chapter **25.**

9.3 *Easements.* Neighbours' rights of way and rights of drainage etc. (But not public rights of way, nor water mains nor mains sewers: these do not require easements but are governed by Acts of Parliament - Highways Act, 1980, Water Acts, 1945 - 1989, etc.) See 1.2(6) above and 18.3.1 - 2 below.

9.4 *Tithes.* Originally payable to the Church, but almost entirely abolished by the Finance Act, 1977.

9.5 *Entry rights.* These are basically rights of taking premises back from tenants who fail to pay the rent.

9.6 *Rentscharge.* These must be looked at in a little more detail. They are payments which have to be made on certain *freehold* properties:-

9,6,1 and they are found in Manchester, Liverpool, Bristol, Weston-super-Mare and London, but are rare elsewhere.

9,6,2 Many rentscharge arose in the following way:- A builder in Victorian times wanted to buy (freehold) a piece of land on which to build ten houses, but could not afford the market price for the land. The landowner therefore agreed: "I will sell you the land in fee simple for a nominal £1, on the condition that

from each of the ten plots I and my heirs shall receive £5 per year for ever. In other words, the payments are to be to me and my heirs in fee simple. If in any year the sum is not paid, I shall levy distress by taking goods worth £5 from that house - or if there are no goods there, I shall take that house back!"

9,6,3 Some rentscharge are higher than £5, some are as low as £3 - but whatever the figure, it is fixed, with no provision for increasing it to allow for inflation.

9,6,4 So a purchaser buying the house today at its present market value, perhaps £150,000 or more, receives the property in fee simple subject to the right of the present rentcharge-owner to collect £5 from him or her each year (usually at the rate of £2.50 every six months) and to distrain if the sum is not paid - and to take the house back if it is empty and there are no goods there to distrain upon.

9,6,5 Is a fee simple subject to such a condition a fee simple *absolute* in possession? (If it is not, the common law will not recognise it.) Isn't it a fee simple *conditional* like the one in paragraph 6.8.6 - because the deed says that if a certain condition happens, the owner shall lose the property? And therefore isn't it *Equitable* and in need of trustees?

9,6,6 The answer to this problem is, *don't worry about it!* The point was not properly covered in the legislation of 1925, and therefore it was declared in the Law of Property (Amendment) Act, 1926, that such a fee simple is a fee simple absolute.

9,6,7 No new rentscharge can be created since the Rentcharges Act, 1977. (There are exceptions for a few unusual cases such as freehold flats.)

9,6,8 Existing rentscharge can be redeemed.

(The price to redeem - i.e. buy off - a £5 rentcharge would be the amount which would have to be invested to produce £5 interest per year.)

9,6,9 It is intended that all these rentscharge will have been redeemed or phased out by the year 2037.

9.6.10 Note that rentscharge are payable on *freeholds*. Do not confuse them with rent payable to a landlord on a leasehold. The law applicable to rentcharge-owners differs in many ways from that applicable to landlords.

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9.7 All of the five legal interests can also exist as Equitable interests.

9.7.1 Thus if a mortgage has been made by a written contract signed by both parties, but no mortgage deed has been drawn up, Equity will recognise it as an Equitable mortgage (as long as the contract has been registered at the Land Charges Registry or Land Registry) although common law will not recognise it because there is no deed.

9.7.2 In 8.9 above, an example of an Equitable easement (Equitable because there was no deed) occurred.

9.8 Interests which are not on the list of the five legal interests can only be Equitable, even if they have been created by a deed. One example of such an interest is a restrictive covenant (see Chapter **20**). Another example is an Option to Purchase.

> (An Option to Purchase, granted to me, is a right for me to buy Fred's land at an agreed price at some future date *when I choose to*. A developer would sometimes pay a farmer for such a right. Contrast it with a right of pre-emption which is a right for me to have first refusal *when and if Fred chooses to offer his land for sale*.)

9.8.1 One consequence of the rule in 9.8 is that all Options to Purchase need to be registered. If it is an option to purchase unregistered land, the option must be registered at the Land Charges Registry, otherwise it will be void against another purchaser who buys the land first. (This situation arose in *Midland Bank Trust Co. Ltd. v. Green [1981] AC 513* in which the purchaser actually knew of the unregistered option, and bought the land deliberately to destroy the option – and the House of Lords said she was legally entitled to do so.) And an option to purchase

registered land needs to be noted on the Charges Register at the Land Registry - as in 8.4.3 above.

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| A List of legal rights | A List of Equitable rights |
|---|---|
| fee simple absolute in possession | fee simple absolute in possession (of beneficiary; legal fee simple held by trustees)<br>fee simple absolute in remainder (future interest)<br>fee simple conditional in remainder<br>fee simple conditional in possession (as in 6,8,6)<br>entailed interests (various types)<br>life interests (various types) |
| term of years absolute (periodic or specific) | beneficiary's term of years absolute (legal term held by trustees)<br>agreement for a lease<br>tenancy at will<br>tenancy on sufferance |
| 1, mortgages (including legal charges) | equitable mortgages (e,g, a mortgage of an entailed interest) |
| 2, easements (& profits à prendre, etc,) | equitable easements etc, (see 18,5,2) |
| 3, tithes (obsolete) | tithes (obsolete) |
| 4, rights of entry | equitable rights of entry |
| 5, rentcharges ("M,E,T,E,R,") | equitable rentcharges (e,g, a rentcharge for life)<br>options to purchase<br>annuities, estate contracts etc, |
| chief remedy; damages | remedies; prohibitory injunctions<br>mandatory injunctions<br>specific performance |
| *and, later in this book* | |
| joint tenancy (of trustees) | beneficial joint tenancy<br>tenancy in common |
| prescription | restrictive covenants |
| | purchaser' rights after exchange of contracts<br>equitable right to redeem mortgage |

Chapter 10

# A SUMMARY

10.1 The four foundations of Land Law

(1) Tenures
(2) Estates
(3) Equity
(4) the 1925 provisions.

10.2 Here is a property .....

10,2,1 It is held from the Crown on freehold tenure.

10,2,2 What is actually owned (and is for sale here) is the total of the rights and duties, known as the freehold estate.

10,2,3 There is only one type of freehold estate known to modern common law, and that is the fee simple absolute in possession.

10,2,4 One type of leasehold estate is known to modern common law: it is the term of years absolute, and the term may be either specific or periodic.

10,2,5 The vendors may be holding the property for their own benefit, or they may be trustees holding it on behalf of beneficiaries who may have many different kinds of Equitable interests, but this makes no difference to a purchaser, who need not even know about the beneficiaries' Equitable interests as long as the purchase price is paid to trustees.

10,2,6 One trustee is not enough. If you hold property in your sole name for your own sole benefit, you can sell it alone, and no trustees are necessary: but in cases where trustees *are* needed, there must be at least two of them, or a Trust Corporation for the reason given in paragraphs 4.6.1 - 4.6.2 above.

10,2,7 Properties may be subject to legal interests for mortgagees, adjoining owners, rentcharge-owners and landlords; and can be subject to many kinds of Equitable interests such as Equitable easements.

10.2.8 The modern way for the ownership of the legal estate to be shown is by means of a Land Registry Title Certificate, which is always in three sections known as the Property, Proprietorship and Charges Registers.

10.3 Little or no attempt is made in this book to give a value-judgment on whether this is the best possible system of Land Law. *(It isn't!)* Some other system might in many respects give greater simplicity, more flexibility, better social justice or increased commercial efficiency. Whatever our opinions on these matters, we have to work within the present system, because it is the only system we have in this country.

10.3.1 Criticism is in order - as long as the critic understands the principles of what he or she is criticising! (Far too many of them don't!)

10.3.2 Criticism does not of course make these requirements any less compulsory. Nothing but an Act of Parliament can change these rules.

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TEST QUESTIONS:-

11. Explain the functions of:-
    (a) the Land Charges Registry,
    (b) the Charges Register of the Land Registry,
    (c) the Local Land Charges Registries.

12. What are the advantages of the registered land system over the unregistered system?

13. What are the three registers on which the three parts of the Land Registry Title Certificate are based? In which of these registers would the following appear:- (i) a legal easement to which the property is subject, (ii) a legal easement for the benefit of the property, (iii) the owner's name, (iv) a mortgage, and (v) an Equitable easement to which the property is subject?

14. What are
    (i) an Office Copy
    (ii) an overriding interest
    (iii) overreaching?

15. Name the two legal estates, the five legal interests, and any three Equitable interests.

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*Answers to questions 6-10*

6. Equity came into existence to counteract the shortcomings of common law, particularly with regard to (i) trusts, (ii) the lack of suitable remedies in some cases - see 4,8(3) - and (iii) informality; see 4,10 for an example of informality.

7. Fairness (or justice, or conscience).

8. A mandatory injunction is an order to *do* something - e.g. to remove an obstruction.
A prohibitory injunction is an order *not* to do something - e.g. not to play loud music after 10,00 p.m.

9. A mandatory injunction (see answer 8 above) is nothing to do with a *contract;*
specific performance is an order to proceed with a *contract*.

10. The property should be granted to two trustees, on trust for sale with power to postpone the sale, and on trust to hold the benefits (the proceeds of sale, and the rent if any) for the grandson.

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*Answers to questions 11-15*

11. The Land Charges Registry shows certain incumbrances which might not show up from the deeds, on unregistered land. See 8,12 above.
The Land Registry's Charges Register shows the incumbrances on registered land. See 8,4,3 above.
The Local Land Charges Registries show matters known to Local Authorities, on both registered and unregistered land. See 8,17,1 above.

12. Advantages of registered land; one document instead of many; title guaranteed so there is no need to check back into the past; less storage problem; information as to ownership is available to the public; and if a Title Certificate is destroyed the Land Registry can supply a new one.

13. The three registers are;
the Property Register,
the Proprietorship Register,
the Charges Register.
A legal easement to which the property is subject should be in the Charges Register;
A legal easement for the property's benefit should be in the Property Register;
The owner's name will be in the Proprietorship Register;
A mortgage should be in the Charges Register;
An Equitable easement to which the property is subject should be in the Charges Register.

14. An Office Copy is a copy of the entries currently on the registers. It is available from the Land Registry at any time for £5.
Overriding interests are interests which are good without being put onto any register; see 8,15 for examples.
Overreaching is the transforming of rights in land into rights in money - see 7,5 above.

15. *See page 87 for answer to question 15.*

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# Part 2

## further Rights over Land

## Chapter 11

## SETTLED LAND

*owners in succession - the ancestral home for generation after generation*

11.1 The system known as Settled Land was designed for the landed gentry in their stately homes, and is unlikely to be encountered elsewhere unless it has been used by mistake - which happens sometimes in home-made wills.

11.2 Settled land is land which has granted to persons in succession. In other words, it has been granted to a series of people, one after another - to Ben for his life, and then to Charles ... and so on.

### *a) settled land in its heyday*

11.3 The purpose for which the landed gentry used the Settled Land system (particularly in the eighteenth and nineteenth centuries) was to ensure that their families retained their land (and the influence that went with it) for generation after generation.

11.3.1 For example:- Alan (the landowner, with a fee simple absolute in possession) might have become anxious about his son: "If, after my death, my son becomes a gambler and a spendthrift, he might sell the land and squander all the money, so there would be nothing left for future generations". And Alan thinks of a solution: "I will not let him have ownership of the land: I will not let him inherit the fee simple. When I die, I shall say in my will that I only leave him a limited period of rights, to enjoy the land *for the length of his life*. I shall leave the period after that to his baby son, for the length of *his* life. And

I shall leave the period after that to *his* son, who is of course not even born yet."

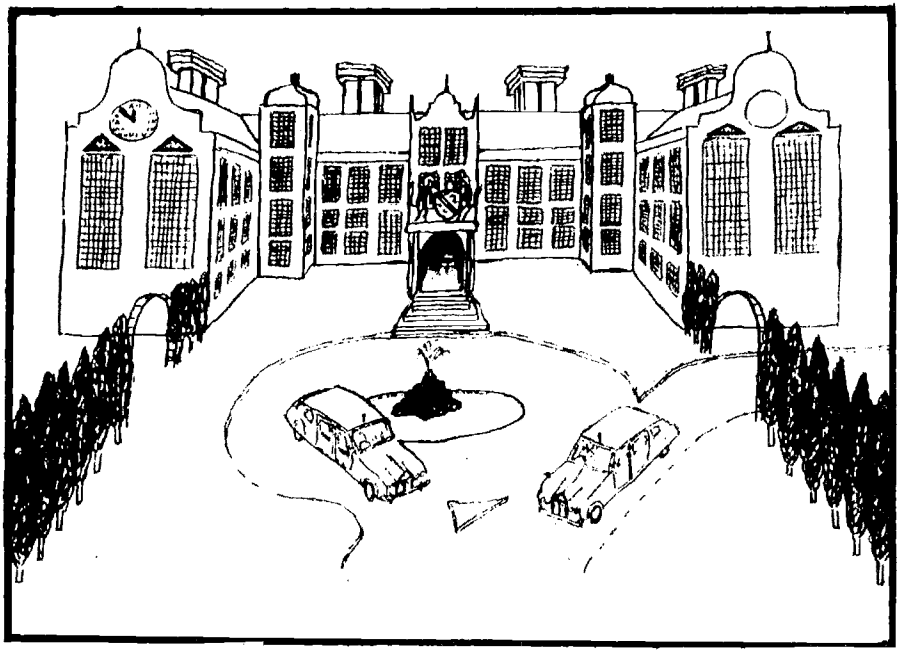
11,3,2 So Alan granted the land

to my son, Ben, for his life,

and then to Ben's son Charles, for his life,

and then to Charles' first son, in fee simple.

11,3,3 Any purchaser wishing to buy this land naturally wanted to have it permanently, and not for a temporary short period. And he found that to obtain permanent rights over this land, he had to buy the rights appertaining to one period of time from Ben, and he had to buy the rights relevant to a further period of time from Charles (who probably could not sign the necessary document because he was still only a small child) and he had to buy a further period of rights from Charles' son (who certainly could not sign because he had not yet been born!).



stately home with 20,000 acres

11,3,4 These difficulties made the land completely impossible to sell - which was of course precisely what Alan had intended.

11,3,5 All that Ben could sell was the right to the land for the length of his own life - which had little value in view of the fact that he might be killed in an accident at any time.

11,3,6 The permanent rights to the land could not be sold until Charles' son reached full age.

("Full age" means 18 since the passing of the Family Law Reform Act, 1969; but previously the required age was 21.)

11,3,7 If Charles' son had been granted a fee tail instead of a fee simple, it would have created a further complication (not described in this book) by which it was often possible to tie the land up within the family for a further generation, or sometimes two.

11.4 In this way, the landed gentry kept their stately homes and lands (and the power and prestige that went with them) within their families from generation to generation.

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### *b) Settled land since 1882*

11.5 Unsaleable land can cause social and economic problems, especially if it happens to be on the outskirts of an expanding town.

11.6 Parliament has therefore enacted (by the Settled Land Act, 1882, replaced now by the Settled Land Act, 1925) that settled land can be sold in fee simple absolute in possession.

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### *c) Settled Land since 1925*

11,6,1 The person in present possession is declared (by the Settled Land Act, 1925) to have the legal fee simple

absolute in possession - for we know from paragraph 7.2 above that someone *must* have the whole fee simple absolute in possession of the freehold land, by the law as it has stood since 1925, and the rights for life (for Ben and Charles) can only be Equitable.

11,6,2 The right for Charles' son, whether it is an interest in tail or whether it is a fee simple (a future fee simple which cannot become a fee simple absolute in possession until Ben and Charles have died) can also only be Equitable, as it is not a fee simple absolute in *possession*. (See 6.5.2 above.)

11,6,3 So our example from paragraph 6.11.2

Ben for life

Charles for life

Charles' son in tail male conditional

is re-written by the Act of Parliament (the Settled Land Act, 1925) to make it read as follows:-

11,6,4

| *at common law* as to who can sell the land | *in Equity* as to who is entitled to the benefit of the land or the proceeds of the sale of the land |
|---|---|
| Ben has the fee simple absolute in possession and can sell it;<br><br>but two people (Adam and Alfred) will be appointed as "trustees of the settlement". | Ben for his life,<br>Charles for his life,<br>Charles' son in tail male conditional. |

11,6,5 Ben can sell the legal fee simple absolute in possession of all or any part of the land, but the purchase money will not be paid to Ben: the purchaser must hand it over to the trustees who must see that it is used for the benefit of the beneficiaries.

(For instance, Ben sells off a few fields and a couple of cottages, and the money is used to provide an irrigation system for the rest of the land, for the benefit of future

generations of the family; or alternatively the money is invested by the trustees, and the interest on it is paid to Ben for his life, then to Charles for his life ... etc. Either way, the future generations receive the benefit.)

(The Settled Land Act, 1925, gives the person in possession - i.e. Ben - the name of *tenant for life*. This misleading name means he can sell the legal fee simple absolute in possession. Quite separately, in Equity Ben is a *life tenant*, which means he is entitled to the benefit of the income for the rest of his life.)

11.6.6 So the land can be sold, but the family wealth is kept tied up in the family, for generation after generation.

11.6.7 This is another example of the general principle which we saw in paragraphs 4.6.4 and 7.7 above, that common law makes it easy to sell the land, while Equity tries to ensure that the final result is fair to all persons concerned.

11.7 This transfer of beneficiaries' rights *from* the land *to* the proceeds of sale is known as "overreaching". We have seen it before, in 7.5 and 7.5.1 above.

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### *d) A trust for sale, as an alternative to settled land*

11.8 An alternative method which can be used to produce the same result is to create a Trust for Sale:-

11.8.1

| *at common law* as to who can sell the land | *in Equity* as to who is entitled to the benefit of the land or the proceeds of the sale of the land |
|---|---|
| Adam and Alfred (the trustees, on Trust for Sale) in fee simple absolute in possession | Ben for his life<br>Charles for his life<br>Charles' son in tail male conditional |

11.9 In the case of the Trust for Sale, it is the trustees who own the legal fee simple absolute in possession - and this is an example which has been seen twice previously in this book: see paragraphs 6.12.1 and 7.4.8 above.

11.9.1 The trustees of the Trust for Sale have the power to postpone the sale for as long as they see fit, so the land may remain unsold for many generations. (So a system originally designed for *selling* property is used to keep the property within the family.)

11.10 Trust for Sale is more suitable for today's requirements than Settled Land, but a member of the aristocracy may sometimes prefer the Settled Land system because it enables him to sign documents himself instead of having to ask trustees to do so.

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*e) Waste*

11.11 As Ben only has the benefit of the property for his life, he must not be allowed free rein to destroy it during his lifetime. This would count as "waste". "Waste" includes all alterations. There are four types of waste:-

11.11.1 *Ameliorating waste.* This means alterations which amount to an improvement, such as converting a disused barn into a cottage (with Planning Permission to do so obtained from the Council, of course). The life tenant (Ben) is unlikely to be stopped from doing such works, even if the remainderman (Charles in the example above) says he would prefer the property to be left as it is.

11.11.2 *Permissive waste.* This means doing nothing, and so the property gradually deteriorates. There is nothing in Land Law to stop Ben from doing this, unless he has signed a covenant that he will do repairs. (On the other hand, under Planning Law the Local Authority may be able to serve a Repairs Notice requiring repairs to be done, if the property is a

"listed building" - i.e. a building recognised as being of architectural or historical interest.)

11.11.3 *Voluntary waste.* This means doing something active which is detrimental to the property. It may be cutting down the timber and selling it, or it may be mining. (In some districts, mining would be a sensible use of the land, but adjacent to a stately home in green countryside it is unacceptable.) Ben must look at the document (it may be a deed or a will) by which he was granted his life interest. If it states that he is "unimpeachable of waste", he is free to do these things - provided of course he obtains Planning Permission. If the deed or will does not say that he is "unimpeachable of waste", he cannot cut timber (unless it is a plantation which was planted *for the purpose* of cutting it when it reached a certain age) and he cannot open a new mine, although he can continue to work one which is already open. These provisions were a useful way of protecting the property in the days before there were Planning controls.

11.11.4 *Equitable waste.* This means deliberate destruction. In *Vane v. Barnard (1716) 2 Vern. 738* the life tenant of Raby Castle (in County Durham) objected to the woman that the remainderman married, and therefore told him, "You shall never have this castle" - and brought in two hundred workmen to demolish it! The remainderman obtained a mandatory injunction (see paragraph 4.8(3) above) forcing the life tenant to repair all the damage.

11.12 Waste is also important in Landlord and Tenant Law. Tenants who have a periodic or specific term of years absolute (see 3.8.3 and also 3.7.3 above) are restricted in what they can do to the property.

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Chapter 12

# THE RULE AGAINST PERPETUITIES

*a) the rule*

12.1 This is a difficult and inconvenient rule affecting future conditional rights.

12,1,1 We saw an example of a future conditional right in paragraph 6.8.5 above: "The property will go to John *if* he marries my daughter Dorothy".

12,1,2 Nature puts a time-limit on this condition, for neither John nor Dorothy will live for ever. We do not know whether he will marry her - but we do know that they cannot get married to each other after either of them has died. *Either* the marriage will take place while they are both still alive, *or* it will never take place.

12.2 On the other hand, some conditions may be of a type that keeps everyone guessing, not knowing whether the thing will happen or not, for a couple of hundred years or more.

12,2,1 An example of this would be, "The property will go to John in fee simple *if* the house is pulled down and rebuilt".

12,2,2 The uncertainty - the possibility that the house might be demolished and rebuilt two or three centuries from now, and John's heirs might then come forward and demand the property - is something that cannot be tolerated.

12,2,3 Therefore, conditions of this latter type are void by the Rule against Perpetuities (unless made after 15th. July, 1964 - see paragraph 12.5 below).

12.3 The Rule asks the question whether the event could occur outside a time limit of *"the lifetime of someone alive when the condition is made, plus 21 years after the end of that lifetime".*

12.3.1 If it *cannot* happen outside that time limit (as in paragraph 12.1.1 above, where the marriage cannot happen after one of them is dead) the condition does not break the Rule against Perpetuities: but if it *could* happen outside the lifetime-plus-21-years time limit (as in paragraph 12.2.1 above, where the demolition and rebuilding of the house may happen after two or three centuries) the condition breaks the Rule and the grant is therefore *immediately* void from the very day it is made: it is void (so John does not get the property) even if the house is demolished and rebuilt next year.

12.4 In other words:

1) if the event *must* happen either (i) within a lifetime plus 21 years, or alternatively (ii) never (as with the example in paragraph 12.1.1. above) it does not break the Rule against Perpetuities;

2) but if it could occur either (i) within a lifetime plus 21 years, or (ii) later than that, or (iii) never (as with the example in paragraph 12.2.1 above) the grant is completely void from the day it is made, even if in fact the condition is fulfilled within a few weeks.

12.4.1 The law does not wait and see whether the condition is in fact fulfilled within the lifetime and 21 years: it simply declares the grant void whether the condition is fulfilled or not.

(Another example, in which the "21 years" becomes important;- "This property is granted to the first of Dorothy's children to reach 21", This grant is valid even if Dorothy has at present no children, because even if Dorothy dies the day her child is born, that child (if it lives to be 21) *must* reach 21 within Dorothy's lifetime plus 21 years. There is no way in the natural order of events that a child can reach 21 *more than* 21 years after its mother has died. - There appear to have been no cases on this point involving sperm-banks or frozen embryos, as yet. - But a grant, "To the first of Dorothy's children to become a vicar," would break the Rule, because she might at

some distant future date have a child who becomes a vicar more than 21 years after her death.)

12.5 This Rule does not apply to conditions imposed since 15th. July, 1964 (the day that the Perpetuities and Accumulations Act, 1964, came into effect). For these conditions, there is another (much more reasonable) Rule, by which the law will wait and see whether the condition is in fact fulfilled within the time limit.

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### *b) practical "perpetuities" problems*

12.6 The chief danger caused in Land Law by the Rule against Perpetuities is to do with future drainage easements.

12.6.1 The Rule was not designed to apply to such rights, but it does so anyway - unfortunately.

12.6.2 Suppose (for example) that in 1961 a house was built in a village which at that time had no mains sewer. So the house was built with a septic tank in the garden, and an easement "to use any drain that may in future be laid" across the neighbour's land to reach a future sewer. This was a conditional easement - conditional on the drain being built - and so it is subject to the Rule against Perpetuities: and as there was no guarantee that any future drain would be laid within a lifetime plus 21 years, this easement is void and worthless - though the person who drew up the deed granting the easement in 1961 probably did not realise that. Then in 1993 a new drain from the house was laid across the neighbour's land, to reach the new sewer which had just been laid through the village. But the easement made in 1961 is void, so the new drain has been laid without any legally-recognised permission.

12.6.3 If the new drain is used "neither by force, nor in secret, nor by permission" for more than 20 years, an easement by prescription (see paragraph 18.6 below) may come into existence - but this drain has only been used since 1993.

12,6,4 So the new drain has no right to be there, and if the owner of the land which it crosses decides to remove it or to block it up (either through sheer ill-nature or because it is in the way of some building work he is carrying out) he is legally entitled to do so - regardless of the consequences for the house which is thus deprived of drainage. The owner deprived of the drain must make (and pay for) other arrangements.

12,6,5 The person who drew up the deed in 1961 should have avoided this potential catastrophe by limiting the condition to a lifetime plus 21 years. This is why grants of easements "to use any drains that may be laid within the lifetime of Her Majesty Queen Elizabeth II or within 21 years after her death" are sometimes found in deeds. (In deeds made since 15th. July 1964, a reference to "within 80 years" can be used instead of the "lifetime-plus-21-years" formula.)

12.7 Consider finally a grant made by a freeholder, Alan,

to my second son, Ben, for his life,

then to Ben's baby son Charles, for his life,

then to Charles' first son, for his life,

then to *that* son's first son ... etc.

The last line can break the rule against perpetuities. Charles is alive, and Charles' son if he ever has one will be born in Charles' lifetime (or within nine months after Charles' death) - but there is no guarantee at all that the next generation will be born within the lifetime (plus 21 years) of any of the persons alive today (Alan and Ben and their wives and Charles). This is why, in the examples in 6.11.1 and 11.3.2 above, Charles' son had to receive a fee simple or a fee tail. A life interest to him would have left any grant to *his* son void, and the land would return to Alan, or his heirs in fee simple.

(Two other rules about future rights, namely the Rule against Inalienability and the Rule against Accumulations, are not included in this book.)

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Chapter 13

# A SECOND SUMMARY

13.1 There are three ways in which land can be owned:-

13.1.1 *Sole Beneficial Owner*

A sole purchaser buys the property, either in fee simple absolute in possession or for a term of years absolute, for himself or herself (or itself if the purchaser is a limited company). No trustees are required, as the property is for the benefit of the purchaser alone, and no-one else.

13.1.2 *Settled Land*

Settled land is designed to keep wealth within the family for future generations. It can be sold, but trustees see that the proceeds of sale are properly dealt with.

13.1.3 *Trust for Sale*

Trustees own the fee simple absolute in possession (or term of years absolute) of this land, on behalf of the beneficiaries. The trustees can sell it (or can postpone the sale indefinitely, so in many cases it will not be sold for many years) and must see that the proceeds of sale are properly dealt with.

13.2 We shall see in the next chapter that all co-ownerships must be held on Trust for Sale.

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A note on the Equitable Doctrine of Notice.

This doctrine, by which Equitable rights were binding only in so far as a purchaser knew, or should have known, of their existence, is omitted from this book because in 1925 it was superseded on registered land, and to a large extent on unregistered land, by the registration requirements. The question today is not, "Did the purchaser know?" but, "Was the right registered?" The doctrine still applies however to certain Equitable rights (pre-1926 Equitable easements, pre-1926 restrictive covenants etc.) on unregistered land.

Chapter 14

# CO-OWNERSHIP

*owners together*

14.1 Co-ownership exists wherever two or more persons own a freehold or a leasehold property *together*.

14.1.1 Harry and Wendy buy a house;

14.1.2 Tom, Debbie and Harry (business partners) buy office premises.

## *a) two types of co-ownership*

14.2 Co-owners are *either*
1) joint tenants, *or*
2) tenants in common.

14.3 Which type they have chosen to be should be stated in the deed by which they bought the property.

(The phrases "joint owners" and "owners in common" might have been preferable, but the Law of Property Act, 1925, uses the word "tenants" - because all "owners" of land are "tenants of the Crown" as we saw in paragraph 2.2 above.)

14.4 If the co-owners are joint tenants, they have the "right of survivorship". This means that when one of them dies, the others automatically own the property.

14.4.1 *Example:-* Harry and Wendy are joint tenants. Harry dies: the whole property then belongs to Wendy. (This is automatic on a joint tenancy, regardless of anything that Harry may have written in his will.)

14.5 If the co-owners are tenants in common, there is no "right of survivorship".

14.5.1 *Example:-* Tom, Debbie and Harry are tenants in common. Harry dies. His share does not go to Tom and Debbie; it goes (by inheritance) to his widow Wendy, either because he left it to her in his will, or because he died without leaving a will and she is his next of kin.

(The rules of inheritance - not in this book but see the note after paragraph 6,4,2 - are in the Administration of Estates Act, 1925, as amended by the Intestates' Estates Act, 1952, and by other legislation.)

14.6 Joint tenants are always equal.

14.7 Tenants in common may hold equal or unequal shares.

14.8 Married couples are likely to be joint tenants.

14.9 Business partners usually find that tenancy in common is more suited to their requirements.

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*b) a 1925 problem*

14.10 The Land Law reformers in 1925 were faced with a problem which affected many tenancies in common:-

14,10,1 *For example:-* Tom, Debbie and Harry were tenants in common. Harry died and his share passed to Wendy, then Tom died, and in his will he left his share in this property to his family (Ian, Joan, Keith, Louise and Mary). To sell this property, the signatures of all of them (Debbie, Wendy, Ian, Joan, Keith, Louise and Mary) were required.

14,10,2 If any one of them had emigrated, this could make selling the property a slow process - the document might have to be sent to Australia for signature -

14,10,3 and if any one of them had cut off all links with the family and could not be found, the property could not be sold at all.

(But such a person who has been missing for more than seven years can be treated as having died.)

14.11 The same problem could arise on joint tenancy - even between husband and wife - because one of them might "sever" the joint tenancy - i.e. change it into a "tenancy in common in equal shares". (Joint tenants are equal, so the severance must be into *equal* separate shares.)

14.11.1 Suppose for example a husband, after a quarrel with his wife, gave her notice in writing (or today it can even be an oral mutual agreement) that he was severing the joint tenancy; and he then made a will leaving all his share of the property to his sisters. If, after the husband's death, the address of one of the sisters cannot be found, the wife (anxious to move out of the house into a smaller one) would have found that the house could not be sold because the missing sister's signature was not obtainable.

*c) and a solution*

14.12 To avoid this problem of unsaleable property, the solution adopted by the legislators in 1925 was to say that all co-ownership properties must be held by trustees on Trust for Sale. (This is not merely a suggestion: it is compulsory, by the Law of Property Act, 1925. - See 4.5 for details of Trusts for Sale.)

14.12.1 There must be at least two trustees (unless the trustee is a Trust Corporation) for the reason which we saw in paragraphs 4.6.1 - 4.6.2 above,

14.12.2 and to keep the sale reasonably simple, there must not be more than four trustees.

14.13 Trustees cannot be tenants in common: they must always be joint tenants of the legal estate.

14.13.1 The basic principle that makes this system work is that the trustees must be joint tenants. If one of them dies, "right of survivorship" applies, so the property belongs legally to the surviving trustee or trustees. That is the rule for all legal co-owners.

14.13.2 The rule for Equitable co-owners is different - but it applies to the proceeds of sale, and not to the land itself, so it does not conflict with the common law rule. The Equitable co-owners (the beneficiaries) should choose at the time of the purchase either to be joint tenants (in which case, "right of survivorship" applies to them) or tenants in common (in which case, "right of survivorship" does not apply).

14.13.3 Learn the general rule by heart:- In all co-ownerships, the legal owners (the trustees) must always be joint tenants; but the Equitable owners (the beneficiaries) have the choice of whether to be joint tenants or tenants in common.

(The correct name for tenancies in common since 1925 is "Equitable interests in undivided shares" - but the name "tenancies in common" is easier to say and is often used.)

14.14 So here is the result:-

*(i) tenancy in common, today*

14.14.1 Tom, Debbie and Harry today buy a property as tenants in common.

14.14.2 Two, three or four trustees must be appointed.

14.14.3 They can appoint *themselves* as trustees: so we find Tom, Debbie and Harry (as trustees, legal joint tenants) holding the property for the benefit of Tom, Debbie and Harry (as beneficiaries, Equitable tenants in common).

14.14.4

| *at common law* as to who can sell the land | *in Equity* as to who is entitled to the benefit of the land or the proceeds of the sale of the land |
|---|---|
| Tom, Debbie and Harry (as trustees) must be joint tenants. | Tom, Debbie and Harry (as beneficiaries) have chosen to be tenants in common. |

14.14.5 If, a few months later, they wanted to sell it, the three legal owners could sell (all of their signatures are needed, because *all* legal owners must sign) and the three beneficiaries would receive the proceeds of the sale, in their appropriate shares. (If Tom had provided half the money to buy the property, and the other two had provided a quarter each, they would be paid out in those shares.) - But in fact they do not sell it, they keep it - and after a few years, Tom and Harry die.

14,14,6 After Tom and Harry have died, Debbie is the legal owner by right of survivorship.

14,14,7 She appoints a second trustee (this could be her sister, or her solicitor, or one of Tom's grown-up children, or someone else)

14,14,8 and the two trustees can sell the property. Their two signatures are the only ones that are needed.

14,14,9 As for the purchase money: the trustees must ensure that the right amounts are paid to the beneficiaries:

14,14,10 so Debbie gets her share (a quarter, in this example, according to paragraph 14.14.5 above) and Tom's heirs receive Tom's share, divided between them; and Wendy (Harry's heir, either by his will or as his next of kin) receives Harry's share.

14,14,11

| *at common law* as to who can sell the land | *in Equity* as to who is entitled to the benefit of the land or the proceeds of the sale of the land |
|---|---|
| Debbie and a second trustee sell as joint tenants. | Tom's heirs, Harry's heirs and Debbie receive their fair shares of the proceeds of the sale. |

14,14,12 If one of Tom's heirs is untraceable, his part of Tom's share is invested for him (by the trustees) until he can be traced or can be presumed dead.

14,14,13 This does not delay the sale, because the only signatures needed are those of the trustees.

14,14,14 This is another example of the general principle that common law makes the sale easy, and Equity does its best to ensure that the final result is fair to all.

*(ii) a rare bird - a severed joint tenancy*

14,14,15 Similarly in the example in paragraph 14.11.1 above, in which the husband and wife (Harry and Wendy) were joint tenants but the joint tenancy was severed:-

14,14,16

| *at common law* as to who can sell the land | *in Equity* as to who is entitled to the benefit of the land or the proceeds of the sale of the land |
|---|---|
| Harry and Wendy (the trustees) must be joint tenants.<br><br>(Trustees *must* be joint tenants; this legal joint tenancy cannot be severed.) | Harry and Wendy (the beneficiaries) chose originally to be joint tenants but this Equitable joint tenancy was severed into a tenancy in common. |

14,14,17 Harry has made a will leaving his share in the property to his seven sisters:-

(Note: the severance must have been *before* his death; it is not possible to *create* a severance by a will, because the "right of survivorship" comes into effect (and so the whole property would have passed to Wendy) a split second before the will takes effect.)

14,14,18 When Harry has died, "right of survivorship" applies to the legal joint tenancy, so the property legally belongs to Wendy - but not entirely for her own benefit, because when the property is eventually sold, her late husband's seven sisters have rights to part of the money.

14,14,19 When Wendy chooses to sell, she appoints a second trustee (possibly her new husband, if she has re-married)

14,14,20 and the two trustees sell the legal fee simple absolute in possession (or term of years absolute if the property is leasehold).

14,14,21 The trustees then pay Wendy's half of the proceeds to herself, and Harry's half to his sisters.

(See 14,11 for why this is half and half.)

### *(iii) the commonest situation of all: a normal joint tenancy (not severed)*

14,14,22 If there had been no severance of the Equitable joint tenancy, the situation would have been:-

14,14,23

| *at common law* as to who can sell the land | *in Equity* as to who is entitled to the benefit of the land or the proceeds of the sale of the land |
|---|---|
| Harry and Wendy (as trustees) must be joint tenants. | Harry and Wendy (as beneficiaries) have chosen to be joint tenants. |

14,14,24 This situation (very frequently found among married couples) is known as *beneficial joint tenancy*, i.e. legal-and-Equitable joint tenancy.

14,14,25 On Harry's death, joint tenancy's "right of survivorship" applies to both the legal and the Equitable situation: and therefore, regardless of whether Harry left a will or not, after Harry's death Wendy is holding the property for the benefit of herself and no-one else.

14,14,26 As there are no other beneficiaries (and therefore, if Wendy were to mis-handle the situation in any way, she could not harm the interests of anyone except herself) there is no need for a second trustee to be appointed. Wendy is entitled to sell the property alone and to keep all the net proceeds of sale.

14,14,27 The situation is no longer a co-ownership: Wendy has become the sole owner, for her own sole benefit.

14,14,28

| *at common law* as to who can sell the land | *in Equity* as to who is entitled to the benefit of the land or the proceeds of the sale of the land |
|---|---|
| Wendy | Wendy |

14.15 If someone with a beneficial joint tenancy mortgages his or her share and the other joint tenant does not, this usually amounts to a severance, in Equity, into a tenancy in common in equal shares.

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*d) the four unities of joint tenancies*

14.16 All joint tenancies have the four *unities:* possession, interest, title and time. Remember them as PITT:-

P unity of Possession,
I unity of Interest,
T unity of Title,
T unity of Time.

14.16.1 *Unity of Possession:* the joint tenants are all entitled to the *same* possession - i.e. the whole property.

(A situation where one of them is entitled to the upstairs and another to the downstairs would not be co-ownership.)

14.16.2 *Unity of Interest:* they *all* have a lease for (say) 99 years, or they *all* have a fee simple absolute in possession, or ... the point is, they all have the *same* interest.

(If one of them has a life interest and another has a fee simple, it is not joint tenancy, it is settled land - and if one has a lease and another has a fee simple, it is not joint tenancy, it is a landlord-and-tenant situation.)

14.16.3 *Unity of Title:* they all received their right by the *same* deed, or inherited it under the *same* will.

(If they are joint squatters who have been there more than twelve years, they all acquired their rights under the *same* statute - the Limitation Act, 1980. See Chapter 26.)

14.16.4 *Unity of Time:* They all received their rights at the same time.

(This usually follows naturally from having unity of title.)

14.17 All joint tenants have all of the four unities, or else they are not joint tenants. All tenants in

common have unity of possession, and *may* have some (or all) of the other three.

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### *e) Statutes on co-ownership*

14.18 These rules, making a Trust for Sale compulsory for all co-ownerships, are laid down in the Law of Property Act, 1925.

14.19 Procedures for appointment of trustees, and rules as to what securities trustees can invest the trust money in, are in the Trustee Act, 1925, as amended by the Trustee Investments Act, 1961.

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### *f) A Critique of the Trust for Sale*

14.20 Trust for Sale is one of the most important topics in Land Law, because whenever two or more persons together buy a property, there is a Trust for Sale.

14.21 It sometimes produces a reaction from purchasers, saying, "We want to buy it, not sell it!" - and so it has to be explained to the purchasers that although the Law of Property Act, 1925, makes the use of a Trust for Sale compulsory in all co-ownerships, there is a power to postpone the sale indefinitely.

14.22 Nevertheless there is an artificiality here. The "Trust for Sale" system - see paragraphs 4.5 and 14.12 above - was originally a means of investment, by which the trustees were meant to sell the land at a profit: and the legislators have imposed this system onto family homes, which are bought primarily as *homes* rather than as investments to be sold. (It would have been better if the legislators had created a completely new type of co-ownership in 1925.)

14.23 The Trust for Sale on co-ownership works well if the parties live in harmony, or if one of them dies.

This has been done. The law [illegible] by Act of Parliament since this book was printed.

14.24 It does not work nearly as well if the parties fall into disharmony. Problems arising from such discord are the subject of our next chapter.

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TEST QUESTIONS:-

16. Are the following recognised by common law or by Equity or by both?

| | | | |
|---|---|---|---|
| (a) | easements | (g) | options to purchase |
| (b) | joint tenancies | (h) | restrictive covenants |
| (c) | weekly tenancies | (i) | tenancies in common |
| (d) | life interests | (j) | beneficiaries' rights |
| (e) | periodic terms | (k) | fee simple absolute |
| (f) | trustees' rights | (l) | tenure. |

17. What is settled land?

18. John wants to grant a house to his Aunt Agatha for the rest of her life, but then to his sister Sarah. What are the two ways by which he could do so? Which is the better way?

19. Romeo and Juliet and their friend Shylock have bought a freehold house in London. Romeo and Juliet die. Who can sell the house, and who will be entitled to the proceeds of sale (a) if the three of them were beneficial joint tenants, and (b) if they were Equitable tenants in common?

20. Bacchus and Venus (cohabitees) are beneficial joint tenants of a house. Bacchus provided 80% and Venus 20% of the purchase money. Who will be entitled to the proceeds of sale (a) if Venus has died, or (b) if Venus has left Bacchus and gone to live with Jupiter? *(See paragraph 15.11.1 below.)*

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Chapter 15

# RELATIONSHIP BREAKDOWN

15.1 The legislators of 1925 could not have imagined the social circumstances of the 1990s in which many relationships - marital and otherwise - break down and in which the salaries of both partners are needed to keep up the mortgage payments: and so the 1925 legislation was not designed to cope with such situations.

15.2 Therefore there have been very many cases which have had to be decided by the Courts, on these matters. (This is why there are nearly as many cases in this chapter as in the whole of the rest of this book.)

15.2.1 In some of these cases, the parties are co-owners. In others, the deeds (or the Land Registry Certificate - see Chapter 8) have just the man's name as the owner - although in some of these cases the woman provided part of the money to buy the property. And there are just a few cases in which only the woman's name appears as owner.

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*a) On Divorce*

15.3 If the two parties are currently obtaining a divorce, there is a reasonably modern statute, the Matrimonial Causes Act, 1973, by which the Court will deal with the property on the basis of who *needs* it.

15.3.1 The principle is that the children's interests are put first, and, subject to this, the Court endeavours to see that neither party is left homeless. So, if the husband has other accommodation with his new partner but the wife and children have nowhere to go (except to the Housing Aid office of the local authority, which has a duty under the Housing Act, 1985, to find them accommodation - but it might be no more than bed and breakfast) the Court may transfer the house to the wife, regardless of whether it was previously

in the husband's name alone or in their joint names, and regardless of what proportions of the purchase price (and the mortgage interest) each of them had paid. Alternatively, the Court might order the house to be sold, and might divide the proceeds of sale in proportions that gave the wife sufficient capital to buy another (cheaper) house.

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*b) On Relationship Breakdown without Divorce*

15.4 If the warring parties are not currently divorcing (and of course, they cannot divorce unless they are married) these useful provisions are not available to them, and they are thrown back onto the general Land Law which dates mainly from 1925.

15.5 Under this, there are two questions:-

15.5.1 (i) Who can sell the property?
(This is basically a question of common law.)

(ii) Who is entitled to the proceeds of the sale?
(This is basically a question of Equity.)

15.5.2 The parties may be unmarried cohabitees, or two brothers, or mother and daughter, or business partners, etc. - or they may be a husband and wife who have separated but are not divorcing *yet*. (Desertion for two years is evidence of marital breakdown giving grounds for divorce, and the wife may not be able to afford to wait two years before moving to a cheaper house.)

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*c) On Breakdown without a Divorce: who can sell?*

*house in two names*

15.6 If the parties are co-owners, there is a Trust for Sale, and if the trustees cannot agree on what to do, this means that the property should be sold.

15.6.1 Thus, if the two of them are co-owners, and the man (who has stormed out and gone to his mother's home -

or elsewhere) tells the woman, "I want the house to be sold", it legally should be sold.

15.6.2 But it cannot be sold without her signature, as she is a legal co-owner. She is one of the trustees.

15.6.3 If she refuses to sign, the court at its discretion can order the sale to go ahead (under s.30 of the Law of Property Act, 1925) but it is likely to use its discretion the other way, saying, "Although in theory, by the artificiality of the 1925 legislation, *[see paragraph 14.22 above]* this property is an investment to be sold, in reality it was bought as a *home*, and the woman and children are still using it as a home: so no order to sell it will be made".

15.6.4 So the man finds that the property (representing his life's savings, and in which he no longer lives) is unsaleable.

15.6.5 Whether he has behaved badly towards her, or whether *her* behaviour has been such that he deserves our sympathy, is treated as irrelevant.

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*house in one name*

15.7 If the house is in the man's name alone (i.e. not in co-ownership) he can sell it.

15.7.1 Nevertheless, his *wife* can stop him from doing so, by registering her "right of occupation" under the Matrimonial Homes Acts, 1967 and 1983.

15.7.2 These two Acts only apply within marriage, so cohabitees and others cannot use this provision.

15.7.3 Registration is made by filling in a form and sending it to the appropriate registry, which is the Land Registry if the property is "registered land", and is the Land Charges Registry if the property is "unregistered land" - see Chapter 8.

15.7.4 Once the wife has made such a registration the husband cannot sell the matrimonial home without her signature.

15.7.5 A husband can make such a registration if the matrimonial home is in his wife's name.

15.8 In the case of *Williams & Glyn's Bank Ltd. v. Boland [1981] AC 487*, the ownership of the fee simple of the house was registered in the husband's name alone at the Land Registry, and his wife had not made any registration under the Matrimonial Homes Acts, but she had provided part of the money to purchase the house. Some time later, the husband mortgaged the house to the Bank without telling his wife. He failed to keep up the mortgage payments, but the Court (the House of Lords, the highest Court in the land) recognised the wife as having an Equitable interest dating from before the date of the mortgage, because she had provided purchase money. Her Equitable interest held good without being entered on the Register, by virtue of s.70(1)*(g)* of the Land Registration Act, 1925 - see 8.14.2 above. So she was able to prevent the Bank (which wanted to sell the property) from evicting her.

15.8.1 This is why, since 1981, Banks and Building Societies have required all occupants to sign a form agreeing that any interests they may have shall take second place to the lender's interests.

15.8.2 Mrs. Boland's Equitable interest was as a beneficiary under a "constructive trust", in which the court assumed that the legal owner (her husband) held the property as trustee for himself and her. Her right was not in writing, so this is an exception to the general rule that Equitable interests must be in writing. Equity makes this exception for fairness. The same exception will be seen again several times, between paragraphs 15.9 and 15.17 below.

15.9 In *City of London Building Society v. Flegg [1988] AC 54* (another House of Lords case) a similar situation arose. A house was bought in the names of Mr. and Mrs. Maxwell-Brown (co-owners, on Trust for Sale) but £18,000 of the purchase price was provided by Mrs. Maxwell-Brown's parents (Mr. and Mrs. Flegg) who lived with them in the property. The Maxwell-Browns

later mortgaged the property to the Building Society without telling the Fleggs, and then failed to keep up the mortgage payments. The Fleggs tried to prevent the Building Society from selling the house, on the grounds that they were in exactly the same position as Mrs. Boland and so the Court should follow the *Boland* precedent case. But in the *Flegg* case, the mortgage money had been paid to two trustees (Mr. and Mrs. Maxwell-Brown) so the rule in paragraph 4.6.2 above (stating that if money has been paid to at least two trustees, the only remedy available to defrauded beneficiaries is to sue the trustees) was applicable. So the Fleggs lost their home, and only had the right to sue their daughter and son-in-law, both of whom had gone bankrupt.

(In *Boland* there was only one trustee - namely Mr. Boland, holding as trustee for himself and his wife - whereas in *Flegg* there were two. This is a point which an average person might regard as an irrelevant minor detail, but it made all the difference to the result of this case.)

15.10 In *Abbey National Building Society v. Cann [1991] 1 AC 56*, Mrs. Cann had financially contributed to the purchase of a flat which was registered at the Land Registry in the sole name of her son. The case arose because her son mortgaged it without telling her, and did not pay the interest. The facts were:- On the day the purchase was completed, the vendor had left the door open; and so the moving of Mrs. Cann's furniture into the flat had started half an hour before the solicitor completed the purchase. So Mrs. Cann claimed that she went into actual occupation, and became entitled to the protection of s.70(1)*(g)* of 1925 Land Registration Act (which says that the rights of purchasers in actual occupation hold good even if they have not been entered on the Register) half an hour before the mortgage was created, and that therefore her right should take priority over the lender's right, just as Mrs. Boland's did. - The House of Lords held that this was not "actual occupation" but only "steps preparatory to occupation". It also held that where a purchase and

a mortgage are completed together, you cannot slot in any rights between the purchase and the mortgage. (So you cannot say, "She was in occupation at the moment of completion of the purchase, and this is a split second *before* the completion of the mortgage".) In *Cann* the mortgage was created at the time of the purchase, whereas in *Boland* the mortgage was created many months after the completion of the purchase. So these facts did not add up to the same legal point as those in the *Boland* precedent, so 77 year old Mrs. Cann and her 82 year old husband lost their home.

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*d) On Breakdown without a Divorce: if the Family Home is sold, who is entitled to the Proceeds of the Sale?*

15.11 Beneficial joint tenants are basically regarded as having equal rights.

15.11.1 Therefore, if the parties (married or otherwise) are beneficial joint tenants, and they separate, and the man wants the house to be sold; and the woman (realising that the house will be too big for her to remain in, without the man and his salary) agrees to the sale: the proceeds of sale will be divided between them equally, irrespective of what proportions of money they each provided at the time they bought it.

15.11.2 If they had wanted the proceeds to be divided proportionately on a sale, they should have bought as tenants in common (so they would be joint tenants at law but tenants in common in Equity, as in paragraph 14.14.3) - but then they would not have the right of survivorship in the event of the death of one of them, so either of them could secretly make a will leaving his (or her) share to someone else.

15.11.3 Co-owners must (in Equity) have either joint tenancy (which gives them equality and right of survivorship) or tenancy in common (which gives them proportional rights and no right of survivorship). There is no third alternative by which they could choose to have proportional rights and a right of survivorship.

15.12 If a property is in one person's name alone, but the partner (i.e. wife, cohabitee, son, business partner or whoever it may be) made a substantial contribution to the purchase price, Equity will regard the legal owner as a trustee, holding the property on behalf of himself and the other person as tenants in common.

15.12.1 This creates a trap for purchasers, who need to insist that the legal owner must appoint a second trustee: because if the purchasers pay their money to the legal owner and he then absconds with it, the defrauded beneficiary might be able to sue the *purchasers* under the rule in paragraph 4.6.1 above. The *Boland* case (paragraph 15.8 above) shows that beneficiaries' rights can hold good in some circumstances even if they are not entered in any register from which purchasers could find out about them.

15.12.2

| *at common law* as to who can sell the land | *in Equity* as to who is entitled to the proceeds of the sale of the land |
|---|---|
| Harry in fee simple absolute in possession<br><br>(A purchaser should insist that Harry must appoint an additional trustee.) | Harry and Wendy (who both contributed money towards the purchase) |

15.13 In *Gissing v. Gissing [1971] AC 886*, there was no co-ownership: the house was in Mr. Gissing's name. Also, he had paid for it - but his wife had a job, and out of her salary she had paid for their son's school fees, some family holidays, kitchen cupboards, the laying of a lawn, etc. When, after more than 25 years, they separated and the house was sold, the House of Lords decided that she was entitled to nothing of the proceeds of sale. Though it was her *home*, it was not her *house*. She had put money into the *marriage* but she had put nothing into the *property* - except cupboards and a lawn which were too minor to be taken into account. She had done nothing beyond what *any* wife would do.

15.14 In *Pettitt v. Pettitt [1970] AC 777*, the house was in the name of the wife, who had bought it with money she had inherited. Her husband installed fitted wardrobes and made various other improvements which increased the value of the property. The House of Lords held (i.e. decided) that what he had done was merely intended to make the home more pleasant for their enjoyment, and so, when the marriage broke down and the house was sold, he was not entitled to anything from the proceeds of sale.

(But, by a later rather unclear statutory provision, s.37 of the Matrimonial Proceedings and Property Act, 1970, it seems that someone in Mr. Pettitt's position today would receive a share if his efforts were seen as "substantial contribution to the improvement of the property". This provision only applies to married couples, and engaged couples.)

15.15 In *Eves v. Eves [1975] 3 All ER 768, [1975] 1 WLR 1338*, the woman (a cohabitee, though she and the man both had the same surname) had broken up concrete with a sledgehammer. The house was in the man's name: he had told her that it could not be in their joint names because she was too young - which was untrue because she reached full age just before the completion of the purchase. The Court of Appeal held that her heavy manual labour was more than a woman would normally do, and she had done it believing the house was theirs jointly and that its registration at the Land Registry in the man's name alone was just a technicality: and so she was entitled in Equity to a return for the work she had contributed towards the improvement of the property. It awarded her one quarter of the net proceeds of sale.

15.16 In *Grant v. Edwards [1986] Ch 638*, Mrs. Grant lived with Mr. Edwards, and made periodic financial contributions without which he would have found it difficult to pay the mortgage. When they split up, Mrs. Grant claimed an interest in the house. The house was in the names of Mr. Edwards and his brother: Mrs. Grant was not included because Mr. Edwards had told her it might mean she would get

less money from her husband on her divorce. The Court of Appeal found that this was just an excuse for not including her as a legal owner, and the intention was that she was to have an interest. So the basic points are the same as those in *Eves v. Eves*, and Mrs. Grant was awarded a 50% interest in the house.

15.17 In *Lloyds Bank Plc v. Rosset [1991] 1 AC 107*, Mrs. Rosset had spent several weeks doing wallpapering and painting, and supervising builders: they transformed a semi-derelict house into a good house. The house had been bought in Mr. Rosset's name alone: he had inherited money from a relative in Switzerland, and the Swiss trustee would not send the money unless the house was to be in Mr. Rosset's name alone. Mr. Rosset mortgaged the house to Lloyds Bank - Mrs. Rosset did not know - and he failed to pay the interest. Mrs. Rosset claimed to have a right, like Janet Eves and Mrs. Grant and Mrs. Boland. - The House of Lords held that Mrs. Rosset's case was not the same as these precedent cases. Like Mrs. Boland, Mrs. Rosset was in occupation before the mortgage was made: but Mrs. Boland (and also Mrs. Grant in *Grant v. Edwards*) had made financial contributions, and Mrs. Rosset had not. She had done work, like Janet Eves, but Janet (and Mrs. Grant) had been led to believe they had an interest: Janet had been told that she had not been included as owner because she was too young, and Mrs. Grant was told that it was so as not to upset her divorce arrangements. Mrs. Rosset's position was the opposite: she knew she could *not* share the ownership because the Swiss trustee would not send the money on those terms. So she lost her case - and her home.

15.18 Contrary to popular belief, a "common-law wife" (i.e. a mistress, a cohabitee who is not legally the man's wife) has no rights over the man's house, however long they have lived together, unless she has made a substantial contribution in money (or in labour after being led to believe she has an interest in the house

- like Janet Eves) or unless the property has been transferred into their joint names.

15,18,1 This is the opposite of the rule in Social Security Law, in which they are in many respects treated in the same way as a married couple.

(A proposal for increasing the rights of cohabitees is due to be put before Parliament during 1996. Whether this Bill will be passed into an Act remains to be seen. A space is left below for the reader to write in the details of the amendments, when and if they are passed. One change which *has* been made, just as this book goes to print, is mentioned in paragraph 15,18,5 below.)

15,18,2 There is a rule of evidence, known as Estoppel, which says that if a promise was made about a property (e.g. "It belongs to us both: I bought it for both of us") and the person relying on the promise has acted to her detriment (e.g. by spending her savings on improvements to the property, or by giving up the tenancy of her flat) he who made the promise is not allowed to give evidence in court denying that he made the promise. The result is that a woman may therefore gain an interest in the property by Court Order, as this rule of evidence stops the man from saying she has no such right.) This is all rather a minefield. *Pascoe v. Turner* gives us an example of what can happen:-

15,18,3 In *Pascoe v. Turner [1979] 1 WLR 431 (Court of Appeal)* the owner moved out and told his resident girl-friend that the house was all hers. She spent £230 of her own money on repairs, and so the rule of estoppel prevented him from giving evidence to say that the house was not hers. She got the house.

15,18,4 And if the man dies intestate (i.e. without leaving a will) his mistress would not inherit his property - though their children, being his flesh and blood, would do so. But if this leaves her destitute, the court has power under the Inheritance (Provision for Family and Dependants) Act, 1975, to grant her a "reasonable provision" out of his property.

(As the amount granted has to be *taken away* from whoever would otherwise have received it, this can cause major bad feeling within the family.)

15,18,5 But - here is a recent change, made since this chapter was written - on deaths from 1st. January, 1996, onwards, the cohabitee has rights under the Law Reform (Succession) Act, 1995, if at least two years of cohabitation before the death can be proved.

15.19 With regard to the *Gissing* case in paragraph 15.13 above:-

15,19,1 If the property had been in their beneficial joint names, as the majority of matrimonial homes are today, Mrs. Gissing would have received half the proceeds of sale.

15,19,2 If her right of occupation had been registered (which would be possible today under the Matrimonial Homes Act, 1983) she could have prevented the sale until her husband offered her better arrangements.

15,19,3 If they had been divorcing, she would surely have received *something* from the court.

15,19,4 And if she had made a *substantial* contribution to the property, such as paying for the building of a large extension, she would have been recompensed for it.

15,19,5 But none of these factors applied in Mrs. Gissing's case.

15.20 The cases in this chapter are a small selection of the most important ones, from a very large number of precedent cases on the subject of family disputes.

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Chapter 16

# FIXTURES

*"I've put in new radiators and fitted carpets. Can I take them away as part of the furniture or do I have to leave them for the purchaser?"*

16.1 The parties should come to an agreement at the outset of their negotiations. Whether these items are to be taken or left does not matter, as long as both parties agree on what is to happen. But if nothing has been agreed, "fixtures" count as part of the land.

*a) What are "fixtures"?*

16.2 If there is no agreement on what is to be taken and what left (probably because the parties forgot to consider the question) two questions can be asked:-

*(i) To what extent is the thing fixed?*

16.2.1 If it is fixed - even if just nailed to the wall - it is a "fixture" and therefore part of the land unless the person wishing to take it away shows that it is not so. (See 16.2.3 below.)

16.2.2 If it is not fixed but stands by its own weight, it can be taken away with the rest of the furniture unless the person claiming that it should be left can show that it is part of the land - as happened in *d'Eynecourt v. Gregory (1866) LR 3 Eq 382* in which a pair of sculptured marble lions, some sculptured marble vases and sixteen marble-slab garden seats, all standing by their own weight but all forming part of the architectural design, had to be left.

*(ii) If it is fixed, is the purpose of this to make the property a better property or the thing a better thing?*

16.2.3 Consider two oblong objects, each fixed to the wall with six screws. One of them is a door, the other is

a full-length oil-painting of Grandma. The one is fixed to make the building a better, warmer, building: it is part of the land. The other is fixed so that it can be seen better as a portrait: it is part of the furniture. In *Leigh v. Taylor [1902] AC 157*, it was held by the House of Lords that a tapestry, which had been nailed to the wall so that it could be better admired as a tapestry, could be taken away and did not pass with the land.

16.2.4 A bookcase might amount to part of the structure of the building (and therefore a "fixture") or a free-standing piece of furniture, or a top-heavy piece of furniture screwed to the wall to give it stability (and therefore not a "fixture"). A carpet may lie by its own weight, or may be tacked down to prevent it from rucking or sliding - i.e. to make it a more efficient carpet - or it may be glued to the floor, as carpets in modern office blocks often are; in which case, if it cannot be removed without serious damage either to itself or to the land, it will normally count as a fixture.

*b) Tenants' Fixtures*

16.3 Certain items fitted by a leasehold tenant during his tenancy can be removed by him when the tenancy ends. Stoves, window-blinds, and similar items which can be removed in one piece (known as "ornamental and domestic fixtures") and machinery of the tenant's trade ("trade fixtures") such as petrol pumps at a garage, can be removed. So can "agricultural fixtures", on certain conditions laid down in the Agricultural Holdings Act, 1986.

16.4 These rights are only for outgoing tenants: they are not available to persons selling or mortgaging land.

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TEST QUESTION

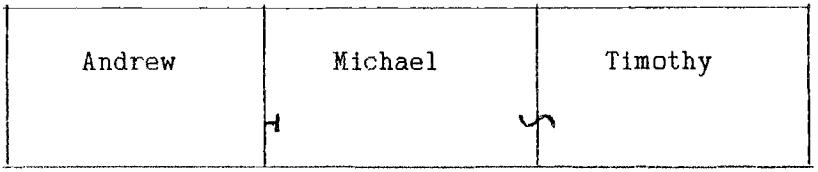
21. Can (a) a seller, or (b) a tenant, or (c) a borrower who is being evicted by his Building Society, unscrew radiators which he has fitted, and remove them?

Chapter 17

# BOUNDARIES

*walls, hedges, fences, ditches - or just a line on a plan*

17.1 Ownership of boundaries can sometimes be seen from a plan.




17.1.1 On the fence between Andrew's and Michael's properties on this diagram, the "T" mark on Michael's side of the fence indicates that this fence is Michael's responsibility.

17.1.2 The "S" mark on the fence between Michael's and Timothy's plots denotes a "party fence" belonging to Michael and Timothy jointly.

17.2 Plans are not always to be trusted. As to the fence between Andrew's and Michael's properties, the truth may be that Michael has let the fence fall down and has ignored all Andrew's requests for it to be repaired (and he has been so rude as to point out that even if there is a covenant that he should repair the fence, this covenant will probably be unenforceable for the reason which we shall see in paragraph 20.21 below) and so Andrew, in despair, has erected a fence of his own. So the present situation is that the fence between the two properties is Andrew's - which is the exact opposite of what the plan shows.

17.3 As to the fence between Michael's and Timothy's lands: as this fence belongs to them jointly, this is co-ownership - which would require a Trust for Sale

with at least two trustees if the law did not make a special provision saying that for boundaries this is unnecessary.

17,3,1 To avoid the trouble of having to appoint trustees for every party wall, hedge, fence and ditch throughout England and Wales, the law treats the party boundary as "severed vertically" - i.e. split down the middle. Michael's side of the fence belongs to him, normally subject to an easement that it will support Timothy's side, and *vice versa*.

17,3,2 The same rule would normally apply to the dividing wall between a pair of semi-detached houses, and the dividing walls between terraced houses, etc.

17,3,3 With flats, the most usual arrangement is that the ceiling belongs to the flat, but the timbers to which the ceiling is nailed (which are the joists supporting the floor of the flat above) belong to the flat above.

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*Answers to questions 15-20*

15. The two legal estates are fee simple absolute in possession and term of years absolute. (These are the only two ways of owning the right to land.)
The five legal interests (legal rights over someone else's land) are "METRE" - mortgages, easements, tithe, rentcharges and entry rights.
All other Land Law rights over land are Equitable interests. They include; Equitable easement, life interest, entailed interest, conditional fee simple, future fee simple, all beneficiaries' rights, restrictive covenants, Equitable mortgage, option to purchase, and many others. Any three of these are a correct answer to this question.

16. (a) (b) (c) (e) and (k) are recognised both at common law and in Equity;
(d) (g) (h) (i) and (j) are purely matters of Equity;
(f) and (l) are matters which common law deals with.

17. Settled land is any land held in succession - for example "to X for life and then to Y in fee simple".

18. The problem here is that John wants to grant a *present life interest* and a *future fee simple;* but the common law requires that someone must have the *present* fee simple. So a grant "to Agatha for life and then to Sarah" will *not* give a legal life estate or a legal future fee simple, because such estates do not exist since 1925. John has two choices:-

(i) A grant "to Agatha for life and then to Sarah" creates settled land, because they are in succession one after another. By the Settled Land Act, 1925, this gives Agatha the legal fee simple absolute in possession, and she could sell the house; but if she does so, the purchaser must pay the purchase-money to two Settled Land Act trustees who will invest it for the benefit of Agatha for her life and will then hand the money over to Sarah. *Equity* recognises Agatha as having a life interest and Sarah as having a future fee simple.

(ii) A better way is to appoint trustees to hold the house on Trust for Sale under the Law of Property Act, 1925. (If it is stated to be on trust for sale, it is not settled land and the Settled Land Act will not apply to it.) So a grant "to Bill and Ben in fee simple, on trust to sell, with power to postpone sale, and to hold the net proceeds of sale (and net income if any before sale) in trust for Agatha for life and then for Sarah in fee simple" is needed. Bill and Ben have the legal fee simple, and can sell the house - but they do not *have* to sell, because they have power to postpone sale indefinitely; and *Equity* recognises Agatha as having a life interest and Sarah as having a future fee simple in the benefit - the benefit being the right to live in the house or to receive rent from a tenant until the house is sold, and then to benefit from the proceeds of the sale.

19.(a) Shylock can sell. No second trustee is needed because Shylock alone is entitled to all the money, by right of survivorship.

(b) Shylock is the sole surviving trustee so he needs to appoint a second one. The two trustees can then sell. The money goes to Romeo's heirs, Juliet's heirs, and Shylock.

20.(a) Bacchus, by right of survivorship.

(b) Bacchus and Venus take 50% each; beneficial joint tenants' rights are equal.

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# Part 3

## Rights over other people's Land

*(The two main types are easements and covenants.)*

## Chapter 18

## EASEMENTS

*rights for drainage pipes, electricity cables and other services*

### *a) Characteristics of easements*

18.1 Easements are rights to do something (e.g. to walk, or to receive light, or to run drainage through a pipe) across someone else's land.

18.2 Easements have four essential characteristics:-

18,2,1 (1) They concern two pieces of *land*. The piece which has the benefit of the easement is called the *dominant tenement*, and the piece subject to the easement is the *servient tenement*.

("Tenement" merely means land; it comes from the same root-word as tenure.)

18,2,2 (2) The right must *benefit* the dominant tenement: it must make the property more valuable, or more convenient or more desirable. An easement must benefit land and not just a person.

(For example; easements of drainage benefit the dominant land; proper drainage makes a house a more valuable and more marketable property. But if a farmer allows me to walk across his land to get from the bus terminus to the beach, this is convenient for *me* but it is nothing to do with my land and therefore cannot be an easement, although, if I paid for the right, I can enforce it by Law of Contract. But the contractual right is only a person-to-person right

between me and the farmer, whereas an easement made in fee simple absolute in possession lasts for ever.)

18.2.3 (3) The dominant and servient tenements must be in two different ownerships (or in one ownership but occupied by different occupiers - e.g. two tenants).

18.2.4 (4) An easement must be the type of right which is *capable* of being granted, though this particular one may have arisen in some other way. There must have been someone capable of making the grant, and someone capable of receiving it. (See 18.9.1 for an example in which there was no-one capable of making the grant.) The right claimed must not be too vague, and must be in the general nature of rights recognised as easements.

(So this includes a right of air to a ventilator, but not a right of air to a windmill on a hill because this is too vague as the wind might blow from any direction. It includes rights for electricity wires, and a grant of a right to lay wires for a computer network would probably be regarded as being of the same general nature.)

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### *b) Easements and public rights compared*

18.3 Easements are for use by the owner or owners of the dominant land (and their tenants and their visitors) but not for the general public.

18.3.1 Public rights - such as public rights of way and highways, and mains services - are not easements but come under various statutes, such as the Highways Act, 1980, the Electricity Acts, 1947 - 1989 (by which mains electricity cables can be laid across someone's property without permission, after notice has been given - for it would not be right that a village could be deprived of electricity just because a neighbouring landowner refused to allow cables to be laid across his or her land) and the Gas Acts 1965 - 1986, the Water Acts 1945 - 1989, **and others.**

18.3.2 The individual pipes or wires from the mains into the premises are not part of the mains. These need easements if they cross someone else's property.

18,3,3 If a landowner permits the general public to cross his or her land, even for a couple of years, a public right of way may arise. This is why landowners erect a sign, "This way is not dedicated to the public", or close it off for one day each year.

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*c) How do easements come into existence?*

18.4 Easements are usually expressly created, in the ways described under heading *d)* of this chapter; but in some cases they are implied or can arise in certain other ways as shown under heading *e)* of this chapter.

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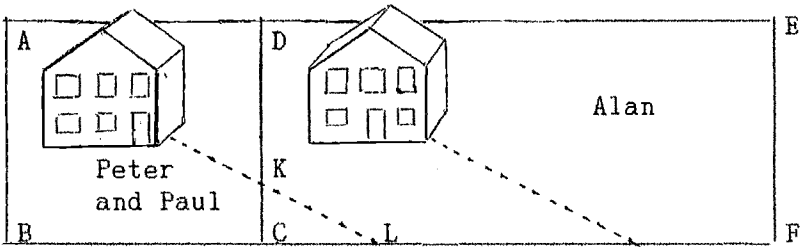
*d) express grants and express reservations*




18.5 Peter and Paul, as beneficial joint tenants, own the plot ABCD in the diagram above, in fee simple absolute in possession. Alan owns the neighbouring plot CDEF, also in fee simple absolute in possession. - Peter and Paul ask Alan for permission to lay, from their house, a drainage pipe running downhill across Alan's land from K to L. In return for a suitable payment, Alan grants them permission, in writing. This is an *express grant* of an easement.

18,5,1 If this grant is made in fee simple absolute in possession, or for a term of years absolute, *and* is contained in a formal legal document (namely a deed) this is recognised by the common law: it is a *legal easement*. (See paragraphs 8.4.3 and 8.19.1 as to registering this grant at the Land Registry.)

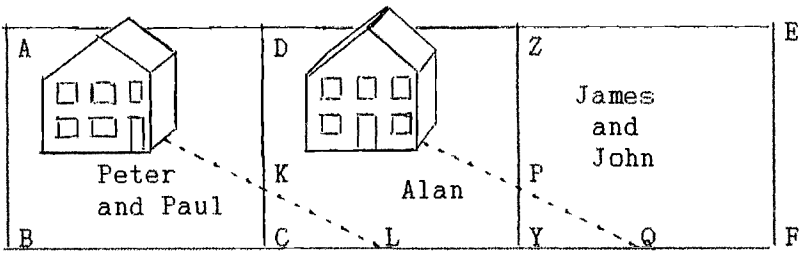
18,5,2 If the grant is for some other period (e.g. for someone's life) or if it is made in some informal way (such as by writing Peter and Paul a letter - so there is writing, and a payment, but there is not a legal deed) common law will not recognise it: but for the sake of fairness Equity will do so: it is therefore an *Equitable easement*, as mentioned in 4.10 above. (See 8.12 - 8.13.1 and 8.19.1 - 8.19.2 for the registration requirements for this type of easement.)

(If made since 26th. September, 1989, the informal writing described in 18,5,2 needs to be signed by *both* parties, Alan *and also* Peter and Paul. This is laid down in s.2 of the Law of Property (Miscellaneous Provisions) Act, 1989.)

18,5,3

| *at common law* requirements of an easement | *in Equity* requirements of an easement |
|---|---|
| It is created by deed, either in fee simple absolute in possession or for a term of years absolute. If the right is across registered land, the deed should be registered at the Land Registry. *See also Prescription, in Chapter 19.* | It usually needs to be in writing and paid for. All Equitable easements created since 1925 are subject to rules as to registration. If they cross registered land they should be entered at the Land Registry; and if they cross unregistered land they must be registered at Land Charges Registry. |

18.6 Alan, the owner of the large plot CDEF in the diagram on page 91, is dividing it into two as shown below, and is selling the part EFYZ to James and John in fee



simple absolute in possession - but (as the second diagram shows) Alan's own drain runs under the land he is selling, so he must reserve the right to continue using this drain.

18.6.1 He therefore sells to James and John "All that plot of land marked EFYZ on the plan Except and Reserving an easement of drainage between the points P and Q". This is an *express reservation* of an easement. (The registration requirements are as in 18.5.3 above.)

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18.7 In a block of flats, every flat needs easements of way to use the staircases and the lifts, and further easements for all the service pipes and wires to come up from ground level to the individual flat.

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*e) other ways that easements come into existence*

18.8 *(i) by implied grant:-*

18.8.1 An example of an implied grant of an easement is where X has a piece of land which is completely surrounded by other land as when a farmer sells X a field, right in the middle of the farm, with no access to any public road or footpath. If no right of way was expressly granted, a right is implied, because otherwise X could not use the land at all.

18.8.2 In *Wong v. Beaumont [1965] 1QB 173*, in which a basement property had been sold for use as a restaurant, an implied grant of an easement to put a ventilator-pipe through the vendor's adjoining property was recognised, because without it, the basement could not be used *as a restaurant* at all.

18.8.3 If the owner of a piece of land sells part of it and keeps the rest, then by the rule in *Wheeldon v. Burrows (1879) 12 Ch D 31 (Court of Appeal)* the purchaser receives certain easements by implied grant. This rule says that for the benefit of a purchaser, quasi-easements (i.e. matters which would have been easements if the land sold and the land retained had been in separate ownerships) shall grow

into easements if they are continuous and apparent, necessary to the reasonable enjoyment of the land purchased, and have been used for its benefit up to the date of the purchase.

18,8,4 We will take as our example Alan's drain in the above diagrams: but we need to be very careful to get our example the right way round. If Alan sells the *house*, CDZY, and keeps the plot EFYZ, the rule in *Wheeldon v. Burrows* applies, for the benefit of the purchaser who will need to use the drain. The purchaser will receive an easement by implied grant.

("Necessary" in this context does not mean "essential". It would include the drain P-Q, even though it would be possible to do without this drain by installing a septic tank. So the degree of necessity looked for is more lenient here than it is for "easements of necessity" such as those in 18,8,1 and 18,8,2 above.)

18,8,5 But the rule does not apply the other way round. If Alan sells the *garden* EFYZ and keeps the *house* CDZY, he must expressly reserve a new easement of drainage through P-Q - as in 18.6.1 above. He is expected to know (or to find out) where his own services run, and if he does not expressly reserve this easement, the assumption is that he does not want it.

18.9 *(ii) by implied reservation:-*

18,9,1 If the farmer in 18.8.1 had sold his farm and had kept one land-locked field in the middle, and had forgotten to make an express reservation of an easement of access to it, an easement of way by implied reservation would be recognised because he could not otherwise reach the land at all. But the courts are much less willing to recognise implied reservations than implied grants.

18,9,2 Another example of implied easements is that with a pair of semi-detached houses there will be mutually-implied easements that the two houses will continue to hold each other up: if the owner of one of them demolishes his building, he has a duty to ensure that adequate support is provided, to keep the

neighbour's house structurally safe. (These are by implied grant or implied reservation, depending on the circumstances: the courts will recognise both.)

18.10 *(iii) by Statute:-*

18.10.1 Easements may be imposed by Act of Parliament. For example, an Act under which a new motorway is to be built may include an easement of support by which the adjacent land is bound to give lateral (sideways) support to a motorway embankment.

18.11 *(iv) by Prescription*

18.11.1 These are described in Chapter 19.

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### *f) Easements and Profits à Prendre compared*

18.12 Profits à prendre (from the French: prendre, to take) are rights of taking something from the servient tenement. Examples include hunting rights (e.g. to take pheasants, or to fish) and grazing rights (to allow a person's animals to take and eat the grass).

(Do not be confused by the name. This has nothing at all to do with making a financial profit.)

18.13 Profits à prendre may be appurtenant, in gross, appendant or *pur cause de vicinage*.

18.13.1 *Profits appurtenant* are like easements except that they involve taking something instead of merely doing something. The requirements set out in 18.2.1 - 18.2.4 and the methods of creation described in 18.3 - 18.10 apply to profits à prendre appurtenant in the same way as they do to easements, *except* that the rule in *Wheeldon v. Burrows* does not apply to profits, and on registered land all profits à prendre are overriding interests so they hold good without any registration.

18.13.2 *Profits in gross.* Profits, unlike easements, can be for the benefit of an individual. Such profits, for which there is no dominant tenement because they are not for the benefit of any land, are profits in gross.

For example, a farmer may sell the shooting rights over his farm, in fee simple absolute in possession, to a City business executive. Such a right would pass to the executive's heirs after his death; but it is more common for shooting and fishing rights to be granted by way of licence or by contract, either of which would be personal to the executive alone.

18,13,3 *Profits appendant* are a relic of the middle ages: they are a right for villagers to put horses, oxen, cows and sheep onto the village common. *Profits pur cause de vicinage* (meaning, "because of adjacency") may still be found in mountain and moorland areas: they are rights for these animals to wander over the unfenced parish boundary from one common to another.

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*g) Easements and Licences compared*

18.14 Licences, unlike easements, are purely personal. They do not "run with the land": they cease if either party dies or if the land is sold.

(An exception to this rule will be seen in 18,16,3 below.)

18.15 A licence is a permission to do something which would otherwise be a trespass.

18.16 Licences include bare licences, contractual licences, and licences by estoppel.

18,16,1 *A bare licence* can be completely informal and is likely to be oral. "Yes, you *can* go into my garden to get your ball back." "Yes, you *can* walk across my field as a short cut to the fish-and-chip shop." Such licences can be revoked (cancelled) at any time.

18,16,2 *A contractual licence* is granted in return for some consideration. For example: "You can fish in my river for £50 per year." Such licences can be brought to an end in accordance with the terms of the contract.

18,16,3 *A licence by estoppel* might arise in the following way. If X says to Y (possibly in return for some service, or for some payment) "You can drive your car

across my land to reach the rear of your property", that agreement is unenforceable, because it should have been in writing signed by both parties. (See note to paragraph 4.10 above.) But if, in reliance on what X has said, Y spends money on building a garage to which his car can gain no access except by crossing X's land, and X knows this, X is not allowed afterwards say in evidence in court, "You cannot drive your car across my land". X is estopped from denying what he originally said, now that Y has acted to his detriment in relying on what was said. - And if X sold his land to Z who knew these circumstances, this prohibition would also apply to Z (or at least, it would on unregistered land: on registered land the position is less clear) and so the licence by estoppel for Y to drive across the land in such a case can be enforced permanently.

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*h) Summary*

18.17 Easements have four essential characteristics:

(i) there must be two pieces of land - a dominant and a servient tenement, as in 18.2.1,
(ii) the right benefits the dominant tenement, as in 18.2.2,
(iii) different owners (or occupiers) as in 18.2.3,
(iv) must be a type of right which is *capable* of being made by an express grant (such as a right of way) as in 18.2.4, though this particular one need not necessarily have been made that way.

18.18 Easements come into existence in six main ways:

(i) by express grant, as in 18.4,
(ii) by express reservation, as in 18.5 and 18.5.1,
(iii) by implied grant, as with the grant of a "way of necessity" in 18.7.1,
(iv) by implied reservation, as with the reservation of a "way of necessity" in 18.9.1, [check nos.]
(v) by Prescription (on which there is a lot still to say - see next chapter) and
(vi) by Statute - 18.10.1 shows an example of this.

*i) Summary of Registration Requirements for Easements*

18.19 *(i) as to easements running over registered land*

18.19.1 *All* easements (except those by prescription, which are overriding interests) should be protected by being put onto the Charges Register at the Land Registry: but by *Celsteel Ltd. v. Alton House Holdings Ltd. [1985] 1 WLR 205*, it appears that in many cases easements which have not been put onto the Register will be protected as overriding interests.

18.20 *(ii) as to easements running over unregistered land*

18.20.1 *Legal* easements (by deed, or implied, or by prescription) cannot be registered. They hold good without registration.

18.20.2 *Equitable* easements created before 1st. January, 1926, cannot be registered. They hold good without registration, *except* that they may be stopped (even after all these years) if a purchaser of the land they run across proves that when in all good faith he bought that land, he *did not know* of the easements, and also there was no reason why he *ought* to have known of them.

18.20.3 All *Equitable* easements created since 31st. December, 1925, must be registered at the Land Charges Registry. Otherwise any purchaser of the servient tenement can stop the use of them, whether he was aware of their existence when he bought or not.

(The *reason* for registration is so that the thing is known - so that purchasers of the servient tenement are not caught out by incumbrances which they did not expect.)

18.21 *(iii) local searches*

Easements are nothing to do with the local Council, and therefore will *not* appear on Local Searches made at the Local Land Charges Registries.

Compare this page and page 42. 18.19.1 corresponds with the last three lines of 8.19.1, 18.20.3 corresponds with 8.19.2, and 18.21 corresponds with 8.19.3.

Chapter 19

# Easements continued:-

# EASEMENTS BY PRESCRIPTION

19.1 Prescription is a solution to one of life's great mysteries.

19,1,1 For example:- You are digging foundations for your new extension - and you come upon your neighbour's water pipe. You did not know it was there. Nor did your neighbour. There appears to be no written easement for it - and yet it is an old-fashioned pipe which has obviously been there for very many years.

19,1,2 The probable explanation of this situation is that when the pipe was laid, the builder (now long since dead) forgot to mention it to his solicitor (who is also long dead) and so no easement was drawn up. Or maybe there *was* a deed, but over the years that deed has been lost. We shall never know.

19.2 To resolve this dilemma, common law will recognise the existence of an easement if the alleged right has been used *nec vi, nec clam, nec precario* (meaning "neither by force, nor in secret, nor by permission") for more than twenty years.

19,2,1 An alleged right used by force (e.g. by threatening the owner of the land crossed, so that he is afraid to object) will not give a right to an easement by prescription.

19,2,2 Nor will an alleged right used in secret, as in *Liverpool Corporation v. Coghill [1918] 1 Ch 307*, in which factory waste-fluid had been secretly discharged into a sewer for more than twenty years.

19,2,3 And nor will an alleged right used by permission: because, if there is permission, the owner of the land can withdraw the permission if it is not in writing, and can thus stop what is being done. (If the

permission is in writing, it is an Express Grant, and not to do with prescription at all - though whether what was expressly granted is an easement, or merely a licence that can be revoked, depends on such questions as what was the wording of the document, and whether any payment was made. And the expressly granted easement needs to have been registered as shown in 18.19 and 18.20 above.) (As to licences, see 18.14 above.)

19.3 The right claimed, used "neither by force, nor in secret, nor by permission", must have been used reasonably frequently - so a claim in respect of an old long-disused water-pipe which the claimant wants to start using again is likely to fail.

19.4 The right claimed must have been used against a fee simple owner-occupier. Prescriptive rights do not arise against land occupied by a leaseholder. (But as long as the use *began* against an owner-occupier, the claim is not damaged if the servient land is let to a tenant at a later date.)

19.5 If the alleged right satisfies all these conditions and has been used without hindrance or objection for longer than about 20 years, it is likely to be recognised by common law as a legal easement under one (or more) of the three types of prescription.

19.6 The three types are known as

19.6.1 common law prescription

19.6.2 prescription by "lost modern grant", and

19.6.3 prescription under the Prescription Act, 1832;

19.6.4 but all three types are matters of common law and not Equity,

19.6.5 and all three types hold good without any registration at the Land Registry, the Land Charges Registry, or any other registry.

19,6,6

| *at common law* | *in Equity* |
|---|---|
| There are 3 types of Prescription, known as common law prescription, prescription by lost modern grant, and prescription under the Prescription Act, 1832. | There is no Equity applicable to this chapter (except that the equitable remedy of an injunction may be awarded). |

19.7 All three types are in need of reform.

*common law prescription*

19.8 The oldest of the three types is *common law prescription*, by which, if the right being claimed was already being exercised before the beginnings of legal memory (i.e. the year 1189 - anything before then is classified as "time immemorial") the Court will allow it to continue.

19,8,1 It does not take much imagination to see that in most cases, proving that something was already happening before 1189 will be impossible.

19,8,2 The Court therefore accepts a compromise. If there is proof that the right claimed has been exercised "neither by force nor in secrecy nor by permission" for more than about 20 years, it will assume that this began before 1189 unless the contrary is proved.

(Therefore a right claimed over a path which has been used for a couple of centuries or more will not become an easement by common law prescription if it is shown that at the time of Oliver Cromwell - about 1650 - the land over which the path runs was under the village pond; or if it is shown that prior to the Wars of the Roses the lands which are the present alleged dominant and servient tenements both belonged to the same baron, and so, at that time - about 1480 - the condition in 18,2,3 was not fulfilled.)

*lost modern grant*

19.9 Because of the shortcomings of common law prescription, the courts developed the doctrine of prescription by "lost modern grant". This doctrine says that if the right claimed has been exercised *nec vi, nec clam, nec precario* for more than about 20 years, but does not go back to 1189, the court will assume that a legal grant of the alleged right must have been made by a deed which has subsequently been lost.

19.9.1 This, too, has its difficulties. In the eighteenth and nineteenth centuries when such cases were heard in front of a jury, one of the difficulties was to persuade the jurors that the law required them to assume that there had been a deed, which was now lost, even if in their own minds they did not think there had ever been a deed. Another difficulty was that if there *could not* legally have been a deed, the claim would fail.

(For instance, if it were shown that the alleged right had been used ever since 1870, the assumption would be that there had been a deed of grant, creating the right by way of express grant - but not if at the crucial time the land had been held in the way set out in 11.3.1 - 11.3.4 above. The land in that example was settled land, and neither the land nor any easement over it in fee simple could be sold before 1882 - see 11.6 - because the signature of a person who had then not yet been born was required. So the requirement set out in 18.2.4 above, that there must be someone capable of making the grant, was not fulfilled. So the claim that there was a "lost modern grant" must fail in this case.)

*Prescription Act, 1832*

19.10 Because of the shortcomings of both the above methods of prescription, the Prescription Act, 1832, was passed. Unfortunately the Act is badly drafted, and as it did not abolish the two older methods the result is that there are now three unsatisfactory methods of prescription instead of two. In practice

it is best to claim under all three types, as will be seen in 19.12 - 19.12.2 below.

19.10.1 The length of time which must be proved under the 1832 Act is:-

| | *for easements* | *for profits à prendre* |
|---|---|---|
| for an alleged right which has been used neither by force nor in secret nor by permission | 20 years | 30 years |
| for an alleged right which has been used neither by force nor in secret nor by written permission (but there was permission given by word of mouth) | 40 years | 60 years |

19.10.2 In each case, it must be the period immediately before the claim, because the claim must be made - by issuing a writ - within 12 months from the date that the alleged right is interrupted.

19.10.3 The Act does not give a prescriptive right: all it gives is the right to obtain a prescriptive right by Court Order, by taking court proceedings within 12 months after the enjoyment of the alleged right is interrupted.

19.10.4 The Act gives nothing at all until there is an interruption or a blockage of the alleged right.

19.10.5 If, although no court action was taken, the blockage is removed within less than a year, it can be ignored for the purposes of the 1832 Act.

19.10.6 The courts have recognised 19 years and 1 day as sufficient to satisfy the 20 year period (because you can wait 364 days before starting your court action, and by that time 20 years will have passed).

19.10.7 These constraints do not apply to claims to prescription at common law or by lost modern grant.

19.10.8 There is a special provision in the 1832 Act for rights of light: they need only 20 years (i.e. 19

years and 1 day!) of enjoyment to gain a prescriptive right, even if their enjoyment has *not* been "neither by force nor in secret nor by permission". At any time before this period is up, a notice can be served under the Rights of Light Act, 1959, to prevent the right of light from arising.

19.11 If there was permission in writing, prescription does not apply. If the writing was not in a deed, it may amount to a grant of an Equitable easement, which should have been registered - see 18.4.3 and 18.10 - or (depending on the wording of the document) it may be a licence which *may* be enforceable under the Law of Contract. If the writing was in a deed, it will in most cases be a legal easement: see 18.5.3, 18.19.1 and 18.20.1 again for the registration requirements for such easements.

19.12 In *Tehidy Minerals Ltd. v. Norman and others [1971] 2 QB 528*, a group of farmers who were running five farms as one co-operative unit had put their sheep out to graze on the Tehidy Mineral Company's land. So had their predecessors: sheep from all five farms were grazing there from 1920 to 1941, and from one of the farms, sheep were there in 1896. But not before that. From 1941 to 1954 the land was requisitioned and ploughed up under War Emergency regulations; but from 1954 to 1966 the sheep were put there again, by a written permission given in 1954, headed with the word "Licence". In 1966 the Mineral Company tried to terminate this licence because it wished to sell the land to a developer: and the farmers claimed to have rights by all three types of prescription.

19.12.1 Where all three types are claimed, the Court will consider them in the order (i) 1832 Act, (ii) common law prescription, (iii) lost modern grant.

19.12.2 The decision in the *Tehidy Minerals* case (by the Court of Appeal) was:-

(i) *If* the farmers already had a right by prescription in 1954, the licence should never have been given.

(ii) The farmers' claim under the 1832 Act failed. Their claim was that they had exercised grazing rights (profits à prendre) without permission: for this the Act requires evidence of enjoyment for the *last* 30 years with no interruption exceeding 12 months: and because of the wartime interruption this could not be shown.

(iii) The farmers' claim to common law prescription also failed, because it did not date back to 1189: there was proof that it had not been used before 1896.

(iv) The farmers' claim under "lost modern grant" succeeded. They could show 20 years' enjoyment (1920-1940) with no interruption at all: and so the court must assume that prior to 1920 there had been a deed of grant, which had been lost. - But as this case was concerned with five farms, the law required the Judges to assume that there had been five separate deeds of grant, which by strange coincidence had all been lost without trace! (The three Judges made a written report on how ridiculous this law is!)

(v) Therefore the farmers already had a right by prescription before 1954; and therefore the "licence" given in 1954 should never have been drawn up, and could be ignored. So they were entitled to continue to put their sheep onto the land permanently.

> (Consider the practical implications of that case. For the developer, four years' delay from his proposed purchase of the land in 1966 until the court decision in 1970. And the land could not be developed at all unless the farmers could be persuaded voluntarily to give up their grazing rights in return for compensation - consider the effect of that on the valuation of the land.)

19.13 Easements by prescription can only be used in the way they have been used in the past: so twenty years use on foot or with a bicycle will not give a prescriptive right to use it with motor cars. (But twenty years use with horse-drawn wagons can be enough to give a right for motor vehicles.)

19,13,1 For expressly-created rights, the opposite is the case: unless there is a limit imposed by the express wording (e.g. "a right of way *on foot only*") the person with the benefit of the right may use it without restriction, as long as it is not used so much that other people with a right are prevented from using it, as in *Jelbert v. Davis [1968] 1 WLR 589 (Court of Appeal)* in which a driveway three metres wide was used every weekend by 200 caravans.

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TEST QUESTIONS

22.(a) State the requirements of (i) common law prescription
(ii) prescription by lost modern grant, and
(iii) prescription under the 1832 Prescription Act.

(b) What is the position if written permission to use the right was granted?

(c) To what extent is it true that the combined working of the three types of prescription gives a system which is both convenient and fair?

23.(a) Tom, Dick and Harry have used a private path across Fred's freehold field for the last 35 years. Tom says he had oral permission, Dick has written permission for which he paid £5, and there is no evidence that Harry ever had any permission at all. Advise Fred, with reasons, whether he can stop Tom, Dick and Harry from using the path.

(b) If you have the right answer, it will strike you that the law on this topic is odd. Explain in what way it appears odd.

24. You are standing in a freehold field with a developer who intends to purchase the field, on which he has planning permission for the erection of Phase 2 of his housing and commercial development, and you are butted from behind by a sheep. The developer tells

you, "There are a couple of hundred sheep here. Apparently the farmers round here lost a lot of money at the time of the stock market crash in 1929, so the owner of this land at that time told them they could put their sheep on here free of charge, and they have been doing it ever since - except that in those dry years of 1991 and 1992 they didn't put them here because the grass didn't grow. For those two years they put the sheep on the lower pasture - the field where I built Phase 1 of my development last year. But then in late 1992 the farmers brought piped water up here and installed an irrigation system and drinking troughs and a sheep-dipping pool. They spent a lot of money - but there's nothing in writing to say they can use the land, and I've told the vendor to get rid of them."

(a) Advise the developer of the legal position as to the sheep.

(b) Consider the implications of this answer for members of the particular profession for which you are studying.

25. What are (a) an express grant, (b) an implied grant, and (c) an express reservation, of an easement?

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*answer to question 21*

21.(a) The seller cannot remove the radiators he has fitted, unless it is expressly stated in the contract of sale that he can do so.

(b) The tenant has no right to remove the central heating system, nor to leave it damaged; but he might be entitled to unscrew these new radiators and take them away as long as he puts the old ones back and leaves the system in working order. In *Jenkins v. Gething (1862) 2 J&H 520, 70 ER 1165*, a tenant was permitted to remove heating pipes, but not the heating boiler.

(c) The rule for a borrower is the same as the rule for a seller. He cannot take away the radiators he has fitted.

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***answer to question 22***

22.(a) (i) The alleged right must have been used *nec vi, nec clam, nec precario* reasonably frequently over owner-occupied land since 1189. If it has been used in this way for more than about twenty years, the court will assume it has been used ever since 1189 unless there is evidence showing that it is not so.

(ii) The alleged right must have been used *nec vi, nec clam, nec precario* reasonably frequently over owner-occupied land for more than about twenty years. The court will assume that there must once have been an express grant of the right, by a deed which has since been lost.

(iii) The alleged right must have been used *nec vi, nec clam* reasonably frequently (and with no interruptions enduring longer than a year) over owner-occupied land, for twenty years (for an alleged easement) or thirty years (for an alleged profit) if the alleged right has been used *nec precario,* or forty years (easement) or sixty years (profit) if the use of it originally began by word-of-mouth permission. This claim must be made by commencing court action within one year after an interruption of the alleged right. Easements of light are a special case for which only twenty years need ever be shown.

(b) If there is written permission, none of the three types of prescription will apply, but if the writing is in a deed or in return for consideration, and the registration requirements have been complied with, and the wording of the writing shows that it is not merely a licence, the right will usually be enforceable as a legal or an equitable easement made by express grant (or express reservation).

(c) The three types of prescription together make a system which is not convenient and can easily result in unfairness - but until Parliament changes it, this is the law and we have no choice but to work within these unsatisfactory rules.

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Chapter 20

# COVENANTS

*controlling the unneighbourly neighbour*

## *a) definition*

20.1 A covenant is a promise contained in a deed.

20,1,1 A covenant need not be to do with land: but all the covenants in this chapter are to do with land, or (as lawyers say) they are covenants which "touch and concern" land.

## *b) the two types of covenant*

20.2 Covenants are of two types, restrictive and positive.

20.3 A restrictive covenant is a promise *not* to do something:-

20,3,1 e.g. not to carry on any trade or business on the property, not to keep chickens on the property, not to play musical instruments on the property after 10.30 p.m. or before 7.30 a.m. - Restrictive covenants are always *restrictions*. Nothing in the nature of any positive action has to be done.

20.4 A positive covenant is a promise to *do* something:-

20,4,1 e.g. to insure against fire, to keep the fences in repair, or not to let the fences fall down (which is just another way of saying, to keep the fences in repair) and to weed the garden (or, not to let weeds grow in the garden) - all these require some positive *action* to be taken.

## *c) the reason for covenants*

20.5 Covenants are often imposed by builders on freehold as well as on leasehold developments, to help to maintain the quality of the neighbourhood.

*d) registration of covenants*

20.6 Restrictive covenants created since 1925 in respect of freehold land should be registered - at the Land Registry if the land affected by them is registered land, and at the Land Charges Registry if the land is unregistered land. (See 8.19.1 and 8.19.2 above.)

(Note that this does not apply to positive covenants, nor to any covenants in leases.)

20.6.1 If a covenant which requires registration has not been registered, any purchaser of the land affected by the covenant may ignore the covenant.

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*e) Can the covenant be enforced?*

20.7 Subject to what is said in paragraph 20.6.1 above, there are three rules:-

20.7.1 Rule 1: If *there was a contract* between the person who wants to enforce the covenant and the person he wants to enforce it against, the covenant can be enforced. This relationship between two parties to a contract is called Privity of Contract. The rule is: If there is privity of contract, the covenant can be enforced. (Enforcement will be by injunction, if necessary.)

(For example, in paragraph 18.6 above, Alan sold part of his land to James and John, and expressly reserved an *easement* of drainage. Suppose Alan had also imposed a *covenant* that no chickens should be kept on the property, but James and John *are* now keeping chickens there. Alan can bring a case against James and John, *because there was a contract*, for the sale and purchase of the land, between Alan and James and John. That's privity of contract. Alan is suing James and John for breach of contract - so, strictly speaking, this is part of the Law of Contract and not part of Land Law at all.)

20.7.2 Rule 2: A landlord is always able to sue his tenant, even if the tenant got the property by transfer from a previous tenant so there is no direct

contract between the present tenant and the landlord. (And equally a tenant can always sue his landlord.) This landlord-and-tenant relationship is called Privity of Estate. The rule is, if there is privity of estate, one of them can sue the other even if there is no privity of contract, *if* the covenant is one which "touches and concerns the land". (See 20.1.1 above.) This rule only applies on leaseholds, of course. There is no landlord-and-tenant relationship on freeholds.

(For example, in 18.6 above, there is Privity of Contract but no Privity of Estate between Alan the vendor and James and John the purchasers of the fee simple.)

20.7.3 Rule 3: If there is no Privity of Contract and no Privity of Estate, the covenant cannot be enforced: but two important exceptions to this rule will be seen in paragraphs 20.17 and 20.20.2 - 3 below. (We can call them the *"Tulk v. Moxhay"* exception and the "benefit" exception.)

20.8 Summarising the three rules:-

20.8.1 Rule 1: If there is "Privity of Contract", the covenant can be enforced.

20.8.2 Rule 2: If there is no Privity of Contract but there is Privity of Estate, the covenant can be enforced if it touches and concerns the land.

20.8.3 Rule 3: If there is no Privity of Contract and no Privity of Estate, then (subject to two exceptions) the covenant cannot be enforced - it is not worth the paper it is written on.

20.9 An example based on a series of diagrams will illustrate how these rules work in practice. But as Rule 2 only applies to leaseholds, and not to freeholds, we must consider covenants on freeholds and covenants on leaseholds as two different problems. We shall consider covenants affecting freeholds under heading *f* and those affecting leaseholds under *g*.

### *f) Can covenants affecting freehold land be enforced?*

20.10 The rules applicable are rules 1 and 3 above. So we need to look at the example in two stages, to consider it (i) where there is privity of contract (so Rule 1 applies) and (ii) where there is no privity of contract (so Rule 1 does not apply).

#### *(i) if there is privity of contract*

20.11 Ann owns a freehold property consisting of a house and an orchard, as in this diagram:-

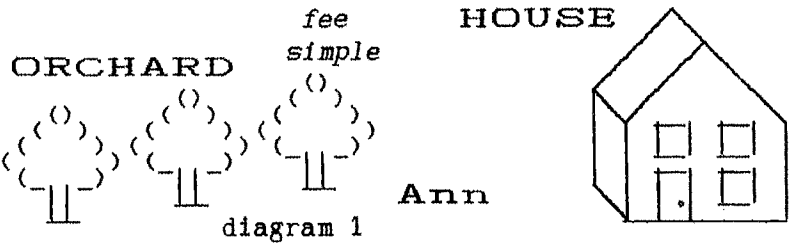


diagram 1

and she sells the orchard to Ben in fee simple, imposing on Ben a restrictive covenant not to keep pigs on the property, and a positive covenant not to let the fence between the house and the orchard fall into disrepair:-

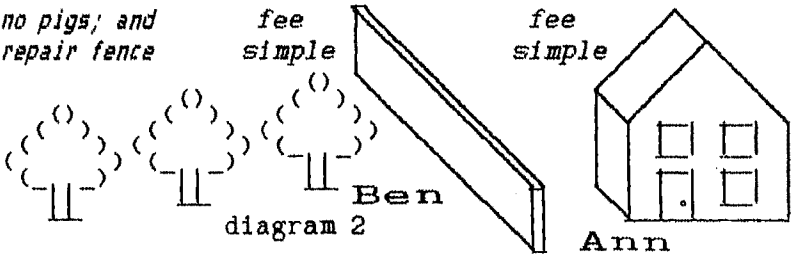


diagram 2

If Ben then breaks either (or both) of the covenants, Ann can sue Ben *because there was a contract between Ann and Ben*. Ann offered to sell the orchard to Ben, and Ben accepted (or possibly Ben offered to buy, and Ann accepted) in consideration of the price which Ben paid. That relationship is Privity of Contract. Because there is this Privity of Contract, the covenants can be enforced.

*(ii) if there is no privity of contract*

20.12 In diagram 3, the orchard has changed hands two more times, in fee simple absolute in possession. Ben sold it to Cindy and Cindy sold it to Dan. And Dan is breaking the covenants.

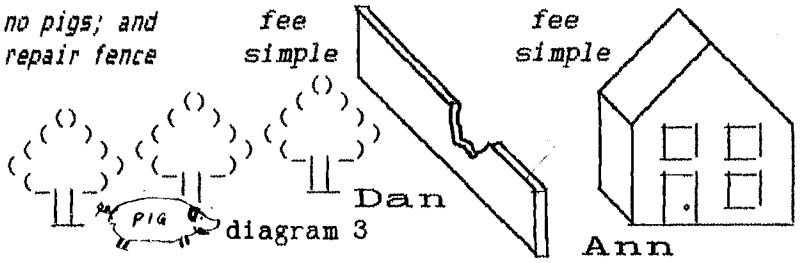

diagram 3

20.13 So the present position is:- Ann sold the orchard to Ben in fee simple and imposed on Ben the two covenants. - Ben then sold the orchard to Cindy in fee simple, again subject to covenants not to keep pigs and not to let the fence fall into disrepair (and also subject to a "covenant for indemnity" by which Cindy promised Ben that Cindy would take responsibility for any breach of the covenants). - Cindy then sold the orchard in fee simple to Dan, subject again to covenants as to pigs and fencing and a "covenant for indemnity" by which Dan promised Cindy that Dan would take responsibility for any breach of covenant. Dan is now breaking the covenants. Can Ann sue Dan?

20.14 Three further rules *(worth learning by heart)* apply here:-

20.14.1 Rule A. The benefit of covenants runs with the land;

20.14.2 Rule B. The burden of covenants does not run with the land, at common law;

20.14.3 Rule C. The burden of *restrictive* covenants runs with the land, in Equity.

20.15 How these rules apply in practice will be seen in paragraphs 20.16.1 (Rule B) 20.17.3 (Rule C) and 20.20.2 (Rule A) below.

*the position at common law*

20.16 There has been no contract between Ann and Dan, so there is no Privity of Contract between them. (The only contract Ann had was with Ben.) And there is no landlord-and-tenant relationship and therefore no Privity of Estate, because both the properties are freehold. Therefore, so far as common law is concerned, Ann cannot sue Dan.

20,16,1 This is an example of the rule in paragraph 20.14.2 above, that the burden of covenants does not run with the land at common law. The burden here has not gone with the land: it has remained on Ben. Ann can sue Ben on the basis of Privity of Contract. But Ben also had a contract with Cindy, in which Cindy promised to indemnify Ben against any such claim: so Ben can sue Cindy - if he can find her, and assuming she is not dead - on the basis of Privity of Contract. Cindy can then sue Dan, on the basis of Privity of Contract. Thus, Ann sues Ben who sues Cindy who sues Dan.

20,16,2 Note that the only person to whom Dan made any promise is Cindy: so the only person who can sue Dan is Cindy. And the only person who can sue Cindy (to force Cindy to take action against Dan) is Ben. If either Ben or Cindy are dead or are bankrupt or cannot be found, the chain is broken and there is no remedy (at common law) against Dan.

*the position in Equity*

20.17 On restrictive covenants, but not positive covenants, Equity comes to Ann's rescue, as a result of the famous case of *Tulk v. Moxhay (1848) 2 Ph 774, 1 H&Tw 105, 41 ER 1143, 47 ER 1345.*

20,17,1 The facts of *Tulk v. Moxhay* were:- Leicester Square (in central London) and the land around it belonged to a builder, Mr. Elms, in fee simple. He built on the surrounding land, and sold the properties in fee simple with the benefit of a covenant that the central square (Leicester Square) should never be

built upon. He then sold the Square in fee simple, subject to the covenant not to build upon it. The purchasers sold it on, subject to the covenant: it changed hands several times, until eventually it was bought in fee simple by Mr. Moxhay, who announced that he was going to build on it. When the neighbouring owners complained that this would break the covenant, Mr. Moxhay pointed out that to enforce the covenant it would be necessary for the original covenantor (the person to whom Mr. Elms sold the Square) to be sued. That person could then sue the next owner, who could sue the next, and so on: but as it was virtually certain that not all the previous owners could be found, the chain of Privity of Contract would be broken and so no-one would be able to enforce the covenant against Mr. Moxhay. - At common law, this is correct, but Mr. Tulk (one of the neighbouring owners) took the case to the Court of Chancery - i.e. Equity.

(Reminder: Equity and common law have both been heard in the same courts since 1875 - see paragraph 4.2 above - but this case was before that date.)

20.17.2 The Court of Chancery decided that for the sake of fairness, an injunction would be granted to prevent the square from being built upon.

20.17.3 Mr. Tulk thus succeeded in enforcing the restrictive covenant against Mr. Moxhay *without finding all the previous owners*. This is an example of the rule in paragraph 20.14.3 above, that the burden of *restrictive* covenants runs with the land in Equity.

20.17.4 It was held in *Austerberry v. The Corporation of Oldham (1885) 29 ChD 750* that the rule in *Tulk v. Moxhay* does not apply to positive covenants: and the House of Lords confirmed this in *Rhone v. Stephens [1994] 2 AC 310.*

*practical application of the rules at law and in Equity*

20.18 And therefore, in the example in diagram 3: can Ann sue Dan?

20,18,1 Ann can sue Dan on the restrictive covenant (provided the covenant is registered) just as Tulk could sue Moxhay. But on the positive covenant *Tulk v. Moxhay* does not apply and so Ann can only sue Ben, who can sue Cindy who can sue Dan - if all these people are still alive and can be found.

20,18,2 This again is an example of the rule in 20.14.3 above, that the burden of restrictive covenants runs with the land in Equity.

20,18,3 Ann will not be able to rely on *Tulk v. Moxhay* if she herself has not acted equitably. There is a maxim, "He who seeks Equity must do equity". This is all a matter of fairness: there are no absolute rights here.

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## 20.19 *summary*

20,19,1 *As to restrictive covenants only:* Equity enables Ann to sue Dan, even though there is neither privity of contract nor privity of estate.

(This is subject to the rule that if the covenant was created later than 1925, it must have been registered, otherwise Dan is entitled to break it.)

20,19,2 *As to positive covenants:* Ann cannot sue Dan here, because there is neither privity of contract nor privity of estate, and Equity will not help her.

(Positive covenants are not usually registered. There would not be much point in registering them.)

20,19,3

| *at common law* enforcement of covenants over freehold land | *in Equity* enforcement of covenants over freehold land |
|---|---|
| no satisfactory method | for positive covenants, there is no satisfactory method; but restrictive covenants may be enforced under the rule laid down in *Tulk v. Moxhay*. |

20.20 *What if Ann has sold?*

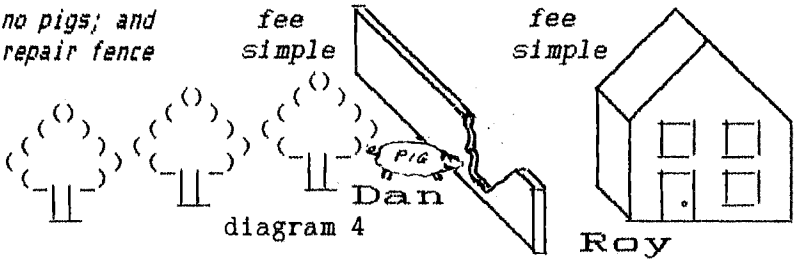


diagram 4

20,20,1 In diagram 4, Ann (the person with the benefit of the covenants - the person who has the benefit of knowing that she has rights against Dan or against Ben if the covenants are broken) has sold her property in fee simple to a purchaser Pat, who sold it on to Quentin, who sold it to the present owner Roy. And now Dan is breaking the covenants. Can Roy enforce the covenants against Dan?

20,20,2 As stated in 20.14.1 above, the benefit of covenants runs with the land. So the benefit of both of the original covenants has passed on from Ann to Roy: Roy can do anything that Ann could do.

20,20,3 But what could Ann do? On the restrictive covenant, she could sue Dan under the rule in *Tulk v. Moxhay:* so Roy can sue Dan on the restrictive covenant, under the same rule. On the positive covenant, Ann could only sue Ben (privity of contract) and so Roy can sue Ben just as if Roy had privity of contract with Ben: and then Ben sues Cindy who sues Dan.

20.21 The practical result of the rule that *Tulk v. Moxhay* is not applicable to positive covenants is that on freehold land, positive covenants have usually become unenforceable by the time the land subject to them has changed hands three or four times. This problem does not occur on leasehold land, because the *landlord* can enforce all the covenants touching and concerning the leased land, by privity of estate.

20.22 Practical Advice to Roy:- "As to the positive covenant: you cannot enforce it if you cannot find Ben and Cindy, so the covenant is worthless. I suggest that you deal with the fencing problem yourself, at your own expense. - As to the restrictive covenant: you can take action against Dan under *Tulk v. Moxhay* if the covenant is registered, as long as your own behaviour has been completely equitable. And if you cannot do so (e.g. because the covenant is not registered) do not despair: use other branches of the law. Pigs in a residential area are likely to amount to a Tort of Private Nuisance, against which an injunction could be obtained. Or better still, report the situation to the Environmental Health Department of the District Council, as a health hazard, and let the Council take action under the Public Health Acts, for the removal of the pigs."

20.23

| *at common law* enforcement of covenants over freehold land | *in Equity* enforcement of covenants over freehold land |
|---|---|
| Roy cannot sue Dan: Roy can sue Ben who can sue Cindy who can sue Dan, by Privity of Contract. | On restrictive covenants, if registered, Roy can sue Dan. On positive covenants, Roy cannot sue Dan: Roy can sue Ben who can sue Cindy who can sue Dan, by Privity of Contract. |

20.23.1 This corresponds to what we saw in 20.19.3 above.

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### *g) Can covenants affecting LEASEHOLD land be enforced?*

20.24 There will always be Privity of Estate. Privity of Estate is the relationship of landlord and tenant.

20,24,1 For example: Ann owns the house and orchard in fee simple as in Diagram 1 above, and Ann *leases* the orchard to Ben, and imposes covenants on Ben as to pigs and fencing as in the previous example:-

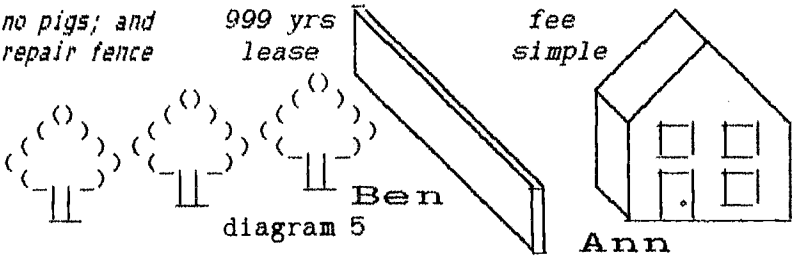

diagram 5

Ann is the landlord, and Ben is the tenant. This is privity of estate.

20,24,2 Therefore if Ben breaks either or both of the covenants, Ann can sue Ben.

20,24,3 In this example there is also privity of contract (Ann offered to lease to Ben, and Ben accepted) so Ann has a right to sue Ben on both bases here.

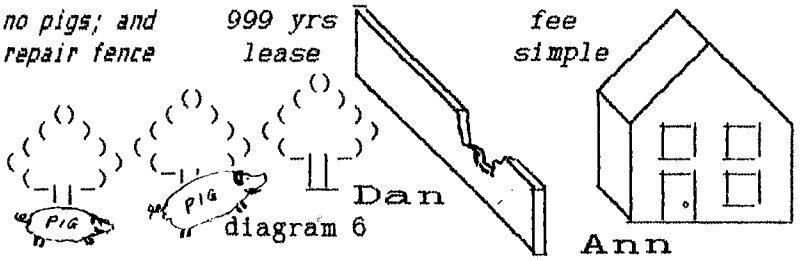

diagram 6

20,24,4 In diagram 6, Ann leased the orchard to Ben for 999 years, but at a later date Ben assigned his lease (i.e. he sold the whole of his rights for the rest of the 999 years) to Cindy; and later Cindy assigned the lease to Dan. Dan is now breaking the covenants. Can Ann sue Dan?

20,24,5 Dan bought from Cindy. Dan has never had a contract with Ann, so there is no privity of contract between Ann and Dan. But Ann is still the landlord, and Dan is the present tenant: and both covenants touch and concern the land - i.e. the orchard - and are not merely personal (unlike a covenant to do shopping for

the landlord every week, which is a very useful covenant for an elderly or disabled landlord, but has nothing whatever to do with the land) and so Ann can sue Dan because there is privity of estate between Ann and Dan.

20.25 *summary*

20.25.1 *As to both the covenants*, Ann can sue Dan because there is privity of estate, even though there is no privity of contract.

(Covenants in leases do not need registration. But the lease itself needs registration if it is for longer than 21 years - see 8.1 and 8.15.1 above.)

20.25.2

| *at common law* enforcement of covenants over leasehold land | *in Equity* enforcement of covenants over leasehold land |
|---|---|
| The landlord can sue the present tenant, by Privity of Estate, even if there is no Privity of Contract. | The landlord can sue the present tenant, by Privity of Estate, even if there is no Privity of Contract. |
| Both restrictive and positive covenants can be enforced through Privity of Estate if they touch and concern the tenanted land. | Both restrictive and positive covenants can be enforced through Privity of Estate if they touch and concern the tenanted land. |

*a problem for tenants*

20.26 Ann is landlord, and Dan is tenant. And Dan is in breach of the covenant to pay the rent - in fact he is several hundred pounds in arrears. Ann can sue Dan for this sum - privity of estate - but just as she is about to do so, Dan goes bankrupt, or flees the country, or does something else which makes it impossible for Ann to recover the rent from him. What can Ann do? - There is privity of *contract*

between Ann and Ben. Ben promised that the rent would be paid, and we saw in 20.14.2 that the burden of that covenant does not run with the land, it stays on Ben's shoulders. So Ann sues Ben, who has to pay Dan's arrears of rent. This leaves Ben out of pocket, but he can then sue Cindy if he can find her - he has privity of contract with her - and Cindy can then sue Dan, except that Dan is either bankrupt or not to be found.

20.26.1 By the Landlord and Tenant (Covenants) Act, 1995, this trap for former tenants is abolished in respect of all leases granted after the end of 1995. Landlords will no longer be able to sue former tenants in this way. But at present, the vast majority of leases in existence are leases which were granted before the end of 1995, and for the tenants of these leases the trap remains.

20.26 *What if Ann has sold the freehold?*

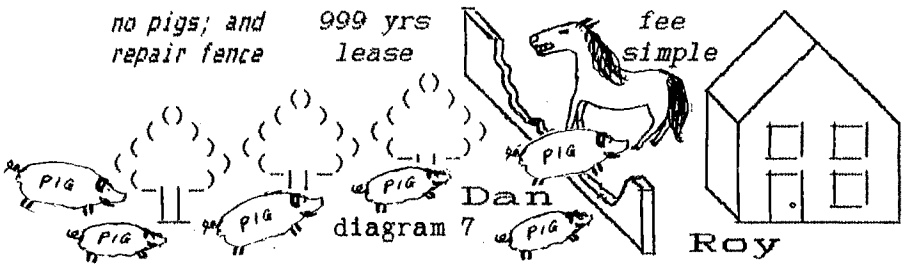

diagram 7

20.26.1 Here the leasehold has been assigned to Dan, but Ann sold the fee simple of the entire premises (the orchard subject to the tenancy and the house with vacant possession) to Pat who resold it to Quentin who sold it to the present freeholder Roy. Dan is breaking the covenants, and the question is, can Roy (the present landlord) sue Dan (the present tenant)?

20.26.2 Roy can sue Dan because there is privity of estate between Roy and Dan.

20.26.3 Suppose Roy sells the house (but not the orchard) to Sam - so the house is owned by someone who is not the landlord of the orchard. This is not a straightforward problem, because although the benefit

of covenants runs with the land, as in paragraph 20.14.1 above, Sam is not the landlord. Privity of estate only applies between the current tenant and the current landlord, so Sam does not get the benefit of Roy's privity-of-estate rights. So Sam cannot on *that* basis sue Dan. On the restrictive (but not the positive) covenant, Sam may be able to sue Dan under *Tulk v. Moxhay*, if the covenant was made for the benefit of Sam's land - but was it? When the covenant was first imposed on Ben by Ann, was this "Ann as landlord of the orchard" or "Ann as landlord of the orchard and also Ann and her successors in title as owners of the adjoining house"? (The wording of the Lease may or may not help to answer that.) - We are touching here on questions of enforceability of covenants which are too complex for inclusion in this book. Sam should have avoided this situation by insisting on having a covenant in the purchase deed to say that Roy will enforce the covenants against the tenant of the orchard. If that was done, Sam can sue Roy, by privity of contract, to compel Roy to sue Dan on privity of estate.

20.26.4 If Roy had *leased* the house to Sam, instead of selling it to him, the position would have been the same: Sam needs a covenant from Roy, enabling Sam to force Roy to sue Dan - and this situation is parallel to the situation in 20.28.4 below.

*assignments and sub-leases*

20.27 Privity of estate gives the landlord the right to sue the tenant (and also gives the tenant the right to sue the landlord) but gives the landlord no right to sue a sub-tenant. Understand the difference between an assignment (which passes the property to a new tenant) and a sub-lease or underlease (which passes the property to a sub-tenant):-

20.27.1 *Example of an Assignment:-* Leo grants a lease to Tess for 21 years at a rent of £500 per year. After 5 years, Tess sells the remaining 16 years of the lease (every single day of it) to Alf, for a capital sum of £30,000. Alf is now the new tenant: Alf must

pay the annual £500 rent to Leo. Tess departs with the £30,000 and has no further interest in the property. If Alf fails to pay the rent, or breaks any other covenant, Leo can sue Alf: this is privity of estate: Alf is Leo's present tenant.

20,27,2 *Example of a Sub-lease:-* Leo grants a lease to Tess for 21 years at a rent of £500 per year. After 5 years, Tess sub-lets the property to Sid for 4 years at a rent of £600 per year. After the 4 years, the property will return to Tess. Sid is a sub-tenant: Sid is paying £600 rent annually to Tess, and Tess is paying £500 rent annually to Leo. If Sid breaks any covenant, Leo cannot sue Sid; Leo can only sue Tess, and then Tess sues Sid. (In practice, that problem can be avoided by requiring that the contract made between Tess and Sid must also be signed by Leo. If both Leo and Sid have signed it, Leo can sue Sid because they have both signed the same contract and so there is privity of contract between them.)

20,27,3 An assignment must be for every single day of the residue (the remaining unexpired time) of the lease. A sub-lease must be for at least one day less than that length of time, so that, for at least one day, the property will return to the tenant.

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*h) Freehold flats*

20.28 These cause a lot of trouble. Here is the problem:-

20,28,1 Alex, a developer, built a block of twenty flats. He sold one to Pam and another to Joe, in fee simple absolute in possession. Each flat is subject to a covenant that the owner will pay one twentieth of the cost of structural maintenance and repair of the building. Joe sold his flat to Kate, and after Kate's death, the executors of her will sold her flat to Mark in fee simple absolute in possession subject to this covenant. The building now needs repairs to its roof, and Mark (whose flat is not directly affected by the leaking roof) refuses to pay his share. Can Pam (whose flat is affected) compel Mark to pay?

20.28.2 By the rule in 20.20.2 above, Pam (who has the benefit of the covenant) has all the rights that Alex had. But it is a positive covenant so the rights under *Tulk v. Moxhay* are not available: the only right available is to sue Joe, who could then sue Kate if only she were not dead. There is no-one who can enforce this covenant against Mark. (See 20.16.2 and 20.20.3 above.) Although Mark promised to pay, he only made this promise to Kate, who is no longer available to enforce it. To sum up: Mark cannot be made to pay his share.

20.28.3 Many Building Societies have therefore refused to grant mortgages on freehold flats.

20.28.4 If the developer had granted these flats on long leases instead of in fee simple, the developer (as landlord) could have enforced this positive covenant against Mark by privity of estate as in 20.26.4 above. A Lease usually contains a right of re-entry whereby the landlord can take the property back (by exercising forfeiture of the Lease) for breach of covenant.

20.28.5 An arrangement frequently adopted with flats is that after the builder has granted leases (usually of 99 years or longer) of all the flats, the tenants set up a Limited Company in which they all hold shares. The builder than sells the fee simple absolute in possession of the entire premises to the Company for a nominal sum, so the Company becomes the landlord. Each of the tenants has a leasehold but is a shareholder in the Company which has the freehold. Each time a flat changes hands, the tenant's share in the Company changes hands, with the flat. Often there are two Companies - a Landlord Company, and a Management Company responsible for repairs. If a tenant will not pay his share towards the repairs, the Company (the landlord) can sue the tenant: there is privity of estate.

20.28.6 Difficulties can arise if a Management Company gets into wrong hands (so fees are collected from all the tenants but no proper repairs are done) or if some flats are sub-let (see 20.27.2 above).

20,28,7 In the Leasehold Reform, Housing and Urban Development Act, 1993, Parliament has enacted certain provisions aimed at reducing these problems. The extent to which these new "commonhold title" provisions for blocks of flats will improve the situation remains to be seen in the future: they do not solve the problems of existing freehold flats.

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*i) Alteration of covenants*

20.29 Another problem with covenants is that they last for ever.

20,29,1 Restrictive covenants not to build more than three houses per acre (about seven per hectare) which might have been quite reasonable a hundred years ago, can be extremely inconvenient today.

20,29,2 The *Lands Tribunal* has the power to order the extinguishment or amendment of covenants, but may require compensation to be paid to people adversely affected by such orders.

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*j) covenants and town planning*

20.30 Covenants and Town Planning are entirely separate matters. Obtaining Planning Permission does not give any right to break covenants. (It is likely that the Planning Committee of the Council will not even know that the covenants exist.)

20,30,1 See 27.1 below for three "hurdles" facing a developer. He has to jump all three of them.

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TEST QUESTIONS

26 Explain what is meant by:-

(a) privity of contract
(b) privity of estate
(c) legal estates
(d) legal interests
(e) equitable interests
(f) equitable remedies
(g) equitable easement
(h) restrictive covenant
(i) positive covenant
(j) benefit of a covenant.

27(a) When "Seaview Cottage" was built in 1912, it was made subject to covenants "to keep the front garden wall in repair, to keep the garden free from weeds, and not to use the property for any trade or business". The property is freehold. The present owners have just obtained Planning Permission to convert the cottage into a restaurant and to make the front garden into parking spaces for customers' cars. (This will involve demolishing the garden wall and concreting the garden.) Neighbours are objecting to the development and are saying that they will seek an injunction to stop it, as it is in breach of all the covenants. - Advise the *neighbours* whether they can prevent this development.

(b) How (if at all) would your answer differ if "Seaview Cottage" and the neighbours' properties were leasehold, all held from the same landlord?

(c) How (if at all) would it differ if the neighbours' properties were held from a different landlord?

28. Five years ago, Alan sold the freehold plot EFYZ in the diagram on page 92 to James and John as tenants in common. He imposed a covenant not to keep chickens on it, and reserved a legal easement of drainage through the pipe P-Q. Later, he granted James and John an Equitable easement to run a gas pipe across the rear of his property CDZY. - James and John have now sold their property to Edwin who has started a chicken business there, and vehicles coming onto the land to collect the eggs have crushed the drainage pipe. - Advise Alan (with reasons) of his rights against Edwin (a) if both the properties are registered land, and (b) if Edwin's property is registered land but Alan's is not.

29. Are the following covenants restrictive or positive?

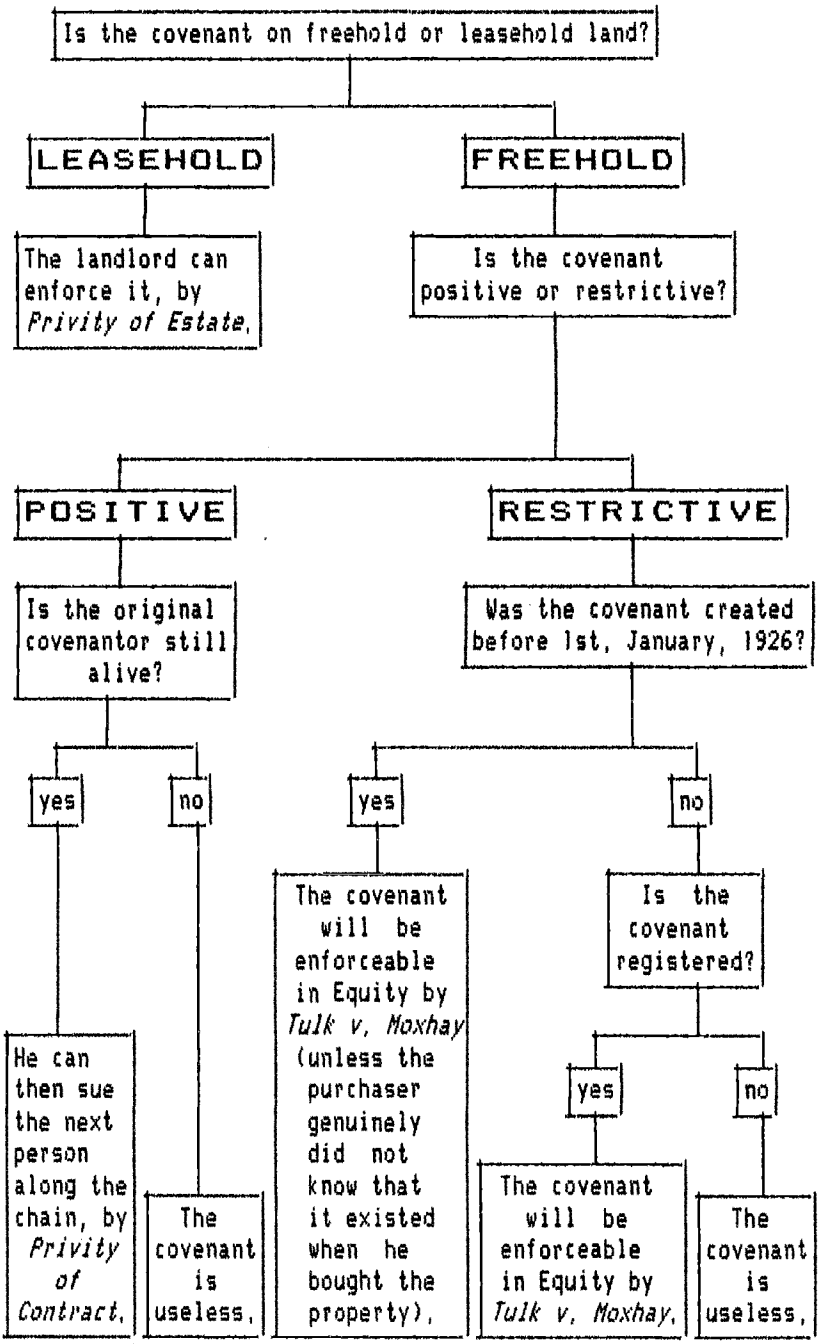
(a) not to let the insurance lapse,

(b) not to allow caravans or speedboats in the garden,

(c) not to allow weeds in the garden,

(d) to refrain from playing loud music on the premises.

20.30 *A check-chart for enforceability of covenants:-*



*answers to questions 23-25*

23.(a) Tom. As there is oral permission, common law prescription and prescription by lost modern grant cannot apply, and prescription under the Prescription Act, 1832, requires 40 years use. As this path has only been used for 35 years, Tom's claim will fail; Fred can stop Tom (by injunction, if necessary) from using the path.

Dick. The position with regard to Dick is complicated. As he has written permission, prescription does not apply here at all. But if the permission is written in a deed, then if Fred's land is unregistered land Fred cannot stop Dick; and if Fred's land is registered land Fred cannot stop Dick if the easement is registered at the Land Registry. (See 8,4,3, 8,19,1 and 18,5,1 above.) This easement is a *legal* easement.

If the permission is written in an informal document (or if Fred's land is registered land and the easement is in a deed which has not been registered at the Land Registry) then Dick has no legal easement but he may have an Equitable easement. The position (provided that the document is a contract or an unregistered deed, and not a mere revocable licence) is;-

(i) If Fred's land is unregistered land and Dick's easement is registered at the Land Charges Registry, Dick has an Equitable easement which cannot be stopped; but if the easement is not registered at the Land Charges Registry, any purchaser of the land can stop it. (See 8,13,1, 8,14, 8,19,2, 18,5,2 and 18,20,3 above.)
(ii) If Fred's land is registered land, Dick *should* have made sure that his Equitable easement was noted on the register at the Land Registry. If this has been done, Dick cannot be stopped; but if it has not, Dick may still have a good Equitable easement under the rule in *Celsteel Ltd. v. Alton House Holdings Ltd. (1985)*. (See 8,4,3, 8,15,3, 8,19,1 and 18,19,1 - think about how 8,19,1 and 18,19,1 correspond with each other, 8,19,2 and 18,20,3 - as to unregistered land - also correspond.)

Harry. The path has been used without force, without secrecy and without permission, so far as we can tell, for more than 20 years, so Harry cannot be stopped. He has a legal easement by prescription under the Prescription Act, 1832, and also by lost modern grant. If the using of the path began 35 years ago, and

did not occur before that, it does not go back to 1189 and so a claim based on common law prescription would fail; but if it has been used for 35 years and no-one can remember what happened before that, there is an assumption that the using of the path dates right back to 1189 and so a claim to common law prescription would also succeed.

(b) It is odd that Tom, who had the good manners to ask permission, can be stopped, whereas Harry, who did not, cannot be stopped.

24.(a) For a profit à prendre granted by oral permission (which is what is claimed here) the 1832 Prescription Act requires that it must have been used for 60 years. As what is claimed here began in 1929, this can be shown, except that in 1991-2 there was a break of longer than a year. Therefore a claim under the 1832 Act fails. This is similar to what happened in *Tehidy Minerals Ltd. v. Norman and others* in which a claim under the 1832 Act failed because of a break exceeding one year.

A claim to common law prescription also fails, because the evidence shows that the use of the land only began in 1929 and therefore it does not go back to 1189. This too is similar to the situation in the *Tehidy Minerals* case. (The claim to common law prescription would also fail in the present case because the land had been used *precario*, i.e. by permission.)

A claim under lost modern grant also fails, because there was permission; the use was not *nec vi, nec clam, nec precario*. This is the opposite of the *Tehidy Minerals* situation.

Therefore the farmers have no right by prescription, as all three claims to such a right will fail.

But the farmers were told that they could put their sheep there. Admittedly this promise was not in return for any consideration, and was not even in writing, so it would not be enforceable in court, but nevertheless the promise was made, and then the landowner stood by while the farmers, relying on this promise, spent a lot of their money on installing a water system. After they have done this in reliance on the promise, the rule of evidence called estoppel does not allow evidence to be given saying that the promise cannot be relied on. See 15.18.2 above. Therefore it cannot be said in court that the farmers have no right - so they cannot be stopped, unless after

negotiation they agree that in return for a suitable amount of compensation, they will discontinue the use of their right.

The provisions of the Agricultural Holdings Act, 1986 (not covered in this book) by which agricultural tenants can claim financial compensation for improvements at the end of their tenancies, do not apply here, as the farmers are not tenants of this land.

(b) From a valuer's point of view, if the developer will have to pay compensation to the farmers, this adversely affects the value of the land. As to what this sum might be; what is the annual cost of feeding 200 sheep? How much money would have to be invested to produce this amount per year as interest? In a doubtful case, will an Insurance Company insure the developer against having to pay compensation, and what amount of premium would it charge? (On the above facts, it is unlikely that any Insurance Company would insure against such a risk.)

From the point of view of others involved, e.g. the builder, building surveyor, quantity surveyor, conveyancer, vendor, developer, developer's mortgagee, housing manager (in the case of a council or Housing Association development) etc., the main problem will be the delay. This situation has all the ingredients of a dispute which will drag on through months or years of correspondence and perhaps a court case. (In *Tehidy Minerals* it took four years to come to the decision that the farmers had a right, and there had to be further negotiation as to compensation after that.) For that period, the vendor is kept waiting for the purchase money, the builder must find other work or lay off employees, the housing manager will find that his or her plans to fill these houses are delayed, perhaps for several years (by which time, elderly people to whom these houses had been allocated have died) and the developer may find that by the time the land can be developed, the interest rates offered by his Bank are far higher than they were when he first agreed to buy the land.

25.(a) See 18.5 above.
(b) See 18.8 above.
(c) See 18.6 and 18.6.1 above.

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# Part 4

other matters concerning Land Law

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## Chapter 21

## DISABILITIES

*This chapter has nothing to do with any special circumstance affecting the land; it is about matters affecting the seller or the buyer of the land.*

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*a) minors*

21.1 A person under eighteen years of age cannot own a legal estate in land. (There are certain exceptions regarding leaseholds.)

21.1.1 If a person under eighteen buys land, the seller remains the legal owner, but is trustee for the purchaser, who is the equitable owner.

21.1.2 If two or more persons, one of whom is under eighteen, buy land as co-owners, the one over eighteen is legal owner of the property as trustee for himself and the younger one.

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*b) bankrupts*

21.2 A bankrupt person cannot sell his land, but his trustee in bankruptcy can sell it to obtain money to pay to the bankrupt person's creditors.

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*c) mentally ill persons*

21.3 If a person is "incapable, by reason of mental disorder, of managing and administering his property and affairs" (as the Mental Health Act, 1983, says) a

receiver (usually a relative) is appointed to deal with that his affairs - this can involve anything from getting a burst pipe repaired to selling or letting the house - and what the receiver does is supervised by a court called the Court of Protection.

21,3,1 It may be that a person is not mentally incapable in general, so no receiver has been appointed, but that person nevertheless has moments of mental incapacity. If such a person makes a contract when he is in a mental state in which he cannot appreciate the consequences of his actions, and the other party to the contract knows he is in that state, the contract is voidable: the person in that state may choose to treat the contract as void, when he recovers. The same rule applies if someone makes a contract when he is too drunk to appreciate the consequences of what he is doing, and the person with whom he is contracting knows he is in that state.

(A contract made under duress - threats - is also voidable.)

21,3,2 If someone is likely to become mentally incapacitated - for instance, if an elderly person is beginning to show signs of senility and it is realised that he will soon be mentally incapacitated, or if he has had a slight stroke and it is feared that a second stroke would leave him mentally as well as physically incapable - it is advisable that, while he is still sufficiently mentally capable, he should sign an Enduring Power of Attorney. This enables the person appointed as "attorney" (it is usually a relative) to deal with the person's affairs on hs behalf.

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*d) deceased persons*

21.4 If the owner of land dies leaving a will in which he names an executor (i.e. a person who is to deal with his affairs after his death) the will entitles the executor to deal with the property; but the executor must obtain a document called a Probate (a formal proof that the will is believed to be genuine) from the Probate Registry.

21,4,1 Note that it is the executor (and not the beneficiary who has inherited the land) who is entitled to deal with the property. If it is to be sold, the executor will sell it and will pass on the purchase money to the beneficiaries. If it is not going to be sold, a document called an Assent is drawn up, to transfer the legal estate from the executor to the beneficiary.

21,4,2 Very often, executors are also trustees, holding the property on trust for sale. (See 4.5 above.)

21.5 If the deceased person died intestate (i.e. without leaving a will) the next of kin must obtain a document known as Letters of Administration from the Probate Registry, before selling the property or transferring it by Assent to a particular beneficiary.

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*e) charities*

21.6 If a body is a registered charity, this gives it tax advantages, but there are restrictions on what it can do with its land. In many cases it cannot sell it without an order obtained from the Charity Commissioners or a Judge.

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*answers to questions 26-28*

26 (a) see 20,7,1
(b) see 20,7,2 and 20,24
(c) see 5,4 - 5,4,2 and 7,3,1-3
(d) see 9,1
(e) see answer to question 15 on page 87
(f) see 4,8(3)
(g) see 4,10 and 18,5,1-2
(h) see 20,3
(i) see 20,4
(j) see 20,20,1

27 (a) *If* the neighbours have the benefit of the covenants (which is considered in (c) below) then the position is;- (i) The covenant as to the wall is a positive covenant; the neighbours have to sue the person who made that covenant in 1912. (That person must be over 100 years old! If he is dead, the covenant is worthless.) (ii) The covenant as to weeds is also positive, and in any case, covering the garden with concrete will not break the covenant. (iii) The neighbours *can* enforce the restrictive covenant against trade or

business under *Tulk v. Moxhay*. (As it is a pre-1926 covenant, there is no registration requirement.) Therefore, despite the Planning Permission, the property cannot be used as a restaurant.

(b) See 20.26.4 and 20.28.4 - the landlord can enforce all three covenants, through privity of estate.

(c) Whether the neighbours' landlord has the benefit of these covenants is not at all certain, though it *may* be that until 1912 one freeholder owned the neighbours' properties and the site of "Seaview Cottage", and when he sold the site to the builder of "Seaview Cottage" he imposed the covenants on that property for the benefit of the other properties. If that is the case, the neighbours' landlord has a right against the landlord of "Seaview Cottage", as to the restrictive covenant, under *Tulk v. Moxhay*. Even so, the best that the neighbours can hope to do is to take action against their landlord by privity of estate, to force him to sue the landlord of the cottage under *Tulk v. Moxhay*, in order to force the landlord of the cottage to sue his tenant with whom he has privity of estate. Otherwise, they appear to have no rights under any of the three covenants.

28 (Don't get confused here; each matter must be considered separately.)

(a) *(both properties being registered land)* (i) Alan can sue Edwin (for damages and an injunction) for interference with Alan's legal easement of drainage, if the easement is registered at the Land Registry - see 18.19.1 - but if the easement is not registered, Alan *may* still be able to sue Edwin under the principle laid down in *Celsteel Ltd. v. Alton House (Holdings) Ltd.* - see 8.15.3, 8.19.1 and 18.19.1 above. (ii) Alan can enforce (by injunction) the restrictive covenant against chickens, by the rule in *Tulk v. Moxhay*, if the covenant has been entered at the Land Registry, but not otherwise. (The principle in *Celsteel* appears not to extend to covenants.) (iii) Alan cannot cut off Edwin's gas pipe (equitable easement) if it has been entered at the Land Registry or if it can be regarded as protected as an overriding interest under *Celsteel*.

(b) *(Alan's land being unregistered land)* (i) and (ii) The answer is the same as above. (The question on registration is whether the land subject to the rights is registered land, not whether the land with the benefit is registered land.) (iii) The land subject to the gas pipe is unregistered land, so, if this equitable easement has not been registered at the Land Charges Registry, Alan can stop it. *Celsteel* does not apply to unregistered land.

Chapter 22

# LIMITATION

*squatters*

22.1 Title by limitation (under the Limitation Act, 1980) is also known as squatter's title or title by adverse possession.

22.2 If a boundary fence falls down, and when it is re-erected it is not put back into exactly the same place, one owner will gain (and his neighbour will lose) a little bit of land. If the loser does nothing about this for twelve years, he may be considered as having abandoned that land. Thus he loses all right to it, and the person in possession can claim it.

22,2,1 Occasionally someone takes over an abandoned house or a large piece of abandoned land in this way. This is rare, but the same twelve-year rule applies.

22.3 The point that the person claiming under the Limitation Act, 1980, has to show is that the last owner has *abandoned* the land for at least twelve years. Contrast this with the rule for Prescription:-

22,3,1 By prescription, after *twenty years* of use, the user *gains a right to an easement or a profit à prendre* over someone else's land;

22,3,2 By the Limitation Act, after *twelve years* of abandonment, the owner *loses his land*, and the law protects whoever is in occupation.

22,3,3 In *Williams Brothers Direct Supply Ltd. v. Raftery [1958] 1QB 159*, the plaintiff company owned a piece of land on which they intended to build an extension of their factory: but they were prevented from building by the outbreak of the Second World War. A squatter moved in; he grew vegetables and bred dogs on the land. More than twelve years later, the company at last succeeded in obtaining Planning Permission for their development, but the squatter

claimed to have squatter's title to the land. The court decided that he had no such title, because the company had never *abandoned* the land: it had only been *delayed* in its plans for developing the land.

22.4 Difficulties can arise particularly if the owner has suffered mental illness or if the land is settled land or is leasehold. One example will be given here:-

22.4.1 X abandons his land. (Perhaps he is fleeing from his creditors or from the police, or perhaps he has died intestate and his next of kin do not want it and cannot even be bothered to try to sell it.) Y takes possession of it, and just over twelve years later he spends a lot of money improving it, believing he is safe in doing so because X has abandoned it for more than twelve years. A few months later, Z appears, saying, "Didn't you know that X only had a leasehold? Look: I have a copy of the Lease here, and I have the freehold deeds which show that I am the freeholder. The Lease expires next year, and then I shall take the property back. Do you get compensation for your improvements? No, of course you don't. I didn't ask you to do them and I didn't even know you were doing them: so anything you have built on my land is mine."

22.4.2 We saw in Chapter 17 that anything fixed to the land (other than tenants' fixtures such as the tenant's trade machinery) cannot be removed at the end of the lease but must be left for the freeholder.

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22.5 If the land taken over is registered land, it still belongs legally to the person whose name is in the Proprietorship Register (see 8.4.2 above) at the Land Registry; but if that person has abandoned the land for twelve years, he is henceforth holding the legal estate as trustee for the squatter, and the squatter can demand to have the legal estate transferred in the Land Registry records, into the squatter's name.

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Chapter 23

# A FURTHER SUMMARY

23.1 We have seen that all land is held from the Crown, either directly (freehold tenure) or indirectly through a landlord (leasehold tenure).

23.2 What is owned is an estate - a collection of rights and duties for a length of time.

23.3 Since 1925 (by the Law of Property Act, 1925) only two estates are recognised by common law: fee simple absolute in possession (freehold) and specific and periodic terms of years absolute (leasehold).

23.4 All other former estates are now in the realms of Equity; in which case, trustees will be required.

23.5 There may be a sole owner, or persons in succession (A and then B) or co-owners (A and B together either as joint tenants or tenants in common). If there are persons in succession, the land must be settled land unless it is stated to be on trust for sale. If there are co-owners, the land must always be on trust for sale. (Trust for sale is not a very satisfactory system in the event of a family break-up.)

23.6 On a trust for sale, the trustees (as owners of the freehold or leasehold legal estate) can sell the property and receive the purchase money, but Equity then requires them to deal with the purchase money for the beneficiaries. On settled land, a "tenant for life" (see page 55) can sell the land, but the purchaser must pay the purchase money to trustees, and Equity then requires the trustees to deal with the purchase money for the beneficiaries (A and then B, in the example in 23.5 above).

23.7 Equity also recognises certain informally-created matters, such as an easement created by a contract instead of by a deed.

23.8 On unregistered land, there is a list of matters (mostly equitable) which need to be registered at the Land Charges Registry.

23.9 On registered land, the legal ownership and all other matters (except overriding interests) should be registered at the Land Registry. (Creation of a right is by deed - or by contract in the case of an equitable right - and the deed or contract is then sent to the Land Registry with a completed form of application for registration and a cheque for the registration fee.) The Land Registration Act, 1925, is not well drafted, and could do with reform.

23.9.1 On both registered and unregistered land, the general rule (in the Law of Property Act, 1925, and the Land Registration Act, 1925) is that if a right which needs to be registered is not registered, the purchaser of the land affected by that right can stop the right from being used.

23.9.2 Beneficiaries' rights under trusts are not registered. If the trustees sell the land, the beneficiaries' rights attach to the purchase money. This is known as Overreaching.

23.10 There are also Local Land Charges Registries, dealing with local matters (largely Town Planning matters).

23.11 Easements are created by express or implied grant, express or implied reservation, prescription, and statute. Express grant, express reservation and prescription are the ways most frequently met with. All three types of prescription are in an unsatisfactory state, in need of reform.

23.12 The law of covenants is also in an unsatisfactory state. (A law in which the constraints of privity of contract were done away with, and all covenants made after a certain date were made binding generally - like easements - would be more practical, but, although proposals for this change have been made, Parliament has not passed any Act to this effect.)

23,12,1 The Lands Tribunal can remove or amend obsolete covenants, but compensation may be payable to the persons losing the benefit of the covenant.

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TEST QUESTION:–

30 A property was granted to Adam for life and then Bert in fee simple. Four years ago, Adam granted Cora an option to purchase the land for £199,000 at any time within six years; but eighteen months ago Adam sold the land in fee simple for £200,000 to Dave and Eric as beneficial joint tenants. They did not go into occupation, and for the last fourteen months a squatter, Fred, has been in occupation. – Adam and Eric have just died, and the property is now claimed by:–

Bert (as remainderman of the settled land)
Cora (by exercise of her option)
Dave (as surviving joint tenant)
Eva (Eric's daughter, and heir to his property)
Fred (claiming squatter's title because he has been in occupation more than 12 months).

Who is entitled to the property? To what (if anything) are the others entitled?

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*answer to question 29*

29 (a) positive (it is necessary to pay the renewal premium so that the policy will not lapse)

(b) restrictive (if you do nothing, no caravans or speedboats will spring up in your garden)

(c) positive (if you do nothing, weeds *will* spring up in your garden, and you have to remove them)

(c) restrictive (doing nothing will not break this covenant).

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We have reached the end of that part of Land Law which is called Real Property Law. Land Law may be likened to a three-roomed cottage with an extension: the three rooms are *(a)* Real Property Law, *(b)* Law of Transfer of Land (Conveyancing and Mortgages) and *(c)* Landlord and Tenant Law, and the extension, which did not exist in its present form until 1947, is *(d)* Town and Country Planning Law. As items *(b)*, *(c)* and *(d)* are the subject of separate half-modules on the courses for which this book is written, they will only be introduced in barest outline in the remaining four chapters of this book.

Now have a look at the "Final Test Question" on page 163. (It's number 35: in 25 parts!) You should be able to answer all sections of it except parts 9, 10 and 11 at this point.

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*answer to question 30*

30 Either Cora or David will be entitled to the land. If Cora's option was registered before the land was sold to Dave and Eric, Cora can insist on buying the land from Dave at £199,000. (Dave's and Eric's solicitor or licensed conveyancer would have seen this entry in the register and told them, so they knew they were buying subject to it.) If Cora's option was not registered before Dave and Eric purchased, they did not become bound by it, and so Dave is entitled to the land in fee simple, by right of survivorship. 9,8,1, 14,4,1

If Dave and Eric had been equitable tenants in common, then Eric's share in the land (or in the £199,000 if the land were sold to Cora) would have gone to Eva; but as Dave and Eric were beneficial joint tenants (i.e. both legal and equitable joint tenants) the survivor Dave takes all, and Eva has no right to any share in this property. 14,4,1, 14,5,1

Bert is entitled to the £200,000. Settled Land Act trustees have this invested, and have been paying the interest on it to Adam. Now that Adam is dead, Bert is entitled to it in an immediate lump sum. 11,6,4 - 6, 11,7

All that Fred will receive is an Order to give up possession, signed by the County Court Judge. Title by limitation requires 12 years, not 12 months! 22,3,2

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Chapter 24

# CONVEYANCING

*(sale of land)*

## *a) the reason for conveyancing*

24.1 The object of conveyancing is to ensure that the buyer receives a legal estate (i.e. a legal fee simple absolute in possession or a legal term of years absolute) without any unexpected incumbrances.

## *b) the meaning of exchange of contracts*

24.2 The contract (the agreement, that the seller will sell and the buyer will buy the property, at the agreed price) must be in writing, signed by the seller and the buyer. This is required by s.2 of the Law of Property (Miscellaneous Provisions) Act, 1989.

24.2.1 It is usual to prepare the contract in duplicate. One copy is signed by the buyer and is handed over (usually with a deposit of 10% of the purchase price) to the seller's conveyancer (i.e., solicitor or licensed conveyancer). The second copy, signed by the seller, is then handed over to the buyer's conveyancer. The moment of handing over the second copy is the moment of "exchange of contracts".

> (The Law Society has approved procedures by which exchange of contracts can take place by a telephone message followed by putting the contract in the post the same day: this is very useful where exchanges of contracts on several transactions, financially dependent on each other, need to be done all on the same day.)

24.2.2 The contract becomes binding on both the seller and the buyer at the moment of exchange of contracts. Before that moment, either of them may freely back out of the proposed transaction.

## *c) before exchange of contracts*

24.3 Before exchange of contracts, the buyer needs to discover anything wrong (either legally wrong - e.g.

an extension to the house was built without a necessary planning permission and will have to be pulled down - or financially wrong - e.g. the buyer cannot get a big enough mortgage - or structurally wrong - e.g. the roof timbers have dry rot).

24.3.1 Discovering these problems after exchange of contracts is too late: the buyer cannot *then* back out without committing a breach of contract, giving the seller the choice of either keeping the 10% deposit or claiming specific performance (as in 4.8(3) above).

24.4 Therefore, before exchange of contracts, five precautions are needed:-

24.4.1 1: A Local Search is made - see 8.17.1 above - by the buyer's solicitor or licensed conveyancer.

("Making a search" means sending the local Council a standard form of application for its staff to make the search. An enquiry form with some additional questions about Planning, etc., is normally sent with it. The solicitor or conveyancer does not actually go there.)

24.4.2 2: The seller answers a number of questions about fixtures, ownership of boundary fences etc.

(In the streamlined "Protocol" conveyancing system introduced by the Law Society in 1990, the buyer's solicitor can expect the seller's solicitor to supply these details, and also copies of planning permissions and an Office Copy from the Land Registry - see 8.5 - without being asked for them. In the "traditional" conveyancing system, the purchaser's solicitor had to ask for them.)

24.4.3 3: The buyer's solicitor scrutinises the draft contract (i.e. the proposed form of contract, drawn up by the seller's solicitor) to check whether any of it is unacceptable. (For instance, a developer would not buy land which had a restrictive covenant not to build on it, although a market-gardener would buy it.)

24.4.4 4: The buyer finalises the financial arrangements.

24.4.5 5: The buyer may arrange to have a structural survey of the property carried out.

24.5 When satisfactory replies have been received on these five points, exchange of contracts takes place - provided that the buyer has not had a change of mind and the seller has not received a better offer.

24.6 Delay can occur at this point because of "chains" of transactions:- "I can exchange contracts to buy your house as soon as I've exchanged contracts to sell my present one, but I can't do it yet because the couple buying my house are held up because the woman buying their bungalow is having trouble selling her flat".

*d) after exchange of contracts*

24.7 Before a deed is drawn up to transfer the legal estate from the seller to the buyer, proof is needed that the seller is entitled to sell it.

24.7.1 On registered land, an Office Copy from the Land Registry (see 8.5 and the note to 24.4.2 above) provides this proof.

24.7.2 On unregistered land, an *Abstract* consisting of photocopies or typed or written extracts from the deeds, is required. The Law of Property Act, 1969, states that the abstract should commence with a deed at least fifteen years old - as in 8.10.2 above.

24.8 Written questions raised concerning the Office Copy or the Abstract by the buyer's conveyancer (and by the lender's solicitor if the buyer is borrowing money on mortgage) are known as *Requisitions*.

24.9 Then the purchase-deed is prepared by the buyer's conveyancer, first as a draft (proposed copy) and then, after its exact wording has been approved by the seller's and the lender's solicitors, as an engrossment (fair copy for signature). Once it has been signed, it is held by the *seller's* solicitor.

24.9.1 On a purchase of registered land, this purchase-deed is called a Deed of Transfer, whether the land is freehold or leasehold. On unregistered land, the purchase-deed is either a Deed of Conveyance (of a freehold) or a Deed of Assignment (of a leasehold).

24.10 The lender's solicitor produces the Deed of Mortgage (often called a Legal Charge) at this stage.

24.11 A final search is then made:-

24.11.1 this is made at the Land Registry (to check for any changes which have occurred since the registry issued the Office Copy) if the land is registered land;

24.11.2 it is made at the Land Charges Registry (as a final check for equitable easements and other similar matters which might have been omitted from the Abstract) if the land is unregistered land.

(Do not confuse these searches with the *Local Search* made in 24.4.1 above. - But the *method* of making the search is the same; a printed form is filled in and sent to the appropriate Registry. The solicitor does not go there.)

24.12 On the day named in the contract as "completion day", several things happen. (i) Legal ownership of the property changes hands as the signed purchase-deed is handed over to the buyer's solicitor in return for the remaining 90% of the price. This is "completion of the purchase". (ii) This deed and the mortgage and all other documents (i.e. the Title Certificate and searches if the land is registered; a bundle of old deeds and searches if the land is unregistered) are then handed over to the lender's solicitor. (iii) The keys are made available to the buyer. Part of the art of conveyancing is to try to ensure that the keys are available *before* the removal van loaded with the buyer's furniture arrives at the property.

24.13 Stamp Duty (a tax, at present 1% of the purchase price) must be paid to the Inland Revenue within thirty days after completion of the purchase, except on properties of £60,000 or less, which are exempt from this tax.

24.14 Registration must then take place, as described in 8.11.1 above.

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Chapter 25

# MORTGAGES

## *a) What is a mortgage?*

25.1 A mortgage is a "secured loan". When the lender (the mortgagee) lends money to the borrower (the mortgagor) the lender takes the deeds, or the Land Registry Title Certificate, of the borrower's property, as *security*. If the borrower falls seriously into arrears with the mortgage-payments, the lender, having the title documents, is able to sell the property, to recover the whole amount of the loan.

25.2 The mortgagee is referred to as "it" in this chapter, as it will usually be a Bank or a Building Society - though it could be a private individual, or a group of individuals such as trustees.

## *b) Repayment and endowment mortgages*

25.3 On a "repayment mortgage", the payments, usually required monthly, are payments of interest plus repayments of a small portion of the capital sum borrowed. The amounts are calculated so that the whole of the loan will be repaid in a certain number of years - typically 25 years.

25.4 On an "endowment mortgage", the payments are payments of interest only, but the borrower has an "endowment" life assurance policy, on which monthly or quarterly premiums have to be paid. In return for these premiums, the Life Assurance Company will provide a lump sum, sufficient to pay off the mortgage and maybe more than that, on an agreed date - typically after 25 years, or immediately on the death of the borrower if that occurs before the agreed date. (So the borrower's dependants do not have to worry about paying the mortgage: the lump sum from the Life Assurance Company pays it off.)

### *c) Mortgagees' remedies for non-payment*

25.5 If the mortgage payments are not made reasonably regularly, the mortgagee has a choice of five steps it can take. One of these, Foreclosure, can be treated as obsolete; the other four are important:-

25.5.1 If the interest due becomes more than two months in arrears, or if there is any breach of covenant, the lender can SELL the property, usually with vacant possession, to get its money back. It can apply to the County Court for an Eviction Order if the borrower and all other occupants will not leave voluntarily. The lender may also sell the property if it gave the borrower notice that it wanted its money back, and the loan has not been repaid within three months after that notice. (The lender is always entitled to ask for its money back on three months' notice. This might happen, for instance, if the lender were a business-man who needed his money back because his business was facing a cash-flow problem.)

25.5.2 The mortgagee's second remedy is to take POSSESSION of the property, and perhaps let it to a tenant. This is not at all to be recommended, because if the borrower then obtains some money (e.g. a lottery or pools win, or a redundancy payment or an inheritance) he can pay off the mortgage and demand his property back This leaves the lender with the problem of providing alternative accommodation for the tenant. On the other hand, if the borrower does *not* have any such good luck, and nor does the tenant - in fact the tenant gets into debt and then leaves without paying the rent - the law says that the amount of rent that the lender *should* have received from the tenant must be the lender's loss. So the amount that the borrower owes the lender must be *reduced* by that figure, because the lender should have collected that amount from the tenant. But the third remedy provides a way round this problem:-

25.5.3 The third remedy, APPOINTING A RECEIVER to collect the rent from the tenant, avoids the above problem, because although the receiver is chosen and appointed by the lender, and pays the rent to the lender, the

receiver is legally the *borrower's* agent, and therefore any rent not collected is the borrower's loss, not the lender's loss.

25,5,4 Fourthly, if the property has been sold but did not produce enough money to pay off the whole debt plus the legal expenses, but then the borrower obtains some money (a lottery win, etc.) the lender may SUE the borrower for the amount of debt outstanding.

25.6 These four remedies of the lender may be remembered by the word SPAS:

S sell
P possess
A appoint a receiver
S sue.

25.7 These remedies (other than taking possession) do not become available to the lender until the *legal repayment date* has passed. That needs a word of explanation:-

25,7,1 Long ago, before Equity came to the rescue, mortgage loans had to be repaid one year from the date they were borrowed. That was the *legal repayment date*. If you did not repay it by then (even if you were only one day late) you lost your mortgaged land - and you still had to repay the money.

25,7,2 Equity therefore stepped in and gave an *Equitable right to redeem*, entitling the borrower to repay the loan within a reasonable time *after* the legal repayment date. So the legal repayment date was after one year, but Equity gave the borrower longer.

25,7,3 But the lender's remedies (except possession) do not become available until the legal repayment date has passed, and Banks and Building Societies are not willing to wait a year: so, in nearly all modern mortgages, the legal repayment date is one *month* after the day the money is lent. Nobody expects the money to be repaid on that date - all borrowers will rely on the extra time given to them by the Equitable right to redeem: and on a normal 25 year mortgage,

the legal repayment date passes after one month, but Equity gives an extra 24 years and 11 months (and a bit more, if necessary) to pay off the mortgage. But the point is that the lender's rights of selling, appointing a receiver, and suing are not available until the legal repayment date has passed. (Nor is Foreclosure, which is an obsolete remedy based on taking away the borrower's Equitable rights.)

22,7,4

| *at common law* | *in Equity* |
|---|---|
| Common law says the whole mortgage must be repaid just one month after it is borrowed. | The Equitable right to redeem gives the borrower extra time. |

*d) Four types of mortgage*

25.8 *Legal Mortgage by Demise.*

25,8,1 Readers of this book know there are only two legal estates: the fee simple absolute in possession and the term of years absolute.

25,8,2 If the property is freehold, the borrower has the legal fee simple absolute in possession - and therefore, what does the lender have?

25,8,3 In a legal Mortgage by Demise, the lender has a legal term of years absolute. This is usually for 3,000 years if the property is freehold. (If the property is leasehold, the lender's legal term of years will be a sub-lease a few days shorter than the lease.)

25,8,4 So the lender becomes technically a tenant of the borrower, but will not move in - although he *could* do so if the mortgage interest went into arrears, because taking possession is one of the lender's remedies which we saw in paragraph 25.5.2 above.

25,8,5 The mortgage deed will include a proviso that the term of years ends immediately when the mortgage is paid off.

(A borrower may pay off his mortgage at any time if he has enough money, but if he pays it off very quickly the lender may charge him an extra administration fee.)

25.8.4 Mortgages by Demise may be either repayment or endowment mortgages.

25.9 *Legal Charge* (its full name is "Charge by Way of Legal Mortgage").

25.9.1 This, unlike the Mortgage by Demise, does not give the lender a legal term of years; but it gives the lender all the remedies - the rights to sell, possess, appoint a receiver, sue, and foreclose - *as if* the lender had a legal term of years absolute.

25.9.2 This has one great advantage over the mortgage by demise. Example:- Suppose X mortgages her 99-year leasehold flat to Y, by a Mortgage by Demise. Y will normally take a legal term of years absolute, for the 99 years all but the last 10 days. (Technically, Y is sub-tenant, but he will of course not move in.) - But X and Y have failed to notice that X's lease contains a covenant not to sub-let. Y's term of years is a sub-lease, so there is a breach of the covenant, and the landlord Z can commence proceedings to recover the flat. This will leave X with no home, and Y with no security for the loan. - But if Y's mortgage were a Legal Charge, this problem could not arise: a Legal Charge does not give the lender a legal term of years, it only gives him the rights *as if* he had a legal term of years. So the mortgage is not a sub-lease and so there is no breach of the covenant.

25.9.3 Until the 1960s, the majority of mortgages were Legal Mortgages by Demise, but today, the most popular form is the Legal Charge.

25.9.4 Legal Charges may be either repayment or endowment mortgages.

25.10 In three situations, a Mortgage by Demise will be an *Equitable Mortgage by Demise* instead of a legal one. The three situations are:-

25.10.1 (1) if the mortgage is made by an informal document instead of a formal deed. (This is the sort of thing that might happen if the parties drew up their own mortgage without taking legal advice.)

25.10.2 (2) if the right which is mortgaged is only Equitable. (An example would be a mortgage of an Equitable future fee simple. See 6.8.2 and 6.8.3 above, in which Charles could obtain a loan *immediately* by mortgaging his future fee simple, but the mortgage would have to be an equitable one.)

25.10.3 (3) if the deed states that the mortgage is Equitable, not legal. (On unregistered land, this could help to keep financial arrangements within a family private.)

25.11 A Charge may be an ***Equitable Charge*** instead of a Legal Charge, in the same three situations.

> (Until 1989, an Equitable Charge could be made by word of mouth, by a borrower handing his deeds or Title Certificate to his Bank Manager as security for an overdraft; but since 1989, such a transaction must have some writing, signed by the borrower and the lender, to satisfy s.2 of the Law of Property (Miscellaneous Provisions) Act, 1989.)

25.12 All mortgages of registered land should be registered in the Charges Register at the Land Registry - see paragraph 8.4.3 above.

25.13 Mortgages of unregistered land should be registered at the Land Charges Registry if the deeds have not been handed over to the lender. Usually such mortgages will be Second Mortgages: see the note following paragraph 8.13 above.

25.14 See also the *Boland*, *Flegg*, *Cann* and *Rosset* cases - paragraphs 15.8, 15.9, 15.10 and 15.17 above - for examples of some of the awful problems that can arise with mortgages.

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Chapter 26

# LANDLORD AND TENANT LAW and HOUSING LAW

## *a) Landlord and Tenant Law*

26.1 Landlord and Tenant Law is to do with the relationships between landlords and their tenants: so it is about leaseholds. It only covers the private sector (i.e. properties with private landlords). The public sector (such as council housing) comes under Housing Law - see part *b* of this Chapter.

26.1.1 A landlord can always enforce covenants against the tenant, whether the covenants are restrictive or positive: for there is always Privity of Estate between the landlord and the tenant even in cases where there is no Privity of Contract. (See 20.10.)

26.2 All legal leaseholds are either specific or periodic terms of years absolute.

26.2.1 The difference between a specific term (eg. a 7 years lease) and a periodic term (e.g. a three-monthly tenancy) has been explained at 3.8.3 above.

26.2.2 Equity also recognises tenancies at will and on sufferance - see 3.9 and 3.10 above.

26.3 For this chapter, the words "lease" and "tenancy" can both be treated as having the same meaning - i.e. a leasehold - but in practice it is usual to use the word "lease" for a specific term for which a capital sum is paid (e.g. a lease of a luxury flat on a 125 years term for £250,000 plus a rent of £6 per year) and to use the word "tenancy" for a periodic term or a short specific term which is purely at a rent (e.g. a tenancy of a student flat at £85 per month).

26.4 A lease for a term not exceeding three years can be made by word of mouth. (That includes virtually all periodic tenancies - but it is wise to have writing so that there cannot be a dispute in which the only evidence of what was agreed is the tenant's word against the landlord's.)

26.5 The difference between an assignment and a sub-lease has been seen in paragraphs 20.27 - 20.27.3 above.

26.6 A lease (or tenancy) is different from a licence. A licence is a permission to do something which would otherwise be a trespass. Examples are:- I allow my neighbour's son to sail his model yacht in my goldfish pond (this is a bare licence for which he pays nothing) and I go to the theatre (this is a contractual licence because I pay for my seat). Sleeping in a dormitory at boarding school, sharing a room with strangers in a lodging-house, and spending a night in an hotel, are also by contractual licence.

26.7 Lessees (tenants) have the benefit of an extensive array of statutes. This subject is largely political: Labour governments have passed statutes favouring tenants, and Conservative governments have passed statutes favouring landlords.

26.7.1 With residential leases of less than 7 years, the Landlord and Tenant Act, 1985, imposes certain obligations on the landlord to keep toilets, sinks, electricity supply etc. in repair. This includes such items as immersion heaters but not electric kettles.

26.7.2 *As to protection against eviction:-* Residential tenancies which commenced before 15 January, 1989, are likely to be "regulated" tenancies protected by the Rent Act, 1977 (by which the tenant is protected against eviction except for good reason, and against having the rent increased above a certain limit) but those made on or after that date are likely to be either "assured" or "assured shorthold" tenancies under the Housing Act, 1988. ("Assured shorthold" tenancies, which so many students have, are mentioned further at 26.7.3 below.) Leases over 21 years of

houses will in many cases be within the provisions of the Leasehold Reform Act, 1967, by which the lessee can compel the lessor to sell him or her the freehold. Many leasehold flats have the benefit of the Leasehold Reform, Housing and Urban Development Act, 1993. For leases of business premises, there are Landlord and Tenant Acts, 1927 and 1954. All these statutory provisions are outside the scope of this book.

26,7,3 Assured shorthold tenancies are for a specific term of at least six months: during this time the landlord cannot get rid of the tenant (except for non-payment of rent, etc.) - and the tenant is liable for the rent for the whole of that time even if he or she leaves before the end of that time. After the end of the specific time, the tenancy often becomes periodic - typically monthly at a monthly rent and terminable by either the tenant or the landlord by giving notice.

26,7,4 Various properties, such as council houses, Housing Association properties, and accommodation let by universities and other educational bodies to students, are not within the above provisions but are covered by other provisions, chiefly in the Housing Acts, 1985 and 1988, and Housing Associations Act, 1985.

(Thus if a landlord lets to a student, the matter is within 26,7,3 above; but if the landlord lets to the University which sub-lets to the student, it is within 26,7,4 because the student's landlord is an educational body.)

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*b) Housing Law*

26.8 Housing Law involves the Local Authority: maybe as landlord of council housing; or maybe in an Environmental Health role to deal with run-down out-of-repair housing.

*(i) The Council as landlord*

26.9 Council tenancies are "secure tenancies" under Part IV of the Housing Act, 1985. The council cannot evict

the tenant, except for a good reason such as refusal to pay the rent.

26.10 The council tenant's right to buy the freehold of his council house (or long leasehold in some cases, such as a flat) is in Part V of the same Act.

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*(ii) The Council's powers as to all bad housing*

26.11 Under Parts VI and IX of the Housing Act, 1985, District Councils have certain duties and powers with regard to properties within their districts. If a property is so far deficient in repair, stability, or drainage etc. as to be "unfit for human habitation", the Council has a *duty* to serve a "compulsory repairs notice", or alternatively a "closing order" (closing the house down) or a "compulsory purchase order".

26.11.1 If the property is in serious disrepair but is not actually "unfit for human habitation", the Council has the *power* (but no *duty*) to serve a "compulsory repairs notice" under Part VI of the same Act. Thus the Council has a free hand to serve or not to serve such a notice: but if such a notice is served, it must be obeyed. - So whether anything is done is at the Council's discretion. The Council's policy is likely to be in accordance with its politics: a Labour council might decide to improve the housing fabric of its district by requiring landlords and even owner-occupiers to do repairs (and giving them grants towards meeting the cost) whereas a Conservative council in the same situation might decide to save taxpayers' money by taking no action.

26.12 There are further provisions, under Parts X and XI of the same Act, as to overcrowding, and as to "houses in multiple occupation" (e.g. large old houses divided into bed-sits). These provisions include requirements as to the number of bathrooms to be provided in such houses, and rules as to fire doors and fire escapes.

*(iii) Homelessness*

26.13 If a "vulnerable" person (e.g. one under 18, or over 65, or pregnant or disabled) is *homeless*, then, unless they became homeless "intentionally" (e.g. by refusing to pay the rent, even though they can afford to) the Council *must* provide them with accommodation: Housing Act, 1985, Part III. Sometimes this accommodation will be a tenancy of a council flat; but often it will be bed and breakfast (paid for by Social Security if necessary) in an hotel.

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*c) an interprofessional warning*

27.7 Terminology can vary from one profession to another. In Chapter 2 of this book it was stated that there are only two tenures: freehold and leasehold. But do not be surprised if a Housing Officer speaks of four tenures: (i) council housing, (ii) Housing Association housing, (iii) lettings by private landlords, and (iv) owner-occupation.

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TEST QUESTION

31.(a) Fred, a freeholder, granted a 99 years lease to Luke. Luke granted a 35 years sub-lease to Stan, and later assigned the residue of the 99 years lease (subject to the sub-lease) to Ada. Stan has granted a 4 years sub-sub-lease to Una. Stan is now offering to sell all his rights in the property to Percy, and Percy has asked you to explain to him in practical terms just what he will receive if he accepts this offer. Explain to him what rights and duties he will have.

(b) Una says the thermostat on the immersion heater has just jammed. Who pays for the repair?

(c) Which of these matters must be registered at the Land Registry?

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Chapter 27

# PLANNING LAW
# and
# ENVIRONMENTAL HEALTH LAW

27.1 Developers need to surmount three hurdles:-

(1) They need to be sure that the land they propose to develop is not subject to any covenants, easements, road proposals or other matters that would restrict or prevent the development they intend to carry out;

(2) They need to be sure that any necessary Planning Permissions have been obtained;

(3) As the development proceeds, they need to make sure that the Building Regulations are complied with.

## *a) Planning Law*

27.2 Planning Permission is needed for all development, unless it is a small addition not exceeding 15% of the original building (or 10% if it is in a terrace) which will not raise the roof line and will not extend in front of the front wall of the building.

27.3 Each County Council has a Plan of the intended development of its county, which looks ahead to the early 21st. century.

27.3.1 *For example:-* Land north of Bristol is designated for residential and office development (the intention being that this will be the site for tens of thousands of the houses which are needed to meet the expected population-growth in the Bristol area) and land south of Bristol is designated as "green belt" on which Planning Permission for development of green-field sites *will not* be given (the intention being to preserve some rather pleasant countryside and to prevent Bath, Bristol and Weston-super-Mare from joining up into a 35 mile urban sausage).

27.3.2 Applications for Planning Permission are considered by the Planning Committee of the *Local* Authority (i.e. the District Council or equivalent authority - see 8.17 above) on the basis of the *County* Council's Plan.

27.4 Planning Permission greatly increases the value of land, but when the landowner sells the land to a developer, much of this profit is taken by the government as Capital Gains Tax.

27.5 Planning Permission may be granted subject to conditions. These conditions continue to apply to the land even if it changes hands. The difficulties which we saw with regard to enforcement of covenants (Chapter 20) do not apply to these conditions.

27.6 If a development is built without Planning Permission, or in breach of conditions, the Planning Authority (the Local Authority as in 27.3.2 above) can serve an "enforcement notice" requiring demolition of the development. (This is not just theory - it happens!)

*b) Environmental Health Law*

27.7 The development must be built of proper materials, and in a sound manner, as laid down in the Building Regulations - cavity walls must have cavities of correct width, there must be adequate provision in habitable rooms for ventilation, and so on. If these Regulations are not complied with, the Local Authority's Building Inspector can order the work to be pulled down.

27.8 The matters in 26.11 - 26.12 above could also have been classified as Environmental Health matters, and are likely to be dealt with by the Environmental Health Department rather than the Housing Department, in a typical Local Authority.

*c) Finding out the Problems*

27.9 The site may include a "listed building" - listed as being of architectural or historical interest - or it

may be in a "conservation area" (such as a picturesque village) or an "a.o.n.b." ("area of outstanding natural beauty") or a "National Park" or an "s.s.s.i." ("site of special scientific interest") or a "green belt" - or a building on the site may have a "closing order", as being "unfit for human habitation" - or there may be a "tree preservation order", a road improvement scheme, a series of planning conditions or even an "enforcement notice". All these Planning and Environmental Health matters will show up on the reply to the Local Search and Enquiries that the purchaser's conveyancer will have sent to the local Council before exchange of contracts for the purchase of the site. (See 8.17.1 and 24.4.1 above.)

27,9,1 We have seen already (18.21) that easements are not on the Local Search, as they are nothing to do with the Local Authority. The same is true of covenants. On registered land, details of easements and restrictive covenants are in the Land Registry; on unregistered land, legal easements are in the deeds but restrictive covenants and equitable easements are registered at the Land Charges Registry. Some rights (such as those by prescription) do not show up on any register at all, and purchasers must just keep their eyes (and ears) open for them.

*end of text*

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TEST QUESTIONS

32. What is the difference between (i) a draft Conveyance (ii) an engrossment Transfer (iii) a Title Certificate and (iv) a contract?

33. What is a Legal Charge? Should it be registered in the Charges Register at the Land Registry? Must it be repaid on its Legal Repayment Date?

34. Distinguish between

(a) "overreaching" and "overriding interests"
(b) "tenure" and "tenancy"
(c) "Land Charges Registry", "Land Registry", and "Local Land Charges Registries"
(d) "Land Charges" and "Legal Charges"
(e) "legal estates", "legal interests", "equitable interests"
(f) "easements", "covenants" and "planning conditions"
(g) "express grant" and "express reservation" of easements
(h) "registration of title" and "registration of incumbrances"
(i) "assignment" and "sub-lease"
(j) "tenant for life" and "life tenant"
(k) "trust" and "trust for sale"
(l) "monthly tenancy" and "tenancy for a month"
(m) "lease" and "licence"
(n) "registered land" and "unregistered land".

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*answers to questions 31-34*

31 (a) Percy will have the right to receive rent from Una, and the right to sue her and probably evict her if she fails to pay; and he will have the right to receive the property back from her at the end of the 4 years. - Percy will be under a duty to pay rent to Ada, and to hand back the property to her at the end of the 35 years, and will be subject to whatever other covenants and conditions are in the sub-sub-lease. - Percy should check whether the consent of Ada and/or Fred is needed for Stan to assign the residue of the sub-sub-lease to him; there may be a condition that they must join in and sign the contract between Stan and Percy, in which case Percy will be liable to them on privity of contract, in addition to his liability to Ada on privity of estate. And see (b) below.

(b) See 26.7.1 by which the liability for repairing the immersion heater falls onto Una's landlord; that appears to Stan at present, but if the heater had failed a little later the responsibility would have been Percy's.

(c) See 8,1 - the freehold and all leaseholds exceeding 21 years must be registered. (So should all mortgages on them - 25,12 above.) Leases not exceeding 21 years cannot be registered - 8,15,1 - so, in this case, the freehold, the headlease and the sub-lease will be registered, but the sub-sub-lease will not be registered but will hold good as an overriding interest. - But see also the final ten lines of the answer to 34(n) below.

32 (i) A draft Conveyance is a provisional copy (for approval) of the proposed purchase-deed for unregistered freehold land,

(ii) An engrossment Transfer is a fair copy purchase-deed, signed or ready for signature, for registered freehold or leasehold land,

(iii) A Title Certificate is the document provided by the Land Registry after completion; it replaces the deeds,

(iv) A contract is an agreement - for example an agreement that I *will* buy or sell. (The contract is the promise that I *will* buy the land; I buy it by the Transfer; and the Title Certificate is the proof that I *have bought* it.)

33 A Legal Charge is a mortgage; see 25,9,1 - 2 for details,

It should be registered in the Charges Register at the Land Registry; see 25,12 above, and there is an example of such a registration at the foot of page 36,

It will almost certainly not be paid off until much later than its Legal Repayment Date, because the Equitable Right to Redeem gives the borrower extra time; see 25,7,1 - 3 above,

34 (a) See 7,5 - 7,5,1 and 8,15 - 8,15,3

(b) *Tenure* is how the land is held. It is freehold (held from the Crown) or leasehold (held from a landlord). A *tenancy* is a periodic or short specific term of years; so a tenancy is a leasehold *estate*. See 2,9 and 26,3

(c) The *Land Charges Registry* is for registration of incumbrances on unregistered land; see page 39. The *Land Registry* is for registration of the title (including the incumbrances) in respect of registered land; see pages 35-36. The *Local Land*

*Charges Registries* are for registration of local matters on both registered and unregistered land; paragraphs 8,17 - 8,17,1

(d) A *Land Charge* is an incumbrance - the sort of thing that gets registered in the Land Charges Registry or a Local Land Charges Registry - see (c) directly above. A *Legal Charge* is a mortgage. 25,9 - 25,9,2

(e) *Legal estates;* fee simple absolute in possession, terms of years absolute (7,3,1-2) - *Legal interests;* mortgages, easements, tithes, rentcharges, entry rights (METRE) (9,1) - *Equitable interests;* all other interests in land (see page 46).

(f) An *easement* (18,1) is a right to do something on someone else's land - e,g, right of way, right of drainage. A *covenant* (20,1) is a promise made to someone in a deed, either to do something (e,g, to keep a fence in rpair) or not to do something (e,g, not to park caravans on the property). *Planning conditions* (27,5) are imposed by the Council, as part of the permission to develop the land. Sometimes they look like covenants (e,g, there could be a planning condition not to park caravans on a residential development) - but covenants can become unenforceable, through lack of privity of contract and privity of estate in the case of positive covenants, and through non-registration in the case of restrictive covenants. There are no such constraints on planning conditions; the Council can enforce them.

(g) A *grant* (18,5) gives or sells someone a right; a *reservation* (18,6 - 18,6,1) holds back something for myself.

(h) *Registration of title* is registration of the legal fee simple, or of a legal leasehold term of more than 21 years. The title deeds are replaced by a Title Certificate set out in the same format as the Office Copy on page 36. An estimated five million properties have not yet been brought onto this system but are still unregistered titles on which the ownership of the freehold or leasehold is shown by a set of title deeds.
- *Registration of Incumbrances;*- Incumbrances are matters to which the land is subject, such as easements and restrictive covenants. *(i) incumbrances on registered land* On a registered title, these incumbrances (except overriding interests, such as rights by prescription) should be registered at the Land Registry, and will then appear on the Title Certificate. (See the example of the restrictive covenant in

the Office Copy on page 36.) *(ii) incumbrances on unregistered land* On unregistered land, there are certain incumbrances which must be registered at the Land Charges Registry. These include Equitable easements created since 1925, and restrictive covenants created since 1925.

(i) See 20,27,1 and 20,27,2

(j) See 11,6,4 and the second note (on page 55) to 11,6,5

(k) A *trust* is any situation in which trustees hold property (either land, or stocks and shares or other investments, or money or any other assets) on behalf of one or more beneficiaries. See 4,1,1 for an example. A *trust for sale* is the particular type of trust (see 4,5) which was widely used for investment in the days of Queen Victoria and is compulsory today for all co-ownerships. 14,12

(l) A *monthly tenancy* is a periodic term, terminable by a month's notice. A *tenancy for a month* is a specific term lasting for one month and no longer. 3,8,3

(m) See 3,8,3 26,6 and 18,14 - 18,16,3

(n) *Registered land* is land of which the legal estate in question (the fee simple absolute in possession or a term of years absolute, as the case may happen to be) has been registered at the Land Registry. *Unregistered land* is land in respect of which the ownership of the legal freehold or leasehold estate (whichever estate is being sold or otherwise dealt with) still has to be shown by deeds.

- It is possible to find land in respect of which the freehold estate has been registered but a long lease made some time ago is still on the old unregistered system; and land in respect of which leasehold and sub-leasehold estates are registered but the freehold is not. An example of this last situation would be the position in Question 31 if the lease and sub-lease were registered but the freehold (which has been in Fred's family for many years) has never been sold since registration became compulsory in that part of the country, and therefore has never been registered.

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FINAL TEST QUESTION, to test knowledge of all chapters in this book.

*(note; no answer is given to this question, but paragraph references are given)*

35 Several years ago, Alec and Betty bought a freehold property, which is subject to two covenants (both made in 1937) not to keep pigeons on the land and not to let the garden wall fall into disrepair. A neighbour, Derek, has used a path across this property since 1971, without any permission. There is a right for this property, granted in 1959, to drain into any drains that may in the future be laid across the adjoining land. Alec has recently died, and Conrad wants to buy the property. Advise Conrad on the following points:-

1 Who can sell the property to him? 14.14.8 *or* 14.14.26
2 Who will be entitled to the purchase-money? 14.14.10 *or* 14.14.26
3 What is the name of the legal estate which Conrad will receive? 3.4.2
4 Will he be bound to obey the two covenants? 20.17.1 20.17.4 20.18.1
5 Can he obtain an injunction to stop Derek from crossing the land? 19.8.2 19.9 19.10.1
6 What registration requirements must Conrad observe? 8.6 8.11.1
7 What is an Equitable easement, and has Derek got one? 18.5.1 - 2 19.6.6
8 Why did Alec and Betty hold the property on trust for sale? 4.12 14.14.14 14.22
9 What permissions will Conrad need before he can build an extension onto the house? 27.1 27.2 27.7
10 What precautions need to be taken before exchange of contracts, to protect Conrad? 24.4
11 What is exchange of contracts? 24.2.1
12 Conrad's wife has left him, and he therefore asks you to explain the case of *Gissing v. Gissing* to him. (a) Describe what it did. (b) Do you think it was a fair decision? (c) Regardless of your answer to that, what effect will this case have for Conrad and his wife, and

will she be able to claim any interest in the property Conrad is now buying? 15.13

13 If Conrad's aunt who lives with them is providing one third of the purchase price, what rights will she have in the property? 15.8 15.12 15.12.1

14 Could she prevent the Building Society from selling the property if Conrad fails to keep up the mortgage payments? 15.8 15.10

15 Conrad tells his friend Cornelia, "Come, live with me and be my love. My house is yours while heaven's above!" – Cornelia pays half the cost of putting a new roof onto the house. Two years later, Conrad tells her to leave. Has she any claim with regard to the house? 15.15 15.16 15.18.2 – 3

16 What is the difference between an easement and a profit à prendre? 18.1 18.12

17 Conrad is thinking of letting the house, if the Building Society will allow him to do so. What is the difference between a lease (or tenancy) and a licence? What is the difference between a leasehold for a specific term of years and one for a periodic term of years? 26.3 26.6 18.15 18.16 3.8.3

18 Will the minerals beneath the ground belong to Conrad, and if so, is he allowed to dig them out? 1.2(2)

19 Is this land settled land? 11.1 11.2

20 Does the easement of 1959 allow Conrad to join a drainage-pipe into the drain which his neighbour has recently laid across an adjoining property? 12.6.2

21 How far is it true to say that it is the Planners, and not Conrad, who will control what Conrad's land is used for? 27.2 27.3.1 1.2(2)

22 What is "land"? Is an upstairs flat "land"? Is a railway tunnel "land"? 1.2 1.5

23 What is "law"? Is Equity "law"? 4.1

24 In what respects could Parliament improve our Land Law? 23.5 23.9 23.11 23.12

25 Which, if any, of the above matters will affect the *value* of the property? *Think about it!*

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