absence. The system of guarding the cars was negligent. Only one guard checked both car parks on only five days per week, with no cover for breaks. S recovered damages for the loss of the car and inconvenience for loss of use. This was not, the judge said, a car park of 'general invitation' such as a public car park. It was not a temporary parking arrangement and the defendants owed him a duty of care as bailees. They were not mere licensees with no duty of care.

(ii) It was held in *Chappell (Fred)* v *National Car Parks, The Times*, 22 May 1987, that where a vehicle was parked on NCP land for a fee but there was no barrier, the land was open and no keys to the vehicle were handed over, as the owner locked the vehicle and retained the keys, no bailment of the vehicle took place and NCP were not liable for its theft.

(iii) It should not be assumed that because in the *Chappell* case there was no bailment that this result will be arrived at in all such public car parks. A modern multi-storey car park with its careful checks on incoming and outgoing cars and a fee in return for a parking space and tickets to be presented before allowing departure will almost invariably constitute a bailment.

The position may be different where the car park is on open land albeit fenced since in such a case it is difficult to show the essential ingredient of bailment, i.e. that the owner gives the bailee the ability to exclude all others except the owner.

463 *Ultzen* v *Nicols* [1894] 1 QB 92

A waiter took a customer's overcoat, without being asked to do so, and hung it on a peg behind the customer. The coat was stolen and it was *held* that the restaurant keeper was a bailee of the coat and that there was negligence in supervision on the part of the bailee.

Comment In this case the servant seems to have been regarded as taking possession, but it is unlikely that a bailment will arise if a customer merely hangs his coat on a stand or other device provided by the establishment.

464 *Deyong* v *Shenburn* [1946] 1 All ER 226

An allegation that an actor who left his clothes in a dressing room had constituted the theatre owners bailees of the clothes was not sustained.

Bailment: finders and involuntary recipients

465 *Newman* v *Bourne & Hollingsworth* (1915) 31 TLR 209

The claimant went into the defendant's shop on a Saturday in order to buy a coat. While trying on coats she took off a diamond brooch and put it on a show case. She left the shop having forgotten the brooch; an assistant found it and handed it to the shopwalker who put it in his desk. By the firm's rules the brooch ought to have been taken to its lost property office. The brooch could not be found on the following Monday.

Held – there was evidence to support the trial judge's finding that the firm had become a bailee and had not exercised proper care.

466 *Neuwirth* v *Over Darwen Industrial Co-operative Society* (1894) 70 TLR 374

A concert hall was hired for an evening performance. No mention was made of rehearsal but the orchestra rehearsed in the hall during the afternoon without opposition from the proprietors or the keeper of the hall. After the rehearsal Neuwirth left his double-bass fiddle in an ante-room in such a position that when the hall keeper came to turn on the gas in the ante-room he could not do so without first moving the instrument. The fiddle fell and was badly damaged.

Held – there was no contract of bailment between the parties. The care of musical instruments was outside the scope of the hall keeper's authority and there was no evidence that he had been guilty of negligence in the course of his employment.

Comment Reference should also be made to *Elvin and Powell Ltd* v *Plummer Roddis Ltd* (1933).

Bailment: obligations of bailor

467 *Hyman* v *Nye* (1881) 6 QBD 685

The claimant hired a landau with a pair of horses and a driver for a drive from Brighton to Shoreham and back. The claimant was involved in an accident owing to a broken bolt which caused the carriage to upset so that the claimant was thrown out of it.

Held – the trial judge's direction to the jury that the claimant must prove negligence was wrong. There was an implied warranty that the carriage was as fit for the purpose for which it was hired as skill and care could make it.

468 *Reed* v *Dean* [1949] 1 KB 188

The claimants hired a motor launch called the *Golden Age* from the defendant for a family holiday on the Thames. The claimants set sail at about 7 pm on 22 June 1946, and at about 9 pm, when they were near Sonning, they discovered that a liquid in the bilge by the engine was on fire. They attempted to extinguish the fire but were unable to do so, the fire-fighting

equipment with which the launch was supplied being out of order. The claimants had to abandon the launch and suffered personal injury and loss of belongings. The claimants admitted to a fireman after the accident that they might have spilt some petrol when the tank was refilled.

Held – the claimants succeeded because there was an implied undertaking by the defendant that the launch was fit for the purpose for which it was hired as reasonable care and skill could make it. Further, as the launch had caught fire due to an unexplained cause, there was a presumption that it was not fit for this purpose. The defendant's failure to provide proper fire-fighting equipment was a breach of the implied warranty of fitness.

Bailment: obligations of bailee

469 ***Houghland* v *R Low (Luxury Coaches) Ltd*** [1962] 2 All ER 159

The defendant company supplied a coach for the purposes of an old people's outing to Southampton. On returning the passengers put their luggage into the boot of the coach. During a stop for tea the coach was found to be defective and another one was sent for and the luggage was transferred from the first coach to the relief coach. The removal of the luggage from the first coach was not supervised, but the restacking of the luggage into the new coach was supervised by one of the defendant's employees. When the passengers arrived home a suitcase belonging to the claimant was missing and he brought an action against the defendant for its loss. It was *held*, by the Court of Appeal, that whether the action was for negligence or in detinue, the defendant was liable unless it could show that it had not been negligent. On the facts it had failed to prove this and was, therefore, liable. It was in this case that Ormerod, LJ made some observations on bailments in general. The county court judge had found that the bailment was gratuitous and that the defendant was liable only for gross negligence. Dealing with this question, Ormerod, LJ said:

> For my part I have always found some difficulty in understanding just what was gross negligence, because it appears to me that the standard of care required in a case of bailment or any other type of case is the standard demanded by the circumstances of the particular case. It seems to me to try and put bailment, for instance, into a watertight compartment, such as gratuitous bailment on the one hand and bailment for reward on the other, is to overlook the fact that there might well be an infinite variety of cases which might come into one or other category.

470 ***Global Dress Co* v *W H Boase & Co*** [1966] 2 Lloyd's Rep 72

B & Co were master porters and had custody of 30 cases of goods belonging to G & Co at a Liverpool dock shed. One case was stolen and G & Co brought an action for damages against B & Co. B & Co offered evidence of their system of safeguarding the goods and the county court judge at first instance found the system to be as good as any other in the Liverpool Docks, but notwithstanding this he found B & Co liable. On appeal to the Court of Appeal it was *held* that if B & Co could not affirmatively prove that their watchman was not negligent it was of no avail to show that they had an impeccable system, and the appeal should be dismissed. Thus, the onus of proving that their servant was not negligent lay upon B & Co.

471 ***Doorman* v *Jenkins*** (1843) 2 Ad & El 256

The claimant left the sum of £32 10s with the defendant, who was a coffee-house keeper, for safe custody and without any reward. The defendant put the money in with his own in a cash box which he kept in the taproom. The taproom was open to the public on a Sunday but the rest of the house was not and the cash was, in fact, stolen on a Sunday. Lord Denman *held* that the loss of the defendant's own money was not enough to prove reasonable care and the court found for the claimant.

472 ***Brabant* v *King*** [1895] AC 632

This action was brought against the government of Queensland for damage to certain explosives belonging to the claimant which the government, as bailee for reward, had stored in sheds situated near the water's edge on Brisbane River. The water rose to an exceptional height and the store was flooded. The question of inevitable accident was raised and also the degree of negligence required. The Privy Council *held* that, because of the nature of the site, the bailee was required to place the goods at such a level as would in all probability ensure their absolute immunity from flood water, and the defendant was held liable. The Privy Council went on to say, in case of deposit for reward, that bailees were 'under a level of obligation to exercise the same degree of care, towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended from the character either of the storehouse or of its locality; and the obligations included,

not only the duty of taking all reasonable precautions to obviate these risks but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred'. Counsel for the government suggested that a bailee was not liable for damage caused by the defects in his warehouse where these defects were known to the bailor, in this case the proximity of the warehouse to the Brisbane River. The Privy Council dismissed this argument on the ground that it was a dangerous one, not supported by any authority. It said that the bailor could rely on the skill of the bailee in this matter. It will be seen from this decision that a bailee for reward is liable even in the case of uncommon or unexpected danger, unless he uses efforts which are in proportion to the emergency to ward off that danger.

473 ***Wilson* v *Brett*** (1843) 11 M & W 113

Wilson was in process of selling his horse and Brett volunteered to ride the horse in order to show it off to a likely purchaser. Brett rode the horse on to wet and slippery turf and the horse fell and was injured. Brett pleaded that he was not negligent but the court *held* that he had not used the skill he professed to possess when he volunteered to ride the horse and that he was liable.

474 ***Saunders (Mayfair) Furs* v *Davies*** (1965) 109 SJ 922

The claimants delivered a valuable fur coat to a shop belonging to the defendants, on sale-or-return terms. The defendants displayed it in their shop window and at 2.30 am one morning the coat was stolen in a smash-and-grab raid.

Held – in all the circumstances and because of the valuable nature of the property, the defendants had taken an unreasonable risk and were negligent in leaving the coat on display in the window all night.

475 ***Coldman* v *Hill*** [1919] 1 KB 443

The defendant was a bailee of cows belonging to the claimant. Two of these cows were stolen through no fault of the defendant, though he failed to notify the claimant and did not inform the police or take any steps to find the cows. The claimant now sued him for negligence and it was *held* – by the Court of Appeal – that it was up to the defendant to prove that, even if notice had been given, the cows would not have been recovered. In the circumstances of this case that burden had not been discharged and the defendant was liable.

Bailment: delegation by bailee

476 ***Davies* v *Collins*** [1945] 1 All ER 247

An American Army officer sent his uniform to the defendants to be cleaned. It was accepted on the following conditions: 'Whilst every care is exercised in cleaning and dyeing garments, all orders are accepted at owner's risk entirely and we are unable to hold ourselves responsible for damage.' The defendants did not clean the uniform but sub-contracted the work to another firm of cleaners. In the event, the uniform was lost and the defendants were *held* liable in damages. The Court of Appeal took the view that the limitation clause operated to exclude the right to sub-contract because it used the words 'every care is exercised', which postulated personal service.

477 ***Edwards* v *Newland*** [1950] 2 All ER 1072

The defendant agreed to store the claimant's furniture for reward. Later, without the claimant's knowledge, the defendant made arrangements with another company to store the claimant's furniture. The third party's warehouse was damaged by a bomb and they asked the defendant to remove the furniture but this was not done immediately because there was a dispute about charges. Eventually the claimant removed his furniture but some pieces were missing.

Held – the claimant could recover from the defendant because he had departed from the terms of the contract of bailment by sub-contracting. However, the defendant was not entitled to damages against the third party because the latter, though a bailee, had not, in the circumstances, been negligent.

478 ***Learoyd Bros & Co* v *Pope & Sons*** [1966] 2 Lloyd's Rep 142

The claimants entered into an agreement with a carrier for the transport of their goods. The carrier subcontracted the work to the defendants, who were also a firm of carriers, though the claimants had no notice of this arrangement. The lorry was stolen while the defendants' driver was in the wharf office upon arrival at London Docks, and the carrier with whom the claimants had contracted paid some of the claimants' loss and the claimants now sued the defendants for the balance.

Held – the defendants were bailees to the claimants, notwithstanding the absence of any contract between them, and that the defendants' driver was negligent in leaving the lorry unattended and, therefore, the defendants were liable for the claimants' loss.

Bailment: actions against bailees for non-delivery: defence of superior title

479 ***Rogers, Sons & Co* v *Lambert & Co*** [1891] 1 QB 318

The claimants had purchased copper from the defendants but did not take delivery of it and left it with the defendants as warehousemen. The claimants then resold the copper to a third person. Some time later the claimants asked for delivery of the copper from the defendants, but the defendants refused to deliver on the ground that the claimants no longer had a title to it.

Held – this was no defence to an action of detinue. The defendants must show that they were defending the action on behalf and with the authority of the true owner.

Co-ownership: severance of joint tenancy

480 ***Re Draper's Conveyance*** [1967] 3 All ER 853

In 1951 a house was conveyed to a husband and wife in fee simple as joint tenants at law and of the proceeds of the trust for sale. In November 1965, the wife was granted a decree *nisi* of divorce and this was made absolute in March 1966. In February 1966, she applied by summons under s 17 of the Married Women's Property Act 1882, for an order that the house be sold and in her affidavit asked that the proceeds of sale be distributed equally between her husband and herself. The court made such an order in May 1966, and in August 1966 a further order was made under the Act of 1882 that the former husband give up possession of the house. In spite of the order, the former husband remained in possession until January 1967, when a writ of possession was executed. Four days later he died without having made a will. The former wife now applied to the court to determine whether she held the proceeds of any sale absolutely (which would have been the case if she and her former husband had been joint tenants at his death) or for herself and the deceased's estate as tenants in common in equal shares (which would have been the case if there had been severance).

Held – severance of a joint tenancy in a matrimonial home may be effected by the wife's issue of a summons under s 17 of the Married Women's Property Act 1882, and her affidavit in support. The affidavit had stated the former wife's wish for severance and had operated accordingly. Therefore, she held any proceeds of sale as trustee for herself and the estate of her former husband as tenants in common in equal shares.

Leasehold: leases and licences distinguished

481 ***Shell-Mex and BP Ltd* v *Manchester Garages Ltd*** [1971] 1 All ER 841

The claimants by an agreement contained in a document called a licence let the defendants into occupation of a petrol filling station for one year. The parties had some disagreements during this time and at the end of the year the claimants asked the defendants to leave. The defendants refused claiming that the agreement gave them a business tenancy protected by the Landlord and Tenant Act 1954, Part II, which deals with the method of terminating business tenancies. This method had not been followed by the claimants.

Held – by the Court of Appeal – it was open to parties to an agreement to decide whether that agreement should constitute a lease or a licence, but the fact that it was called a licence was not conclusive. However, in this case it was a licence because the claimants retained, under the agreement, the right to visit the premises whenever they liked and to exercise general control over the layout, decoration and equipment of the filling station. These rights were inconsistent with the grant of a tenancy.

Comment In *Westminster City Council* v *Clarke* [1992] 2 WLR 229 the House of Lords decided that Mr Clarke, who was an occupant of a council hostel for single homeless persons, was a licensee and not a tenant under a lease. He had no exclusive rights of occupation and his licence could be terminated on seven days' notice or forthwith if in breach of the rules. The claimants gave him notice because of complaints about him and were entitled to possession of his room.

Leasehold: exclusive possession of land not necessarily a tenancy in spite of agreement

482 ***Binions* v *Evans*** [1972] 2 All ER 70

Mr Evans was employed as a chauffeur by the Tredegar Estate which owned a number of houses. His father and grandfather had also worked for the estate. Mr Evans died in 1965 and the trustees of the estate allowed Mrs Evans to continue to reside in a cottage which belonged to the estate, free of rent and rates. In 1968 the trustees made a formal agreement with Mrs Evans, the defendant in this case, who was then aged 76. The agreement purported to create a tenancy at will in order to provide her with a temporary home for the rest of her life free of rent without any rights to assign, sub-let or part with possession. Two years later the trustees sold the cottage and other properties to Mr and Mrs Binions,

the claimants, expressly subject to the tenancy of Mrs Evans and because of that tenancy the trustees accepted a lower price. A copy of the trustees' agreement with Mrs Evans was given to the purchasers. Shortly afterwards the purchasers tried to evict Mrs Evans on the ground that her tenancy, being at will, was liable to determination at any time. She refused to vacate and the court was asked to decide whether her occupation was in the nature of a tenancy at will or a mere licence.

Held – by the Court of Appeal – the interest of the defendant was not a tenancy at will, although it had been so described in the agreement. When the trustees created a right in her favour to live in the cottage for the rest of her life, it could not be a tenancy at will liable to be terminated at any time. It was, therefore, a mere licence, though equity would not permit the claimants to revoke it as long as the defendant was not in breach of the licence. The claimants held on a constructive trust to give effect to the agreement with Mrs Evans.

Comment In *Prudential Assurance Co* v *London Residuary Body* [1992] 3 WLR 279 the House of Lords held that an agreement which stated that certain land was leased until it was required for road widening was void as a lease for uncertainty as all leases of land must be for a term of certain duration.

Leaseholds: effect in equity of agreement for a lease other than by deed; part performance; liability of landlord for latent defects

483 ***Walsh* v *Lonsdale*** (1882) 21 Ch D 9

The defendant agreed in writing to grant a seven years' lease of a mill to the claimant at a rent payable one year in advance. The claimant entered into possession without any formal lease having been granted, and he paid his rent quarterly and not in advance. Subsequently the defendant demanded a year's rent in advance, and as the claimant refused to pay, the defendant distrained on his property. At common law the claimant was a tenant from year to year because no formal lease had been granted, and as such his rent was not payable in advance. The claimant argued that the legal remedy of distress was not available to the defendant.

Held – as the agreement was one of which the court could grant specific performance, and as equity regarded as done that which ought to be done, the claimant held on the same terms as if a lease had been granted. Therefore, the distress was valid.

Leaseholds: implied covenants: inapplicable to latent defects

484 ***O'Brien* v *Robinson*** [1973] 1 All ER 583

The claimant was the tenant of a flat to which s 32 of the Housing Act 1961 (giving an implied covenant to repair) applied (see now Landlord and Tenant Act 1985). In 1965 the claimant had complained about stamping on the ceiling above, but it was found that the landlord was not given notice that the ceiling was defective. In 1968 the ceiling fell and the claimant was injured.

Held – by the House of Lords – the defendant landlord was not liable for breach of covenant.

Comment (i) In *Sheldon* v *West Bromwich Corporation* (1973) 25 P & CR 360, the Court of Appeal held the defendant landlord liable where a water tank in a council house had remained discoloured for some considerable time to the knowledge of the Council. The tank burst and the Council was in breach of its implied covenant, under what was then s 32 of the Housing Act 1961, to keep the installation for the supply of water in repair. The discolouration of the tank, which the Council knew about, meant that this was not a latent defect.

(ii) The relevant provisions of the 1961 Act are now to be found in ss 11–16 of the Landlord and Tenant 1985.

Easements: cannot exist 'in gross' but only with reference to the holding of land

485 ***Hill* v *Tupper*** (1863) H & C 121

Hill was the lessee of land on the bank of a canal. The land and the canal were owned by the lessor, and Hill was granted the sole and exclusive right of putting pleasure boats on the canal. Later Tupper, without authority, put rival pleasure boats on the canal. Hill now sued Tupper for the breach of a so-called easement granted by the owner of the canal.

Held – the right to put pleasure boats on the canal was not an interest in property which the law could recognise as attaching to the land. It was in the nature of a contractual licence which could not be enforced against the whole world. Tupper could have been sued by the owner of the canal, or by Hill, as lessee, if he had also been granted a lease of the canal.

Easements: right must be definite enough to form subject of grant

486 ***Bass* v *Gregory*** (1890) 25 QBD 481

The claimants were the owners of a public house in Nottingham, and the defendant was the owner of some cottages and a yard adjoining the claimants'

premises. The claimants claimed to be entitled, by user as of right, to have the cellar of their public house ventilated by means of a hole or shaft cut from the cellar to an old well situated in the yard occupied by the defendant. The claimants sought an injunction to prevent the defendant from continuing to block the passage of air from the well.

Held – the right having been established, an injunction would be granted because the access of air to the premises came through a strictly defined channel, and it was possible to establish it as an easement.

Comment In *Bryant* v *Lefever* (1879) 4 CPD 172, the claimant and defendant occupied adjoining premises, and the claimant's complaint was that the defendant, in rebuilding his house, carried up the building beyond its former height and so checked the access of the draught of air to the claimant's chimneys. The Court of Appeal held that the right claimed could not exist at law, because it was an attempt to claim special rights over the general current of air which is common to all mankind.

Easements: not necessarily negative

487 *Crow* v *Wood* [1970] 3 All ER 425

This case arose out of damage done on a farm in Yorkshire by sheep which strayed on to it from an adjoining moor. The owner of the sheep, who was the owner of another farm adjoining the moor, raised, as a defence against an action for trespass, an obligation on the claimant to fence her own property to keep the sheep out. It was *held* – by the Court of Appeal – that a duty to fence existed as an easement and that it had passed under s 62 of the Law of Property Act 1925, when the defendant purchased his farm, even though his conveyance and previous ones had made no reference to the obligation of other farmers to keep up their fences. However, the right was appurtenant to the land sold and, therefore, became an easement in favour of the defendant and his successors in title.

Easements: categories capable of limited expansion

488 *Re Ellenborough Park* [1956] Ch 131

Ellenborough Park was a piece of open land near the seafront at Weston-super-Mare. The park and the surrounding land was jointly owned by two persons. The surrounding land was sold for building purposes, and the conveyances granted an easement over the park in favour of the owners of the houses. The owners of the houses undertook to be responsible for some of the maintenance, and the owners of the park agreed not to erect dwelling houses or buildings, other than ornamental buildings, on the park. The park was later sold, and the question of the rights of the owners or occupiers of the houses fronting on to the park to enforce their rights over the park arose. It was contended that the rights created by the conveyances were not enforceable, because they did not conform to the essential qualities of an easement, and that they gave a right of perambulation which was not a right legally capable of creation.

Held – the rights granted to the owners of the houses were enforceable as a legal easement.

Comment As regards the categories of easements, there have been a number of cases concerning car parking as an easement. From these case rulings it can be said that although parking can exist as an easement, parking that monopolises the use of the land will be regarded as too great an interference with the land to exist as an easement as in *Batchelor* v *Marlow* (2001) 82 P & CR 459. In that case the claimant claimed a right to an easement to park six cars in a space only large enough for six cars. The same problem arose in *Central Midland Estates Ltd* v *Leicester Dyers Ltd* [2003] 4 CL 404 where the court conceded that the right to park could exist in law. However, since the claim was to park an unlimited number of vehicles anywhere on the piece of land concerned being restricted only by the space available, there could be no easement on the facts because this would make the actual owner's right to the land illusory as in the *Batchelor* case. The only way to achieve such wide rights is to ask for a lease of the relevant land. In this connection, it is worth noting that in *Stonebridge* v *Bygrave* [2001] All ER (D) 376 (Oct) the High Court ruled that where a tenant has an exclusive right in a lease to park in a specified parking place the problems described above did not arise because the owner of the land must be taken to have retained sufficient use of his own land.

489 *Phipps* v *Pears* [1964] 2 All ER 35

A Mr Field owned two houses, Nos 14 and 16 Market Street, Warwick, and in 1930 he demolished No 16 and built a new house with a wall adjacent to the existing wall of No 14. In 1962, No 14 was demolished under an order of Warwick Corporation, leaving exposed the wall of No 16. This wall had never been pointed; indeed it could not have been because it was built hard up against the wall of No 14. It was not, therefore, weatherproof and the rain got in and froze during the winter causing cracks in the wall. The claimant sued for the damage done, claiming an *easement of protection*. It was *held* by the Court of Appeal that there is no such easement. There is a right of

support in appropriate cases. No 16 did not depend on No 14 for support; the walls, though adjoining, were independent. Lord Denning, MR said in the course of his judgment:

> A right to protection from the weather (if it exists) is entirely negative. It is a right to stop your neighbour pulling down his house. Seeing that it is a negative easement, it must be looked at with caution because the law has been very chary of creating any new negative easements. . . . If we were to stop a man pulling down his house, we would put a brake on desirable improvement. If it exposes your house to the weather, that is your misfortune. It is not wrong on his part. . . . The only way for an owner to protect himself is by getting a covenant from his neighbour that he will not pull down his house. . . . Such a covenant would be binding in contract; and it would be enforceable on any successor who took with notice of it, but it would not be binding on one who took without notice.

Comment These walls would not appear to be party walls as where two properties are semi-detached. Thus, the newer Party Wall, etc. Act 1996 may not have applied.

490 *Grigsby* v *Melville* [1972] 1 WLR 1355

A Mr Holroyd owned two adjoining properties, consisting of a cottage and a shop which had recently been occupied in single occupation by a butcher. Beneath the drawing room of the cottage there was a cellar, the only practical means of access to which was by way of steps from the shop which the butcher had used for storing brine in connection with the business of the shop. In 1962, Holroyd conveyed the cottage to Natinvil Builders Ltd, the predecessor in title of the claimant in this case. The conveyance accepted 'such rights and easements or quasi-rights and quasi-easements as may be enjoyed in connection with the . . . adjoining property'. A month later Holroyd conveyed the shop to a Mrs Melville. Mrs Melville, who was a veterinary surgeon, began to use the cellar for storage. The claimant acquired the cottage in 1969 but did not realise the situation until 1971 when she heard hammering beneath her drawing room floor. She sought an injunction to prevent Mrs Melville from trespassing there. The defendants claimed that the cellar was excluded from the property conveyed, or alternatively that they enjoyed an easement of storage there equivalent to an estate in fee simple.

Held – by Brightman, J – (*a*) that the cellar, though not the steps leading to it, formed part of the property conveyed to Natinvil Builders Ltd; (*b*) that the exclusive right of use claimed was so extensive as probably to be incapable of constituting an easement at law; (*c*) that in any event on the facts use of the cellar for the purposes of the shop had ceased when the properties were divided, it had never been contemplated that such would be the case in the future and the defendants' claim to an easement failed. This decision was confirmed by the Court of Appeal [1973] 3 All ER 455.

Easements: acquisition; effect of Law of Property Act 1925, s 62

491 *Ward* v *Kirkland* [1966] 1 All ER 609

The wall of a cottage could be repaired only from the yard of the adjoining farm. Before 1928 both properties belonged to a rector and the tenant of the cottage repaired the wall without seeking the permission of the tenant of the farm. In that year the cottage was conveyed to a predecessor in the title of Ward and in 1942 Mrs Kirkland became the tenant of the farm. From 1942 to 1954 work to the wall was done with her permission as tenant and in 1958 she bought the farm. In October 1958, Ward did not make entry on to the farmyard to maintain the wall because Mrs Kirkland would not let him enter as of right. In this action, which was brought to determine, amongst other things, whether Ward was entitled to enter the farmyard to maintain the wall and for an injunction to prevent interference with drains running from the cottage through the farmyard, it was *held* – by Ungoed Thomas, J – that:

(*a*) assuming such a right could exist as an easement it would not be defeated on the ground that it would amount to possession or joint possession of the defendant's property;

(*b*) although such a right was not created by implication because it was not 'continuous and apparent', yet the advantage having in fact been enjoyed, it was transformed into an easement by s 62 of the Law of Property Act 1925;

(*c*) no easement had arisen by prescription because permission had been given between 1942 and 1958;

(*d*) permission having been granted by the rector to Ward to lay drains from the cottage through the farmyard and Ward having incurred expense in so doing it was assumed that the permission was of indefinite duration and an injunction would be granted to prevent interference with the drains by Mrs Kirkland.

Comment (i) Even in the absence of an easement, advantage may now be taken of the provisions of the Access to Neighbouring Land Act 1992 (see Chapter 21).

(ii) A further illustration is provided by *Bratts Ltd* v *Habboush*, High Court, 1 July 1999 (unreported). The claimant was a tenant of a nightclub in part of a building. The landlord removed emergency lighting and exit signs from the common parts of the building. The claimant submitted that the right to use and maintain the lighting and exit signs was an easement under s 62 of the 1925 Act. The High Court so held and decided also that the claimant was entitled to damages to replace the signs and lights.

Easements: acquisition: by prescription

492 *Tehidy Minerals* v *Norman* [1971] 2 WLR 711

The owners of a number of farms adjoining a down claimed to be entitled to grazing rights over it. The facts of the case were as follows:

(*a*) the farms and the downs had been owned by one person until 19 January 1920;

(*b*) the down had been requisitioned by the government on 6 October 1941;

(*c*) during the period of requisition the owners of surrounding farms had grazed cattle on the down by arrangement with the Ministry concerned;

(*d*) on 31 December 1960, the down was derequisitioned and the association of farmers which had made the arrangements with the Ministry entered into a further arrangement with the owner of the down for the maintenance of certain fences erected by the Ministry and grazing continued but under the control of the association of farmers.

On appeal from a decision of the county court judge that the farmers were entitled to grazing rights over the down it was *held* by the Court of Appeal that:

(*a*) as there had been no enjoyment of the grazing rights between October 1941 and 31 December 1960, except by permission of the Ministry, the farmers could not claim 30 years' prescription which the Act of 1832 required for a profit to be established by user as of right;

(*b*) despite the extreme unreality of such a presumption, it must be presumed that a modern grant, since lost, had been made of grazing rights at some time between 19 January 1920 and 6 October 1921, i.e. 20 years before the requisition; this presumption could not be rebutted by evidence that no such grant had been made but only by evidence – of which there was none – that it could not have been made;

(*c*) the period of 20 years applied to profits as well as to easements for the purposes of the law of lost modern grant although the Act of 1832 provided for different periods in the two cases;

(*d*) only the demonstration of a fixed intention never at any time to assert the right or to attempt to transmit it to anyone else could amount to an abandonment of an easement or profit, thus the acquiescence by the farmers in the arrangement under which the association controlled the grazing for a period of time did not amount to abandonment.

Comment It was held by the Court of Appeal in *Benn* v *Hardinge*, *The Times*, 13 October 1992, that non-user for 175 years of a grant of a right of way made in 1818 did not of itself indicate an intention of the owner (or his predecessors) of the right to abandon it, so that it still existed in the absence of any evidence of intention to abandon it. Comment in a leading text that 20 years' non-user was enough was not approved.

493 *Diment* v *N H Foot* [1974] 2 All ER 785

A vehicular way across the claimant's field was claimed and had been used by the defendant from time to time without dispute between 1936 and 1967. The claimant, although the registered owner of the field throughout that period, had never farmed the land herself but had had tenants and during much of the time had lived far away or abroad. Until 1967 the claimant knew nothing of the way claimed.

Held – by Pennycuick, V-C – (*a*) the law of prescription rested upon acquiescence for which knowledge was essential; (*b*) the claimant had no actual knowledge and knowledge was not to be imputed to her either (i) because there was a gateway from the field to a parcel of the defendant's land to which there was no vehicular access; there were a number of possible explanations for it; or (ii) because the claimant had not shown that her agents did not have knowledge of the use of the way or the means of knowledge. The presumption that long use was known to the owner was rebuttable and in the present case had been rebutted. It did not extend to the knowledge of agents. The burden of proving such knowledge or means of knowledge lay on the defendant and there was no evidence of either in the present case.

Comment Even if the owner of the servient tenement (A) knows of the use the right will not arise if A *permits* the use. Thus, in *Goldsmith* v *Burrow Construction Co Ltd*, *The Times*, 31 July 1987, the claimants had used a path over the defendants' land for over 20 years. However, the defendants had a gate across the path and locked it from time to time. The Court of Appeal held that no easement had come into being. The claimants' use depended on the permission of the defendants. They had shown this by locking the gate from time to time.

494 ***Davis* v *Whitby*** [1974] 1 All ER 806

The claimant and his predecessors in title had enjoyed a right of way over the defendant's land by a certain route for 15 years and then by another route, substituted by agreement, for a further 18 years. On appeal by the defendant to the Court of Appeal against the decision that a right of way over the substituted route had been established by prescription, it was *held* – by the court – that the appeal should be dismissed. 'When you have a way used for some time and then afterwards a substituted way is used for the same purpose, both uses being as of right, with the apparent consent or acquiescence of those concerned, then the original way and the substituted way should be considered as one.' (*Per* Lord Denning, MR)

Restrictive covenants: there must be land which can benefit

495 ***Kelly* v *Barrett*** [1924] 2 Ch 379

The owner of an estate in Hampstead developed it for building purposes. He made a new road through it, and sold plots of land along the road to a building firm who erected dwelling houses on the land. The purchasers undertook that the houses built should be used as private dwelling houses only. The owner of the estate did not retain any land except the road, which was afterwards taken over and vested in the local authority. A subsequent purchaser of two adjoining houses carried on a nursing and maternity home in them. The tenant for life under the former estate owner's will and one of the original purchasers claimed an injunction to restrain the defendant's activities.

Held – no injunction could be granted because the agreement was not a valid building scheme, and the vendor's successor did not retain any interest capable of being affected by the restrictions.

Mortgages: equity of redemption; restraint on redemption enforced if parties at arm's length; collective transactions

496 ***Knightsbridge Estates Trust Ltd* v *Byrne*** [1939] Ch 441

The claimant company was the owner of a large freehold estate close to Knightsbridge. This estate was mortgaged to a friendly society for a sum of money, which, together with interest, was to be repaid over a period of 40 years in 80 half-yearly instalments. The company wished to redeem the mortgage before the expiration of the term, because it was possible for it to borrow elsewhere at a lower rate of interest.

Held – the company was not entitled to redeem the mortgage before the end of the 40 years because, in the circumstances, the postponement of the right was not unreasonable, since the parties were men of business and equal in bargaining power. A postponement of the right of redemption is not by itself a clog on the equity of redemption; much depends upon the circumstances. Further, the postponement did not offend the rule against perpetuities, which did not apply to mortgages.

497 ***Noakes* v *Rice*** [1902] AC 24

The appellant was a brewery company and the respondent wished to become the purchaser of a public house owned by the company. The respondent borrowed money from the company in order to effect the purchase, and agreed that the company should have the exclusive right to supply the premises with malt liquors during the period of the mortgage and afterwards, whether any money was or was not owed. The respondent subsequently gave notice to the company that he was prepared to pay off the money secured by the mortgage, if the company would release him from the above-mentioned contract. This was refused and the respondent asked the court for relief.

Held – the covenant was invalid as a clog on the equity of redemption in so far as it purported to tie the public house after payment of the principal money and interest due on the security.

498 ***Kreglinger* v *New Patagonia Meat and Cold Storage Co*** [1914] AC 25

The appellants were a firm of merchants and wool brokers. The respondents carried on the business of preserving and canning meat, and of boiling down carcasses of sheep and other animals. The appellants advanced money to the respondents, the loan being secured by a charge over all the respondents' property. The appellants agreed not to demand repayment for five years, but the respondents could repay the debt at an earlier period on giving notice. The agreement also contained a provision that the respondents should not sell sheepskins to anyone but the appellants for five years from the date of the agreement, so long as the appellants were willing to purchase the same at an agreed price. The loan was paid off before the expiration of the five years.

Held – the option of purchasing the sheepskins was not terminated on repayment, but continued for the period of five years. The option was a collateral contract which was not a mortgage and in no way affected the right to redeem the property.

499 ***Cityland and Property (Holdings) Ltd* v *Dabrah*** [1967] 2 All ER 639

A first mortgage of £2,900 was granted by the seller of property to a purchaser and was expressed to be repayable in the sum of £4,553 for which the property was charged. The £4,553 was to be repaid over six years by equal monthly instalments and there was no mention in the mortgage of any interest. The whole of the balance of the £4,553 became payable if the borrower defaulted and for this reason Goff, J *held* that the premium amounting to £1,653 was an unreasonable collateral advantage and, therefore, void under the principle in *Kreglinger*'s case (1914) (above). The judge having disallowed the premium was prepared to allow interest at 7 per cent on a day-to-day basis which he thought to be somewhat more than market rates, but in fact it was below market rates. The premium was an interest computation of $9^1/_2$ per cent, non-reducing over six years, and if it had been expressed as such in the mortgage it would appear that the court could not have set it aside since the court can only set aside unreasonable collateral advantages. However, in regard to interest rates, it appears that 'equity does not reform mortgage transactions because they are unreasonable' (Greene, MR in *Knightsbridge Estates Trust Ltd* v *Byrne* (1939) (see above)). But this case was not cited to Goff, J. It would seem that for the future interest in mortgages should be expressed as such and not disguised as a premium.

Remedies of legal mortgagee: taking possession; duty of mortgagee

500 ***White* v *City of London Brewery Co*** (1889) 42 Ch D 237

The claimant had a lease of a public house in Canning Town, and he mortgaged it to the defendants to secure a loan of £900 with interest. One year later, no interest having been paid since the date of the mortgage, the defendants entered into possession of the public house. They later let the premises on a tenancy determinable at three months' notice under which the tenant was to take all his beer from the defendants. Eventually the lease was sold by the defendants, and the claimant asked the defendants to account and pay him what should be found due.

Held – the defendants must account to the claimant for the increased rent they might have received if they had let the public house without the restrictive condition regarding the sale of the defendants' beer, since a 'free house' would produce more rent than a 'tied house'.

Charges and encumbrances over land: spouse's right of occupation

501 ***Williams & Glyn's Bank Ltd* v *Boland*** [1980] 3 WLR 138

A husband and wife lived together in the matrimonial home which was owned by the husband and subject to a mortgage with the bank. The husband was registered as the owner for the purposes of the Land Registration Act 1925. It appeared that his wife had made a substantial contribution of money towards buying the house and that she had, accordingly, equitable rights in it. The husband failed to keep up the mortgage repayments and the bank asked the court for a possession order over the house with a view to selling it. The wife raised objection to the possession order, claiming that her rights and occupation gave her an 'overriding interest' in the home which overrode the bank's claim to possession under s 70(1) of the Land Registration Act 1925. Section 70 includes as an overriding interest: 'The rights of every person in actual occupation . . .'. The bank argued that the wife was not in actual occupation and also relied on s 3 of the 1925 Act which provides that equitable rights, such as the wife had, were not an overriding interest but a 'minor interest' and it was admitted that these would not have defeated the bank's claim. However, the House of Lords *held* that the wife's objection must be sustained and refused the bank an order for possession. The wife was in actual possession just as much as her husband and the fact that he was in occupation did not prejudice her right to be regarded as in occupation also. If she had not been in occupation, apparently her equitable rights would have been a minor interest, but since she was also in occupation this fact converted them into an overriding interest.

Comment (i) This decision has caused considerable concern to banks and building societies since the occupation of most houses is shared either with a spouse or a cohabitee or relatives who have made some financial contribution towards the purchase.

(ii) The response of lending institutions has been to ask a spouse (or other relatives who may have rights of occupation) to sign a Deed of Postponement as s 6(3) of the Matrimonial Homes Act 1983 allows. This postpones the interest of an occupier to that of the lender.

(iii) Following the decision of the House of Lords in *Abbey National* v *Cann* [1990] 2 WLR 832 the person claiming an overriding interest must occupy the property from the time of purchase. Persons who take up occupation later are excluded. For example John buys a house with some help from his mother in terms of finance. Some time after the purchase John's mother comes to live with John. John's mother cannot claim an overriding

interest against a person who, e.g., lent John money on mortgage to complete the purchase.

(iv) A contrast is provided by the decision of the House of Lords in *City of London Building Society* v *Flegg* [1987] All ER 435. In this case the property was owned by a husband and wife, Mr and Mrs Maxwell-Brown, as joint tenants. They were, therefore, trustees of land of the property and could give a good receipt for purchase money so as to override all beneficial interests of themselves and others. The building society had advanced capital money to them by way of mortgage and their receipt for that money had overriden all equitable interests including their own and that of Mr & Mrs Flegg, parents of the wife, who lived there. The building society could sell the property without regard to those interests if the loans were not repaid.

(v) See also *Hodgson* v *Marks* (1970) in Chapter 13.

(vi) In *Hypo-Mortgage Services Ltd* v *Robinson* [1997] 2 FCR 422, the Court of Appeal held that children who lived with a parent who was the legal owner of a property could not have an overriding interest protected under the LRA 1925, s 70(1)(g) by reason of actual occupation because they had no rights of their own to occupy and were present only because their parents were the occupiers.

(vii) The decision of the Court of Appeal in *Ferrishurst Ltd* v *Wallcite Ltd*, *The Times*, 8 December 1998 makes it clear that in order to rely on s 70 a person does not have to be in occupation of the whole of the land. In that case, Ferrishurst had a lease of office premises and a third party had a lease of a garage contained within the same premises. Ferrishurst had an option to acquire a lease of the whole premises when its lease of the office premises expired. Wallcite bought the freehold of the whole of the premises, there being no entry on the title register regarding the right of Ferrishurst to ask for a lease of the whole of the premises. Nevertheless, the Court of Appeal said that Ferrishurst had the right and that Wallcite must grant it the lease. So instead of becoming an unfettered freeholder, Wallcite became a landlord.

The case demonstrates how important it is to ascertain the fact of a person's occupation of land (or now part of it) when acquiring a property or dealing with the land in terms, e.g. of a security. Full and stringent enquiries should be made, and it is also desirable (if not essential) to inspect the property to ascertain all the facts.

(viii) Overriding interests may themselves be overridden. The court has a discretion under s 14 of the Trusts of Land and Appointment of Trustees Act 1996. This discretion was used by the Court of Appeal where the property was jointly owned by a husband and wife and the husband became bankrupt and the wife was in occupation. The court ordered a sale of the property where otherwise there was no prospect of the claimant being paid and the wife having a resource which would enable her to reaccommodate herself (see *Bank of Baroda* v *Dhillon* [1998] 1 FCR 489).

Mortgages of chattels: bills of sale

502 *Koppel* v *Koppel* [1966] 2 All ER 187

Mr Koppel, who was estranged from his wife, invited a Mrs Wide to come to his house and look after his children on a permanent basis. Mrs Wide agreed to do so provided that Mr Koppel transferred the contents of his house to her to compensate for giving up her own home and disposing of her furniture. The transfer was recorded in writing. Later Mrs Koppel sought to levy execution on the contents of the house for her unpaid maintenance which amounted to £114. In proceedings resulting from Mrs Wide's claim to the property, a county court registrar held that the written transfer of the property to Mrs Wide was void as an unregistered bill of sale.

Held – by the Court of Appeal – the contents of the house were not in Mr Koppel's 'possession or apparent possession' within s 8 of the Bills of Sale Act 1878, because:

(*a*) Mr Koppel had transferred possession to Mrs Wide under the document which was an absolute bill of sale;
(*b*) the grantor of the bill, Mr Koppel, had, therefore, neither possession nor apparent possession. He did not have apparent possession because Mrs Wide was living in the house with him and both had apparent possession of the property, not merely Mr Koppel;
(*c*) Mrs Wide was, therefore, entitled to the property.

Lien: innkeepers

503 *Robins & Co* v *Gray* [1895] 2 QB 501

The claimants dealt in sewing machines and employed a traveller to sell the machines on commission. The claimants' traveller put up at the defendant's inn in April 1894, and stayed there until the end of July 1894. During this time the claimants sent the traveller machines to sell in the neighbourhood. At the end of July, the traveller owed the defendant £4 for board and lodgings, and he failed to pay. The defendant detained certain of the goods sent by the claimants to their traveller, asserting that he had a lien on them for the amount of the debt due to him, although the defendant knew that the goods were the property of the claimants.

Held – the defendant was entitled to a lien on the claimants' property for the traveller's debt.