Licences to occupy land

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LICENCES TO OCCUPY LAND

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Section 1 of the thesis discusses whether the concept of a licensee in exclusive possession existed prior to the decision in ERRINGTON V ERRINGTON and then proceeeds to consider the tests which were subsequently developed to distinguish between a licensee in exclusive possession and a tenant. The aim of the exercise is to show how the possessory licence was in fact developed to deal with certain perceived needs examined in the remaining three sections.

Section 11 sets out to show how the judiciary became increasingly willing to use the concept of a possessory licence to avoid the full rigours of the Rent Acts as statutory controls were increased and how in recent years with a move towards deregulation they have been less prepared to see the licence fulfill this role.

Section 111 examines the use which has been made of licence concepts to avoid the Limitation Acts and thereby prevent a finding of adverse possession. Given the amendments contained in the Limitation Act 1980 the section also considers the present scope as well as the justification for use of the licence in this way.

Finally Section 1V shows how, in contrast to the use of the licence to detract from occupational security examined in Sectins 11 and 111, licence concepts have been used and developed to protect residential security where informal family and quasi-family arrangements for the occupation of property have been made. The Section considers the various approaches which have been taken by the courts in order to decide whether the developments were necessary and desirable, and in particular considers whether the protection of vulnerable groups in society necessitates recognition of the licence as an interest in land.

INTRODUCTION

The concept of a licence and aims of the thesis.

In the legal context, a licence is simply a permission, dispensation or authorisation to do something which would not otherwise be lawful. As such, licences may arise in very diverse circumstances and either give rights to the licensee or merely a liberty or privilege to do a particular act. For instance, a licence may arise out of central or local government regulations which in some way restrict the activities of citizens, e.g. the need for a licence to drive a car on the public highway, to sell alcoholic liquor, to use a television set etc. Licences may also be granted to interfere with the body of another in some way (e.g. to cut a person's hair, remove his teeth , have sexual intercourse), thereby negating the tort of trespass to the person and, in some cases, a crime. Finally, a licence may be given by an owner of any type of property to permit interferance with such property in some prescribed way, e.g. destroy a pet, to use a telephone, to enter land (preventing the tort of trespass to property), to reproduce certain material (preventing a breach of copyright).

The concern of this thesis, however, is with only one type of situation in which licences occur, namely, licences to occupy the land of another, whether exclusive or non-exclusive. Of this particular area of law, a New Jersey judge once commented:

> "The adjudications upon this subject are numerous and discordant. Taken in their aggregate, they cannot be reconciled and if an attempt should be made to arrange them into harmonious groups, I think some of them would be found to be so eccentric in their application of legal principles, as well as in their logical deductions, as to be impossible of classification."(1)

Arguably, the same comment is appropriate to judicial treatment of the licence in the English courts since the beginning of the present century. Hanbury and Maudsley express the view:

> "The history of licences is a remarkable story of false trails and confused thoughts."(2)

The aim of this thesis then is to study the development of occupational licences in an attempt to dispel some of the confusion and to suggest the way forward. The study is divided into four main sections. The first Section,

Section I traces the development of the possessory licence, that is to say the notion that a licensee may be in exclusive possession of land. Sections II and III look at the use the judiciary have made of the concept of the possessory licence in avoiding the statutes collectively known as the Rent Acts (Section II) and the Limitation Acts (Section III). The final section, Section IV considers the role occupational licences have been made to play in family or quasi-family arrangements concerning real property. In each section, in addition to tracing and explaining why judges have made use of licence concepts in the particular sphere in issue, an attempt has been made to evaluate the necessity and desirability of such developments from the practical as well as the theoretical point of view, and to look at present as well as future trends.

In the context of real property, the term 'licence' was originally used in contrast to the situation where a person was on the land of another by virtue of some 'interest in land'. A finding of a licence in relation to land was therefore essentially a negative thing; it was a judgement on what the interest is not, compared with what it might be. Hence, in THOMAS v SORRELL, Vaughan C.J. explained:

> "A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful."(3)

It is arguable, that since Vaughan C.J. made his statement, the law has developed in such a way that a licensee may in some circumstances have an interest in land. This issue will be discussed fully in Section IV. However, it should be noted, in the recent decision of the House of Lords in STREET v MOUNTFORD, Lord Templeman reiterated the traditional understanding of licences emphasising their negative nature. He said:

> "The licence does not create an interest in land to which it relates but only makes an act lawful which would otherwise be unlawful."(4)

From the outset, it is important to note that care is required in defining licences, especially where a comparison is expressly or implicitly being drawn with an interest in land. In this respect, some of the principal textbook writers are not very helpful, as they define licences relating to land in terms which are positive. For example, Cheshire and Burn say:

> ".... a licence is essentially a permission to

> enter upon the land of another for an agreed purpose. The permission justifies what would otherwise have been a trespass."(5)

Similarly, in the opening to the chapter on licences, Megarry and Wade say:

> "Fundamentally a licence is a mere permission which makes it lawful for the licensee to do what would otherwise be a trespass."(6)

Such definitions obscure the essentially negative nature of a licence, and are the starting point for the confusion which has arisen in relation to occupational licences. In MARCROFT WAGONS LTD v SMITH, where the court was called upon to decide whether the occupier was a tenant or a licensee, Roxborough L.J. was hesitant in his use of the term 'licence'. After refusing to find the occupation was as tenant, he commented:

> "How the interest of the occupant ought, in those circumstances to be described, I do not know. It would be a pity to call it a 'licence' because the word has .... already been appropriated to quite different situations. It must, I think, be left to jurists to invent a new name...."(7)

Moreover, in NATIONAL PROVINCIAL BANK LTD v HASTINGS CAR MART, a case concerned with whether a wife who had been deserted by her husband had an interest in the matrimonial home binding on a third party, Lord Hodson described the term 'licence' in relation to land as an "overworked word",(8) whilst Lord Wilberforce asked, of the term 'licensee':

> "What is achieved by the description? After the [plaintiff] has been so described, the incidents of the description have to be ascertained."(9)

Much of the confusion disappears when one brings to the forefront the fact that licence relating to land is not a positive but a negative thing. The concept of a licence has inevitably been applied to describe an increasing variety of situations because it is essentially a term which explains what an interest is not, and as such it cannot be expected to embody a unifying principle characteristic of any recognised proprietary interest.

It is clear that a permission to occupy land may create a right to be there, as in the case of a lease, or alternatively merely a privilege, for example, an invitation to a friend's house for dinner. It is also clear that a permission to be on land may give rights to

occupy, to the exclusion of all others, or merely be a permission to occupy along with another or others. In the first section of the thesis, the development of the so-called possessory licence will be examined critically.

References Introduction

1. Vice Chancellor EAST JERSEY IRON CO v WRIGHT (1880) 32 NG Eg 248 at p.254.

2. "Modern Equity" 12th Edition p. 867.

3. (1673) Vaugh 330 at p. 351.

4. [1985] 2 All ER 289 at p. 292.

5. "Modern Law of Real Property" 13th Edition E. H. Burn p. 553.

6. "The Law of Real Property" 5th Edition p. 798.

7. [1951] 2 KB 497 at p. 507. For facts of the case see post p. 16.

8. [1965] AC 1175 at p. 1223.

9. Supra at p. 1251.

SECTION I

The Development of the possessory licence.

(a) Development up to ERRINGTON v ERRINGTON

It has been argued that,(1) before the case of ERRINGTON v ERRINGTON, if a person was "in exclusive possession of land", then a tenancy arose. There was no authority for the finding that a person could be in exclusive possession without an estate at common law or in equity. At maximum the person would have a fee simple absolute; at minimum, a tenancy at will. However, in the course of his judgement in ERRINGTON v ERRINGTON Lord Justice Denning stated:

> "In distinguishing between [leases and licences], a crucial test has sometimes been supposed to be whether the occupier has exclusive possession or not. If he was let into exclusive possession, he was said to be a tenant albeit only a tenant at will.... whereas if he had not exclusive possession he was only a licensee.... This test had, however, often given rise to misgivings because it does not correspond to realities.... The test of exclusive possession is by no means decisive."(2)

The facts of ERRINGTON v ERRINGTON were briefly as follows. A father bought a house for his son and daughter-in-law with the aid of a mortgage from a building society. The house was conveyed into the father's name and he was responsible to the building society for payment of the mortgage instalments, although these were in fact paid by the couple right up until the time of the dispute. The father did, however, hand over the building society book to his daughter-in-law and there was evidence he had told her that if and when she and his son paid all the instalments the house would be theirs. The dispute arose when the father died, leaving the house by will to his wife. By this time, the son had left the daughter-in-law for another woman, and the widow brought an action for possession against her daughter-in-law. In the county court the daughter-in-law raised two defences: either (1) the arrangements amounted to a tenancy at will, in which case the widow's claim was barred by the operation of the Limitation Act 1939, or

(2) the couple were tenants with Rent Act protection. The county court judge favoured the first construction and the widow appealed. The Court of Appeal (Denning, Hodson and Somervell L.JJ.) dismissed the appeal although they disagreed with the county court judge's finding that the couple were tenants at will. Instead, despite the finding that the couple were in exclusive possession, the Court of Appeal decided they were contractual licencees with an irrevocable right to remain so long as the instalments were paid.

It is proposed in this section to examine whether ERRINGTON v ERRINGTON in fact marks a major development in the law by introducing the notion of a licensee in exclusive possession and if so to evaluate its significance. Before embarking upon this discussion it may be helpful to stop and to consider briefly the characteristics and development of leasehold interests, as it is with leases that licences to occupy have predominently been contrasted.
In order for a transaction to come within the definition of a lease or 'term of years'(3) the grantor (landlord) must confer on the grantee (lessee or tenant) exclusive possession to certain land (4) for a period that is capable of definition; that is to say there must be an ascertainable commencement date (5) and a certain maximum duration by the date the lease is to take effect.(6) A term of years invariably, but not necessarily,(7) arises out of a bilateral contract and is granted in consideration of a money rent. It is worth noting that originally the lease or tenancy was merely regarded as a right in personam existing only in the law of contract.A tenant for years was possessed but not seised of the land, and consequently if dispossed could only bring a personal action for recovery of damages. It was not until the fifteenth century that occupation rights of this kind came to be recognised as proprietary rights. However, because of their development, leasehold interests have always been thought of along commercial lines in contrast to freehold interests which, apart from the fee simple absolute in possession, have been used mainly to provide for family members and have been primarily concerned with public duties owed by the holders of the land under the feudal structure of which leases had no part. At a time when investments in the modern understanding of the term were virtually unheard of, the lease was a way in which a person could increase his income. Moreover, one of the common methods by which security for a loan could be raised and the laws of usury avoided, was for the debtor to lease land at a nominal rent to the creditor, the creditor obtaining interest from the profits of the land.(8) Consequently although the lease is today recognised as a legal estate in land, it is still

regarded as being of a somewhat hybrid nature; partly realty and partly personalty. This is summed up in the term 'chattel real',an alternative name for leasehold.

It should be noted from the outset, that in any situation where a person occupies the land of another, a legal relationship must result in the sense that the law finds it necessary to define the relationship between the person and the land. The law of property is of course concerned with the relationship between persons and things , and not merely things in isolation from the persons who have rights over them. However, there is obviously a clear distinction between an 'intention to create a legal relationship'; that is to say to enter a contract with respect to occupation of some land, and the legal relationship which necessarily results from any 'dealings' between persons concerning land. Because the concept of a term of years developed out of the law of contract it is not surprising that, as will be seen,(9) the concept of intention to create a legal relationship has been of significance in distiguishing between leases and licences. However it will be shown that failure to differentiate between the role of 'legal relations', on the one hand, and an 'intention to create a legal relationship',on the other, has led the law into confusion.

We are now in a position to proceed with the evaluation ot the impact of ERRINGTON v ERRINGTON (10) in introducing the concept of a licencee in exclusive possion. The first step towards achieving this aim must be to examine the somewhat slippery concept of exclusive possession which it has already been stated is essential to the finding of a tenancy or lease possession'. In COBB v LANE, Somervell L.J. commented on the term 'exclusive possession':

> "I think it may be that there is a certain ambiguity in the expression."(11)

Although he did not do so explicity, he seems to go on to draw the distinction between an occupier with the right to exclusive possession and an occupier with sole possession in fact, but without necessarily having the right to exclusive possession. He then expressed the view that although occupation with the right to exclusive possession must give rise to a tenancy, it is not necessarily true that a person in sole possession in fact, without a right to exclusive possession, should be regarded as a tenant. However, unfortunately, as Cullity points out,(12) at the time when the possessory licence was arguably being developed, some judges either did not recognise or did not draw out the distinction between the

two possible meanings of 'exclusive possession'. For example, in MARCROFT WAGONS LTD. v SMITH, Evershed M.R. does not seem to be aware of the distinction, for at one point in his judgement, he spoke of "a right to occupy premises with many of the attributes of a tenancy but without the essential qualification of an interest in land"(13) whereas later he used the wider phrase "go into exclusive possession",(14) which encompasses the concept of sole possession in fact. On the other hand, it would appear from the consistency and his careful choice of words with reference to exclusive possession in early cases such as MARCROFT WAGONS LTD. v SMITH and ERRINGTON v ERRINGTON, that Lord Denning (as he now is) was aware of the distinction and used the phrase 'exclusive possession' to refer to sole possession in fact. For example, in MARCROFT WAGONS LTD. v SMITH, he said of the defendant:

> "She was I think a licensee in the sense that she did not acquire any interest in land.... the word "licensee".... is used to denote permissive occupation falling short of a tenancy",(15)

and in ERRINGTON v ERRINGTON he commented:

> "a crucial test has sometimes been supposed to be whether the occupier is in exclusive occupation or not",(16)

a phrase which would again suggest the wider meaning of sole possession in fact. However, it is noticeable that in the later case of LUGANDA v SERVICE HOTELS LTD.(17) for the purposes of S.70 (2) of the Rent Act 1968, Lord Denning draws the distinction between "exclusive occupation" and "exclusive possession". He appeared then to use the term exclusive occupation to mean sole possession in fact, reserving "exclusive possession" for the situation where a person has the right to exclude everyone including the landlord, for he said:

> "I am quite satisfied that "exclusive occupation" in S.70 (2) does not mean "exclusive possession" in the technical sense it is sometimes used in landlord and tenant cases. A lodger who takes a furnished room in a house is in exclusive occupation of it notwithstanding that the landlady has a right to access at all times ..... A person has exclusive occupation of a room when he is entitled to occupy it by himself and no-one else is entitled to occupy it."(18)

Text book writers do not always assist in allaying any confusion as to the different meanings to be attached to

exclusive possession. Pettit,(19) whilst in the main body of the text drawing out the distinction between the right to exclusive possession and the sole possession in fact, then proceeds to footnote the following cases as authority for the finding of a licensee with a right to exclusive possession: FOSTER v ROBINSON (20); MARCROFT WAGONS v SMITH (21); ERRINGTON v ERRINGTON (22); COBB v LANE (23); FACCHINI v BRYSON (24); ADDISCOMBE GARDEN ESTATES LTD. v CRABBE (25); BRACEY v READ (26) FINBOW v AIR MINISTRY (27); BARNES v BARRATT (28); SHELL-MEX AND B.P. LTD. v MANCHESTER GARAGES LTD. (29); and HESLOP v BURNS (30). It is submitted that out of this list clearly at least COBB v LANE and HESLOP v BURNS do not involve licensees with a right to exclusive possession.(31)

It is obviously important to ascertain the meaning attached to the phrase "exclusive possession" in cases before ERRINGTON v ERRINGTON to decide whether the case marks a development in the law. In ERRINGTON v ERRINGTON it was suggested that the defendant and her husband were "in permissive occupation". Lord Justice Denning said:

> "They had a mere personal privilege to remain."(32)

Consequently if it is true to say that the term exclusive possession was used in earlier cases to refer only to the situation when a person was in possession with the right to exclusive possession, then ERRINGTON v ERRINGTON would not in this respect seem to mark a development in the law. If, on the other hand, exclusive possession was used in the sense of sole possession in fact, and prior to ERRINGTON v ERRINGTON this was consistently found to give rise to at very minimum a tenancy at will, the case does give rise to a development in the law. However, the significance of the development would still have to be examined.

It is proposed first to consider whether cases before ERRINGTON v ERRINGTON are unanimous in the finding that sole possession in fact gives rise to a tenancy. Professor Hargreaves in an article entitled 'Licenced Possessors'(33) argues that, subject to some special exceptions (e.g Crown Land, ecclesiastical and charitable institutions) this was in fact the case. In contrast, Professor Cullity (34) purports to cite authorities which show that the law prior to ERRINGTON v ERRINGTON was by no means unanimous on this issue. He argues that the test of a tenancy adopted in some cases was the narrower test of the 'right to exclusive possession'. The significance of ERRINGTON v ERRINGTON is thus reduced, as it is not suggested that the young couple in that case had a right

to exclusive possession , but a mere privelege. An examination will therefore be made of the decisions reviewed by both Cullity and Hargreaves.

In his article Hargreaves uses the expression "actual exclusive possession" which would seem to be synonymous with the phrase "sole possession in fact". He relies upon four main groups of authorities for his proposition that, before ERRINGTON v ERRINGTON, irrespective of intention, actual exclusive possession gave rise to a tenancy: (a) Passages from Littleton (35); (b) cases where possession taken under an agreement for sale or for a lease were held to give rise to a tenancy at will(36); (c) cases concerned with the position of a mortgagor in possession(37) ; and (d) sixteen cases concerned with S.7 of Limitation Act 1833.(38) However, as Cullity(39) has already pointed out, the Limitation Act cases are not very strong authorities for Hargreaves' proposition, as the outcome of most of these cases would not have been different if a possessory licence had been found and in any case, in some of them, a tenancy was found to exist at the trial stage and this finding was not challenged on appeal. Furthermore, one of the Limitation Act cases, DAY v DAY (40) arguably detracts from Hargreaves' proposition in that the Privy Council seemed to imply an intention was required to create a tenancy. Nevertheless DAY v DAY is hardly a significant authority to the contrary, for the statement was clearly obiter dicta as both parties had conceded a tenancy at will and furthermore, although cited with approval by Darling J. in the later case of JARMAN v HALE (41), Channell J. disapproved of the viewpoint expressed. Referring to the passage in DAY v DAY which seemed to suggest intention was required for a tenancy to arise, he said:

> "I am not clear myself this passage is well founded. It seems to me that if you find a definite acknowledgement from the tenant that he is holding by the permission of the other, that is all you need."(42)

Apart from the decision in DAY v DAY, the cases cited by Hargreaves largely support his proposition. What then of the further cases cited by Cullity which arguably detract from the apparently harmonious view that sole possession in fact was conclusive of a tenancy? Cullity divides these into three groups: (a) cases he calls the Poor Law cases (43); (b) rating cases(44): and (c) decisions where the crucial test of a tenancy was not sole possession in fact, but the question of whether there was an intention to grant a right to exclusive possession.(45)

The Poor Law decisions of R v INHABITANTS OF HORDON ON THE HILL (46) and R v INHABITANTS OF STANDON(47) are authorities for finding a licensee in exclusive possession without a legal or equitable estate. Both cases were concerned with whether a settlement had been created and were situations where the occupiers were clearly in exclusive possession. In R v INHABITANTS OF STANDON (where a father loaned his son some money to buy some land on the understanding that he would build a cottage for his mother and father to live in so long as either lived), Lord Ellenborough said:

> "no estate either legal or equitable was conveyed to the father or mother .... they had nothing more than a conditional and qualified licence by parol to occupy."(48)

Perhaps the cases may be explained on the basis that the word 'licence' was being used in the very broad sense to contrast with the interest required to give rise to a settlement. In any case the significance of these two decisions is weakened by the fact that the Poor Law cases of R v INHABITANTS OF EATINGTON (49) and R v INHABITANTS OF CHEDISTON (50) seem to exclude the possibility of a licensee in exclusive possession.

To turn now to so called the rating cases cited by Cullity. It is submitted that these are of no real significance as again and again the point is made in these cases, that liability for rating does not depend on title but only on occupation; whether a person in possession as a licensee or a tenant at will is concerned with title. For example, in KITTOW v LISKEARD UNION, Mellor J. said:

> "....the parish has nothing to do with title; they look to the fact of beneficial occupation and when they find it, although it may be there is no actual title which might stand against the superior title, that is immaterial to the parish."(51)

Again in HOLYWELL UNION AND HALKYN PARISH v HALKYN DRAINAGE CO., Lord Hershall L.J. said:

> "The question of whether a person is an occupier or not within the rating law is a question of fact and does not depend upon legal title."(52)

and in WESTMINSTER CORPORATION v SOUTHERN RAILWAY CO., Lord Russell, admittedly without criticising the notion of a licensee in de facto occupation, said:

> "rateability does not depend on title to occupy, but on the fact of occupation."(53)

and finally Lord Wright M.R. observes of the agreements in question:

> "Some are in the form of a demise or tenancy agreement, others purport to grant a licence. But substantially their effect is the same so far as it concerns what is material to this appeal."(54)

Lastly, to consider the decisions which Cullity maintains are authorities for the view that a tenancy only arose when there was an intention to grant exclusive possession and therefore did not automatically arise where there was sole possession in fact. The first of these is PROVINCIAL BILL POSTING CO. v MOOR IRON CO.(55). This concerned an action for wrongful distress in relation to the grant of an exclusive right of putting up advertising hoardings and posting bills on specified land. The action succeeded on the ground that the advertising boards were merely chattels and consequently not distrainable. This was the only ground Kennedy L.J. was prepared to consider, but Buckley L.J. did also consider whether the action should fail on the ground that there was no lease in respect of which an action for distress lay. In this connection, he asked:

> "What did the plaintiffs take under the agreements? They took the exclusive right of using the land and affixing the hoardings and using them for bill-posting purposes. I think this amounted to nothing more than a licence to go upon the land and do specified things on it. The plaintiffs had no estate in any definite parcel of land nor had they the exclusive right to the occupation of any definite portion of it."(56)

Admittedly, this passage seems to refer to intention but surely what Buckley L.J. is asking is whether the plaintiff had sole possession in fact or merely rights to enter the land short of taking possession of it, for it should be remembered the concept of possession in itself requires intention. Thus the decision is not an authority for the proposition that, assuming sole possession in fact exists, a tenancy only arises where there is an intention to give a right to exclusive possession. The same would seem to be true of all the other cases cited by Cullity except MOSS v BROWN(57) which will be considered later. To consider first WELLS v KINGSTON-ON-HULL(58). Here the owners of a dock contracted to allow the plaintiff use of the dock for repairing a ship. The defendants subsequently refused to

let the ship in. As the agreement was merely oral, the question arose as to whether the contract was for an interest in land, in which case it would be not be enforceable as the Statute of Frauds required writing. At one point in his judgement Lord Coleridge C.J. said:

> "Whether a contract in writing was essential depends on whether, by the terms of the agreement between the parties, it was intended to confer an interest in land."(59)

However, he continued:

> "Now prima facie it appears to me that such an agreement as this is not what would be generally understood as dealing with an interest in land. In ordinary language it is a contract for useof a graving dock. It is possible that in a contract for use of such a dock such an exclusive right to the possession of the dock as to amount to an interest in land might be intended to be given .... I cannot think that there was any such intention here."(60)

In other words, Lord Coleridge was saying the wording of the contract suggested no intention to give sole possession of the dock to the plaintiffs or, put another way, the defendants never parted with possession. This interpretation is backed up by the judgement of Denman J., who after agreeing with the reasoning of Lord Coleridge, added:

> "It seems to me that looking to the whole agreement, it does not amount to a demise of the dock or a contract for an interest in land, but only to an agreement for the use of the dock for repairing the ship subject to the control of the Corporation and without depriving them for a moment of the full right to possession and property over it."(61)

The next case cited by Cullity as authority for use of the test of the right to exclusive possession for the creation of a tenancy is GLENWOOD LUMBER CO. v PHILLIPS in which Lord Davey said, on the question of whether a licence to occupy land had arisen:

> "It is not a question of words but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation .... it is in law a demise of the land itself."(62)

However, once again, within the context of the facts, it

appears the reference to an exclusive right of occupation is directed to the question of whether the instrument in question merely gave a right to go on the land to cut timber or actual sole possession of the land itself, the concept of possession requiring intention. It is interesting to note that in the recent House of Lords decision in STREET v MOUNTFORD (63) , Lord Templeman appeared to have interpreted GLENWOOD LUMBER CO. v PHILLIPS as dealing with the question of whether there was an intention to grant sole possession in fact. Finally, to TAYLOR v PENDLETON (64), cited by Cullity as an authority for use of the test of the right to exclusive possession. This was concerned with liability for poor law rates, which was said to depend upon whether the agreements in question conferred exclusive occupation so as to create a tenancy. Certainly Wills J. addressed himself to the question of how the parties intended the agreements to operate but only after formulating the question in issue as being "whether the plaintiff had exclusive occupation of the soil.....", (65) in other words, was the plaintiff in sole possession in fact.

Therefore, out of the five decisions cited by Cullity four do not seem to support his proposition that the test of a tenancy as compared to a licence was that of the right to exclusive possession. MOSS v BROWN(66), however, does. The facts of this case were that during the war, whilst the tenant of a certain property was abroad, his wife allowed some friends of hers to go into possession of the flat he rented, the friends paying rent to the wife. The question was whether the friends were licensees, periodic tenants, or tenants at will for the purpose of notice requirements. Both Asquith and Somervell L.JJ. expressed the view an intention was required to create a right to exclusive possession and, as there was no such intention, the friends were licensees. Morton L.J. dissented. He considered the fact of exclusive possession to be conclusive to the finding of,at minimum, a tenancy at will.

Thus a review of the decisions cited by Cullity shows that prior to ERRINGTON v ERRINGTON very few cases really detract from the principle that whenever an occupier was found to be in exclusive possession, a tenancy arose. Furthermore, the narrower meaning of the phrase 'exclusive possession', namely, an occupier with a right to exclusive possession, was adopted only in one case (MOSS v BROWN) as the test for the existence or otherwise of a tenancy. Consequently, so far, it would appear that the view that ERRINGTON v ERRINGTON marks a development in the law, on account of the finding that the young couple were licensees in sole occupation in fact, is correct. However, it still remains to discuss the

decisions relied upon in ERRINGTON v ERRINGTON itself as authorities for the finding of a licensee in exclusive possession of land.

The first of these was MARCROFT WAGONS LTD v SMITH decided not long before ERRINGTON v ERRINGTON. It quite clearly supports the finding of a licensee in exclusive possession. The case was concerned with whether the daughter of a deceased statutory tenant was a tenant or a licensee when she was allowed to remain in occupation after her mother's death, paying a weekly sum to the landlords. The Court of Appeal (Denning L.J., Evershed M.R. and Roxburgh J.), undoubtedly influenced by the consequences of Rent Act protection (68), upheld the decision of the county court judge that the daughter was a licensee. The validity of the other authorities relied upon by Denning L.J in ERRINGTON v ERRINGTON is less clear. He started by placing reliance on dicta of Lord Abinger's C.B. in HOWARD v SHAW (69). This case concerned a claim for rent on account of the defendant's beneficial use and occupation of land when he was let into possession under, what turned out to be, an abortive contract of sale of the land. Lord Abinger expressed the opinion that whilst the defendant was in occupation under a valid contract of sale, he could not be regarded as a tenant. He does not, however, say expressly the defendant was a licensee, although this is the obvious implication. It is submitted that the case is a very weak authority for the finding of a licensee in exclusive possession for three main reasons. Firstly, the other members of the court (Parke and Alderton B.B.) were of the opinion that the defendant was a tenant at will the moment he went into possession. The reason given by Lord Abinger for finding the defendant was not a tenant at will in the circumstances of the case was "the parties could not convert the contract of purchase into a contract for a tenancy."(70) This reasoning seems inconsistent with the view normally adopted at the time that a tenancy at will arises from the fact of entry into exclusive possession. Secondly, the statement of Lord Abinger was clearly obiter dicta as the sole issue was whether a person in possession under a contract of sale which is abandoned must pay reasonable compensation to the owner for beneficial enjoyment. Finally, as Professor Hargreaves points out (71) when the problem of use and occupation was not in issue in BALL v CULLIMORE (72), Lord Abinger himself expressed the view that a purchaser let into possession was, at common law, a tenant at will.

The next case relied upon by Denning in ERRINGTON v ERRINGTON was BOOKER v PALMER.(73) The facts of the

dispute arose out of the war-time spirit. The defendant's house had been destroyed in an air raid and one of his relatives was a butler to one Mrs. G, who knew a landowner with an empty cottage on his estate. The landowner told Mrs. G. that the defendant, among others, could remain in the cottage rent-free for the rest of the war. Some time later the landowner leased the land, which included the cottage, to the plaintiff, who brought an action for possession. It should be noted that the issue in the case was whose licensee or tenant was the defendant, Mrs. G's or the landowner's, not was the defendant a licensee or a tenant. Clearly the Court of Appeal (leading judgement, Lord Greene M.R.) was of the opinion that the defendant was a licensee but this may well have been because the defendant was occupying along with others and consequently did not have exclusive possession. The authority of the case is further weakened by the fact the status of the defendant was not in issue; and the outcome of the case would have been the same even if he was found to have been a tenant at will. Moreover, in ERRINGTON v ERRINGTON, Denning placed reliance on the following statement of Lord Greene M.R.:

> "There is one golden rule which is of very general application, namely that the law does not impute intention to enter into legal relationships where the circumstances and conduct of the parties negative any intention of the kind."(74)

It has been pointed out by many writers (75) that dependence on this quotation as authority for the finding of defendant's status as licensee is erroneous, as Lord Greene M.R. was at this stage referring to the relationship between Mrs. G. and the landowner and not the relationship between the plaintiff and the defendant licensee. Naturally, there was no question of Mrs. G. being a tenant at will for she was not in possession and no rent was payable.

Denning L.J. next placed reliance upon three war-time requisitioning cases where an occupier in exclusive possession was found to be a licensee. In one of these, MINISTER OF HEALTH v BELLOTTI (76), it was conceded the defendants were licensees and therefore the issue of whether the occupiers could be licensees in exclusive possession was not raised. Furthermore, although it appears that the finding of a licensee in exclusive possession in the remaining two cases, SOUTHGATE BOROUGH COUNCIL v WATSON (77) and MINISTER OF AGRICULTURE AND FISHERIES v MATTHEWS (78) was dependent on the special words of a statute, the requisitioning cases do show further acceptance of the concept of a licensee in

exclusive possession.

To turn now to the final case relied upon by Denning L.J in ERRINGTON v ERRINGTON for the finding of a licensee in exclusive possession, FOSTER v ROBINSON (79). In this case, a farm cottage had been let to a farm employee as a yearly tenant. When the tenant retired, his landlord and employer told him he could live in the cottage rent-free for the rest of his life. This the tenant did. After the tenant had died, the question arose as to whether the arrangement operated as a surrender of his original yearly tenancy so as to destroy the Rent Act protection. The Court of Appeal decided the arrangement amounted to the grant of a licence which operated to extinguish the original tenancy. However, the issue of whether the deceased was a licensee or a tenant, after surrender of the yearly tenancy, was obiter dicta as it was not central to the outcome of the decision. Nevertheless the decision once again illustrates that the idea of a licensee in exclusive possession was gaining momentum. Two members of the Court of Appeal, namely Evershed M.R. and Singleton L.J., made clear statements to the effect that occupation of the premises was as licensees, although Evershed M.R. does admittedly add that he regarded the case as one which turned very much on its own facts, such that the principles applied by the court should not be regarded as of general application.

From this, it can be seen that ERRINGTON v ERRINGTON was not an entirely novel decision in finding a licensee in exclusive possession, although on the whole, prior to this, exclusive possession was regarded as conclusive of a tenancy, at minimum a tenancy at will. This is acknowledged by Lord Scarman in HESLOP v BURNS, when, in referring to ERRINGTON v ERRINGTON, he commented of licences:

> "This concept has been developed by the courts so that now it is present as a possible mode of land-holding - a mode which had certainly not been developed with anything like its current maturity in the 19th century."(80)

FOSTER v ROBINSON and MARCROFT WAGONS LTD. v SMITH mark the beginnings of a new tendency to recognise an occupier in exclusive possession by virtue of a licence only. This is not surprising because, by this stage in time, the factors which it will be shown influenced the development of the possessory licence were already in existence.

Having therefore agreed that before ERRINGTON v ERRINGTON there is very little authority for the finding of a

licensee in exclusive possession, it remains to assess the significance of the step forward. For this it is necessary to look closely at the concept of a tenancy and in particular the nature of a tenancy at will; for, as has been shown, the view expressed in by far the vast majority of cases prior to FOSTER v ROBINSON, MARCROFT WAGONS LTD v SMITH and ERRINGTON v ERRINGTON was that exclusive possession gave rise to a tenancy because at minimum a tenancy at will would arise out of the fact of entry into exclusive possession. The aim of the exercise in considering the nature of a tenancy at will is to decide whether it amounts to anything more than what was referred to as 'a personal privilege' to occupy in ERRINGTON v ERRINGTON.

Littleton defined a tenant at will in the following terms:

> "Tenant at will is where lands or tenements are let by one man to another to have and to hold to him at the will of the lessor, by force of which lease the lessee is called tenant at will, because he hath no certain or sure estate for the lessor may put him out at which time it pleaseth him."(81)

A tenancy at will arises, therefore, when one person occupies the land of another on the understanding that either party may terminate the tenancy at any time. The relationship may arise expressly(82) or by implication, such as where a tenant holds over after the expiry of a lease or goes into possession under a void lease or a contract for a lease without an agreement to pay rent on a periodic basis,(83) or in some cases where a purchaser goes into possession prior to completion(84) or during negotiations for a lease.(85) The tenancy at will may also be determined expressly or by implication. Examples of determination by implication are where either party does some act which is inconsistent with its continuance, such as alienation by the landlord or tenant(86) or death of the landlord or tenant.(87) Moreover when rent is paid on a regular basis in circumstances where the tenancy at will was created without agreement to pay rent, the tenancy will be determined and be replaced by a periodic tenancy.(88)

Megarry and Wade explain the concept in these terms:

> "A tenancy at will is a tenancy which involves tenure, i.e. relationship of landlord and tenant but no definite estate for there is no defined duration of interest."(89)

In WHEELER v MERCER, Lord Simonds observed:

> "A tenancy at will, though called a tenancy, is unlike any other tenancy except a tenancy at sufference to which it is next of kin. It has been properly described as a personal relationship between landlord and tenant; it is determined by the death of either of them or by one of a variety of acts, even by an involuntary alienation which would not affect the substance of any other tenancy."(90)

In effect, what Lord Simonds said about a tenancy at will amounts to the characteristics of a personal privilege, to be in exclusive possession of land. This is tantamount to saying that a tenancy at will is simply a licence to be in exclusive occupation of land. However, Cullity attempts to draw a distinction between a licence and a tenancy at will, although he admits the distinction "is clearer in principle than in practice".(91) It is submitted the distinction is non-existent. Cullity maintains a licensee has a mere privilege of doing acts of control subject to a power of revocation vested in the licensor. Consequently, whilst the licence subsists, the licensee cannot object to the licensor interfering with his possession. Although there appears to be no authority for this proposition with respect to a licensee in exclusive possession, WOOD v LEADBITTER does establish the principle, in relation to a licensee not in exclusive possession, and there would seem to be no reason why the position should be any different for a licensee in exclusive possession. On the other hand, says Cullity, a tenant at will has a right to do acts of control co-relative to a duty of the lessor not to interfere with the doing of such acts. Consequently, although the lessor's power of determination is similar to the licensor's power, a tenant at will can, in principle, sue the landlord for trespass on the grounds of interference with possession. He, however, admits such a right is of little importance in practice as any interference with the possession of the tenant at will would normally amount to an implied exercise of the landlord's power of determination, and he cites TURNER v DOE D. BENNETT(92) where Lord Denman C.J. suggested a landlord can never be liable in trespass at the suit of a tenant at will as the court would always regard the act as implied determination of the tenancy. Nevertheless, Cullity goes on to give three reasons why a tenant at will should be regarded as having a right to do acts of control giving him an action in trespass.

The first is this: if, for some reason, the landlord does not wish to terminate the tenancy (e.g. if the

tenant's presence attracted some benefit to the lessor), it would be difficult to see why the landlord's entry should be interpreted as terminating the tenancy. However, if one looks at the facts of DOE D. BENNETT v TURNER, this very point seems to be disproved. On the facts, the plaintiff had let lands to the defendant as tenant at will. Ten years later the plaintiff entered and took some stone from a quarry on the land let, without the defendant's consent. The defendant was allowed to remain on the land for a further twelve years, after which an action for ejectment was brought by the plaintiff. The defendant claimed the plaintiff's title was statute barred as he had been a tenant at will for over twenty years. It would seem the act of taking stones from the quarry after ten years did not involve any desire to eject the tenant at that stage. Nevertheless, the court held the plaintiff's title was not statute barred as the entry had terminated the first tenancy at will, and the tenant had only been in possession under the new tenancy twelve years. Lord Denman C.J. commented:

> ".... in the case of a tenancy at will whateverthe intent of the landlord if he do an act upon the land for which he would otherwise be liable for an action in trespass at the suit of the tenant such act is a determination of the will for so only can it be lawful and not a wrongful act."(93)

To consider Cullity's second reason for regarding a tenant at will as having a right to bring an action in trespass against his landlord. He cites the decision of the High Court of Australia in LANDALE v MENZIES(94) (Barton C.J., Griffith C.J., with Isaacs C.J. dissenting) where the majority decided where there was an implied promise to terminate a tenancy at will after reasonable notice, an action in trespass lay against the landlord, if no notice was given. It is submitted that this decision should be considered with the greatest suspicion. Firstly, it is noticeable that Barton C.J. admitted there was no authority for this view. Secondly, he then went on to justify his decision by eroneously relying on LOWE v ADAMS (95), in which case it was held that reasonable notice was required to terminate a non-exclusive licence of certain sporting rights. Barton C.J. argued that if reasonable notice was required in the case of a non exclusive right, it must be required where exclusive occupation is given. However, the question of reasonable notice in LOWE v ADAMS was for the purpose of an action for breach of contract in respect of a recognised interest in land. Therefore it is no more surprising than the existence of an action in trespass

against a landlord who enters on to land during a fixed term of periodic tenancy.

The third reason for suspicion is that Griffith C.J. admitted being a little doubtful about the proposition a tenancy at will is not determinable instanter. He therefore added,(96) if the tenancy was terminable at law, without reasonable notice, the agreement would nevertheless be enforceable in equity; presumably this would have to be on the basis of breach of contract. Finally, there is the strong dissenting judgement of Isaacs C.J. He adhered to the view that by very definition a tenancy at will must be determinable instanter and, as such, no action in trespass could be. He said:

> ".... it was argued that even a tenancy of this nature may yet be implicitly non-determinable except at the expiration of reasonable notice to quit. This appears to involve a contradiction..." (97)

It is noticeable that in FOSTER v ROBINSON (98), Lord Evershed M.R also considered the notion of a tenant at will, with the promise that the tenancy at will would not be determined, but appeared to dismiss the idea.

In his judgement in LANDALE v MENZIES, Isaacs C.J. proceeded to explain that the effect of the implied agreement not to terminate without reasonable notice was not to preserve the tenancy after determination of the will, but to render the party who determined it without notice liable for damages for <u>breach of agreement</u> and not for trespass. He cited DOE D. BENNETT v TURNER(99) on this point, and concluded:

> "As I understand the law, the landlord of a tenant can never trespass on the property let. If the act complained of is with the consent of the tenant or in pursuance of the agreement of tenancy, it is of course not a trespass because it is lawful..... If it is opposed to or without the tenant's consent it is regarded by the law as ipso facto determination of the tenancy and equally free from liability to trespass."(100)

It would seem, therefore, that the better view is that a tenant at will does not have an action in trespass against his landlord under any circumstances. Consequently this detracts from the view that a tenant at will is in a different position from a licensee with exclusive possession.

Finally, Cullity maintains, even if it is true a tenant at will has no action in trespass there is a clear authority that such a tenant has a right to sole possession which cannot be said of a licensee. He cites Lord Denman in DOE D. BENNETT v TURNER as making such a statement and refers to COKE ON LITTLETON.(101) To this may be added statements made in HESLOP v BURNS. Stamp L.J. implied a tenant at will has a right to exclusive possession when he said:

> "In my judgement the proper inference is that the defendants at the outset entered into occupation of the premises as licensees and not as tenants at will; not with a right to exclude the deceased from possession."(102)

as did Scarman L.J. when he said of a tenant at will:

> "He is there and can keep out trespassers; he is there with the consent of the landlord and can keep out the landlord as long as that consent is maintained."(103)

However, with respect to Lord Scarman's statement, it has already been noted that any entry by the landlord will be regarded as implicitly determining the tenancy at will. Consequently, there is no right to keep the landlord out. Moreover, to speak of a tenant at will as having a right to exclusive possession whilst at the same time the landlord has a right to determine the tenancy at any time, makes a nonsense in Hohfeldian terms.

From the foregoing discussion, it would seem that a tenancy at will is nothing more than occupation with a privilege of exclusive possession and, as such, is very different in nature from other tenancies, i.e. tenancies for fixed or periodic terms. A tenancy at will would, in fact, seem in essence nothing more than what today is referred to as a bare licence. Gray and Symes in their book, "Real Property and Real People" reach this conclusion.(104) Moreover the concept of a tenancy at will predates the recognition of leasehold interests as proprietary rights. The authors maintain:

> "At first the three estates of freehold were the sole estates recognised by law; the only other lawful right to the possession of land was known as a tenancy at will, under which the tenant could be ejected at any time, and which therefore gave him no estate at all." 4(105)

This reinforces the notion that a tenancy at will is something distinct from a leasehold estate and is in fact

merely a licence to occupy. It would appear it was only later when leaseholds became accepted as proprietary interests that tenancies at will came to be generally treated as part of the law relating to leasehold estates.(106) There is also judicial recognition of this fact. For example, in MARCROFT WAGONS LTD. v SMITH, Lord Justice Denning commented:

> "According to the common law as it stood before the Rent Restrictions Acts when the defendant stayed on with the consent of the landlords, she would have become a tenant at will...."(107)

He continued with reference to the facts of the case:

> "In these circumstances it is no longer proper for the courts to infer a tenancy at will.... as they would have done from the mere acceptance of rent."(108)

Denning makes similar statements in FACCHINI v BRYSON (109) and COBB v LANE, in the latter case becoming almost explicit on the point, when he observed:

> "Under the old cases there would have been some colour for saying that the brother was a tenant at will, but the old cases cannot be relied on...."(110)

Other judges are quite prepared to admit there had been a change in the attitude of the courts to the finding of a tenancy at will but do not explicitly suggest the court is now finding a party to be a licensee, where in the past the court would have found the party to be a tenant at will. For example, it is implicit in the judgement of Somervell L.J. in COBB v LANE when he said:

> "No doubt, in former days, except for the question of the statute the distinction between a tenancy whether at will or for a period, and a licence was not so important as it has become since the Rent Restrictions Acts came into operation .... that fact has led to an examination of the distinction."(111)

and Lord Scarman, perhaps, gets nearest to such a suggestion when in HESLOP v BURNS he acknowledged:

> ".... under the impact of changing social circumstances, the tenancy at will has suffered a certain change, at any rate in its purpose and function."(112)

It is interesting to note that in STREET v MOUNTFORD, Lord Templeman defined a tenancy in contrast to a licence in a way which excluded a tenancy at will:

> "To constitute a tenancy the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments."(113)

As a tenant at will is nothing more than a person in actual exclusive possession of land under a bare licence to occupy, in one sense recognition of the concept of a licensee in exclusive possession ERRINGTON v ERRINGTON does not mark a significant development in the law; it is simply a matter of a change of label. However, the reasoning adopted by Denning in ERRINGTON v ERRINGTON shows that underlying the change of name is a more profound and significant development. Denning considered three possible bases on which the couple were in occupation of the house, namely, they were tenants at will, or tenants under the Rent Acts or licensees. He rightly rejected the notion the couple were tenants under the Rent Acts, as this was a family arrangement and there appeared to be no intention to be legally bound to pay the mortgage instalments, assuming these were in any case capable of being regarded as rent.(114) But was Denning right in his rejection of the status of the couple as tenants at will? He decided they were not tenants at will as the essence of such a tenancy was that it should be determinable by either party on demand, and he considered that the father could not have determined the couple's occupation at any time. However, this reasoning is entirely erroneous and occurred on account of Denning's failure to consider the position both at common law and in equity. There would have been nothing inconsistent about finding at common law the couple were tenants at will, but that in equity the position was different. If the agreement (whatever its nature) was capable of specific performance, equity would regard it as creating equitable rights in rem and, as such, the agreement would not have been determinable. (115) Had Denning looked upon the case in its more straightforward way, his fears that finding a tenancy at will would lead to the undesirable outcome of the father's title being defeated under the Limitation Acts after a lapse of 13 years (i.e. before all the instalments were paid) would have been unfounded; the position in equity being different, the Limitation Acts would not have operated at all.

It will be argued in a later Section that existing concepts could have been used to protect the couple in ERRINGTON v ERRINGTON.(116) Why then, after failing to

apply the old common law and equitable principles, did Denning open up a major development in the law by extending the principle by analogy (in saying a licence is revocable at will at law, but in equity not so if contractual) to his new concept of a licensee in exclusive possession of land? It would seem he had already perceived, perhaps from experience of MARCROFT WAGONS LTD.v SMITH,(117) the value of the concept of a licence to occupy as a device for avoiding troublesome statutes. In later Sections, an examination will be made of the use to which the licence has been put in avoiding statutory controls such as those
between landlord and tenant and in respect of limitation of actions. Thus through a failure to define precisely the meaning of exclusive possession and a failure to recognise that a tenancy at will is in essence no more than a licence to occupy, the concept of a licensee in exclusive possession is able to take on a significance of fundamental importance.

References: Section I(a)

1. Hargreaves "Licenced Possessors" 1953 LQR Vol 69 p. 446.

2. [1952] 1 All ER 149 at p. 154.

3. Terminology used in the definition section 205 Law of Property Act 1925.

4. LONDON AND NORTH WESTERN RAILWAY v BUCKMASTER (1874) 10 QB 70 at p. 76.

5. HARVEY v PRATT [1965] 2 All ER 786; SWIFT v MACBEAN [1942] 1 All ER 126.

6. LACE v CHANDLER [1944] 1 All ER 305.

7. See S.205 Law of Property Act 1925 definition.

8. See Holdsworth "History of English Law" vol iii pp 128, 129; Pollock and Maitland "History of English Law" 2nd Edition vol ii p. 117.

9. See post p. 36 f.

10. [1952] 1 All ER 149.

11. [1952] 1 All ER 1199 at p. 1201.

12. A point made by Cullity in his article "The Possessory Licence" (1965) 29 Conv p. 336.

13. [1951] 2 K.B. 496 at p. 503.

14. At p. 504.

15. At p. 506 (my emphasis).

16. [1952] 1 All ER 149 at p. 154 (my emphasis).

17. [1969] 2 All ER 692 CA.

18. At p. 695.

19. "Private Sector Tenancies" 2nd Edition p. 14.

20. [1950] 2 All ER 342.

21. Supra.

22. Supra.

23. [1952] 1 All ER 1199 CA.

24. [1952] 1 TLR 1386 CA.

25. [1958] 1 QB 513.

26. [1963] Ch. 88.

27. [1963] 2 All ER 647.

28. [1970] 2 All ER 483.

29. [1971] 1 All ER 841.

30. [1974] 3 All ER 406.

31. See post pp 38 and 94.

32. Supra at p. 155.

33. 1953 LQR vol 69 p. 466.

34. "The Possessory Licence" (1965) 29 Conv 336.

35. S.70 and S.77.

36. RIGHT d LEWIS v BEARD (1811) 13 East 210; Doe d NEWBY v JACKSON (1823) 1 B and C 448; BALL v CULLIMORE (1835) 2 C M and R 120; Doe d GRAY v STANION (1836) 1 M and W 695; Doe d TOMBS v CHAMBERLAINE (1839) 5 M and W 14; HOWARD v SHAW (1841) 8 M and W 118; Doe d STANWAY v ROCK (1842) 4 Man and G 30 (agreement for sale) HAMMERTON v STEAD (1824) 3 B and C 478; EDGE v HILLARY (1852) 3 Car and K 40; ANDERSON v MIDLAND RY (1861) 3 El and El 615; COATSWORTH v JOHNSON (1886) 55 LJQB 220 (CA); WARREN v MURRAY [1894] 2 QB 648 (CA) (agreement for a lease).

37. See e.g. 1 Smith LC pp 593-596.

38. Doe d THOMPSON v THOMPSON (1837) 6 A and E 721; TURNER v Doe d BENNETT (1842) 7 M and W 226; Doe d EVANS v PAGE (1844) 5 QB 767; Doe d DAYMAN v MOORE (1846) 9 QB 1846; Doe d GROVES v GROVES (1847) 10 QB 486; Doe d BIRMINGHAM CANAL CO. v BOLD (1847) 11 QB 127; Doe d CARTER v BARNARD (1849) 13 QB 945; HOGAN v HAND (1861) 14 Moo.PC 310; DAY v DAY (1871) LR 3 PC 751; BRIGHTON CORPORATION v GUARDIANS OF BRIGHTON (1880) 5 CPD 368; LYNES v SNAITH (1899) 1 QB 486; JARMAN v HALE (1899) 1 QB 994; WOODHOUSE v HOONEY [1915] 1 Ir R 296.

39. Point made by Cullity "The Possessory Licence" supra pp 348-349.

40. (1871) LR 3 945. Cullity "The Possessory Licence" supra.

41. [1899] 1 QB 994.

42. At p. 999.

43. R v INHABITANTS OF STANDON (1836) 1 M and W 695 at p. 700; R v INHABITANTS OF HORDON ON THE HILL (1816) 4 M and S 562; R v HAGWORTHINGHAM (1823) 1 B and C 634; R v BERKSWELL (1843) 1 B and C 542.

44. HOLYWELL UNION AND HALKYN PARISH v HALKYN DRAINAGE CO [1895] AC 117; WESTMINSTER CORPORATION v SOUTHERN RAILWAY [1936] AC 511.

45. PROVINCIAL BILL POSTING CO v LOW MOOR IRON CO [1909] 2 KB 344 at p. 349; WELLS v KINGSTON-ON-HULL (1875) LR 10 CP 402 at p. 406; GLENWOOD LUMBER CO v PHILLIPS [1904] AC 405 at p. 408; TAYLOR v PENDLETON (1887) 19 QBD 288; WILSON v TAVERNER [1901] 1 Ch 578; LANDALE v MENZIES [1909] 9 CLR 89 at p. 118; MOSS v BROWN [1946] 2 All ER 557.

46. (1814) 2 M and S 461.

47. (1816) 4 M and S 562.

48. Supra at p. 467.

49. (1791) 4 TR 177.

50. (1825) 4 B + C 230.

51. (1874) 10 QB 7 at p. 14.

52. [1895] AC 117 at p. 125.

53. [1936] AC 511 at p. 529.

54. At p. 544.

55. [1909] 2 KB 344.

56. At p. 349.

57. [1946] 2 All ER 557 post p. 15.

58. (1875) LR 10 CP 402.

59. At p. 406.

60. At p. 406 (my emphasis).

61. At p. 410.

62. [1904] AC 405 at p. 408.

63. [1985] 2 All ER 289 at p. 292.

64. (1887) 19 QBD 288.

65. At p. 293.

66. Supra.

67. [1951] 2 KB 496.

68. See Section II post p. 62.

69. (1841) 8 M + W 118.

70. At p. 122.

71. (1953) 69 LQR p. 466.

72. (1835) 2 CM + R 20.

73. [1942] 2 All ER 674.

74. At p. 677.

75. e.g. Hargreaves (1953) 69 LQR 466 at p. 473-474.

76. [1944] 1 All ER 238.

77. [1944] 1 All ER 603.

78. [1949] 2 All ER 724.

79. [1950] 2 All ER 342.

80. [1974] 3 All ER 406 at p. 415.

81. S. 68.

82. MANFIELD AND SONS LTD v BOTCHIN [1970] 3 All ER 143.

83. MEYE v ELECTRIC TRANSMISSION LTD [1942] Ch. 290.

84. HOWARD v SHAW (1841) 8 M + W 118.

85. BRITISH RAILWAYS BOARD v BODYWRIGHT LTD (1971) 220 EG 651.

86. PINHORN v SOUSTER (1853) 8 Exch. 763 at p. 772.

87. TURNER v BARNES (1862) 2 B + S 435; JAMES v DEAN (1805) 11 Vest. 383 at p. 391.

88. RICHARDSON v LONGRIDGE (1811) 4 Taut 128 at p. 132

89. "The Law of Real Property" fifth edition p. 42.

90. [1956] 3 All ER 631 at p. 634.

91. "The Possessory Licence" (1965) 29 Conv 336 at pp. 338-339.

92. (1842) 9 M + W 643 at p. 646.

93. (1842) 9 M + W 643 at p. 646 (my emphasis).

94. (1909) CLR 89.

95. (1901) 2 Ch 598.

96. At p. 103.

97. At p. 130.

98. Supra.

99. Supra.

100. At p. 133.

101. 556, 576, 245 b.

102. [1974] 3 All ER 406 at p. 410.

103. At p. 416.

104. At p. 395.

105. "The Law of Real Property" fifth edition pp 40-41.

106. See for e.g. Co Litt 63a, 55a, Preston 25, 28, 29.

107. Supra at p. 505.

108. At p. 506.

109. [1952] 1 TLR 1386.

110. [1952] 1 All ER 1199 at p. 1202.

111. At p. 1201.

112. Supra at p. 416.

113. [1985] 2 All ER 289 at p. 294. See post p. 33 for facts.

114. See post p. 146 f. for further discussion of this issue.

115. Hargreaves (1953) 69 LQR p. 466.

116. Section IV post p. 211.

117. Supra.

(b) Development beyond ERRINGTON v ERRINGTON.

Having decided in ERRINGTON v ERRINGTON(1) that the test of exclusive possession was not conclusive to the finding of a tenancy, what criteria were developed to distinguish between a licensee in exclusive possession and a tenant in exclusive possession? Furthermore, how much importance was attached to the finding of exclusive possession? By the time of MARCHANT v CHARTERS, Lord Denning was able to say, with accuracy, on the distinction between a tenant and a licencee:

> "The law on this subject has been developed greatly in the last 25 years. I might say revolutionised..."(2)

The present position is governed by the recent House of Lords' decision in STREET v MOUNTFORD (3) which undoubtedly has not only put a stop to the development but has to some extent reversed the trend, narrowing the circumstances in which an occupier will be found to be in exclusive possession with merely a licence. The case was concerned with a written agreement described as a licence which, it was conceded, gave exclusive possession of a furnished room. The agreement stated that the rights granted were personal and not assignable and that fourteen days' notice was required to terminate the agreement. In addition, the appellant signed a declaration to the effect that she understood and accepted the licence did not, and was not intended to, give Rent Act protection. This was not, therefore, a case where the 'wool was being pulled over the eyes' of the occupier; the appellant was fully aware she was not intended to have Rent Act protection. Despite this, however, she subsequently applied for a 'fair rent'; the landlords responded by seeking a declaration in the county court that the agreement was merely a licence and, as such, the 'fair rent' provisions did not apply. The county court judge decided, despite the labels used, the agreement amounted to a tenancy. The landlord appealed to the Court of Appeal which, following the more liberal approach which had been developed since the 1950s, decided the agreement was a licence, because that was what it was intended to create. However, on appeal to the House of Lords (Lord Scarman, Lord Keith, Lord Bridge, Lord Brightman and Lord Templeman), the court decided the agreement amounted to a tenancy.

The judgement of the court was delivered by Lord Templeman. He stated that exclusive possessive is not decisive. Nevertheless with respect to residential accommodation,where there is an intention to enter into a legal relationship and exclusive possession is given for

a fixed or periodic term certain in consideration of a premium or periodical payments, there is a tenancy unless the right to exclusive possession is referable to some legal relationship other than a tenancy so as to negative the grant of an estate in land. Lord Templeman gave the following examples of the latter situation; possession under a contract for the sale of land; occupation pursuant to a contract of employment; or occupation referable to the holding of an office. In reviewing earlier cases, Lord Templeman over-ruled the decision in MURRAY BULL AND CO v MURRAY (4)and disapproved of three more recent decisions, namely: SOMMA v HAZLEHURST (5); ALDRINGTON GARAGES LTD v FIELDER(6) and STUROLSON AND CO v WENIZ.(7) Many other decisions were explained.

It is proposed to examine the cases since and including ERRINGTON v ERRINGTON in which the test for distinguishing between a tenancy and a licence has been in issue. The aim of this exercise is threefold. Firstly, to consider Lord Templeman's interpretation of the cases reviewed in STREET v MOUNTFORD; secondly, to trace the development of and ascertain how liberal the test for distinguishing between tenancies and licences had become; and finally, to decide whether the tests developed, and that currently adopted, are workable. The majority of cases in which there is a discussion of the distinction between leases and licences are concerned with the Rent Restriction Acts. However, specific points which arise out of the consequences of the test adopted, in relation to statutory protection for tenants, the operation of the Limitation Acts or family and domestic arrangements will be deferred until the appropriate Section.

In ERRINGTON v ERRINGTON, Denning L.J. stated: "the test of exclusive possession is by no means decisive". (8) Nevertheless, it seems on the whole until the late 1960s and early 1970s, the test of exclusive possession was still regarded as being of vital importance. It is true to say that in COBB v LANE,(9) Denning L.J. made no reference to exclusive possession in distinguishing between a tenancy at will and a licence. However, Somervell L.J. agreed with counsel's submission that:

> "...where there is exclusive occupation for an indefinite period a tenancy at will must be implied unless there is something in the facts to prevent that conclusion."(10)

Despite the fact that in MURRAY BULL v MURRAY,(11) McNair J. failed to ask about exclusive possession, an example of the continued importance of exclusive possession is seen in the judgement of Jenkins L.J. where he said, in

ADDISCOMBE GARDEN PROPERTIES v CRABBE:

> "...the law remains that the fact of exclusive possession if not decisive against the view that there is a mere licence as distinct from a tenancy is, at all events, a consideration of first importance."(12)

and a little later he added that exclusive possession was:

> "...at lowest a strong circumstance in favour of the view that there is a tenancy as opposed to a licence."(13)

The first real signs of a diminution in the importance of the test of exclusive possession can perhaps be detected in the judgement of Lord Denning M.R. in CRANE v MORRIS where he commented:

> "It was also said that the difference between a licence and a tenancy was that in a tenancy the occupier had exclusive possession but on a licence he had not exclusive possession. We have gone past those days. It is now well settled that a man may be a licensee (and not tenant) even though he has exclusive possession."(14)

Once again in ABBEYFIELD (HARPENDEN) SOCIETY LTD v WOODS, Lord Denning did not seem to emphasise exclusive possession, for he said:

> "The modern cases show that a man may be a licensee even though he has exclusive possession, ... the court must look at the agreement as a whole and see whether a tenancy was really intended."(15)

However, the first clear departure from the prime importance of exclusive possession, as a test for distinguishing between leases and licences, comes in the judgement of Sachs L.J. in BARNES v BARRETT where he said of exclusive possession:

> "That however is a factor which is no longer conclusive and indeed appears nowadays to have diminishing weight."(16)

In the following year, in SHELL MEX AND B.P. LTD v MANCHESTER GARAGES LTD, Lord Denning appears to support that view when he said:

> "At one time exclusive possession was a decisive

> factor, but that is not so now. It depends on broader considerations altogether...."(17)

Finally, in MARCHANT v CHARTERS (18), Lord Denning relegated exclusive possession to a mere factor to be considered along with other factors such as whether the occupancy is of a permanent or temporary nature, and the label the parties put on the agreement.

Given that the test of exclusive possession became of diminishing importance in distinguishing between leases and licences, it is necessary to consider the alternative test which was developed to take its place. In ERRINGTON v ERRINGTON, having rejected the test of exclusive possession as being decisive, Denning L.J. concluded:

> "The result of all these cases is that although a person who is let into exclusive possession is prima facie to be considered a tenant nevertheless he will not be held to be if the circumstances negative any intention to create a tenancy."(19)

This passage marks the 'birth' of the test of intention. The question then arises, intention to do what? Denning L.J. went on to explain:

> "If the circumstances and the conduct of the parties show that all that was intended was a personal privilege with no interest in land, he will be held only to be a licensee...."(20)

Was he really saying, as the quotation suggests, that despite the fact that an agreement may satisfy all the recognised characteristics of a tenancy and so be an interest in land, the intention of the parties can alter this result and make the agreement into a 'mere privilege with no interest in land'. If so the negative nature of licences relating to land has been lost. As the point was made in the introduction, a licence in relation to land is a judgement on what the interest is not, rather than what it might be. That such a finding is absurd was pointed out by Lord Templeman in STREET v MOUNTFORD when he said:

> ".... the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork

> even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."(21)

To decide what Denning intended by his test of intention it is necessary to look at the authority he cited to justify applying such a test. This was in fact the often quoted statement of Lord Greene M.R. in BOOKER v PALMER:

> "There is one golden rule which is of very general application, namely that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind."(22)

The facts of BOOKER v PALMER have already been discussed (23) and it was noted that Denning erroneously referred to an arrangement between a certain Mrs. G and the landowner as though it was an arrangement between owner and occupier. From the context in which Lord Greene made the above statement it is quite clear he was not distinguishing between a tenancy and a licence at all; he was merely deciding whether an arrangement between a certain woman, who never took, and was never intended to take possession, of the cottage in question, was intended to create a legally binding agreement so as to make her a tenant, or whether it was merely a friendly arrangement with no binding effect. Lord Templeman in STREET v MOUNTFORD interpreted Lord Greene's judgement in this way for he said:

> "The observations of Lord Greene M.R. were not directed to the distinction between a contractual tenancy and a contractual licence. The conduct of the parties (not their professed intentions) indicated that they did not intend to contract at all."(24)

That this is a correct interpretation is also quite apparent from the judgement of Lord Greene M.R. where he stated:

> "Whether or not the parties intend to create as between themselves the relationship of landlord and tenant under which an estate is created in the tenant and certain mutual obligations arise by implication of law, must in the last resort be a question of intention. Where the parties enter into a formal document the intention to enter into formal legal relationship is obvious; but when all that happens is a quite casual conversation on the telephone it is very much more difficult to infer that the parties were intending to enter a

> legal relationship at all, and in particular such a special relationship as landlord and tenant."(25)

Thus it would seem Denning was quite wrong if he was relying on BOOKER v PALMER as authority for the introduction of the test of intention to create a contractual licence as opposed to a (contractual) tenancy as the question of intention was that of whether there was an intention to create a contractual relationship at all, the assumption being such an intention was necessary for a tenancy.

It is difficult to see how Denning could have understood BOOKER v PALMER in the way it was intended for he decided that the parties in ERRINGTON v ERRINGTON were contractual licensees. Consequently the test of intention seems to be whether the parties intended a contractual licence giving only a 'personal privilege' or a contractual tenancy giving an interest in land. Despite this, in STREET v MOUNTFORD Lord Templeman explained the finding of a licence in ERRINGTON v ERRINGTON on the basis that there was no intention to enter a legal relationship.

It should be reiterated at this point that a test of intention to create a legal relationship can be ambiguous in the context of the relationship between owner and occupier of land, for whenever one person is in possession of property belonging to another a legal relationship must arise be it that of trespasser, owner, licensee or tenant. This point was made by Scarman L.J. in HESLOP v BURNS(26) where he pointed out the relationship of licensee licensor is in a sense a legal relationship.

To turn now to the next case in which the test of intention was discussed, namely COBB v LANE.(27) This was a Limitation Act case. An elder sister had allowed her brother to live in a house bought in her name. He had lived in it for thirteen years before she died, leaving the property to someone else. The executors consequently sought possession of the property from the brother who claimed to be a tenant at will and, as such, to have extinguished his sister's title to the property under the Limitation Act 1939. Denning L.J. reiterated the test of intention he had laid down in ERRINGTON v ERRINGTON. However, as the agreement between the brother and sister was obviously nothing more than a family arrangement, the test of intention applied by Denning could, in relation to the facts, be interpreted to mean, was there any intention to create a legal, contractual agreement? This is how the decision was interpreted by

Lord Templeman in STREET v MOUNTFORD. Moreover, when one turns to the decision which follows COBB v LANE, that of FACCHINI v BRYSON,(28) Denning again seemed to be applying the test of intention in the manner it was intended in BOOKER v PALMER. In the aforementioned case, an employer and his assistant had entered into an agreement which allowed the assistant to occupy a house in return for a weekly payment, on terms which conferred exclusive possession. The assistant was clearly not a service occupier because he was not required to be on the premises for the better performance of his duties. The agreement ended with the words, "nothing in this agreement shall be construed to create a tenancy between employer and assistant". The Court of Appeal, nonetheless, decided the agreement was a tenancy. In the course of his judgment, Denning L.J. gave some explanations about the test of intention. After referring to the earlier cases of FOSTER v ROBINSON,(29) ERRINGTON v ERRINGTON and COBB v LANE, he said:

> "In all the cases where an occupier has been held to be a licensee there has been something in the circumstances such as a family arrangement, an act of friendship or generosity or such like to negative any intention to create a tenancy ...."(30)

He then added:

> ".... the parties cannot by mere words of their contract turn it into something else. The relationship is determined by the law and not by the label which they choose to put on it."(31)

It would seem therefore that, at least in FACCHINI v BRYSON, Denning was applying a different test of intention from that which he applied in ERRINGTON v ERRINGTON. He had certainly modified his view, as was later observed by Jenkins L.J. in ADDISCOMBE GARDEN PROPERTIES v CRABBE (32) when the latter expressed the view that ERRINGTON v ERRINGTON needed to be read subject to the comments of Denning L.J. in FACCHINI v BRYSON (as quoted above). The reason for Denning's apparent change of attitude was that on the facts of FACCHINI v BRYSON he saw widespread evasion of the Rent Acts.(33) On the other hand, in ERRINGTON v ERRINGTON, a family arrangement case, he could at the time see no way of protecting the occupation of the young couple other than by finding a contractual licence. Had he found a bare licence, the agreement would have been revocable at law and the finding of a tenancy, whether at will or for a fixed term, was equally fraught with problems. His thoughts were blinkered as to the scope available in

equity for providing protection.(34)

It is just possible that the statement of Denning L.J. in FACCHINI v BRYSON is not in line with the test of intention to enter into a legal relationship set down in BOOKER v PALMER by reason of Denning's reference not only to 'family arrangements' and 'acts of friendship', but also to acts of generosity. What may be described as an act of generosity is quite consistent with a contractual relationship, as is clear from an examination of CRANE v MORRIS (35) and ABBEYFIELD (HARPENDEN) SOCIETY LTD v WOODS.(36) The facts of CRANE v MORRIS in some ways resemble those of MARCROFT WAGONS LTD v SMITH. The defendant lived in a cottage rent free as an employee of the plaintiff. He later obtained factory work and the plaintiff farmer allowed him to stay on in the cottage until the end of the month. When this period had expired, the defendant refused to leave and claimed to have security of tenure on account of his status as a tenant. The Court of Appeal decided he was merely a licensee. Clearly, a contractual relationship had existed between the plaintiff and the defendant.

ABBEYFIELD (HARPENDEN) SOCIETY LTD. v WOODS was concerned with an old people's home run by a charity. Again there was a contractual relationship between the plaintiffs and the defendant in that an unfurnished room was let to the defendant at a weekly payment, with a provision that the Society had discretion to take possession on one month's notice. The Society sought to exercise its discretion and the question arose, in connection with the issue of security of tenure, as to whether the exclusive possession of the room was as a licensee or tenant. The Court of Appeal decided the defendant was merely a licensee, because, in the words of Lord Denning, the agreement was "a very personal arrangement". What he meant by a "personal" arrangement is unclear but it certainly did not mean a non-contractual relationship. Perhaps "personal" was a reference to the fact that the home was not run on a commercial basis but as a charity, "personal" therefore meaning non-commercial. Certainly the test of intention applied is not one of whether there was an intention to create a legal relationship but the test of intention has shifted to become a test of whether the arrangement was intended to be 'personal' or not. In STREET v MOUNTFORD, Lord Templeman considered the provision of board and services in the case to make the occupier a lodger. Certainly, it is apparent from the judgement of Lord Denning, the court was influenced by the fact that the plaintiff was provided with considerable services, meals and a resident housekeeper, but this did not lead him to discount a finding of exclusive possession. A similar approach was taken by

Lord Denning in the later case of MARCHANT v CHARTERS, (37) which Lord Templeman considered to be only sustainable on the grounds that the occupier was a 'lodger'. In that case, a bed-sitting room was occupied on terms that the landlord cleaned the rooms daily and provided clean linen each week. It is noticeable that Lord Templeman said of MARCHANT v CHARTERS that a consequence of the occupier being a lodger was that he did not have exclusive possession. He did not, however, make this clear in his analysis of ABBEYFIELD (HARPENDEN) SOCIETY LTD. v WOODS, although he did say earlier in his judgement:

> "Exclusive possession is not decisive because an occupier who enjoys exclusive possession is not necessarily a tenant. The occupier may be a lodger or service occupier...."(38)

Yet on the other hand, when, later in his judgement, Lord Templeman summarised the principles laid down, he does not mention lodgers in his categories of situations where there is a grant of exclusive possession but the surrounding circumstances suggest a legal relationship other than a tenancy. Are we to conclude, therefore, a lodger may be in exclusive possession in some circumstances and not others? If so, given that the consideration of first importance in distinguishing between a lease and a licence is once again to be exclusive possession, the introduction of the concept of a lodger would seem to be most unhelpful. Perhaps the problem once again lies with a failure to define precisely the crucial term 'exclusive possession', and a tendency to confuse it with exclusive occupation or sole possession in fact(39). There appear to be three situations:

(i) an occupier may be in exclusive occupation with no contractual or other right to be there. This is consistent with the finding of a licence although formerly it would have been regarded as a tenancy at will; or

(ii) an occupier may have a right to exclusive occupation but no exclusive possession as 'control' of the premises remains with the freeholder/landlord. This, it is submitted, in the case of residential premises, is the lodger situation. Whether such a finding can be made in cases other than that of the lodger is debateable.

In CRANCOUR v DA SILVAESA (40) Ralph Gibson L.J. expressed the view that in the case of residential

accommodation, where an occupier was in exclusive occupation and there were no attendance and services, in the absence of exceptional circumstances outlined by Lord Templeman, a tenancy must be found. However,it is implicit in the judgment of Nicholls L.J in the same case that factors other than attendance and services may negate a finding of exclusive possession. He was influeunced by clauses in the "licence" agreement such as that providing the occupier was only authorised to use the room in question for twenty two and a half out of twenty four hours, and that stating that management and control were vested in the licensor. Similarly in ROYAL PHILANTHROPIC SOCIETY v COUNTY(41), the following extract from the judgment of Fox L.J suggests there are circumstances other than that of the lodger in which an occupier has exclusive occupation but no exclusive possession as the landlord retains "control". In trying to decide whether the occupier in question was a tenant he observed:

> "He plainly was not a lodger; no services were provided, and the landlord did not retain unrestricted access to the premises or otherwise have exclusive possession of them." (42)

Furthermore outside the residential sphere where the lodger concept is inappropriate, Lord Templeman's analysis of SHELL MEX AND B.P LTD. v MANCHESTER GARAGES LTD.(43) which he explained on the basis that no right to exclusive possession had been granted, would seem to be a situation where an occupier has the right to exclusive occupation but no exclusive possession as the landlord retained control. Finally

(iii) An occupier may have a right to exclusive possession if a contract arises and rent is paid; this, according to Lord Templeman in STREET v MOUNTFORD is only consistent with a tenancy, subject to the special categories of situations where the surrounding circumstances negative the creation of a tenancy.

It should be noted at this point that Lord Templeman's special circumstances include "occupancy pursuant to a contract of employment or occupancy referable to the holding of an office".(44) This further illustrates his failure to consider carefully the notion of exclusive possession; a service occupier is another category of person who, though generally in exclusive occupation of

property, does not have exclusive possession, as his occupancy is treated as representative of his employer. It is therefore misleading to consider service occupiers under the heading of situations where a licence may be found to exist even though there has been a grant of exclusive possession.

It would seem, therefore, that the decision in STREET v MOUNTFORD does not restore the test of distinguishing between a lease and a licence to exactly the traditional position. As has been seen,(45) in the nineteenth century, sole possession in fact was generally found to give rise to at minimum a tenancy at will. Later a distinction seems to have arisen between exclusive occupation in fact and a right to exclusive occupation, only the latter being regarded as exclusive possession. Lord Templeman appears in parts of his judgement to take this one step further by providing the right to exclusive occupation may not be exclusive possession if the 'landlord' retains 'control' of the premises in the sense, at least, of providing services and attendance. In this case, the occupation is as a lodger. It is submitted that this new category, of a lodger, is unhelpful and possibly carries dangers with it. The test of 'lodger' has, in the past, been applied for different purposes and found to be unsatisfactory as its meaning changed from time to time with social circumstances, leading to arbitrary results.(46) Furthermore, it is possible that the very vague test of intention set down in MARCHANT v CHARTERS (47) and rejected by the House of Lords, by which the "nature and quality" of the occupancy is considered in order to decide whether a 'personal permission to occupy' (licence) or an 'interest in land' (tenancy) is created, may revive and become the criteria, not for distinguishing between a lease and a licence as such, but, one step removed, to decide whether there is exclusive possession or not. The very real danger of this approach is apparent from Lord Templeman's statement on MARCHANT v CHARTERS:

> "But in my opinion, in order to ascertain the nature and quality of the occupancy and to see whether the occupier has or has not a stake in the room or only permission for himself personally to occupy, the court must decide whether on its true construction the agreement confers on the occupier exclusive possession."(48)

The danger is also apparent from an examination of the decisions where the courts have tried to define a lodger. For example in MORTON v PALMER, a lodger is defined by Lindley L.J. as:

> "a personal relation of someone lodging somewhere with somebody...."(49)

and in NESS v STEPHENSON, Field J., in a speech somewhat reminiscent of Lord Denning's statement of the distinction between a lease and a licence in MARCHANT v CHARTERS said:

> "It is reasonably clear that the mere right of exclusive occupation.... is not inconsistent with the existence of the relation of landlord and lodger, nor does the fact that the landlord does not either by himself or his agent sleep or reside in the house prevent the existence of that relation, so also the nature or extent of the landlord's enjoyment of the portion of the house retained by him or the separate and uncontrolled power of ingress and egress granted to the respondent by the use of a door other than the front or shop door will not prevent the existence of the relation. Neither is it material that the landlord does not render any service to his tenant. All these are matters which may be taken into consideration for the purpose of answering the question to be decided, but they are all consistent with the retaining of such control and dominion over the house by the landlord as is usually retained by masters of houses let in lodgings as distinguishable from landlords absolutely letting the tenements, and that retention of control and dominion indicates the existence of the relation of landlord and lodger between himself and his tenants."(50)

It may well be such ambiguity and confusion could be avoided in the lodger test, if in the distinction between lease and licence, the crucial criteria were those of "attendance and services". This appears to be the approach taken by the Court of Appeal in ROYAL PHILANTHROPIC SOCIETY v COUNTY where Fox L.J. said:

> "He will be a lodger if the landlord provides attendances or services which require the landlord or his servants to have unrestricted access to the premises."(51)

and moreover, went on to warn that it is not a question of what the agreement formally states but the substance of the matter in all the circumstances. This has not been applied in CRANCOUR LTD. v DA SILVAESA (52) where a clause in an agreement, called a licence, reserved to the licensor possession, management and control of the room and gave him an absolute right of entry at all times for

the purpose of providing attendances and enabling him to remove furniture. The licensor was to provide, inter alia, a housekeeper, window cleaning, room cleaning, laundering and bed linen and collection of rubbish. On evidence that the relevant clauses had never been enforced, the Court of Appeal concluded that the provisions were "shams" and accordingly decided the occupiers were tenants not lodgers, as they would have been had the agreements represented the agreement between the parties.(53)

To return now to acts of generosity and benevolence. It has been seen that the House of Lords in STREET v MOUNTFORD did not regard ABBEYFIELD (HARPENDEN) SOCIETY v WOODS (54) as a case where an occupier had a right to exclusive possession. However, the question arises as to whether acts of generosity or benevolence alone, in an otherwise contractual relationship where exclusive possession is granted, will be taken to create licences since the decision in STREET v MOUNTFORD, for, if such acts are not treated in some different way, as Evershed M.R. pointed out in MARCROFT WAGONS LTD.v SMITH

> "landlords, who have ordinary human instincts of kindliness and courtesy, may often be afraid to allow a tenant the benefit of those natural instincts in case it may afterwards turn out that the tenant acquired a position from which he cannot subsequently be dislodged."(55)

Contractual relationships involving generosity or an act of benevolence were not included in Lord Templeman's categories of special circumstances but, at the same time, there is nothing to suggest that his lordship was laying down a closed list of excepted categories. Nevertheless, it is interesting to note that Lord Templeman viewed the decision in MARCROFT WAGONS LTD. v SMITH, which involved an act of generosity , as a case of no intention to create a legal relationship at all. With respect, this appears totally unfounded, given the facts and judgements in that case. It would seem that payment and acceptance of rent for a period of six months between parties at arm's length must give rise to a contractual relationship. The only other case where there is arguably a contractual arrangement and an act of 'generosity' is FOSTER v ROBINSON (56) where occupation was found to be as licensee. This was not cited in STREET v MOUNTFORD but it may well have been treated (as in MARCROFT WAGONS LTD. v SMITH), as a case of no intention to create a legal relationship. Thus, unless the courts are prepared to extend the categories of special circumstances it seems landlords may well have to supress their ordinary human instincts of kindliness and

courtesy, lest they are to be in danger of giving more than they intended.

Returning to the review of cases since ERRINGTON v ERRINGTON, the next decision of significance, following FACCHINI v BRYSON, was MURRAY BULL v MURRAY. (57) This first instance decision appears to mark a dramatic departure from earlier cases. The facts involved an action for possession of a flat after a contractual tenant had held over paying a quarterly rent. There was a definite intention to enter into a contractual relationship of some sort or another concerning occupation of the flat, but McNair J. found that despite the grant of exclusive possession:

> "Both parties intended that the relationship should be that of licensee and no more.... The primary consideration on both sides was that the defendant as occupant of that flat should not be a controlled tenant."(58)

Whereas in ERRINGTON v ERRINGTON, the Court of Appeal somewhat vaguely applied a test of intention to create a personal privilege as opposed to an interest in land, McNair J. is clear and direct. Consequently he decided the defendant was merely a licensee. In effect, he was not only allowing the parties to contract out of the Rent Acts but also accepting that the parties can alter the legal effects of their agreement by forming an alternative intention. This, as has already been pointed out, (59) makes nonsense. It is therefore not surprising that the House of Lords, in STREET v MOUNTFORD, overruled the decision in MURRAY BULL v MURRAY.

In GRAND JUNCTION CO v BATES,(60) where the distinction between licensee and tenant arose as a subsidiary issue, a similar view of the test of intention to that expressed in MURRAY BULL v MURRAY appears to have been taken. Once again there was clearly a contractual agreement (albeit a temporary one) between the parties involved concerning occupation. Upjohn J. commented of exclusive possession and payment of rent:

> "Neither of these factors is decisive but authorities make it clear that prima facie the relationship of landlord and tenant is created, but the parties may, of course, have expressed some different intention, such that it would only be a licence for a limited time."(61)

In the next three cases, ADDISCOMBE GARDEN PROPERTIES v CRABBE,(62) BRACEY v READ (63) and FINBOW v AIR MINISTRY,(64) there appears to be a return to the more

traditional test of the distinction between lease and licence, greater importance being attached to exclusive possession. This may well be because these cases do not involve residential property.(65)

Considering firstly, the decision in ADDISCOMBE GARDEN ESTATES v CRABBE: the case was concerned with whether occupation of a tennis court in return for periodical payments amounted to a business tenancy under the Landlord and Tenant Act 1954. Extensive reliance was placed on the judgement of Denning L.J. in FACCHINI v BRYSON, in which, it has already been observed, Jenkins L.J. noted that a narrower view of the test of intention was taken than that expressed in ERRINGTON v ERRINGTON. Also, greater emphasis is put on exclusive possession. However, despite this, both Jenkins L.J. and Parker L.J. go through, clause by clause, what is quite obviously a contractual document to decide whether a tenancy or a licence is created. This process is explained by Lord Templeman in STREET v MOUNTFORD as being necessary to decide whether exclusive possession was granted at all. But some of the statements of Jenkins L.J. do seem to suggest that a wider test of intention is being applied. For example, he said of the distinction between a tenancy and a licence:

> "It does not necessarily follow that a document described as a licence is, merely on that account, to be regarded as amounting only to a licence in law. The whole document must be looked at and after it has been examined the right conclusion appears to be that whatever label may have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant, and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere licence."(66)

The very fact that he was prepared to entertain that a document of this nature could create merely a licence suggests he conceived it is possible to be a contractual licensee in exclusive possession. However it is possible that the terms of the document are examined to ascertain whether or not exclusive possession has been given. Thus, although the decision applies a stricter test than that applied in the first instance cases immediately preceding it, it is questionable whether there had been a complete return to FACCHINI v BRYSON.

BRACEY v READ(67) concerned an arrangement whereby the

plaintiff agreed to "let or lease" to the defendant the right to train and exercise racehorses on the gallops belonging to the defendant, the question being whether the agreement fell within the control of the Landlord and Tenant Act 1954 so as to create a business tenancy. Cross J. decided a tenancy was created and was somewhat doubtful about the possibility of a licence where there was clearly exclusive possession granted and an intention to create a legal relationship, for he said:

> "In the case of a business transaction like this, I think that the question of whether a man ought to be considered a licensee or a tenant depends principally, if not entirely, on whether he has exclusive possession of the property in question."(68)

The other decision which seems to apply a stricter test of intention during this period is FINBOW v AIR MINISTRY. (69) This first instance decision concerned a licence to occupy and use as agricultural land portions of service airfields no longer used for active military operations. The agreements were described as licences; if they were tenancies the rights of the occupants would be governed by the Agricultural Holdings Act 1948. McNair J. summarised what he saw to be the effect of earlier decisions on the distinction between a tenancy and a licence (making an interesting contrast with his decision in MURRAY BULL v MURRAY), and concluded they established three principles: (i) that the agreement must be construed as a whole and that the relationship is determined by the law and not by the labels which the parties put on it though the label is a factor to be taken into account in determining the true relationship; (ii) that the grant of exclusive possession, if not conclusive against the view that there is a mere licence, is at any rate a consideration of first importance; (iii) (quoting from FACCHINI v BRYSON) in all the cases where a licence has been found there has been "a family arrangement, act of friendship or generosity or such like", which negatives an intention to create a tenancy. On the facts, he decided this was a special circumstance, within FACCHINI v BRYSON, as the occupied land was part of a Royal Air Force airfield and the Secretary of State had no power to grant a tenancy. He went on to explain, had the landowner been a private landowner, then he would have found a tenancy to have been granted. It is not totally clear where this decision, and other decisions where the grantor was found to have no power to grant a tenancy, stand in the light of STREET v MOUNTFORD, as they were not discussed by the House of Lords. However, maybe they fall within the categories of situation outlined by Lord Templeman, in which an occupant may be

in exclusive possession but the surrounding circumstances show that the right to exclusive possession is referable to a legal relationship other than a tenancy. This issue will be considered further in a later Section.(70)

After the arguably stricter approach of the last three decisions, a more liberal attitude seems to be once again revived in ABBEYFIELD (HARPENDEN) SOCIETY v WOODS (71) and in BARNES v BARRETT,(72) where a licence was found to exist despite exclusive possession and an intention to create a legal relationship. Exclusive possession of part of a house, including the kitchen of the house, had been given to the defendant in return for the services of cleaning and cooking and payment of gas and fuel bills for the whole of the house. No monetary sum described as a rent was payable. The question before the court, on the death of the owner of the house, was whether the defendant had a tenancy or a licence to occupy for the purpose of Rent Act protection. The Court of Appeal (Sachs, Russell and Cross L.JJ.) concluded the arrangement was closely akin to a family arrangement to share a house and therefore occupation was by means of a personal licence.(73) It is submitted that the situation was very different from a family arrangement in one vital respect, namely there was clearly an intention to create a legal relationship. Moreover, the explanation given by Sachs L.J. for the finding of a personal licence seems erroneous. He asked what the position would have been had the defendant been unable to provide services through permanent illness or death or had simply been unwilling to do so. He concluded that, in the event, both parties would have intended the defendant should leave. Otherwise, with the situation as it was, the deceased would have been left without a kitchen or a cook. Surely, however, if the services etc. were capable of being regarded as the equivalent of a rent, had the defendant failed or been unable to provide the services, this would be a breach of covenant and, as such, a ground for repossession in accordance with the procedure set down by S.146 Law of Property Act 1925. It is interesting to consider where this case which was not cited stands since the decision in STREET v MOUNTFORD. It would seem to fall within Lord Templeman's 'lodger' category, in the sense that although the defendant had in fact exclusive occupation of part of the house, 'control' remained with the owner. Accordingly, the defendant was not in exclusive possession.

The Court of Appeal decision in SHELL MEX AND B.P. LTD v MANCHESTER GARAGES LTD. (75) continued the overt departure from the principle that, apart from exclusive possession, the test of intention to create a legal relationship was the major factor used by the courts to

distinguish between a lease and a licence. The case concerned a contractual arrangement in the form of a document described as a licence in which the defendants were given the right to occupy premises in return for a rent and an agreement to buy the plaintiff's petrol. Certainly, all three judges in the Court of Appeal expressed the view that no exclusive possession had been granted on account of a clause in the agreement which provided that the plaintiffs remained in possession notwithstanding the agreement, although Buckley L.J. seemed to have some doubts as to whether the plaintiffs really maintained possession or whether this was simply a device to avoid the consequences of the Landlord and Tenant Act 1954. (76) Nevertheless the court, and in particular Lord Denning, did give a full explanation as to how it approached distinguishing between a tenancy and a licence. Lord Denning said:

> "I turn, therefore, to the point; was this transaction a licence or a tenancy? This does not depend on the label which is put on it. It depends on the nature of the transaction itself .... Broadly speaking, we have to see whether it is a personal privilege given to a person in which case it is a licence, or whether it grants an interest in land, in which case it is a tenancy. At one time exclusive possession was a decisive factor, but that is not so. It depends on broader considerations altogether. Primarily on whether it is personal in its nature or not...."(77)

Clearly, the Court of Appeal was prepared to entertain the idea of a contractual licensee in exclusive possession. The test of intention necessary for a tenancy as compared with a licence was therefore certainly not that of whether there was an intention to enter into a contractual agreement for exclusive possession. Neither was the intention to grant exclusive possession itself. If these two fundamental characteristics of a lease were not at the centre of the test of intention, what was? In the words of Lord Denning, it depended on "broader considerations". After making this statement he then proceeded to consider the various clauses of the agreement and thereby to adopt the "substance test" approach which seems to have its origins in the judgement of Lord Justice Somervell in FACCHINI v BRYSON, where he stated:

> "If looking at the operative clauses in the agreement one comes to the conclusion that the rights of the occupier.... are those of lessee, the parties cannot turn it into a licence by saying at the end, "this is deemed to be a

licence."(78)

A similar approach was also adopted by the Court of Appeal in ADDISCOMBE GARDEN ESTATES v CRABBE.(79) In that case, Jenkins L.J. said it was a matter of deciding whether the agreement imposed "in substance the rights and obligations of a tenant" and "in substance the rights and obligations of a landlord".(80) There are, however, a number of drawbacks to this approach. Firstly, if this kind of test is applied it is difficult to understand in what sense the term 'intention' is used. It cannot mean the actual intentions of the parties in the sense of the goal the parties are aiming for in making the agrement, since the aim of the intention is a legal classification, namely, either a tenancy classified as an interest in land, or a licence, not traditionally classified as an interest in land. Parties do not normally intend to contract to create a particular legal classification of a property right but are concerned with the consequences of such a classification. For example, one does not wish an agreement by deed for a right of way to be an easement for the sake of being given the legal label of a legal easement, but because it creates a right enforceable against all third parties.

The question then arises, if intent does not refer to the actual intention of the parties, does it refer to the nominal intention ascertained by means of the terms of the agreement and the words used. Certainly, as regards the words used, many cases such as FACCHINI v BRYSON (81), ADDISCOMBE GARDEN ESTATES v CRABBE(82) and SHELL-MEX v MANCHESTER GARAGES LTD.(83) make it clear that the relationship is not determined by the label used but by the law. However, as to the terms, many later cases assume, in the event of a written agreement for occupation of premises, that the document does accurately reflect the intentions of the parties.(84) This is unfortunate because it fails to take account of inequality of bargaining positions at a time of shortage of accommodation. That the courts do make such an assumption is illustrated by the judgement of Sir John Pennycuick in BUCHMANN v MAY.(85) This case was not actually concerned with the lease/licence distinction but with whether a letting was a holiday let, but the same principles apply. Sir John made it clear that the occupier bears the burden of proving the agreement is otherwise than stated in the written agreement:

> "where parties to an instrument express their purpose in entering into the transaction effected by it,.... this expression of purpose is at least prima facie evidence of their true purpose and as such can only be displaced by evidence that the

express purpose does not represent their true purpose."(86)

The presumption was applied again in SOMMA v HAZELHURST which did involve the distinction between lease and licence; Cumming-Bruce stated:

> " We start from the basis that it is to the documents we must look and the documents alone."(87)

The second criticism of the test of intention is that, given that it has repeatedly been stated that the nature of the relationship is determined by the law, and given also that what is being considered is whether there is an intention to create the right and obligations of landlord and tenant respectively, one would have thought the fundamental characteristics of a tenancy (i.e. exclusive possession for a fixed term, intention to enter a contractual agreement, the making of fixed periodical payments) would have been of vital importance. As Lord Templeman pointed out in STREET v MOUNTFORD, on the significance to be drawn from the hallmarks of exclusive possession, weekly payments and a periodical term:

> "Unless the three hallmarks are decisive it really becomes impossible to distinguish a contractual tenancy from a contractual licence save by reference to the professed intentions of the parties or by the judge awarding marks for drafting".(88)

Perhaps the ultimate illustration of how meaningless the test of intention adopted by the courts had become prior to STREET v MOUNTFORD, is the statement of Lord Denning in MARCHANT v CHARTERS where, after reviewing the cases since ERRINGTON v ERRINGTON, he asked:

> "What is the test to see whether the occupier of one room in a house is a tenant or a licensee. It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on whether the occupation is permanent or temporary. It does not depend on the labels which the parties put upon it. All these are factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room whether under a

contract or not? In which case he is a licensee...."(89)

In effect Lord Denning is saying the distinction between a lease and a licence is that in the case of a licence there is an intention merely to create a personal privilege and in the case of a lease an interest in land. The way one decides what has been created is by deciding whether the parties intend a personal privilege or a stake in the land. The aim of the test has thus become the means. It is down to the pure intuition of the judge. As Harris observed:

> "Intention to create a tenancy when contrasted with intention to create a licence is a spurious concept which conceals a simple development in the law brought about by judicial evolution, namely, that there are certain circumstances to which the courts will not apply the statutory and common law of landlord and tenant."(90)

To turn back to the study of the progression of the test of intention, the total shift in the nature of the test of intention by the 1970s is next illustrated by the decision in HESLOP v BURNS.(91) Here, the deceased had met the defendant at a time when she was living in an attic with her husband, and expecting a baby. The deceased had been so concerned by their living conditions he bought a cottage for the family to live in and then later moved them into a house of which he was the freeholder and which they occupied at the time of his death, rate and rent free. Throughout their relationship, the defendant and her family remained very close friends of the deceased: he became a godfather to their daughter and paid for her education. However, on his death, the house passed to the deceased's relatives, who sought possession of it. The defendant claimed to have extinguished the deceased's title to the house under the Limitation Act 1939, on account of occupation for more than 13 years as a tenant at will. The Court of Appeal decided the defendant was in fact a mere licensee and, as such, was not covered by the Limitation Acts. Clearly, the case is consistent with STREET v MOUNTFORD, in that the court found there was no intention to create a legal relationship, the arrangement merely amounting to an act of friendship. Nevertheless, the reasoning of Lord Justice Scarman goes much further for he goes on to say, even if he made two assumptions, namely, that exclusive possession was granted by the agreement and there was an intention to create a legal relationship, the court need not find a tenancy at will. He continued:

> "Had counsel for the defendants been addressing

> this court a hundred years ago and on the two assumptions I have made, I think he would have succeeded.... Today, however, a very different approach appears to be adopted."(92)

and he concluded:

> "ERRINGTON v ERRINGTON is now an authority binding on this court to the effect that a contractual licence may confer on a licensee an exclusive right of occupation of land.... "(93)

Perhaps even more startling illustrations of the total change in the nature of the test of intention are the family arrangement cases of TANNER v TANNER (94) and HARDWICK v JOHNSON.(95) In both these cases, the court assumes, without any discussion whatsoever, that a party may be in exclusive possession whilst at the same time being a contractual licensee. In the same year as HARDWICK v JOHNSON, Cummings-Bruce L.J. concluded in SOMMA v HAZELHURST, after referring to the special circumstances in which the court in FACCHINi v BRYSON thought exclusive possession compatible with a licence:

> "We can see no reason why an ordinary landlord not in any of the special categories should not be able to grant a licence to occupy an ordinary house."(96)

From this survey of the cases from ERRINGTON v ERRINGTON to STREET v MOUNTFORD, it would appear the test for distinguishing between a lease and a licence had developed to a far greater extent than the judgment of Lord Templeman may have one believe. By the time of STREET v MOUNTFORD, the test of intention was based on nothing more than the intuition of the judge and as such was incapable of definition. STREET v MOUNTFORD has once again laid down ascertainable criteria to enable the distinction between a licensee in exclusive possession and a tenant to be drawn. But two main questions now arise. Firstly, how far is it true to say that STREET v MOUNTFORD has restored the traditional test for distinguishing between leases and licences to occupy and how workable is the test adopted in STREET v MOUNTFORD. Secondly, bearing in mind the possessory licence would seem to be a judicial creation arising to meet certain perceived needs, how far can these needs be satisfied by other means, and what remains of the possessory licence since STREET v MOUNTFORD? This second question will be examined in detail in each of the later Sections.

To consider though, the first issue here, namely, whether the traditional distinction between lease and licence to

occupy has been totally revived. The answer to a certain extent depends upon what one understands by "the traditional test". Taking this to be the distinction between leases and licences applied in the vast majority of cases prior to ERRINGTON v ERRINGTON, there would appear to be three significant departures from the traditional test. To begin with, in the original test exclusive possession was regarded as decisive: if there was exclusive possession there was a tenancy; if there was no exclusive possession, the occupier had merely a licence. Now, according to Lord Templeman, although:

> "Exclusive possession is of first importance in considering whether an occupier is a tenant.... Exclusive possession is not decisive...."(97)

The second difference is, whereas under the traditional test exclusive possession was the sole criteria for distinguishing between lease and licence, according to Lord Templeman, there are three hallmarks of a tenancy:

> "To constitute a tenancy the occupier must be granted exclusive possession for a fixed term or periodic term certain in consideration of a premium or periodical payments...."(98)

The requirement of a fixed or periodic term certain conveniently excludes a tenancy at will from the definition of a tenancy and the requirement of a premium or periodical payment appears to be a new and moreover totally unsubstantiated requirement. The definition of a 'term of years' in Section 205 Law of Property Act 1925 does not require payment of rent, and, as Anderson points out, (99) such a requirement makes a lease unique among the estates in land, as it follows that a lease can only be created by sale. Why then did the House of Lords introduce this requirement, especially as, in reviewing the case law since ERRINGTON v ERRINGTON, Lord Templeman explained the decisions where no payment was made for occupation as situations where there was no intention "to enter into legal relationships at all" (ERRINGTON v ERRINGTON); "of any legal relationship" (HESLOP v BURNS); of "entering into a contract" (COBB v LANE); "to contract at all" (HESLOP v BURNS)? Firstly, maybe this was because Lord Templeman was aware that a test of intention to create legal relationships was spurious, as any relationship between owner and occupier of land must be described as a "legal relationship". Secondly, looking at Lord Templeman's "special circumstances", where an occupier is in exclusive possession, but the circumstances negative the finding of a tenancy, the examples given were consistent with the finding of a contractual relationship, namely possession under a

contract for the sale of land or a contract of employment/holding of an office. A consequence of the requirement of payment of rent or a premium detracts from the traditional test for distinguishing between leases and licences to occupy in an additional respect, for it follows that exclusive possession is now being used in the sense of the 'right to exclusive possession' rather than the broader sense of sole possession in fact.

The third departure from the original distinction, drawn betweem lease and licence to occupy arises out of the first, namely that the test of exclusive possession is no longer decisive. Thus despite STREET v MOUNTFORD, it follows that the intention of the parties must remain relevant to a certain extent. It has already been pointed out that problems may well be experienced as a finding of exclusive possession appears to raise questions of intention but, as Lord Templeman entertains the possibility that there may be:

> ".... legal relationships to which the grant of exclusive possession might be referable and which would or might negative the grant of an estate or interest in the land...."(100)

this would also seem to give rise to independent questions as to intentions of the parties, which could cause difficulties. Thus it would seem that, although STREET v MOUNTFORD has clearly established that questions of intention as to what legal relationship (i.e. net result) the parties intended to bring about are irrelevant, their actual intentions (i.e. the gross product) are relevant. It would therefore appear that the intention of the parties are relegated to enabling a court to decide in cases of ambiguity whether an agreement in fact displays the 'three hallmarks' of a tenancy or not, as opposed to being a means by which those hallmarks may be displaced even though present in substance. It will be interesting to see how far the professed intentions of the parties will, however, be regarded as being of assistance in determining their actual intentions.

References Section I(b)

1. [1952] 1 All ER 149.
2. [1977] 1 WLR 1181 at p. 1184.
3. [1985] 2 All ER 289.
4. [1952] 2 All ER 1079.
5. [1978] 1 WLR 1014.
6. [1978] 37 P + CR 461.
7. (1984) 272 EG 326.
8. Supra at p. 154.
9. [1952] 1 All ER 1199.
10. Supra at p. 1200.
11. [1952] 2 All ER 1079.
12. [1958] 1 QB 513 at p. 528.
13. Supra at p. 529.
14. [1965] 1 WLR 1104 at p. 1107.
15. [1968] 1 All ER 352 at p. 353.
16. [1970] 2 All ER 483 at p. 487.
17. [1971] 1 All ER 841 at p. 843.
18. Supra at p. 1185.
19. Supra at p. 155.
20. Supra at p. 155.
21. Supra at p. 294.
22. [1942] 2 All ER 674 at p. 677.
23. Ante p. 16
24. Supra at p. 294.
25. Supra at pp 676-677.

26. [1974] 3 All ER 406 at p. 414; see also ante p.8.

27. [1952] 1 All ER 1199.

28. [1952] 1 TLR 1386.

29. [1950] 2 All ER 342.

30. Supra at p. 1387.

31. Supra at p. 1387.

32. [1958] 1 QB 513.

33. See post Section II.

34. See post Section IV p. 185f.

35. [1965] 1 WLR 1104.

36. [1968] 1 All ER 352.

37. Supra.

38. Supra at p. 297.

39. See ante pp 8-10

40. (1986) 278 EG 618 at p. 733.

41. (1985) 276 EG 1068. See post pp 77-78 for facts.

42. Supra at p. 1068.

43. Supra; for facts see post p. 51.

44. Supra at p. 300.

45. See ante pp 6-32.

46. See Anderson (1985) 48 MLR 712 at p. 713. See also generally on lodgers and STREET v MOUNTFORD, Waite (1987) 50 MLR 266.

47. Supra see post p. 52.

48. Supra at p. 299.

49. (1882) 51 LJQ B.7. See Anderson (1985) 48 MLR 712.

50. (1882) 9 QBD 249 at 251.

51. Supra at p. 1071. See post pp 77-78 for facts.

52. Supra.

53. See further Section II (pp 62-91).

54. Supra.

55. Supra at p. 501.

56. [1950] 2 All ER 342. For facts see ante p. 18. EASTLEIGH B C v WALSH [1985] 2 All ER 112 (see post p. 68) cannot be regarded as a case within this category, as the local authority was acting in fulfilment of a statutory duty to provide accommodation under the Housing (Homeless Persons) Act 1977.

57. [1952] 2 All ER 1079.

58 Supra at p. 1082.

59. Ante pp 36-37.

60. [1954] 2 QB 160.

61. Supra at p. 169.

62. [1958] 1 QB 513.

63. [1962] 3 All ER 472.

64. [1963] 2 All ER 647.

65. See post Section II.

66. Supra at p. 522.

67. Supra.

68. Supra at p. 475.

69. Supra.

70. Section II.

71. Supra. Facts outlined ante p. 40.

72. [1970] 2 All ER 483.

73. Another ground was that, as the measure of payment of bills varied from month to month, there was no fixed sum payable which could be described as rent; the obligation to pay rent being a usual but not essential element of a 'term of years'.

74. On the facts of the case, the services were no longer required as the freeholder had died.

75. [1971] 1 All ER 841.

76. Supra at p. 846.

77. Supra at p. 843.

78. Supra at p. 1389.

79. Supra. For facts see ante p. 47.

80. Supra at p. 522.

81. Supra.

82. Supra.

83. Supra.

84. See post Section II pp 62-91.

85. [1978] 2 All ER 993.

86. Supra at p. 998.

87. [1978] 2 All ER at p. 1020.

88. Supra at pp 299-300.

89. Supra at p. 1185.

90. (1969) 32 MLR 92.

91. [1974] 3 All ER 406.

92. Supra pp 414-415.

93. Supra p. 415.

94. [1975] 3 All ER 776. For facts see post p. 147.

95. [1978] 2 All ER 935. For facts see post p. 146.

96. Supra at pp 1024-1025.

97. Supra at p. 297.

98. Supra at p. 294.

99. (1985) 48 MLR 712 at p. 716.

100 Supra at p. 300.

SECTION II

Licences and legislation controlling the relationship between landlord and tenant.

In his book, "The Politics of the Judiciary", Griffith observes:

> "The attitude of the judiciary to legislation which seriously interferes with the rights to the enjoyment of property - especially ownership of land - has traditionally been one of suspicion.... changes brought about by Acts of Parliament have not always been welcomed...."(1)

In the sphere of landlord and tenant, Gray and Symes are of the opinion that the courts have:

> "...inflicted serious harm upon the social philosophy expressed in the Rent Acts...."

by:

> ".... a more general retrenching of judicial opinion in favour of the entrepreneurial interest as opposed to the residential tenant."(2)

Moreover, it is the view of Robson and Watchman that, with regard to the Rent Acts, the:

> "...judiciary have indulged in a particularly pernicious form of judicial sabotage. At times stopping short of squeezing the life from the policy."(3)

The way in which Robson and Watchman argue the act of sabotage has been achieved is by means of the development of the 'weapon', the possessory licence, licences only enjoying limited protection in the case of residential property and no protection at all outside residential property.(4)

In this Section, it is proposed to examine critically the manner in which and the extent to which the concept of a licence has been used to mitigate the effects of legislation affecting the rights of landlord and tenant. In addition, in the light of the House of Lords decision in STREET v MOUNTFORD (5), it is proposed to examine how useful the licence remains in avoiding statutory controls.

In the first Section of this thesis, a study was made of the development of the concept of a possessory licence.

It was seen that the concept largely developed from the decisions of the courts in the early 1950s and that, through alteration in the nature and application of the test of intention, by the 1970s the circumstances in which an occupier was found to be in exclusive possession with a possessory licence had substantially widened. In later Sections, consideration will be given to how far importance attached to giving effect to family arrangement, and avoiding the consequences of the Limitations Acts and the Settled Land Act 1925, contributed to this development. First, however, an assessment will be made of the contribution of statutory controls on the landlord and tenant relationship. From the outset, it should be appreciated that it is impossible to consider statutory provisions relating to landlord and tenant from a purely legal point of view. Housing policy and the law which attempts to give effect to that policy has throughout been a matter of acute political controversy. A brief glance at the history of such legislation, with its frequent changes of direction from increase in control to decontrol, shows how the private housing sector at least has been a constant political football.

From the very outset, the judiciary have been highly aware of the impact of statutory intervention. There are numerous statements scattered throughout judgements in cases concerned with the lease/licence distinction in which judges have maintained the impact of statutory control was a relevant consideration. For example, in MARCROFT WAGONS LTD. v SMITH Evershed M.R. stated, referring to the Rent Restrictions Acts:

> "In judging of the inference to be drawn from such events as those which took place here, it seems to me to be vital to bear in mind that is the background against which people must now discuss and regulate their affairs."(6)

And, in FACCHINI v BRYSON, Lord Denning stated:

> "In my opinion.... it is not right to consider the common law position separately from the Rent Restrictions Acts."(7)

In contrast, the House of Lords, in STREET v MOUNTFORD, was of the view that the impact of statutory intervention on the landlord and tenant relationship was an irrelevant consideration. As an authority of the highest importance it is likely in future that judges will not openly admit this as being of relevance in drawing the lease/licence distinction. Nevertheless, they will not be able to discard the statutory background from their decision-

making process, assuming this in any case to be a desirable approach.(8)

Furthermore, in the past, judges have made no secret of the fact they have altered their understanding of the distinction between a lease and a licence on account of the introduction of statutory controls. For example, in MARCROFT WAGONS LTD. v SMITH, Lord Evershed commented:

> "Until in the present century the Rent Restrictions Acts came into play, the law broadly speaking necessarily inferred when exclusive possession was granted to one, of the property of another at a rent payable to that other, a tenancy had been created. The law did not recognise that those conditions were compatible with any other kind of relationship."(9)

Denning L.J., in the same case, made a similar observation:

> "According to the common law as it stood before the Rent Restrictions Acts, when the defendant stayed on with the consent of the landlords, she would have become a tenant at will.... In my opinion, however, it is not correct to consider the common law position separately from the Rent Restrictions Acts...."(10)

And in FACCHINI v BRYSON, his view remained unaltered for he said:

> "It must be remembered at common law, the landlords would have had a clear undisputable right to turn her out.... In that state of affairs, it was very proper to infer a tenancy at will, or a weekly tenancy.... But it is very different when the rights are obscured by the Rent Restrictions Acts and the consequences of granting her a contractual tenancy would be far reaching, because she would be clothed with the status of irremovability conferred by the Rent Acts.... In these circumstances, it is no longer proper for the courts to infer a tenancy at will or a weekly tenancy as they previously would have done, from the mere acceptance of rent."(11)

Again, in HESLOP v BURNS, Scarman L.J. said:

> "To deal with changed social conditions the Rent Restrictions since 1914-15 have introduced a new dimension to the law of landlord and tenant and there has also emerged into prominence the licence

> to occupy. This concept has been developed by the courts so that now it is present as a possible mode of land-holding - a mode which had certainly not developed into anything like its current maturity in the nineteenth century."(12)

It is quite an acceptable approach to judicial interpretation of statutes to take into account and thus to be aware of the purpose of the legislation. But the aim of such exercises is to ensure that the judge gives effect to the statute. It is intended to examine whether the courts have achieved this aim and got the balance right in landlord and tenant cases. Certainly Sachs L.J. thought they had done so. In considering the distinction between a lease and a licence in BARNES v BARRETT and in particular commenting on the judicial approach to the test of intention, he observed:

> "In this way the law has adapted itself so as to deal with the complexities of the Rent Acts without causing patently unintended injustice to landlords, whilst guarding against improper avoidance by the latter of the provisions of those Acts."(13)

Statutory controls of the landlord tenant relationship operate in three main spheres: dwelling houses (the principal governing statute being the Rent Act 1977 and, for council housing, the Housing Act 1980); agricultural holdings (now governed by the Agricultural Holdings Act 1986 which consolidated the Agricultural Holdings Act 1948 and the Agricultural Holdings (Notices to Quit) Act 1977); and business tenancies (now governed by Part II Landlord and Tenant Act 1954, as amended by Part I of Law of Property Act 1969). Until about a hundred years ago, at least in the residential sphere, the relationship of landlord and tenant was almost entirely based on contract.(14) Today, however, the contractual aspect of leases has receded very much into the background and it is true to say that the rights of landlord and tenant are now largely laid down by statute .The problem in any sphere of landlord and tenant is one of inequality of bargaining position. The precise details and extent of the statutory intervention varies considerably from one sphere to another. However, all three spheres of control outlined above have certain features in common.

Firstly, tenants are given a considerable degree of security of tenure. Secondly, there is protection for tenants from landlords' charging excessive rents or imposing unfair increases. Thirdly, except to a limited extent in respect of dwelling houses, the statutory protection does not extend to licensees of premises.

Herein lay the potential for the possessory licence as a means of avoiding protective legislation. The majority of cases which came before the courts in which landlords attempted to use the licence to avoid protective controls are concerned with dwelling houses as opposed to business tenancies or agricultural holdings. Thus more empphasis will be put on residential tenancies.

The origins of residential control stem from a temporary measure introduced during the first world war, occasioned by the developing shortage of accommodation which resulted largely from the decline of speculative building and the destruction caused by the war. The Increase of Rent and Mortgage Interest (War Restrictions) Act 1915, was passed at a time when four fifths of the population lived in the private rented sector. The Act only covered property where the rateable value was low and, as such, protected only comparatively poor people. The Act was later repealed and replaced by a series of statutes commencing in 1920, collectively known as the Rent Acts. These gradually extended control(17) until the Housing Repairs and Rent Act 1954 and the Rent Act 1957 which made significant movements towards gradual decontrol. However, problems in the application and effect of the deregulatory measures led to new interventionary provisions, which reversed the process and resulted in the Protection from Eviction Act 1964 and the introduction of the 'fair rent' scheme by the Rent Act 1965.

During the period of statutory controls up until 1964 there were a number of decisions on the lease/licence distinction. It is noticeable that the courts showed considerable awareness that the licence could be used as a means of avoiding Rent Act protection and were anxious it should not, in effect, become a device for contracting out of the Rent Acts.(18) This is apparent, for example, from the comment of Evershed M.R. in FOSTER v ROBINSON, when finding the occupant to be a licensee, he said:

> "I regard the case as one which turns on a question of fact.... I say that although I am not unmoved by the point made.... that, if this decision is supported, landlords who make a practice of studying decisions under the Rent Acts may seek to improve their position by making arrangements with their tenants based on this decision so as to deprive them of the protection which the Acts are intended to give them."(19)

Similarly, in FACCHINI v BRYSON, Denning L.J. realised the potential scope of the licence when he observed, in what turned out to be a highly prophetic statement:

> "Else we might find all landlords granting licences and not tenancies and we should make a hole in the Rent Acts though which could be driven - I will not in these days say a coach - but an articulated vehicle...."(20)

Again in R v BATTERSEA, WANDSWORTH, MITCHAM AND WIMBLEDON RENT TRIBUNAL ex parte PARIKH,(21) the court was on its guard not to allow the concept of a licence to be used to avoid the statutory protection of tenants. The case concerned whether an agreement to be a "paying guest" of the Parikh family under which the landlady could enter the room 'let' at all times, was a tenancy or a licence. Lord Goddard commented:

> "If a landlady thinks that by use of certain words she can avoid the provisions of the Act of 1946, she is mistaken...."(22)

However, there were some signs of hostility too, or at least lack of enthusiasm for, the statutory intervention. The very fact that in MARCROFT WAGONS LTD. v SMITH, Evershed M.R. referred to a statutory tenancy as a "monstrum horrendum, informe, ingens" (23) may be indicative of this, and in SAMROSE PROPERTIES LTD. v GIBBARD, where there was an attempt (which failed) to avoid Rent Act protection by charging a lump sum at the outset and then a very low quarterly rent which amounted to less than two thirds of the rateable value of the property, so as to fall outside the Increase of Rent and Mortgage Interest (Relief) Act 1920, Lord Evershed commented:

> "I, of course, fully accept the proposition... that a landlord is entitled so to arrange his affairs that the legal results will bring him outside the statutory provision.... If they fail, that does not therefore reflect upon the ethics of their business methods."(24)

Also, in the period up to 1964, it became apparent that Rent Control could lead to unwarranted protection, especially where there was an act of 'kindness' or 'generosity' on the part of the landlord. The problem first had to be faced in FOSTER v ROBINSON (25), where a landlord had allowed a former employee and tenant to remain in his cottage, after retirement, rent free for the rest of his life. Again in MARCROFT WAGONS LTD. v SMITH (26), out of kindness a landlord had allowed a daughter to remain in occupation of property after the death of her mother, a statutory tenant. In both cases, Rent Act protection was claimed, it would seem quite

unjustifiably. The point has already been made that on a strict reading of STREET v MOUNTFORD (27) use of licence concepts will not alleviate the injustice which could be caused to a landlord, for in future where an occupier is in exclusive possession paying a fixed rent a tenancy will arise and consequently Rent Act protection. Thus in a situation such as that of MARCROFT WAGONS LTD. v SMITH, there would seem to be no way out for the landlord, unless perhaps he could raise some kind of estoppel; if a tenant takes advantage of an act of kindness or generosity on the part of his landlord, to the extent he has so taken advantage, he will be estopped from denying protection under the Rent Acts.

Alternatively, FOSTER v ROBSINSON and MARCROFT WAGONS LTD. v SMITH, may be looked upon not as 'generosity' cases but as temporary arrangements and under this heading fall within the 'excepted categories' outlined by Lord Templeman in STREET v MOUNTFORD(28). However,it is necessary to consider whether the decision in EASTLEIGH BOROUGH COUNCIL v WALSH(29) is likely to stand in the way of this possibility. This case concerned a homeless man for whom the local authority provided emergency accommodation under a statutory duty laid down in the Housing (Homeless Persons) Act 1977. Despite his being given the keys to a council house and a document headed 'Conditions of Tenancy', the Court of Appeal decided a licence only was created, attaching importance to the fact that "emergency shelter" was being provided. In the wake of STREET v MOUNTFORD, the House of Lords reversed the decision but, it appears, purely as a matter of construction on the unambiguous written agreement involved in the facts of the case. Consequently, the case does not detract from the possibility of a court finding, in other circumstances where an agreement is intended only to be temporary, that this is within Lord Templeman's excepted categories whereby the grant of an estate or interest in land is negatived.

In the cases up until 1964, it would appear to be fair to say the judges had taken steps to give effect to the policy of the Rent Acts and, at the same time, made justifiable use of the concept of the licence to ensure control was not extended to unwarranted agreements. It has already been noted that the Protection from Eviction Act 1964 and the Rent Act 1965 reversed a process of decontrol which had been begun before. Extension of control continued in the form of the Rent Act 1968 (largely consolidatory), Housing Act 1969, Housing Finance Act 1972, Counter-Inflation Act 1973 and the Rent Act 1974. Of these, the Rent Act 1974 was the most significant. Prior to this Act there had been an easy escape route for landlords wishing to avoid the full

rigours of the Rent Acts: furnished accommodation was not affected by many of the most significant regulatory measures. Consequently, the practice grew up amongst landlords, of providing tenants with some poor quality, second-hand furniture, the value of which formed a substantial part of the rent. This major loophole in the Rent Acts was, however, effectively closed off by the Rent Act 1974, which extended protection to furnished accommodation. Since the Act, various devices have been developed by those advising landlords wishing to avoid Rent Act protection. For example, deposit and instalment "sales", use of "holiday lets", and provisions of board, the latter giving rise to an article in the Glasgow Herald entitled "Beating the Rent Acts - with Bacon and Eggs".(30) Perhaps the most significant of these, however, has been the tendency to draft agreements so as to create licences. It is interesting to note that before 1979, the Francis Report (31) observed that little attempt had been made to avoid the Rent Acts by means of licences. However, a survey by Paley (32), of areas where there was a dense population of private rented sector tenants, in 1976, showed two years after the passing of the 1974 Act, 48% of the sampled lettings with company landlords had altered their letting policies. Of these 15% re-let, on licence, service agreements or rent-free, whilst a further 14% would only enter into holiday lets.

Since 1974, further statutes of less significance than the Rent Act 1974 have been introduced but have been consolidated along with existing legislation into the main statute at present governing residential tenancies, namely the Rent Act 1977. A tenancy who receives full protection under this Act is known as a protected tenancy(33). However, more recently the Rent Act 1977 has been amended by the Housing Act 1980 which, once again, generally moves in the direction of decontrol, although it does for the first time place council tenants in virtually the same position as private sector tenants as regards security of tenure(34). Deregulatory measures include the abolition of controlled tenancies so that, subject to provisions for phasing the increase, all rents under the Act are deemed to be 'fair rents', the introduction of the concept of a "protected shorthold" tenancy under which a landlord is guaranteed possession after the termination of the original term and the "assured tenancy" which is one of a house which has been built since the passing of the Act. It is proposed to consider whether, after the Rent Act 1974, when Rent Act avoidance became difficult, judicial attitudes to licence agreements softened until the recent strict approach in STREET v MOUNTFORD, decided at a time when the shift is once again towards decontrol.

There is some evidence of a change in judicial attitudes towards Rent Act protection after 1974, to be drawn from overt statements which indicate a high degree of sympathy for landlords. For example, in ALDRINGTON GARAGES v FIELDER, Geoffrey Lane L.J. expressed the opinion:

> "There seemed to be nothing wrong in trying to escape onerous provisions or increase one's profit if one could legitimately do so...."(35)

and, in DUMUREN AND ADEFOBE v SEAL ESTATES, Megaw L.J. commented:

> "Owners of property are seeking, perhaps understandably in the circumstances, to get the maximum financial advantage from their properties and to avoid what they no doubt regard as the irksome fetters of the Rent Act."(36)

Whether this apparent softening of attitudes can be so directly attributed to the passing of the 1974 Act is questionable. For, in 1971, in the business tenancy case of SHELL MEX AND B.P. LTD v MANCHESTER GARAGES, Lord Denning had made the ultimate statement of hostility towards protective legislation. After finding a licence, he says:

> " I realise that this means that the parties can, by agreeing on a licence, get out of the Act [Landlord and Tenant Act 1954, as amended by the Law of Property Act 1969] but so be it; it may be no bad thing...."(37)

Be that as it may, apart from overt statements, the greater evidence of a less sympathetic attitude to Rent Act protection is apparent from the entire approach the judiciary adopted towards licence agreements (38). First of all, as has already been discussed in the first Section of this thesis, by altering the nature of the test of intention, a clear view had emerged by the early 1970s that it was possible to be a contractual licensee in exclusive possession of property. Moreover, the fact that the alternative test of intention which was developed proved very unhelpful and by the time of Lord Denning's statement in MARCHANT v CHARTERS(39) was totally devoid of meaning, provided extra scope for judicial creativity.

The second aspect of the general approach taken by judges which is illustrative of a marked lack of enthusiasm to ensure the Rent Acts were not avoided, was by allowing obstacles which made it difficult for occupiers to

establish that the intention of the parties was to create a tenancy, in circumstances where they had signed written agreements purporting to be licences which did not grant exclusive possession. Here, the parol evidence rule was allowed to become a stumbling block. This rule provides a general principle that neither verbal nor documentary evidence is admissible to add to or subtract from or alter a written contract. Following this principle, in both BUCHMANN v MAY(40) and SOMMA v HAZLEHURST(41), it was made clear that the courts would start by looking at the written agreement and presume that this expressed the intentions of the parties. The consequence of this approach is that the burden of proof lies with the tenant to prove the agreement reached was not that represented by the document signed. The question therefore arose as to how a tenant could rebut the presumption that the agreement expresses the intentions of the parties, and how easily this may be achieved. The court will admit extrinsic evidence in two circumstances: firstly, where the agreement is on the face of it ambiguous. For instance, in FACCHINI v BRYSON (42), the document under consideration was described as a licence and included the words "Nothing in this agreement shall be construed to create a tenancy", yet other clauses referred to a tenancy. It is arguable, in the case of ambiguity at least, that the burden of proof should rest with the landlord to establish the intention of the parties on the basis of the contra proferentum rule. This rule applies where a party to a contract seeks to rely on an exemption clause for his own benefit; as the terms of licence agreements are constructed purely for the benefit of the landlord, there seems no reason why the principle should not operate here too.

The second situation where extrinsic evidence is admissible is to show that the written agreement does not put into effect the intention of the parties. For this purpose, it appears that evidence of surrounding circumstances, namely the factual background against which the agreement is signed, is admissible(43). Thus evidence of advertisements, conversations and correspondence prior to signing would be admissible under this heading. Also, it seems that evidence of events subsequent to signing are admissible(44), although the extent to which this is so has not been precisely defined. All this seemed very hopeful for the occupier trying to establish a tenancy, but how helpful did it prove to be? It is necessary to prove to the court that the document signed was a "sham" in the sense that, at the time the document was signed, the parties' real intentions were distorted by the document. The expression "real" intention is here used in the objective sense to refer to the intention which was manifested to

the other party. Within a comparatively short period, there was a succession of six cases in which the courts were called upon to decide whether or not the documents should be given effect to on the basis that they were "shams". In three of these cases, the occupier succeeded in establishing that a tenancy was created, whereas in the remaining three he did not so succeed. It is thus proposed to examine the cases in question and to try and account for the different results, pointing out the difficulties faced by occupiers where their claims failed.

To consider first the cases in which the occupier succeeded in showing the documents signed did not embody the true intentions of the parties. The first of these was the County Court decision of WALSH v GRIFFITHS-JONES(45). Here, the parties entered into two identical non-exclusive occupation agreements, described as licences, each of which provided that use was to be in common with the licensor and other persons. Despite this, Judge McDonnell held that the intention of the parties had been to create a tenancy. He appeared to be influenced by three main factors: firstly, the fact that the occupiers had come looking for a joint tenancy and that the one defendant would not have entered into the agreement without the other; secondly, the defendants were assured that there was no danger whatsoever of the landlady or any other person seeking occupation of the flat; and finally, the agent had explained the clause concerning use in common with the licensor and others as "just a legal formality". The next case in which the occupier succeeded in establishing a tenancy was the Court of Appeal decision of O'MALLEY v SEYMOUR(46). Unlike the first case or subsequent cases to be discussed, this did not concern a sharing agreement; the premises were to be occupied by the defendant alone. However, there was a provision in the contract which provided in effect that exclusive possession was not granted and the plaintiff could share the premises with the defendant or introduce others to share the premises. The Court of Appeal decided (leading judgement Stephenson L.J.) that, although the written agreement created a licence, there had been a firm oral agreement reached two days prior to signing, which established a tenancy. The court reached this conclusion on the basis of the evidence given by the plaintiff in cross-examination, in which she, on several occasions, referred to a tenancy, and the County Court judges' opinion that the defendant was a reliable witness to what had transpired between the parties before signing. The final case, in which the occupier was successful in establishing a tenancy despite signing an agreement consistent with only a licence, was DEMUREN AND ADEFOPE v SEAL ESTATES(47). Here, two

Nigerian post-graduate students, who had just arrived in the country, signed two identical non-exclusive occupation agreements, similar to that considered in WALSH v GRIFFITHS-JONES, for the sharing of a flat together. Once again, there was evidence of a prior oral agreement, and the Court of Appeal (leading judgement, Megaw L.J.) decided that there was sufficient evidence to prove the oral agreement was not given effect to in the written agreement later signed. The court appeared to be influenced, in finding the agreement a "sham", by the fact that the advertisement had been for a self-contained flat, the terms of the agreement were not explained to the parties, especially the distinction between a lease and a licence, and the occupiers had to give post-dated cheques for each month's payment, but the owner could terminate on one week's notice; the owner could thus end the agreement before the end of the month for which the occupiers had paid. Overall, the Court of Appeal seemed very concerned by the imbalance between the parties' rights, as set out in the document and the apparent inconsistencies of it, so much so that Megaw L.J. commented:

> "There is something which is so badly wrong with this agreement that one is bound to look at it with the gravest suspicion."(48)

To turn now to the decisions in which the occupier failed to establish that the intention of the parties was to create a tenancy. The first of these was the Court of Appeal decision in SOMMA v HAZLEHURST(49). This concerned identical written agreements for licences under a sharing arrangement, very similar to that considered by the County Court in WALSH v GRIFFITHS-JONES(50) to which the Court of Appeal gave explicit approval. Once again, there was a clause in each agreement to the effect that user was to be in common with the licensor and other persons. The facts were additionally similar to WALSH v GRIFFITHS-JONES in that there was evidence that when, before signing the contract Mr. Hazlehurst had asked what the non-exclusive occupation clause meant, he was "brushed off". How, then, was the result different? It seems that a large part of the difference lay in the fact that in SOMMA v HAZLEHURST, there was no prior oral agreement against which to judge whether the written agreement was a sham. Cummings-Bruce L.J., therefore, approached the case by asking two questions: firstly, did the parties intend to be bound by the written agreement? In finding that they did intend to be bound, he was very much influenced by the fact that one of the defendants, Mr. Hazlehurst, was an educated man who knew what he was letting himself in for. The second question asked was, could it be said, from the words used in the agreement

that there was an intention to create a tenancy. Given that, on the facts, the intention of the parties could only be ascertained from the written agreement and that the approach of the courts to finding the intention of the parties was the "substance test", i.e. that of ascertaining their intentions from a consideration of the terms of the agreement, it was inevitable, where there were two separate agreements, neither purporting to give exclusive occupation, that the Court of Appeal would find a licence was intended.

The second decision, where the court found that there was no intention to create a tenancy, was ALDRINGTON GARAGES v FIELDER(51). This again concerned the signing of two identical non-exclusive occupation agreements for the sharing of a flat. The decision followed the approach taken in SOMMA v HAZLEHURST and found that licences were created. The distinction between this and other similar cases where tenancies were found to exist, again seems to be based on the fact that there was no evidence given of a prior oral agreement and thus the court was confined to a consideration of the documents themselves to find the intention of the parties.

The remaining decision where the court found a licence and not a tenancy had been created was STUROLSON AND CO.v WENIZ(52). Here, a married couple and a friend of theirs wanted to share a flat. Each signed agreements on the same day in identical terms. It was, however, conceded that, as a matter of construction, each agreement was a licence, not a tenancy, but the husband argued that the agreements were shams. This was rejected by the Court of Appeal; the parties were caught out by the same trap as in SOMMA v HAZLEHURST. Eveleigh L.J. said that, as the husband realised that the landlord would not let the flat to them if the Rent Act 1977 applied to the agreement and appreciated the consequences of this, the agreements could not be described as shams, as the objectives of both parties had clearly been achieved.

Despite the fact that in three of the six cases considered, occupiers who signed non-exclusive occupation agreements managed to establish tenancies, it would seem to have been very much of an uphill struggle to establish a tenancy. This is because firstly such a finding depended on evidence of the precise facts which occurred before signing the agreement and, as much of this evidence centred around oral agreements, the credibility of the individual witnesses was of vital importance. Therefore success depended very much on the individual circumstances of the case. This very point was made by Roskill L.J. in ALDRINGTON GARAGES v FIELDER(53), where he said that neither the case before him nor SOMMA v

HAZLEHURST should be taken to lay down generalised principles. This was obviously an undesirable approach as an individual occupier did not know precisely where he stood and thus the approach encouraged litigation.

The second factor which seemed to affect the occupier's chances of success in establishing a tenancy was how well the agreement to avoid the Rent Acts was constructed. If it was convincingly constructed, he was more likely to fail, whereas if it was badly constructed, as in DEMUREN AND ADEFOPE v SEAL ESTATES(54), this influenced the court in finding the agreement to be a "sham". Finally, the chances of an occupier establishing a tenancy would appear to be reduced if the negotiations were skilfully concluded. Here, the principle would seem to be, the less said the better, because, if the intention of the parties could only be established from the written agreements, the landlord was a certain winner; the "substance test" would require an examination of the individual terms of the agreements which clearly did not have the characteristics of a tenancy. It was therefore obviously impossible to establish that the agreements were "shams" when the court was confined to an examination of the written documents themselves. Moreover, it has already been pointed out that any attempt to ascertain the actual intentions of the parties is illusory(55). The landlord's only intention in entering into a licence agreement is to make sure the agreement is outside the Rent Acts. The tenant is unlikely to have a common intention: if he is aware of the consequences of the distinction between a lease and a licence, he is forced into passive acceptance of the fact that the landlord does not want to allow him Rent Act protection. STUROLSON AND CO. v WENIZ (56) is a classic example of this situation. However, although the courts have been prepared to consider the supposed intentions of the parties, they have been unprepared to consider the motives of the parties. This is precisely where the argument that the agreement was a "sham" broke down in STUROLSON AND CO. v WENIZ. Moreover, the courts were quite explicit in their acknowledgement that the non-exclusive occupation agreements considered were designed purely to avoid Rent Act protection. For example, in SOMMA v HAZLEHURST, Cummings-Bruce L.J. explained:

> "The attempt which has led to this appeal is made by a document drawn up by one or a combination of those who seem to have studied all the efforts, recorded in a welter of cases decided in every court from the County Court to the House of Lords, to avoid letting a dwelling-house or part of it by arranging to licence or to share the occupation of it."(57)

He nevertheless proceeded to find the agreement in question amounted to a licence, even though the inevitable consequence of so doing was to allow the entire policy of the Rent Acts to be undermined. The need for caution expressed by Evershed M.R. in FOSTER v ROBINSON(58) about the dangers of landlord's studying licence cases for this very purpose seemed to have been abandoned. Not only were judges quite explicit about the aims of landlords in drawing up licence agreements, they were also explicit about the fact that the tenants who signed them frequently did so reluctantly, accepting the loss of their statutory protection only out of urgent need. For example, in ALDRINGTON GARAGES v FIELDER(59), Geoffrey Lane L.J. acknowledged that the occupier, Mr. Fielder, was "reluctant to sign", yet this was not considered to be a relevant factor any more than the motive of the landlord. Thus, despite the fact that Rent Act protection arises out of a need to protect the weaker party, the tenant, at a time when there is a shortage of accommodation, the judges, after 1974 at least, consistently failed to take into consideration the social background against which the Rent Acts operated and out of which the cases arose, choosing instead to take a formalistic approach, which, coupled with a somewhat dubious test of intention, succeeded in "driving a hole through the Rent Acts". The attitude to licences was strangely very much at odds with that taken in QUENNELL v MALTBY(60) case concerned with the rights and remedies of a mortgagee. The mortgagor in this case had let a tenant into possession in breach of a covenant against leasing. He later wished to sell his house with vacant possession. In order to assist in effecting this purpose, the mortgagor asked the mortgagee to exercise his right to take possession of the property from the statutory tenant, the tenancy not being binding on the mortgagees. The mortgagee refused to co-operate in this way but did agree to assign the mortgage to the mortgagor's wife, who thereupon sought possession of the premises. The Court of Appeal refused to allow the order for possession. One of the influencing factors in not allowing possession which was greeted with sympathy was that the device could lead to widespread evasion of the Rent Acts. It was said that, where a mortgagee acted as agent of the mortgagor in seeking possession, he should not be allowed to succeed unless he was acting bona fide for his own purposes. Thus the court was prepared to consider the motives of the mortgagee and mortgagor. In contrast, in licence cases, the courts were unprepared to consider motive, taking a similar attitude to that in other spheres in which statute law operates, for example tax avoidance; that is, until FURNISS v DAWSON.(61)

Thus, the review of cases, decided since the closing of major loopholes in protection by the Rent Act 1974, does, as Robson and Watchman have observed(62), appear to reveal a change in attitude. Perhaps, out of fears that the private rented sector would dry up, the judiciary did resort to a passive acceptance of Rent Act avoidance. How wholehearted this acceptance had become is more debatable. It is questionable whether the non-exclusive licence cases discussed are truly reconcilable. The very fact that, whether a tenancy or a licence had been created depended on the precise facts of the case, did enable certain judges to draw distinctions when faced with remarkable similar agreements to those considered in earlier cases, and find tenancies. Perhaps, part of the problem, to give some judges the benefit of the doubt, was that, when presented with "sham documents", they became victims of their own test of intention.

Given that STREET v MOUNTFORD now lays down that, subject to certain exceptions, when an occupier is in exclusive possession in return for payment of a rent, a tenancy will arise, what scope remains for the possessory licence to be used as a means of avoiding protection legislation? The possibilities appear to be limited and decisions immediately subsequent to STREET v MOUNTFORD suggested the courts intended to maintain a strict line. However, more recent cases show some evidence of new life for the licence concept. To begin with, following the strict line, the cases of ROYAL PHILANTHROPIC SOCIETY v COUNTY(63) and BRETHERTON v PATEN(64) illustrate that the courts may well be unwilling to extend the "excepted categories" outlined by Lord Templeman. In ROYAL PHILANTHROPIC SOCIETY v COUNTY, the defendant was a teacher and an employee of a local authority, working in a school owned by the plaintiffs. Originally, under an agreement accepted by all as a licence, he was provided with board and accommodation in a room adjoining a dormitory within the school complex for which a small payment was deducted from his salary. Subsequently, the defendant married and the school agreed to provide him with a house a couple of miles away. The terms on which he occupied the house were referred to as a "tenancy" in correspondence, "rent" was deducted from his salary, and no services were provided. It was accepted that the defendant had exclusive possession but, when the defendant left the school, notice to quit was served and possession proceedings begun on the basis that the defendant was merely a licensee. The Court of Appeal decided that the defendant was a tenant and not a licensee. One of the arguments put forward by the plaintiffs was that the defendant fell within the "exceptional circumstances" of Lord Templeman on account of (i) the relationship between the parties; (ii) the

fact that the previous room was occupied as a lodger at a low rent; (iii) the informality of the paperwork and (iv) the absence of provisions concerning subletting and assignment. This was rejected by the Court of Appeal for reasons which will be explained below.

BRETHERTON v PATON(65) is perhaps a more striking illustration of the courts' reluctance to breath back life into licences by means of Lord Templeman's "exceptional circumstances". Here, the defendant had wanted to rent a particular house from the plaintiff who had indicated that he was not prepared to let the house but only to sell it. It was eventually agreed that the defendant should move in straight away and carry out repairs in order to enable her to obtain a mortgage and so buy the property. On this basis, she went into exclusive possession of the premises and paid £1.20 per week to the plaintiff to cover costs of insurance. There was no written agreement concerning possession of the property and, when the parties were subsequently unable to agree the sale price, the plaintiff served a notice to quit and began proceedings for possession. The assistant recorder at the County Court held that the three hallmarks of a tenancy existed (the insurance costs constituting rent), but that the situation came within the excepted categories listed in STREET v MOUNTFORD, as the defendant's occupation was referable to an arrangement (albeit ineffective) for the sale of the land. However, on appeal, the Court of Appeal, whilst admitting that the intention behind occupation was that the defendant should buy the house, held that the situation was not one of occupation prior to a contract of sale, as the agreement was void for uncertainty, no purchase price having been agreed. This may well be so but the fact that Lord Templeman uses the word "include" of his excepted categories suggests that it is open for the courts to add to the examples he provided. There should be no danger of this kind of an arrangement being used as a device to avoid the Rent Acts, as it is open to the courts to find the agreement a "sham" if there was no actual intention to occupy prior to a genuine sale. Consequently, the approach appears to be unnecessarily strict and unfair on the freeholder.

Still considering cases which have taken a strict line since STREET v MOUNTFORD, one way in which the decision of the House of Lords could be significantly limited, is by a finding that the principles laid down were only intended to be directed to residential accommodation as opposed to the commercial sphere. This is because in laying down the test for distinguishing between leases and licences, Lord Templeman frequently referred specifically to residential accommodation. For example he

stated:

> "If on the other hand residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance or services, the grant is a tenancy.(66)

However,it is also true, in reviewing earlier decisions, non-residential lease/licence cases such as ADDISCOMBE GARDEN ESTATES v CRABBE(67) and SHELL MEX AND BP LTD. v MANCHESTER GARAGES(68) were discussed, suggesting that the principles were intended to be of wider application. Against this background, in LONDON AND ASSOCIATED INVESTMENT TRUST PLC. v CALOW(69), it was argued that STREET v MOUNTFORD only applied to residential property. On the facts of the case, the occupier was somewhat unusually claiming to have merely a licence to occupy, whilst the landlord was claiming that a business tenancy existed in order to justify a claim for rent and service charges after the occupier had left the premises without giving formal notice. The basis of the landlord's claim was, if the agreement was a lease it remained in force until properly determined in compliance with the Landlord and Tenant Act 1954. However, Judge Baker expressed the view that Lord Templeman's express references to residential accommodation were explainable on the grounds that the facts of STREET v MOUNTFORD related to residential property. This would seem to be a correct interpretation for there is no justifiable reason for setting down a different test for distinguishing between leases and licences in the commercial sphere, except on the grounds of the effects of the different statutory controls in each sphere, and Lord Templeman was adament this consideration was irrelevent.(70) Nevertheless in the recent decision of DRESDEN ESTATES LTD. v COLLINSON(71), Glidewell L.J expressed some doubt as to whether the principles applied in the residential and commercial sectors should be the same.

It has already been noted(72) that the intention of the parties remains relevant in deciding whether an agreement creates a lease or a licence to the extent of determining whether the three hallmarks of a tenancy exist. Both ROYAL PHILANTHROPIC SOCIETY v COUNTY(73) and UNIVERSITY OF READING v JOHNSON-HOUGHTON(74) suggested that the courts were not going to provide scope for the possessory licence by allowing in by the back door old approaches to attaching relevance to the intention of the parties. In the first mentioned case, the reason why Fox L.J. was not persuaded by the evidence put forward for the case falling within Lord Templeman's "excepted categories" was because this amounted:

> "really to an attempt to go back to the approach disapproved of by the House of Lords in STREET v MOUNTFORD of examining the circumstances with a view to ascertaining the intention of the parties."(75)

Lord Justice Fox went on to reiterate that the only relevant intention was the intention demonstrated by the agreement to grant exclusive possession at a rent. Similarly, in the first instance decision of Leonard J. in UNIVERSITY OF READING v JOHNSON-HOUGHTON, a case similar in facts to BRACEY v READ(76), being concerned with a grant of rights to gallops, although the learned judge analyses the agreement clause by clause, he does so only with the aim of ascertaining whether exclusive possession is granted.

However, the recent decision in DRESDEN ESTATES LTD. v COLLINSON(77) showed indications that the decision in STREET v MOUNTFORD had not totally laid to rest notions of attaching undue significance to the intention of the parties. This case concerned a written , agreement described as a licence, for the occupation of businesss premises. The agreement expressly stated that it was not a tenancy and was only personal to the parties. Moreover the agreement provided it could be determined by three months notice on either side and further that three months notice was to be given for a unilateral decision by the owner to increase the licence fee. In addition a clause in the agreement enabled the owners to require the licensees to be moved to other premises within the same property without determining the agreement. The occupier subsequently claimed that the agreement fell within Part II of the Landlord and Tenant Act 1954. The Court of Appeal decided the agreement was a genuine non exclusive licence. The court was particularly influenced by thr fact that the owner could increase the licence fee unilaterally and could move the occupier to other parts of the property without the agreement being determined.

In the leading judgment, Glidewell L.J placed reliance (inter alia) on the decision of Lord Denning M.R in SHELL -MEX AND BP LTD. v MANCHESTER GARAGES LTD(78) and passages from Halsbury's Law of England(79). In SHELL-MEX AND BP LTD v MANCHESTER GARAGES LTD it will be remembered(80) Denning M.R stated:

> "We have to see whether it is a personal privelege given, or... an interest in land. At one time it used to be thought that exclusive possession was a decisive factor but this is not so now. It depends on broader considerations altogether..."(81)

The passage from Halsbury (written before the decision in STREET v MOUNTFORD) quoted by Glidewell L.J stated:

> "In determining whether an agreement creates between the parties the relationship of landlord and tenant or merely licensor and licensee the decisive consideration is the intention of the parties....The fact that the agreement grants a right of exclusive occupation is not in itself evidence of the existance of a tenancy, but is a consideration of the first imprtance, although of lesser significance than the intention of the parties."(82)

Taking the words of Halsbury literally, if is difficult to see how exclusive possession can be of first importance if it is of lesser significance that the intention of the parties. Moreover, it is submitted, the reference to the intention of the parties being of greater significance than the existence of a right to exclusive possession is out of line with statements of Lord Templeman in STREET v MOUNTFORD, including statements from his judgment actually quoted by Glidewell. Although Lord Templeman said eclusive possession was not decisive but merely of first importance(83), this needs to be interpreted in the light of his criticisms of the meaningless test of intention which had been developed prior to STREETv MOUNTFORD(84). It is , further, unlikely that Lord Templeman would have agreed that the intention of the parties was the most significant factor in the light of his statement that:

> "...the only intention which is relevent is the intention demonstrated by the agreement to grant exclusive occupation for a term at a rent"(85)

Thus the court in DRESDEN ESTATES LTD. v COLLINSON should have only considered the intention of the parties in order to decide whether exclusive possession had been granted. If it appeared not to have been the court should have gone on to decide whether the agreement was a "sham". The case is significant, however, in that it shows that the House of Lords has not finally killed off the test of intention leaving scope for the re-emergence of the possessory licence.

In the light of STREET v MOUNTFORD, four possible ways of using the possessory licence to avoid the Rent Act protection need to be considered. Firstly, would an express term in any agreement, that exclusive possession had not been granted to the occupier without more, suffice to allow the court to find that there was merely

a licence to occupy? In SHELL-MEX AND B.P. LTD. v MANCHESTER GARAGES LTD.(86) , the agreement contained a term by which the occupier agreed "Not to impede in any way the officers servants or agents of the [freeholder] in the exercise by them of the [freeholder's] rights to possession and control of the premises". The decision was approved in STREET v MOUNTFORD except for Lord Denning's reasoning, based upon the personal nature of the transaction. Furthermore, it has already been noted that the actual intentions of the parties are relevant in ascertaining whether exclusive possession has in fact been granted. Would an express term negative such actual intention? The answer would seem to be: only provided the evidence showed, as it did in the " SHELL-MEX" case, that the express term was not a "sham", that is to say, whatever the agreement formally states, the "substance" of the matter is that the landlord retains such control as to negative a finding of exclusive possession. This was the approach taken in ROYAL PHILANTHROPIC SOCIETY v COUNTY (87).

A second possible opening for the possessory licence post STREET v MOUNTFORD is to allow an occupier to go into exclusive occupation, but to draw up an agreement expressly binding in honour only so that there is no intention to create a contractual relationship. The provision for payment could be couched in terms to make it optional. This should lack the three hallmarks of a tenancy, there being no payment of rent and no right to exclusive possession, but merely a privilege of exclusive occupation. The occupier should then be regarded as a bare licensee and the freeholder could consequently obtain possession at any time. There would appear to be two drawbacks to such an arrangement. Firstly, it is totally impracticable for a commercial landlord to allow someone possession of property on this basis, as he would have no right to sue for arrears of "rent" and no action for breach of covenant. Secondly, it may well be that the courts will in any case decide the actual intentions of the parties are different from their professed intentions.

The third possibility for the possessory licence as a means of Rent Act avoidance is by ensuring the grantor lacks the legal capacity to create a lease. Cases such as MINISTER OF AGRICULTURE AND FISHERIES v MATTHEWS(88) and FINBOW v AIR MINISTRY(89), where licences were found on account of the fact that the public authority granting the licence had no estate or interest in the land out of which to grant a tenancy, were not discussed by the House of Lords in STREET v MOUNTFORD. Scammell(90) drafted a means of creating business licences to avoid the provisions of the Landlord and Tenant Act 1954 Part II,

that comprised a clause for insertion into the memorandum of association of a limited company, restricting its powers to dealing with licences and sub-licences, but depriving it of power to acquire or hold any legal or equitable interest in the land in respect of which the licence is granted. Such a device would seem to have judicial support in the judgement of Lord Denning in TORBETT v FAULKNER, where he observed:

> "Now the company had no estate or interest in the land at all. It had nothing out of which it could carve a tenancy. It was in this respect in the same position as a requisitioning authority. It could only grant a licence not a tenancy."(91)

In the same case, Evershed M.R. seemed also to support this view. However, Pettit(92) points out that there exists a series of cases which lay down an inconsistent principle, there being no cross-references from one line of cases to another. In the line of cases he cites where the grantor has no estate or interest out of which to grant a tenancy, as between the parties, a tenancy by estoppel arises. In CUTHBERTSON v IRVING, the principle was laid down that:

> "...when a lessor without any legal estate or title demises to another, the parties themselves are estopped from disputing the validity of the lease on that ground; in other words, a tenant cannot deny his landlord's title nor can the lessor dispute the validity of the lease."(93)

Bearing in mind that Lord Templeman in STREET v MOUNTFORD considered that the courts should be astute enough to see that "artifical transactions" were not used to evade the Rent Acts, it would be likely that the courts would seek, in the estoppel line of cases, to close the loophole. However, what would be the position if the clause drafted by Scammell was altered so as to provide that the company has no power to be a landlord? This would not give rise to a situation caught by the estoppel cases, as it would not be relying on the inability of the company to hold a legal or equitable interest in the land. But, as Pettit points out, this would seem to be equally doomed to failure on account of S.35 of the Companies Act 1985, which provides that: "In favour of a person dealing with a company in good faith, any transaction decided on by the directors shall be deemed to be one which it is within the capacity of the company to enter into....". Thus, if the occupier dealt in "good faith" with the company, an agreement which gave exclusive possession in return for payment of a rent would be regarded as a valid lease. There may, however, be one way out: a party only

deals with a company in "good faith" if he does not know or ought not to know the contract is ultra vires. If, therefore, the company tells the occupier that they have no power to act as landlords, but only as licensors, it is arguable that no tenancy agreement could be binding on the company.

The final and most serious possibility for the licence, in avoidng the Rent Acts is the non-exclusive occupation agreement. Such agreements have not been totally ruled out by the House of Lords in STREET v MOUNTFORD, despite Lord Templeman's disapproval of SOMMA v HAZLEHURST(94), ALDRINGTON GARAGES LTD v FIELDER (95) and STUROLSON AND CO v WENIZ(96), for the House of Lords still adhered to the principle that exclusive possession is necessary for the creation of a tenancy. The grounds of disapproval of these three decisions was that they were "shams" and, in the opinion of Lord Templeman, the court should:

> "...be astute to detect and frustrate sham devices and artifical transactions whose only object is to disguise the grant of a tenancy and to evade the Rent Acts...."(97)

However, this passage is unclear and open to at least two possible interpretations, the narrower of which may leave the way open for finding licences in future cases. The uncertainty is created by the fact that Lord Templeman fails to explore precisely what is to be understood by a "sham" and, further, does not consider non-exclusive occupation agreements which could not be explained away as "shams". The narrow interpretation of Lord Templeman's approach is that he was merely saying that, as a matter of fact, the cases involved "shams", so that in SOMMA v HAZLEHURST and ALDRINGTON GARAGES LTD v FIELDER, in reality the occupiers were joint tenants enjoying exclusive possession. This interpretation is supported by the fact that Lord Templeman points out, of SOMMA v HAZLEHURST, that, if the landlord had served a notice to quit on the man and asked the woman of the pair to share with a strange man, this would have, in effect, have been notice to them both. Also he expresses the opinion that the purpose of letting the premises was that the couple might live together in what he describes as "undisturbed quasi-connubial bliss". Such a narrow interpretation may not be sufficient to explain Lord Templeman's reference to STUROLSON AND CO. v WENIZ, where it was conceded that the agreements were licences but argued that they were "shams" in order to avoid Rent Act protection. Nevertheless, if Lord Templeman merely disapproved of the three named decisions on the basis that, in reality, exclusive possession existed and, for this reason alone, the agreements were "shams", it does

not follow that all non-exclusive occupation agreements are "shams". It would seem that, if a landlord was to introduce strangers into sharing agreements with one another, possibly at different times, under non-exclusive occupation agreements, the courts could not fairly describe such agreements as "shams". Practically, however, this provides limited scope for use of licences because there is a limited market for sharing on such a basis.

The much wider interpretation of Lord Templeman's approach is that the House of Lords disapproves of any transaction the purpose of which is avoidance of statutory control. This would be to adopt the kind of approach taken by the House of Lords in FURNISS v DAWSON (98) to tax avoidance. Under such interpretation, the courts would be able to disregard transactions which were not in the strict sense "shams", thus including non-exclusive occupation agreements between strangers. Support for this interpretation may perhaps be obtained from the fact that Lord Templeman did not merely make reference to "shams", but also referred to "artifical transactions", a term which would appear to be much wider. A well known definition of a "sham" is that of Diplock L.K. in SNOOK v LONDON AND WEST RIDING INVESTMENTS LTD, where he said it:

> ".... means acts done or documents executed by the parties to the "sham" which are intended by them to give third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create."(99)

Such a definition would not cover a situation where a party intended not to grant exclusive possession in order to avoid Rent Act protection and did not in fact grant exclusive possession because the agreement clearly envisaged, and the parties in fact understood, strangers may be introduced into the premises let from time to time under a sharing arrangement. However, "artificial transaction" may be sufficiently wide to cover this kind of situation.

The recent decision of the Court of Appeal in HADJILOUCAS v CREAN(100) favours a narrow interpretation of the concept of a "sham" and furthermore illustrates there is still some scope left for non-exclusive occupation agreements. A couple of friends signed separate but identical agreements described as licences. The terms of the agreement provided (inter alia) the licensee shall

accept a licence to share with one other person and that the intention was that the licensee should not have exclusive possession. The licence rental was stated to be £260 a calender month, but that the total licence fee paid by all the licensees was not to exceed £260. On these facts Mr. Justice Tibber had decided the agreements were not "shams". The Court of Appeal (Mustill, Cumming-Bruce and Purchas L.JJ) was of the view that despite STREET v MOUNTFORD it was not automatically to be assumed that if two or more persons were occupying premises at the same time they had exclusive possession between them. All that Lord Templeman's judgment had laid down was that the nature of the relationship had to be ascertained from a construction of the documents involved againnst the background of the factual matrix relevent to that exercise in accordance with the ordinary rules of construction of agreements. However on the facts of the case the court felt unable to make a decision without a closer examination of the factual matrix. The scope for non-exclusive occupation agreements may still be limited for Lord Justice Purchas did also say in considering the intention of the parties to the agreement the court should bear in mind the intention of Parliament in passing the Rent Acts and should not be astute to find ways of circumventing it.

It would therefore seem, on account of the decision in STREET v MOUNTFORD, that the possessory licence has met a near death as a device for avoiding Rent Act protection. The scope of the licence had been so widened by the development of an "any meaning" test of intention that, had the House of Lords not taken steps to restrict its sphere, this would have allowed unacceptably widespread evasion of the Rent Acts at a time when there has, in any case, been a significant move towards decontrol in favour of the landlord. Nevertheless, it has been seen that Lord Templeman did not take the opportunity to destroy the licence completely. Although the courts at present seem willing only to a limited extent to breathe life back into the concept in this sphere, the potential just about remains and one wonders whether, under a future government, increasing statutory control on rented property, the possessory licence may be resuscitated to play a similar role to the one developed for it, particularly since 1974.

References Section II

1. Fontana, London 1977 Chapter 5, p. 107.

2. "Real Property and Real People" p. 424.

3. "Sabotaging the Rent Acts" p. 187.

4. See S.19(2) Rent Act 1977.

5. [1985] 2 All ER 289.

6. [1951] 2 KB 496 at p. 502.

7. [1952] 1 TLR 1386 at p. 1391.

8. See post page 85 HADJICOUCAS v CREAN "The Independent" 6th August 1987 where the impact of the Rent Acts was considered to be relevant.

9. Supra at p. 501.

10. Supra at p. 505.

11. Supra at p. 1391.

12. [1974] 3 All ER 406 at p. 415.

13. [1970] 2 All ER 483 at p. 487.

14. Landlords had certain rights by virtue of statute, for example the right to destrain on the tenant's goods for non-payment of rent was partly based on mediaeval statutes.

15. Part VI lettings S. 19(2) Rent Act 1977.

16. Rent and Mortgage Interest Restrictions Acts 1920-39; Furnished Houses (Rent Control) Act 1946.

17. There were some deregulatory provisions introduced from time to time e.g. Rent and Mortgage Restriction Act 1923, but the overall trend was towards increased control.

18. There is no provision in the Rent Acts which says a tenant cannot contract out of his rights, but this was found to be the case in BARTON v FINCHAM [1921] 2 KB 291 (CA) and BROWN v DRAPER [1944] KB 309 (CA).

19. [1950] 1 KB 149 at p. 153.

20. Supra at p. 1391

21. [1957] 1 All ER 352.

22. Supra at p. 355.

23. Supra at p. 501.

24. [1958] 1 WLR 235 at p. 239-240.

25. [1951] 1 KB 636. For fuller explanation of facts see ante p. 15.

26. Supra.

27. Supra, See ante pp 45-46.

28. Supra. See ante p. 34.

29. CA 19th November 1984 (unreported) HL [1985] 2 All ER 112.

30. 24th November 1978.

31. Report of the Committee on the Rent Acts. Cmnd 4609 (1971).

32. "Attitudes to Letting" HMSO (1978) pp 30-31.

33. SS 1, 152 (1) Rent Act 1977.

34. See EASTLEIGH BOROUGH COUNCIL v WALSH ante p. 68.

35. (1978) 247 EG 557 at p. 559.

36. (1979) 249 EG 440 at p. 444.

37. [1971] 1 All ER 841 at p. 844.

38. See generally Robson and Watchman (supra) from whose illuminating articles many of the points made are drawn.

39. Supra. See ante p. 36.

40. [1978] 2 All ER 993 at p. 998.

41. [1978] 1 WLR 1014.

42. Supra.

43. See for e.g. SOMMA v HAZLEHURST (supra) and

ALDRINGTON GARAGES v FIELDER [1978] 247 EG 557.

44. See for e.g. SOMMA v HAZLEHURST (supra) and DEMUREN AND ADEFOPE v SEAL ESTATES (supra).

45. [1978] 2 All ER 1002.

46. (1979) 250 EG 1083.

47. Supra.

48. Supra at p. 455

49. Supra.

50. Supra.

51. [1978] 247 EG 557.

52. (1984) 272 EG 326.

53. Supra.

54. Supra.

55. See ante pp 36-37.

56. Supra.

57. Supra at p. 1021-1022

58. Supra.

59. Supra.

60. [1979] 1 All ER 568.

61. [1984] 1 All ER 530.

62. "Hidden Wealth of Licences" [1980] Conv 27.

63. (1985) 276 EG 1068 CA.

64. (1986) 278 EG 615 CA.

65. Supra.

66. Supra at p. 293.

67. Supra.

68. Supra.

69. (1986) 280 EG 1252.

70. See ante p. 63.

71. (1987) 281 EG 1321 CA.

72. See ante pp 54-55.

73. Supra. See ante pp 77-78 for facts.

74. (1985) 276 EG 1353. See Smith (1987) Conv 220.

75. Supra at p. 1072.

76. [1962] 3 All ER 472 ante p. 47.

77. (1987) 281 EG 1321 CA.

78. [1971] 1 WLR 612.

79. Vol 27 4th edition at para 6.

80. Ante p. 35.

81. Supra at p. 615.

82. Supra.

83. See ante p. 55.

84. See ante p. 36-37.

85. Supra at p. 300.

86. Supra.

87. Supra. See also CRANCOUR LTD v DA SILVAESA (1986) 278 EG 618.

88. [1949] 2 All ER 724.

89. [1963] 2 All ER 647.

90. Precedents for the Conveyancer Form 5-1 at p. 2505.

91. (1952) 2 TLR 659 (CA).

92. "Judge-Proof Licences" (1980) 44 Conv 112.

93. (1859) 4 H and N 742 at p. 743 followed in CONVENTRY PERMANENT ECONOMIC BUILDING SOCIETY v JONES [1951] 1 All ER 901; WOOLWICH EQUITABLE

BUILDING SOCIETY v MARSHALL [1951] 2 All ER 769; UNIVERSAL AND PERMANENT BUILDING SOCIETY v COOKE [1951] 2 All ER 893 and CHURCH OF ENGLAND BUILDING SOCIETY v PISKOR [1954] 2 All ER 85.

94. Supra.

95. Supra.

96. Supra.

97. Supra at p. 299.

98. [1984] 1 All ER 530.

99. [1967] 1 All ER 518.

100. "The Independent" 6th August 1987.

SECTION III

Possessory licences and the Limitation Acts.

In this Section, it is proposed to consider the use to which the possessory licence has been put in avoiding a finding of adverse possession and whether such use is both justifiable and desirable. Adverse possession arises out of the principle of limitation of actions which applies throughout the civil law. Under this principle, no action may be brought in respect of a legal wrong suffered after the expiration of certain prescribed periods from which the cause of action arises. These are now set down in the Limitation Act 1980(1). The effect of the operation of the rules relating to limitation of actions to claims for recovery of possession of land from a trespasser, is to take away the title holder's right to sue for possession. In effect, the title holder's rights over the land are extinguished by the requisite period of adverse possession. In order to establish adverse possession, one of two situations must be proved:

(1) dispossession of the paper owner followed by adverse possession of another, or

(2) discontinuance (i.e. abandonment) of possession by the paper owner followed by adverse possession of another.(2)

It would seem that, to prevent what judges have regarded as an unjust operation of the Limitation Acts in individual cases in relation to actions for recovery of land, the judiciary have developed, and are arguably continuing to develop (3), various devices to avoid reaching the conclusion that there has been adverse possession of the land in question. It will be argued that the concept of a licence has been useful in this respect, as it is clear that time cannot begin to run under the Limitation Acts so long as no wrong is being committed against the title holder. If there is permission to be on the land, there is no wrong and therefore no adverse possession. Amendments contained in the Limitation Amendment Act 1980 ,now consolidated into the LImitationAct 1980 have clearly diminished the scope for using the possessory licence to avoid a finding of adverse possession. However, it is proposed briefly to outline the two main ways that judges utilised licences in adverse possession cases before the passing of the Act and then to consider the present scope for so doing.

(a) The finding of a possessory licence as opposed to a tenancy at will.

The first method involved differentiating between the possessory licence and a tenancy at will. Under S.9 (1) of the Limitation Act 1939, where a person was found to be occupying land as a tenant at will, in the absence of the landlord determining the tenancy, provided the tenant paid no further rent or otherwise acknowledged the landlord's title, time began to run after the expiration of one year from the commencement of the tenancy. Accordingly, if the landlord did nothing which amounted to a positive act of determination, his title was extinguished after thirteen years from the beginning of the tenancy. To prevent such a finding in a series of cases, namely ERRINGTON v ERRINGTON (4), COBB v LANE (5), HUGHES v GRIFFEN (6) and HESLOP v BURNS (7), the courts found occupation was not as tenant at will but as licensee. That this was in fact the aim was made abundantly clear by Denning L.J. in ERRINGTON v ERRINGTON where, after finding the couple were licensees, he concluded:

> "I confess that I am glad to reach this result because it would appear that, if the couple were held to be tenants at will, the father's title would have been defeated after the lapse of thirteen years...."(8)

The court was able to place reliance on the test of intention, which was being developed as a test for distinguishing between tenancies and licences in order to avoid, among other things, the rigours of the Rent Acts. (9) It has already been argued that, prior to ERRINGTON v ERRINGTON, on the whole, very few cases detracted from the principle that, whenever an occupier was found to be in exclusive possession, a tenancy at will at minimum arose; the distinction between tenancy and licence did not involve an occupier having a right of occupation as opposed to a privilege and, as such, did not involve intention but purely evidence of sole occupation in fact. (10) Thus, the reasons given for the finding of a licence by Stamp L.J. in HESLOP v BURNS would have been invalid prior to ERRINGTON v ERRINGTON. The first reason given was:

> "On the facts of this case, it is, in my judgement, abundantly clear that the parties did not enter into any arrangement, far less any arrangement intended to create a legal relationship...."(11)

A tenancy at will, however, did not require an intention to create a "legal relationship", by which it is assumed Stamp L.J. means that a contractual relationship or at

least a relationship creating an interest in land, as the point has already been made, the relationship between any occupier and owner of land must, in the broadest sense, be a legal relationship as legal consequences follow.

The second reason given by Stamp L.J. was:

> "..that the defendants at the outset entered into occupation of the premises as licensees and not tenants at will; not with a right to exclude the deceased [plaintiff] from possession."(12)

but, for a tenancy at will to arise, a right to exclusive possession was not required, even if it makes sense to talk of a right to possession where occupation is on terms under which the landlord can determine the tenancy at any time.(13)

Nevertheless, in his judgement, Lord Justice Scarman expressly recognised that the principles for distinguishing between lease and licence have developed since ERRINGTON v ERRINGTON. It is, however, submitted that the developments make nonsensical and circular the distinction between a tenancy at will and a licence in Limitation Act cases. The development of a test of intention allows for the possibility of a licensee in exclusive possession where previously exclusive possession was conclusive of a tenancy; but, in so far as a licensee is in exclusive possession with merely a "personal privilege" to be in occupation, the relationship is that which would in former times have been called a tenancy at will. Yet, in the Limitation Act cases, used the test of intention is used to avoid the finding of a tenancy at will! In this context, it is interesting to speculate as to why Lord Templeman in STREET v MOUNTFORD(14) defined a tenancy as a "fixed or periodic term certain...." thereby excluding a tenancy at will. It may well be that he appreciated that it was in essence nothing more than a personal privilege or licence to occupy. It is now unnecessary to make use of the concept of a possessary licence as S.9(i) of the Limitation Act 1939 was repealed in 1980(15). Time now only runs in favour of a tenant at will from the determination of his tenancy. In the light of this provision it is interesting to note the recent decision of BP PROPERTIES LTD v BUCKLER(16). There, occupation rent free with the consent of the landlord was not classified as creating a tenancy at will, but a unilateral licence. Since the licence being gratuitous could have been determined at any time, it is submitted, in former times the relationship would have been described as a tenancy at will. Consequently the situation would now come within the provisions of the

Limitation Act 1980 and this would prevent the possession from being adverse. Admittedly, Lord Justice Dillon expressed some hesitation as to whether the licence could have been determined at any time, but he gave no indication as to why this should be the case.

(b) The doctrine of an implied licence.

The second way in which judges made use of the licence concept and so avoided a finding of adverse possession was by developing the doctrine of the implied licence. This doctrine began obscurely in Lord Denning's dissenting judgement in HAYWARD v CHALLONER(17), but was first put forward with force and formed the basis of his decision in WALLIS'S CAYTON BAY HOLIDAY CAMP LTD. v SHELL-MEX AND B.P. LTD(18). In HAYWARD v CHALLONER, a small area of land had originally been rented to the rector of Bilsthorpe on a yearly basis. However, after 1942 no further rent was paid for the use of the land as a garden. In 1966, the plaintiffs who were the freeholders of the disputed land in question brought an action for possession of the land against the defendant, the then incumbent of Bilsthorpe. The defendant claimed that he and his predecessors had been in adverse possession for more than twelve years since the end of the period covered by the last payment of rent, and consequently the plaintiff's right of action was statute barred under the Limitation Act 1939. There was evidence that the only reason why the plaintiffs and their predecessors in title had not asked for the rent in respect of the land was because they did not feel, as loyal churchmen, they could make such a request of the rector of the church. In these circumstances, Lord Denning in his dissenting judgement, declining to find adverse possession, commented:

> "In any case, acts of user are not enough to take the title and of the plaintiff unless they are "inconsistent with the enjoyment of the soil for the purpose of which he intended to use it" (see LEIGH v JACK (3) per Brett L.J.). The user of this little piece as a garden was not inconsistent with the owner's enjoyment. He was content to let it be so used; just as if he had permitted it to be used in this way under licence (see COBB v LANE (4)...."(19)

In WALLIS'S CAYTON BAY HOLIDAY CAMP LTD.v SHELL-MEX AND B.P. LTD(20), Lord Denning elaborated on the idea of an implied licence, this time gaining the support of Ormrod L.J. and thus forming the majority decision. Briefly, the facts of the case may be stated as follows. The

local authority decided to re-route a major road (A165) through a caravan site and a field. A garage proprietor bought the strip of land which formed part of the field (the disputed land) between the existing road and the proposed new road, intending to re-position the garage when the road development took place. But in 1961, he sold the garage and disputed land to the defendants. Also in 1961, the plaintiffs, who ran a holiday camp, bought the rest of the field, the conveyance excluding the strip of land running through it which represented the proposed new road and also excluding the disputed land. However, there was nothing in the field to mark the new boundaries or to distinguish between the plaintiff's and defendant's land. For ten years, the plaintiffs, through a subsidiary farming company, used the field, including the disputed land, for agricultural purposes, which included grazing cattle and growing wheat. After ten years, they used the whole area as a holiday camp and the disputed land formed a "visual frontage amenity". In 1972, the local authority abandoned their plans to build the new road. Consequently, as the disputed strip was surplus to the defendant's requirements, they decided to sell it and wrote offering it to the plaintiffs. The plaintiffs took legal advice and did not reply to the offer. In June 1973, the defendants fenced off the boundary of the disputed land and the plaintiffs then claimed that they had acquired a possessory title under the Limitation Act 1939.

On these facts, Lord Denning maintained that actual possession of the disputed land by the plaintiffs was not sufficient to establish a title based on adverse possession. He stated:

> "... Possession by itself is not enough to give title. It must be adverse possession.... When the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose, like stacking materials or seasonal purpose, like growing vegetables.... see LEIGH v JACK (1879) 5 Ex D 264; WILLIAMS BROTHERS DIRECT SUPPLY LTD v RAFTERY [1958] 1 QB 159; and TECBILD LTD v CHAMBERLAIN (1969) 20 P + CR 633. The reason is not because the user does not amount to actual possession. The line between acts of user and acts of possession is too fine for words. The reason behind the decision is because it does not lie in that other person's mouth to assert that he used

> the land of his own wrong as a trespasser. Rather, his user is to be ascribed to the licence or permission of the true owner. By using the land, knowing that it does not belong to him, he impliedly assumes that the owner will permit it; and the owner, by not turning him off, impliedly gives permission."(21)

From the above, it can be seen that, in relying on LEIGH v JACK(22), WILLIAMS BROTHERS DIRECT SUPPLY LTD v RAFTERY(23) and TECBILD v CHAMBERLAIN(24), Lord Denning interpreted the cases not, as they have been generally understood as drawing a distinction between acts of user and acts of possession for the purpose of ascertaining whether the title holder had been dispossessed, but as establishing a principle that, where a person enters on to the land of another without that other's express permission, and the use he makes of the land is not inconsistent with the paper owner's present or future use or enjoyment of it, it may be implied, as a matter of law, that the user is by licence or permission.(25)

Ormrod L.J.'s judgement seems to support the doctrine of an implied licence, preventing, in this instance, a finding of adverse possession, for he stated:

> "In my judgement, the acts of the plaintiffs in cutting the grass or hay, grazing cattle and occasionally ploughing the defendants' strip of land, in no way prejudiced the defendants' enjoyment of it for the purposes for which they had originally acquired it, namely, for development as a garage or filling station when the time was ripe. Their trespass, relative to the defendants' practical interests in this land, can properly be regarded as trivial. This may be tested by considering their probable response to a request by the plaintiffs for permission to do what in fact was done on the land. The overwhelming inference is that the defendants would have responded in the same way as the North Riding County Council in respect of their strips, by readily agreeing and asking, at most, a nominal consideration, so long as no sort of protected tenancy was created."(26)

There was however a strong dissenting judgment from Stamp L.J in which he denied a licence could be found. Moreover, the Law Reform Committee, in its Twenty First Report, " Final Report on Limitation of Actions"(27), considered that WALLIS'S CAYTON BAY HOLIDAY CAMP LTD. v SHELL-MEX AND B.P. LTD and GRAY v WYKEHAM-MARTIN AND GOODE(28), (an unreported case of the Court of Appeal,

which followed it) in applying the doctrine of an implied licence where acts of the intruder are not inconsistent with the present or future user of the title holder, amounted to judicial repeal of the Limitation Act 1939. Consequently, paragraph 8 (4) of the Limitation Act 1980 now provides:

> "For the purposes of determining whether a person occupying any land is in adverse possession of the land, it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land."

However, paragraph 8 (4) continues:

> ".... This provision shall not be taken as prejudicing a finding to the effect that a person's occupation of land is by implied permission of the person entitled to the land in any case where such a finding is justified on the actual facts of the case."

Consequently, it is apparent that, despite the changes brought about by paragraph 8 (4) it remains open to a judge to find as a matter of fact an implied licence to be on the land existed and thus, it is very much open to question how far the Limitation Act 1980 has prevented the use of implied licences as a means of avoiding a finding of adverse possession. It is therefore proposed to examine the notion of an implied licence in adverse possession cases more closely, firstly to try to ascertain the circumstances in which it may be possible to imply a licence as a matter of fact, since the 1980 Act, and secondly, to consider whether the retention of implied licences to prevent the running of time is justified in the light of the whole purpose behind the concept of adverse possession.

To consider first the circumstances in which a licence may be implied as a matter of fact. Some assistance in ascertaining the criteria for implying a licence may be obtained from a line of cases concerned with an occupier's liability in the law of tort. From such decisions, it is apparent that at least where the licence does not involve permission to remain in exclusive possession of the land, an implied licence may be readily inferred. Admittedly, however, the decisions should be viewed with suspicion as there is evidence that the whole concept of an implied licence has been artificially extended in these cases to avoid the severity of the

common law before BRITISH RAILWAYS BOARD v HERRINGTON, which laid down a minimal duty of care owed by an occupier to a trespasser, as opposed to the higher standard which could be expected by a licensee. This was recognised by Lord Diplock in BRITISH RAILWAYS BOARD v HERRINGTON, where he went as far as saying that, in earlier cases:

> "...the "licence" treated as having been granted .... was a legal fiction employed to justify extending to meritorious trespassers, particularly if they were children, the benefit of the duty which at common law an occupier owed to his licensees...."(29)

It may well be that the courts will not in future go out of their way to infer a licence in occupier's liability cases as the duty of care owed to trespassers was made more just by the decision in BRITISH RAILWAYS BOARD v HERRINGTON and protection is now given by the Occupier's Liability Act 1984. Consequently the criteria for implying a licence, now to be discussed, will be narrowed down.

In EDWARDS v RAILWAY EXECUTIVE(30) and PHIPPS v ROCHESTER CORPORATION(31), the criteria to be adopted for implying a licence were particularly fully discussed. In the first mentioned case, the plaintiff, a boy aged 9, was hit by a passing train, whilst retrieving a ball from the other side of the railway line, after getting through a fence which separated a recreation ground from a railway embankment. The court had to decide whether the plaintiff was a licensee or a trespasser for the purpose of ascertaining the standard of the duty in tort owed to him by the occupier. It was found that the defendants had been aware for many years that children repeatedly climbed through the fence by breaking the wire to gain access to the embankment but they were able to show that they had repaired the fence whenever they saw the damage. On these facts, the court reached the conclusion that no licence could be implied to enter onto the defendant's land. Lord Porter had this to say about inferring a licence:

> ".... even assuming that the respondent has knowledge of the intrusion of children on the embankment, the suggestion that knowledge of itself constitutes the children licensees, in my opinion carries the doctrine of an implied licence much too far; though no doubt where the owner of the premises knows that the public or some portion of it is accustomed to trespass over his land he must take steps to show that he resents it and

will try to prevent the invasion ... "(32)

Lord Porter went on to refer to the earlier decision of LOWERY v WALKER(33) and commenting on the facts of that case, expressed the view that knowledge of constant use of a particular track coupled with failure to take steps to indicate that the ingress is not permitted may well amount to a tacit licence. However, he added that he did not think it would be necessary to take every possible step to keep out an intruder to prevent a licence from being inferred. This point was picked up by Lord Goddard, who stated:

> ".... the owner of a park in the neighbourhood of a town knows probably only too well that it will be raided by young and old to gather flowers, nuts or mushrooms whenever they get an opportunity. But because he does not cover his park wall with a chevaux de frise or post a number of keepers to chase away intruders, how is it to be said that he has licensed what he cannot prevent?"(34)

To what extent then must the occupier act to show objection to the presence of persons on his land to prevent a licence from being implied? Lord Goddard suggested it would be necessary to show that the landowner had so conducted himself that he cannot be heard to say that he has not given his permission.

It is interesting to note that Lord Oaksey(35) considered the state of mind of the licensee to be relevant. He suggested that, if the circumstances indicated that the licensee could have thought and did think that he was not trespassing, but was on the property in question by leave of the owner, then a licence should be implied. It is submitted that what Lord Oaksey intended was to express a view similar to that of Lord Goddard, just stated; that is, a licence should be implied, if the licensee has been led to think that he is not trespassing on the property by reason of the fact that the owner has so conducted himself that he cannot be heard to say he did not give his permission. In any other context, it seems totally inappropriate to imply a licence from the state of mind of the licensee.

In PHIPPS v ROCHESTER CORPORATION(36), Devlin J. discussed further factors to be taken into account in deciding whether a licence should be implied. The facts of the case were concerned with an action in tort against the owners of a piece of waste land, situated behind a housing estate, and undergoing development. The plaintiff, a five year-old, fell into a trench which had been dug for a sewer, whilst crossing the land in

question with his older sister on a blackberrying expedition. It was decided, in the circumstances, that a licence could be implied, although, on the facts of the case, this did not help the plaintiff as the defendants were entitled to assume that his parents would have acted more prudently before allowing a child of that age to wander off, and this being the case, they were not in breach of their duty to him.

In reaching his decision, Devlin J. drew a distinction between toleration on the one hand and permission on the other. He provided an example; the owner of moorland or downland, he said, may be well aware that people walk on his land for pleasure, but knowledge of this fact alone would not be sufficient to imply a licence. This would simply be a matter of toleration of trespassers. He then goes on to draw the distinction between what he calls a "casual" trespass by an individual who comes once, and perhaps never returns, and a trespass by an individual or class of person who form something of a habit of using the land for a given purpose. According to Devlin J., it is in the latter situation only that the question, of whether failure to take steps to prevent the invasion has induced the belief in those who use the land that they have the occupier's tacit permission to be there, becomes relevant.

Devlin J. further considered the question of the extent to which the occupier should be expected to prevent the invasion, in order to rebut the inference of a licence. He decided that this was a matter of degree depending on the circumstances of the case. On the facts before him, he suggested that a notice stating that no entry was permitted would have been sufficient.

A decision which was concerned with an implied licence to remain in exclusive possession of land was MORRIS v TARRENT(37). In this case, the plaintiff, who was the defendant's former wife, owned a farmhouse which had been the matrimonial home prior to the breakdown of their marriage. In 1963, the plaintiff left the house under protest. After the marriage was dissolved, the defendant remained in the property, although the plaintiff at no time granted him an express licence to do so. Between March 1964 and December 1967, the plaintiff on many occasions asked for possession of the house from the defendant, as he was unwilling to fix a price for which to purchase it from her. Eventually, in December 1967, he left. It was necessary to establish whether the defendant's occupation was as an implied licensee as the plaintiff was claiming compensation for his use and enjoyment of the property up until the date he vacated the premises. On these facts, Lane J. held that one

could not imply that the plaintiff had granted a licence to the defendant simply on account of her acquiescence. He further commented:

> "If a stranger with no claim whatsoever to be on the land of another trespasses thereon, he does not become the less a trespasser because the landowner does not immediately exercise his right to eject him."(38)

After making a reference to the fact that title would be barred under the Limitation Acts eventually, he continued:

> "Mere failure to evict a trespasser will not be sufficient reason in itself to imply a licence, although no doubt a situation might arise in which failure to take steps to evict a trespasser whose presence is known may amount to tacit permission to remain."(39)

For the sake of clarity, it is now proposed to summarise the principles taken from the case law outlined above, as to when a licence to be on land may be implied. Firstly, knowledge by an occupier that his land is being used for any purpose is not itself sufficient to imply a licence; this only amounts to toleration not permission. Secondly, permission may, however, be implied where: (a) a particular individual or group of individuals habitually make use of the land; and (b) the occupier fails to take the necessary steps within the appropriate period of time in the circumstances, to show he resents the invasion.

Applying these principles to adverse possession cases, it would seem first that, to imply a licence, knowledge of the activities of the intruder would be essential. Secondly, and perhaps rather ironically, the longer the title holder acquiesces in the possession of the intruder, and the nearer its end the limitation period draws, the easier it becomes to imply a licence to prevent a finding of adverse possession. Thirdly, the longer the intruder remains in possession, the greater the steps that are necessary to show resentment of the invasion to prevent a licence from being implied. In MORRIS v TARRENT, repeatedly asking for possession over a period of four and a half years, and eventually threatening court proceedings was sufficient to show no licence to remain in possession could be implied. However, it was indicated that, had the period been longer, these acts may not have been sufficient to show resentment of the defendant's presence.

To consider now the effect of these principles on decided adverse possession cases, in which a licence has been implied as a matter of law, to establish if it would have been equally possible to have implied a licence as a matter of fact. It would seem, from the facts of WALLIS'S CAYTON BAY HOLIDAY CAMP LTD. v SHELL-MEX AND B.P. LTD.(40) (although this is not made clear in any of the judgements in the Court of Appeal decision), that the defendants did not actually know of the activities of the plaintiffs throughout the limitation period. If this was so, clearly no licence could be implied. On the other hand, had there been knowledge on the part of the defendants, on the basis of the extent of the plaintiff's activities and the long period of acquiescence, it is arguable that nothing short of excluding the plaintiffs from the land would be sufficient to prevent the finding of a licence It should be noted that the principles on which Lord Denning and Lord Justice Ormrod implied a licence in this case could not support the finding of an implied licence in fact. Both judges considered the defendants' probable response, had they been asked by the plaintiffs for permission to use the disputed land, and concluded that they would have allowed such user in these circumstances, where they had no present use for the land. An implied licence in fact cannot arise out of a finding that a title holder, if asked, would have given his permission; this would only amount to an imputed licence.

POWELL v McFARLAND(41) followed WALLIS'S CAYTON BAY HOLIDAY CAMP LTD. v SHELL-MEX AND B.P. LTD in implying a licence in law where the activities of the intruder were not inconsistent with the present or future enjoyment of the freeholder. Very briefly, the disputed land was agricultural land. Whilst the freeholder was abroad in the civil service, the plaintiff entered the land and grazed the family cow on it. He later fenced it in and used it for various purposes including clay pigeon shooting and tethering a goat. At one stage, he also put a business advertising board on the land. During the limitation period, the freeholders, or their agents, only visited the land on a couple of occasions. Slade J. accepted the evidence that the freeholders were not aware of the activities of the intruders, and consequently, on these facts, he concluded:

> ".... it is manifestly impossible under any general principles of law to imply any licence or consent given to the plaintiff .... by [the defendant], who at that time was in Germany and had no knowledge of [the plaintiff's] existence...."(42)

It therefore follows that no licence could now be implied under Schedule 1 paragraph 8 (4) of the Limitation Act 1980.

On the other hand, it is quite clear, on the basis of the criteria discussed, a licence could have in fact been implied in the circumstances of HAYWARD v CHALLONER(43), the freeholders being completely aware of the possession of the land by the defendant and his predecessors in title, and acquiescing in it on account of their allegiance to the Church. It is arguable that the same finding could be made on the facts of TRELOAR v NUTE(44), where the defendant succeeded in establishing title based on adverse possession, and in which Sir John Pennycuick, delivering a leading judgement in the Court of Appeal, launched a strong attack on the doctrine of implied licences set down in the earlier Court of Appeal decision of WALLIS'S CAYTON BAY HOLIDAY CAMP LTD. v SHELL-MEX AND B.P. LTD. In TRELOAR v NUTE, the defendant and, before him, his father, believing the disputed land (which was derelict) was included in the purchase by them of land adjacent to that of the plaintiff, used it for various activities, namely grazing animals, dumping spoil, storage of materials, riding motor cycles, and eventually they levelled it off and, shortly before the action, set about the foundations for a bungalow. On a number of occasions, the plaintiff had protested about these activities through her solicitor and, on one occasion when the defendants erected a fence on the disputed land, she had it removed. However, it was not until after the expiration of the limitation period that court proceedings were brought for an injunction to prevent further trespass on the land by the defendants. If one accepts the principles put forward in MORRIS v TARRENT(45), it is arguable that, in the light of the extent of the activities of the defendants and the long period of acquiescence on the part of the plaintiff, a licence could have been implied so as to prevent a finding of adverse possession.

TRELOAR v NUTE is also an interesting decision on account of the references made to it by the Law Reform Committee's "Final Report on Limitation of Actions". (46) After criticising WALLIS'S CAYTON BAY HOLIDAY CAMP LTD. v SHELL-MEX AND B.P. LTD and the decisions which followed it in establishing the doctrine of an implied licence, the Committee went on to say:

> "We consider that the law should be restored to the law as stated in TRELOAR v NUTE. There can, in our view, be no justification for implying a licence or other similar position, in any case in which there is no factual basis for such

implication...."(47)

What is somewhat confusing about this view is that, in the course of his judgement, Sir John Pennycuick made reference to a "special type" of adverse possession case. Apart from this "special type" of situation, he considered the law to be as follows:

> ".... if a squatter takes possession of land belonging to another and remains in possession for twelve years to the exclusion of the owner, that represents adverse possession and, accordingly, at the end of the twelve years, the owner's title is extinguished.... The simple question is, "Did the squatter acquire and remain in exclusive possession?"(48)

According to Sir John Pennycuick, the "special type" of situation arises where the owner of a piece of land had retained it with a view to its utilisation for some specific purpose in the future and, meanwhile, some other person had physical possession of it; in this type of case, it was necessary to show that the acts done by the intruder inconvenienced in some way the title holder. He then quoted LEIGH v JACK(49), WILLIAMS BROTHERS DIRECT SUPPLY LTD v RAFTERY(50) and WALLIS'S CAYTON BAY HOLIDAY CAMP LTD v SHELL-MEX AND B.P. LTD(51), as examples of cases falling within this category. Later, he went on also to observe:

> "...that all these cases were concerned with a narrow strip of land of such a character that the acquisition of a possessory title to it would not fall within the ordinary purview of the statute and the court was clearly anxious not to put too literal a construction upon the words of the statute."(52)

In the light of the Law Reform Committee's approval of the decision in TRELOAR v NUTE, the question arises as to whether Sir John Pennycuick's "special type" of case is one of the circumstances in which the Committee envisaged a licence may be implied as a matter of fact. However, if the criteria on which a licence may be implied in fact, as analysed above, are accepted, it does not necessarily follow that in all the circumstances a licence may be implied in the "special type" of case referred to in TRELOAR v NUTE. For example, if the title holder with a future purpose for his land has no knowledge of the activities of the intruder, no licence could be implied as a matter of fact even though the activities were not inconsistent with the title holder's future purpose.

It would seem therefore that in the "special type" of situation, the grant of a licence is being imputed to the paper owner rather than implied as a matter of fact. Consequently, the question arises as to whether this is what the Law Reform Committee intended to preserve in Schedule 1 paragraph 8 (4) of the Limitation Act 1980. Moreover, the "special type" of case isolated by Sir John Pennycuick carries with it problems in itself. First of all, the special type of situation only arises where an owner of land has future intentions for a "narrow strip", how narrow does the strip have to be to fall within the exception? In TRELOAR v NUTE, it was one-seventh of an acre; in WALLIS'S CAYTON BAY HOLIDAY CAMP LTD. v SHELL-MEX AND B.P. LTD., it was 1.33 acres. Secondly, what evidence from the owner of future plans for the land is necessary? Can the owner simply assert that he had a future purpose for the land or must there be some concrete evidence of his intentions? If the former is true, then this would lead to the undesirable situation where the owner could stand by and allow an intruder the use of the land, and then any time later claim that the user was consistent with the purpose which was only known to him.

Thus despite paragraph 8 (4), there is still scope for judges to use the concept of a licence to avoid a finding of adverse possession, although the precise limits of the potential remain uncertain. Nevertheless, it would appear to be equally possible to avoid a finding of adverse possession by other means such as by placing a heavy burden on the intruder to establish an intention to possess. This approach was taken by Slade J. in POWELL v McFARLAND(53) where he expressed the view that intention to possess must be made clear to the world at large. Furthermore, it is quite possible to continue the doctrine of necessary inconvenience, but to detach it from the concept of an implied licence, and attach it instead to the requirement that the title holder must have discontinued possession or have been dispossessed. Thus, rather than saying that the title holder impliedly gives his permission (licence) when another enters his land and uses it in a manner which is not inconsistent with the present or future intentions of the owner, it could be argued, on this account, that the owner remains in possession. This approach seems to have been taken in LEIGH v JACK(54). Leigh owned land though which a thoroughfare ran. He intended to develop it into a public highway. In the meanwhile, he sold off part of the land to Jack, the other part he sold to a third party who eventually sold the land to Jack also. Jack therefore owned a plot of land with the narrow strip intended as thoroughfare running through it. He began to

dump waste from an iron foundry on the narrow strip and eventually fenced it. The court had to decide whether these acts amounted to adverse possession. Cockburn C.J. had the following to say:

> ".... those acts do not amount to dispossession.... The plaintiff .... did not intend to abandon ownership of the soil .... his [defendant's] acts were those of a man who did not intend to be a trespasser or to infringe upon another's rights. The defendant simply used the land until the time should come for carrying out the object originally contemplated. If a man does not use his land, ... he does not necessarily discontinue possession of it."(55)

Consequently, it is arguable that the same ends can be achieved by different means and without the concept of a licence. The decision in BP PROPERTIES. v BUTLER(56) has revealed a new role for licence concepts in adverse possession cases, this time the grant of an express unilateral licence to occupy. The facts of the case were as follows. Proceedings for possession of a certain farmhouse and garden had been brought in 1962 well before there had been twelve years adverse possession, although it was not disputed that the possession there had been was adverse. A possession order was granted but no attempt was made to enforce until 1974 when the then freeholder started a fresh action for possession against the defendant's mother and her family. At the time the mother argued that she had by 1974 already been in adverse possession for twelve years and consequently the freeholder's title was barred by the Limitation Act 1939. As a result of this the 1974 action for possession was never heard but instead the freeholder obtained leave to enforce the 1962 possession order, but the defendant lodged an appeal for a stay of execution of the order. Against this background, two letters were written to the defendant's mother, the first from the plaintiff's predecessor in title informing her that the freehold was to be sold and saying that her appeal for a stay of execution was unnecessary. The second was from the plaintiff's as prospective purchasers of the property and said that they were prepared to allow her to remain rent free as long as she wished adding that they would not require her to give possession during her lifetime or until she chose no longer to live there. These letters were presented to the judge by the mother's solicitor and the judge stayed the execution on the warrant for possession pending the mother's agreement to the proposals in the letter. However the freeholders withdrew the warrant for possession so that the mother was never in fact required to accept or reject the terms of the

letter and she remained in the house until her death.

On these facts the Court of Appeal (Dillon, Mustill L.JJ and Sir Edward Eveleigh) decided, after a judgment for possession had been given in 1962, within the limitation period, the plaintiff had twelve years from the date of judgment to enforce the order. Consequently, the leave given in 1974 to enforce the 1962 order, being within twelve years, was valid. Nevertheless, it was still necessary to consider whether the possession since 1974 had been adverse. The plaintiff claimed it was not because the defendant's mother had a unilateral licence to occupy until her death in 1983. She was therefore no longer in adverse possession and time ceased to run in her favour. It was pointed out by Lord Justice Dillon that to allow a unilateral licence to occupy to stop time running would enable a person who was not prepared to incur the obloquy of bringing proceedings for possession or of enforcing a possession order, to keep alive his title for many years until it suited him to evict the party in possession. Despite this he considered possession could not be adverse if it were lawful, as was possession by licence. This was so even though the defendant's mother did not "accept" the terms of the letter. This was because the plaintiff would have been bound to treat her as in possession as licensee in the absence of any repudiation by her of the letters, and could only have evicted her by determining the licence.

The question remains whether the finding of an implied licence as a matter of fact or an express unilateral licence should in any event be allowed to prevent the running of time in adverse possession cases. This requires consideration of the whole purpose behind the concept of adverse possession and whether it still serves a useful purpose. The policy behind the principle of limitation of actions and, in particular, of adverse possession, seems to be basically threefold. Firstly, it is to avoid injustice from loss of documents, witnesses etc. which may make it difficult to establish a defence to negative a claim to possession. This point was made by Lord St. Leonards in DUNDEE HARBOUR TRUSTEES v DOUGLAS:

> "All statutes of limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost, and in well-regulated countries the granting of possession is held an important part of policy."(57)

However, owing to the continuing extension of registered conveyancing throughout England and Wales, this

particular purpose for retaining the principle of adverse possession is undoubtedly declining in importance. Secondly, given that certainty is vital in the sphere of property rights, and given also the significance which the law has attached to possession of land as opposed to absolute title, it remains important, despite the introduction of registered conveyancing, that de facto possession should coincide with title to land. This was recognised by the Law Reform Committee in their report on acquisition of Easements and Profits by Prescription when it commented:

> ".... certainly, if title to land is a social need occupation of land which has long been unchallenged should not be disturbed."(58)

In relation to unregistered conveyancing, certainty of title is further important as the principle of adverse possession serves to cure conveyancing errors. If one accepts that certainty is one of the main reasons for retaining the concept of adverse possession, it seems unjustifiable to allow the finding in fact of an implied licence to prevent the running of time, firstly because it leads to a situation where the de facto possession of the land does not coincide with the paper title, and secondly the whole vague notion of an implied licence itself leads to uncertainty.

The third main reason for the principle of limitation of actions in relation to land is that it is considered unjust that a party should be at the risk of stale demands, the existence of which he may well be quite unaware of, or owing to a change in circumstances he is no longer in a position to satisfy. In A'COURT v CROSS(59), Best C.J. described the statute incorporating the provisions relating to limitation as "as Act of Peace" and pointed out "that long dormant claims have often more cruelty than justice in them". Similarly, in R.B. POLICIES AT LLOYDS v BUTLER, Streatfield J. explained:

> "It is the policy of the Limitation Acts that those who go to sleep upon their claims should not be assisted by the courts recovering their property, but another, I think, equal policy behind the Acts is that there should be an end to litigation."(60)

From the analysis provided of the circumstances in which a licence may be implied in fact, it is clear that a degree of acquiescence is essential. Surely, this is a form of "going to sleep upon one's claim", and therefore precisely one of the things the concept of adverse

possession seeks to protect against. However, it is obvious from some judgements in adverse possession cases, that the importance attached to the "justice" purpose for maintaining a principle of adverse possession has either been diminished or totally ignored. This is largely because the judiciary have tended to look exclusively at the strict morality of the situation between the parties at the expense of the policies behind adverse possession. For example, Ormrod L.J., in respect of the activities of the plaintiffs in WALLIS'S CAYTON BAY HOLIDAY CAMP LTD. v SHELL-MEX AND B.P. LTD., commented:

> ".... the interests of justice are not served by encouraging litigation to restrain harmless activities merely to preserve legal rights, the enjoyment of which is for good reason, being deferred."(61)

Similar sentiments were expressed by Sellers L.J. in WILLIAMS BROTHERS DIRECT SUPPLY STORES LTD.v RAFTERY:

> "The true owners can, in the circumstances, make no immediate use for the land and, as the years go by, I cannot accept that they would lose their rights as owners merely by reason of trivial acts of trespass or user which in no way would interfere with a comtemplated subsequent user. I am glad to think that this appeal must be allowed."(62)

Moreover, turning back to the judgement of Ormrod L.J. in WALLIS'S CAYTON BAY HOLIDAY CAMP LTD. v SHELL-MEX AND B.P. LTD., it is interesting to observe that at one point when he was considering the probable response of the defendants, had they been approached by the plaintiffs with a request for permission to use the land, Ormrod L.J. expressed the view that the defendants would have responded:

> ".... by readily agreeing and asking at most a nominal consideration so long as no sort of protected tenancy was created."(63)

In other words, he was in effect acknowledging that they would probably have responded by tying up their permission in a proper way so as to protect their own legal rights. Surely this is precisely what the concept of adverse possession should encourage in the interests of promoting both justice and certainty. It is therefore submitted that time should not be prevented from running by statute, where a licence may be implied as a matter of fact, as landowners should be encouraged to, and only be protected if they do, give proper legal effect to

arrangements regarding possession of their land.

References Section III

1. This consolidated the Limitation Act 1939 as amended by the Limitation Amendment Act 1980.

2. Sched 1 para 1 and para 8 (1) Limitation Act 1980 and per Sir John Pennycuick TRELOAR v NUTE [1977] 1 All ER 230 at p. 234.

3. See for e.g. the stringent requirements set down by Slade J. in POWELL v McFARLANE (1977) 38 P and CR 452 to establish the necessary animus possidendi for possession.

4. [1952] 1 All ER 149. For facts see ante p. 6.

5. [1952] 1 All ER 1199. For facts see ante p. 38.

6. [1969] 1 WLR 23.

7. [1974] 3 All ER 406.

8. Supra at p. 154.

9. See ante Section I (b).

10. See ante Section I (a).

11. Supra at p. 410.

12. Supra at p. 410.

13. See ante Section I pp 16-20.

14. [1985] 2 All ER 289.

15. Limitation Amendment Act 1980 S. 3 (1) repeated by Limitation Act 1980 which embodies the principle in 4th Schedule.

16. "The Times" 13th August 1987. For facts see post p. 108.

17. [1967] 3 All ER 122.

18. [1974] 3 All ER 575.

19. Supra at p. 125.

20. Supra.

21. Supra at p. 580.

22. (1879) 5 Ex D 264.

23. [1958] 1 QB 159.

24. (1969) 20 P and CR 633.

25. For criticism of this interpretation see Dockray "Adverse Possession and Intention - II" (1982) 46 Conv. 345.

26. Supra at p. 591.

27. Cmnd 6923 (1977).

28. [1977] Bar Transcript No. 10A (CA).

29. [1972] AC 877 at p. 933.

30. [1952] AC 737.

31. [1955] 1 QB 450.

32. Supra at p. 744.

33. [1911] AC 10.

34. Supra at p. 746.

35. Supra at p. 748.

36. Supra.

37. [1971] 2 QB 143.

38. Supra at p. 159.

39. Supra at p. 160.

40. Supra.

41. (1977) 38 P and CR 452.

42. Supra at p. 470.

43. Supra.

44. [1977] 1 All ER 230.

45. Supra.

46. Supra.

47. Supra at para 3.52.

48. Supra at p. 1300.

49. Supra.

50. Supra.

51. Supra.

52. Supra at p. 1302.

53. Supra.

54. (1879) 5 Ex D 264 followed in WILLIAMS BROTHERS DIRECT SUPPLIES LTD v RAFTERY [1958] 1 QB 159 (CA).

55. Supra at pp 270-1.

56. "The Times" 13th August 1987.

57. (1852) 1 Macq 317.

58. Cmnd No. 3100 1966 para 36.

59. (1825) 3 Bing 329 at p. 332.

60. [1950] 1 KB 76 at p. 81.

61. Supra at p. 590.

62. [1957] 1 QB 159 at p. 173.

63. Supra at p. 591.

SECTION IV

Informal family and quasi-family arrangements for occupation of property.

(a) The need for licence concepts.

In the first Section of this thesis, the development of the possessory licence was traced and, in the second section, it was seen how this development was influenced and used in order to avoid giving Rent Act protection to certain classes of occupier. For this purpose therefore the licence was not being used as a vehicle to safeguard occupational rights. In contrast, in this final Section, it is intended to study how the licence has been further developed, outside the rented sector for precisely the opposite object, namely to provide residential security. This study will involve consideration of whether the development was necessary and desirable and will look at present and possible future trends involving use of licence concepts.

The provision of residential security by means of the development of the occupational licence along with other concepts (e.g. constructive trust) has become necessary on account of the fact that the entire structure and machinery of real property rights as embodied in the 1925 legislation(1) is directed towards protection of the investment value of land rather than to its use value. The principles of the 1925 legislation were established against a background in which only a small percentage of homes were owner-occupied. Family homes were often the subject matter of a family trust. They were, as such, held by trustees as a capital asset yeilding income, to be distributed in accordance with the terms of the trust which only in some cases empowered the trustees to permit beneficiaries to occupy a house which was the subject matter of the trust. Furthermore, during the 19th century, the propertied classes had taken advantage of the demand for houses fuelled by the Industrial Revolution and population growth(2), by setting out and building estates which thereafter provided a source of revenue through rents. The primary concern therefore of the 1925 legislators was to facilitate the free alienation of land(3). However, changes had already begun to occur in the late 19th century and early 20th century the effects of which were subsequently to be felt. The purchase of land as an investment declined in popularity for a variety of reasons. The idea of building estates for renting became less attractive, owing to statutory intervention, firstly in the form of public health legislation(4) which interfered with the developers' freedom to build as he pleased, and later

more extensively in the development of a comprehensive system of planning law(5). The introduction of taxation of land(6) undoubtedly added to the accumulating disincentives and a further blow was struck with the introduction of the Rent Acts(7), putting limitations on rents and providing tenants with security of tenure.

The result of these disincentives to invest in land was that land became available for sale. Coupled with this, after the first World War, the Building Societies had already begun to develop as an important force, enabling many who would not otherwise have had the opportunity of becoming owner-occupiers, to acquire a house by means of a mortgage. The destruction caused by the first World War had led post-war governments to subsidise private house building as well as public sector building. Real incomes rose for those who were in work and falling prices and building costs boosted the supply of houses, both factors which created a favourable environment for Building Societies. In 1933 the climate for the development of the Building Societies further improved when government subsidies were withdrawn from the public sector(8). Investment in Building Societies became attractive owing to the security of the Societies and favourable interest rates. In consequence, mortgages became cheaper and their terms easier enabling more people to grant them. The movement towards owner-occupation has been continuously supported by Conservative governments in the form of tax subsidies to home owners(9), and, more recently, by the sale of council houses(10), as well as tax and other incentives to Building Societies, although tax incentives for Building Societies have now been abolished. Today over 60 per cent of homes are owner-occupied, approximately half of these have outstanding mortgages of which in 1978 95 per cent were from Building Societies. Owner occupation has tripled from 4m in 1951 to nearly 14m in 1985 ("Social Trends" 17 1987)

The changes in the structure of ownership of property have been noted by the judiciary. For example, in PETTITT v PETTITT, Lord Diplock commented that recent years had seen the:

> "...emergence of a property-owning, particularly real property-mortgaged-to-a-building-society-owning democracy."(11)

and, in WILLIAMS AND GLYN'S BANK LTD v BOLAND, Lord Wilberforce noted that the great affluence following the two World Wars has brought about:

> "the extensions, beyond the pater familias, of

rights of ownership; itself following from the diffusion of property and earning capacity."(12)

A number of theorists(13) argue that the changes in the structure of ownership in the 20th century have brought about a more subtle transformation in property rights. "Ownership" of tangible rights is no longer so important as the "ownership" of intangible non-assignable assets of a personal nature such as job security, rights to a pension and the undisturbed possession of a house. This they call the "new property". Thus, in an essay entitled "Changes in the Bonding of the Employment Relationship"(14) Glendon and E.R. Lev argue that, whereas, in the past, economic security lay within the family, now, in an age of divorce and increasingly attenuated family ties, the primary source of economic security no longer lies with the family but with an individual's employment or, if he has none, in his dependency relationship with the government through social security. Therefore, they observe, legal principles have altered so that, whereas in the past it was very easy for an employee to be dismissed and very difficult to obtain a divorce, the position is now reversed. So, in an age of great insecurity, due to the housing shortage, economic recession, the unprecedented rate of family breakdown, residential security has become a top priority. This factor has been recognised by the legislature in the Rent Acts(15), the Housing Act 1980(16), with respect to public sector rented accommodation, the Matrimonial Homes Act 1983(17) S.36, Administration of Justice Act 1970 as amended by S.8 of the 1973 Act(18), and the domestic violence legislation, namely the Domestic Violence and Matrimonial Proceedings Act 1976 and the Domestic Proceeding and Magistrates' Court Act 1978(19), to mention only the main provisions. It is also apparent that the need for residential security has been judicially acknowledged in the area of recognised property rights. For example, in the sphere of co-ownership of family property, this is apparent from the manner in which the courts exercise their discretion under S.30 of the Law of Property Act 1925 in deciding whether to order a sale of property held in trust for sale; also from the fact that the doctrine of conversion has been increasingly less rigidly applied (20) in cases of ownership of property under an implied trust for sale where the primary purpose of acquisition is generally for occupation and not as a form of investment; and, from this, the somewhat dubious finding by the Court of Appeal in BULL v BULL(21) (followed in WILLIAMS AND GLYN'S BANK v BOLAND(22)) that a tenant in common under a statutory trust for sale has a right to possession before sale.

A further example of judicial recognition of the

importance of residential security may be drawn from the law relating to mortgages. In addition to the statutory powers protecting the mortgagor's possession of the mortgaged property, some judges have sought to impose limits or even totally abrogate the mortgagee's right to possession of the property. (23)

Licence principles have an important role to play in the protection of residential security where no protection by virtue of a traditionally recognised proprietary interest in the property exists, although it is interesting to note that licence concepts originally began their development in the sphere of commercial relationships. It is possible to categorise into three the areas in which licences have been utilised to protect occupation. First of all, between 1952 (24) and 1965 (25),licence concepts were used to protect against third parties the deserted wife's occupation of the matrimonial home.

The leading case was the decision of the Court of Appeal in BENDALL v McWHIRTER(26). A husband, who was sole owner of the matrimonial home, had deserted his wife, and, on leaving, had said she could have the house and furniture. He was, however, later declared bankrupt and the trustee in bankruptcy sued the wife for possession in order to enable a sale of the property. A possession order was refused on the grounds that the court's power under S.17 of the Married Woman's Property Act 1882, to permit a wife to remain in the matrimonial home, could be exercised not only between husband and wife but also between wife and purchaser from the husband who took with notice of the wife's rights. Romer L.J. whose judgement was approved by Somervell L.J., held that the deserted wife was "a licensee with a special right" under which the husband could not turn her out except by order of the court, and, as the trustee in bankruptcy was in no better position than the husband, he took subject to the clog or fetter which bound the bankrupt. Denning L.J.'s judgement was more far-reaching and controversial. He maintained that the wife's licence to occupy, analogous to a contractual licence, was an "equity" which the trustee in bankruptcy took subject to and could not revoke. It resembled the wife's right to pledge her husband's credit for necessaries and flowed from the status of marriage, coupled with the fact of separation and the husband's misconduct. He went on to support his decision by, somewhat dubiously, comparing the negative covenant of a contractual licensor not to revoke the licence, with a restrictive covenant, claiming the deserted wife's equity was binding in the same way. The approach of the Court of Appeal created numerous conceptual and practical problems. For example, it was unclear whether the "equity" arose on marriage or

desertion, which in turn raised questions of priorities. If the "equity" arose on desertion, this would require the third party to investigate whether the complex matrimonial cause of desertion had been satisfied. It was also unclear whether the "equity" would arise on the occurrence of not only desertion but other matrimonial offences which existed at the time, such as adultery and cruelty, and the duration of the "equity" was also undefined. For instance, would it determine if the wife committed a matrimonial offence or the husband returned? These questions need not concern us, as the deserted wifes' equity was shortlived, the notion being overruled by the House of Lords in NATIONAL PROVINCIAL BANK LTD. v AINSWORTH(27). The Law Lords were especially critical of the vague nature of the deserted wives' interest and its repercussions for established real property law concepts. Lord Hodson, for example, commented:

> "Equity may not be past the age of child-bearing but an infant of the kind suggested would lack form and shape."(28)

It is interesting to note that Lord Wilberforce considered "the ultimate question" to be whether deserted wives could:

> "...be given the protection which social considerations of humanity evidently dictate without injustice to third parties and a radical departure from the sound principles of real property law."(29)

With respect to deserted wives, the Law Lords considered the price of justice to be too high. But on account of the decision in NATIONAL PROVINICAL BANK LTD v AINSWORTH, the Matrimonial Homes Act 1967 was passed to protect occupation of the matrimonial home by spouses who had no proprietary interest in the property. Nevertheless, despite its demise, the deserted wife's licence remains of interest, to the extent that it has influenced the development of licence principles and for the purpose of drawing comparisons between the conceptual and practical objections which led the House of Lords to deny the existence of an "equity" with other areas where the occupational licence has been allowed to flourish with regard to residential property.

Secondly, and more recently, licence principles have been used and continue to be used, to protect occupation of the quasi-matrimonial home by cohabitants. There is evidence that cohabitational relationships are on the increase(30) Certainly, such relationships now exist openly and their general acceptance across society has

given rise to a willingness in English law to give effect to family ties "in the widest sense". For instance, in the 20th century, legislation has gradually assimilated the rights of an illegitimate child with those of a legitimate child(31) although significant differences still remain as regards support obligations, succession rights and custody issues(32); the Domestic Violence and Matrimonial Proceedings Act 1976 has given cohabitants similar protection from domestic violence to that available to spouses; the Inheritance (Provision for Family and Dependants) Act 1975 has afforded a cohabitee certain rights to the estate of a deceased partner; and the Administration of Justice Act 1982, amending the Fatal Accidents Act 1976, gives a cohabitant rights to claim under the 1976 Act in the event of a fatal accident.

Moreover, it is not only the legislature which has been prepared to recognise rights and obligations arising out of cohabitational relationships, but the judiciary have also proved willing in this respect. For example, in DYSON v FOX(33), the Court of Appeal was prepared to accept that the notion of the "family" as used in the Rent Acts in relation to rights of succession of a statutory tenant, had altered since 1950. The court held that a woman who had cohabited with a man for 21 years in a house rented by the man came within the ambit of the word "family", even though, on very similar facts, the Court of Appeal in GAMMANS v EKINS(34), had not been willing to accept that such a woman was protected by the Acts. Bridge L.J. commented:

> "... between 1950 and 1975, there has been a complete revolution of society's attitudes to unmarried partnerships of the kind under consideration. Such unions are far commoner than they once used to be. The social stigma attached to them has almost, if not entirely, disappeared."(35)

Furthermore, in the sphere of co-ownership of property, the courts have, in varying degrees, recognised the rights and obligations arising from cohabitational relationships. In cases concerned with establishing an interest in property, Lord Denning, in particular, when presented with the problem of the breakdown of such a relationship, had a tendency to employ the principles of resulting and constructive trusts, so as to obtain an analogous result to that obtained by judges in the exercise of their discretion under the Matrimonial Causes Act 1973 on divorce. For example, in COOKE v HEAD, Lord Denning commented:

> "I do not think it is right to approach this case by looking at the money contributions and dividing up the beneficial interest according to those contributions. The matter should be looked at more broadly, just as we do in husband and wife cases."(36)

Similarly, in EVES v EVES, in the course of his judgement, Lord Denning commented, of the plaintiff:

> "It is clear that her contribution was such that if she had been a wife she could have had a good claim to have a share in [the house] on divorce.... "(37)

Taking this into account, he concluded that the plaintiff had a quarter share in the property. In BERNARD v JOSEPHS, Lord Denning was even more direct:

> "In my opinion, in ascertaining the respective shares, the courts should normally apply the same considerations to couples living together (as if married) as they do to couples who are truly married. The share may be half and half, or any such proportion as in the circumstances of the case appears to be fair and just."(38)

He later added:

> "...these cases about the homes of couples living together are so similar to those of husband and wife that.... they should be started in the Family Division or transferred to it, rather than the Chancery Division."(39)

Griffiths L.J. was more cautious. He pointed out:

> "There are many reasons why a man and a woman may live together without marrying, and one of them is that each values his independence and does not wish to make the commitment of marriage; in such a case, it will be misleading to make the same assumptions and to draw the same inferences from their behaviour as in the case of a married couple. The judge must look most carefully at the nature of the relationship, and, only if satisfied that it was intended to involve the same degree of commitment as marriage, will it be legitimate to regard them as no different from a married couple."(40)

Admittedly, the decision in BURNS v BURNS(41), followed in WALKER v HALL(42), shows clear signs of a move away

from using resulting and constructive trust principles in cases concerned with breakdown of a relationship between cohabitees to achieve similar results to principles of division of property on divorce.In BURNS v BURNS, May L.J. expressed the view that:

> "As Parliament has not legislated for unmarried couples as it has for those who have been married, the court should be slow to attempt in effect to legislate themselves."(43)

Nevertheless, the judiciary have more consistently been willing to give effect to obligations arising out of cohabitational relationships in the exercise of their discretion to order a sale under S.30 of the Law of Property Act, where the cohabitants are co-owners of property under a statutory trust for sale. The present trend began with the decision of the Court of Appeal in RE EVERS(44). S.24 of the Matrimonial Causes Act 1973 sets out the extensive powers of the divorce court to make property adjustment orders on divorce, nullity or judicial separation. Although Ormrod L.J. expressly denied the relevance of cases decided under S.24 Matrimonial Causes Act 1973, he was prepared to find that the provision of a family home, where children were involved or resulted from the relationship, may constitute, in the same way as between spouses, a "continung purpose" justifying the court in refusing an order for sale under S.30 of the Law of Property Act 1925. He considered that such an approach, adopted in relation to section 30 cases, enabled the court to bring the exercise of its discretion into line with the discretion given under S.24 of the Matrimonial Causes Act 1973, and so:

> " ..go some way to eliminating the differences between legitimate and illegitimate children in accordance with present legislative policy."(45)

This assimilation is further added to by the willingness of the court in section 30 cases beginning with DENNIS v McDONALD(46), to order payment of an occupation rent by the party remaining in the property on breakdown of the relationship, and also to give at least some indications of the circumstances in which a sale may be ordered, comparable with the so called Mesher order(47) once popular in matrimonial cases.

The possessory licence has also been used by the courts to achieve a similar objective of resolving property disputes on breakdown of cohabitational relationships, where an interest in property on trust principles cannot be established; or, arguably(48), simply as an

alternative device for balancing out the interests of the parties in breakdown to resulting or constructive trust principles. It is of course questionable whether the judiciary should, by means of trust or licence concepts, impose similar obligations on cohabitees to those undertaken by persons who have chosen to marry. To do so is an attack on the freedom of the individual because, in effect, it deprives a person of the right to contract out of marriage. Deech expresses the view:

> "The creation of special laws for cohabitants of the extension of marital laws to them retards the empancipation of women, degrades the relationship and is too expensive for society in general and men in particular....."(49)

However, to deny that obligations ever arise out of such relationships would undoubtedly lead to unjust results in some cases, given that many women are in fact still in a position of economic dependency, not to mention the increased burden of support for the weaker party on the public purse. Moreover, as Griffith L.J. recognised, in BERNARDS v JOSEPH(50), cohabitational relationships may exist for a variety of reasons and the intentions of the parties towards one another may consequently be very different. It may well be that one or both of the parties are already married to someone else or do not wish to remarry because they may lose on financial provision from an already divorced spouse, but nevertheless intend their relationship to be permanent. It is submitted that the courts should continue to scrutinise closely the nature of the relationship between the parties as they have done in some cases(51) and, only if satisfied that the relationship amounts to a de facto marriage, should they use the existing legal principles to impose quasi-spousal support obligations. Obviously, an assessment of the basis of the parties' relationship will be difficult to make, but, even if legislation were to be passed to impose obligations of quasi-spousal support on cohabitees, lines would have to be drawn and judgements made about the nature of the relationship.

It has already been noted that BURNS v BURNS(52) may mark a movement away from the practice by the judiciary of resolving property disputes on breakdown of a relationship on resulting and constructive trust principles. It is noticeable that, in BURNS v BURNS, all three judges (Waller, Fox and May L.JJ.), rather than purely indulging in a generalised attack on the shortcomings of the "new model" constructive trust(53), emphasised the fact that Parliament had not legislated to provide machinery to resolve disputes between unmarried couples on breakdown of a relationship, and expressed the

view that the courts should accordingly be reluctant themselves to do so. Consequently, it is possible that the courts may also be less willing to employ licence principles as a method of achieving the same end. An alternative possibility is that the removal of resulting and constructive principles from the armoury may lead the courts to resort to licence concepts more frequently. Assuming that, at least in some circumstances, it is desirable to impose obligations of support on unmarried partners, it is intended, in the course of the general discussion of the development of licences, to examine how suitable licence principles are for this purpose.

The third sphere in which licences have proved useful in protecting residential security is in resolving disputes arising out of informal family and domestic arrangements (other than those between cohabitees). It appears from case law that such informal agreements are also on the increase. Certainly, more disputes arising out of such agreements are coming before the courts. This is undoubtedly partly to do with the availability of Legal Aid(54), although other factors are of significance. For instance, the higher standard of living enjoyed by society as a whole, and the wider availability of mortgages as a means of buying property has resulted in owner-occupation becoming an option extending beyond the bounds of the elite propertied classes of the 19th century. All classes of society now have aspirations to become owner-occupiers. Young couples who in previous generations would have been content to start their married lives in private or public sector rented accommodation now aspire, or feel compelled on account of the shortage of rented accommodation, to become owner-occupiers from the outset. In reality, many of them are unable to afford a mortgage without parental backing and, where the support does not take the form of a straightforward loan, informal arrangements may arise, the precise nature and terms of which are often difficult to ascertain. In addition, whereas the younger generation are frequently in need of financial support, owing to the fact that people are tending to live longer(55) the older generation require accommodation in situations where they can be cared for by relatives when necessary. This may well give rise to arrangements involving, often unspoken, reciprocal benefits, such as those which appeared to underlie the arrangements of the parties in WILLIAMS v STAITE(56), where the mother's motive in allowing her daughter and son-in-law to live in a cottage owned by her, rent free, for so long as they wished, was the hope that they would in return care for their ageing parents. Many of the informal arrangements which have come before the courts could have been brought within established property concepts by using such

devices as trusts, leases or mortgages, had legal advice been sought (although, admittedly, in the case of leases, owing to the implication of statutory control, this may have been deliberately avoided). Why, then, is legal advice not taken? One explanation for informal arrangements within the family or domestic sphere is that putting such agreements on a legal footing is often taken to indicate a lack of trust on the part of those involved. Linked with this, it is apparent that, in many situations, the parties have not clearly worked out in their minds the implications of the arrangement, which inevitably causes problems for the courts. They have thought only of the present and not what may happen in the future, and are motivated only by vague notions of the hope of mutual support or reciprocal benefit. As Lord Denning observed in HARDWICK v JOHNSON:

> "In most cases, the question cannot be solved by looking at the intention of the parties because the situation is one never envisaged by the parties .... so many things are undecided, undiscussed and unprovided for, the task of the court is to fill in the blanks."(57)

A further explanation for the number of informally agreed family arrangements may be that, whereas it has generally been the practice amongst the wealthy propertied classes to seek legal advice before entering into any arrangement which has obvious legal consequences, many of the new propertied classes, either through lack of resources, experience or a general disinclination to approach the legal profession, tend to negotiate without regard to the legal effect of arrangements made. Finally, in some circumstances, informal agreements involving occupation of property may arise from lack of one party's negotiating strength, particularly a problem with the elderly; hence, situations such as those which arose in GREASLEY v COOKE(58), BINIONS v EVANS(59) and BANNISTER v BANNISTER(60). The net result of informal arrangements for occupation of property has been to cause havoc in the real property lawyer's world of neatly conceptualised categories of established property interests. How, for example, could the arrangement in ERRINGTON v ERRINGTON (61) best be explained? It will be remembered that a father obtained a Building Society loan and had the house conveyed into his own name but made his son and daughter-in-law responsible for repayment of the mortgage instalments on the understanding that the house would be theirs when all the instalments were paid. Were they to be regarded as tenants at will, tenants under the Rents Acts or were they purchasers in possession under a contract of sale? The variety of explanations as to the true legal nature of the situation put forward by

academics illustrates the extent of the problem. Similarly, in HARDWICK v JOHNSON(62), where a mother bought a house to provide a matrimonial home for her son and daughter-in-law, the house being conveyed into the mother's name and the young couple paying £28, was the payment being made towards the purchase price or was it rent? The difficulty in classifying the legal nature of the arrangements between the parties in such cases has thrown lawyers back on the residual concept of the licence, which, along with other devices, has been developed to provide a suitable remedy for the disputes arising out of family arrangements.

Given the importance of the "use" value of property in the 1980s and the circumstances in which licences have proved to be particularly valuable in protecting occupation, it is now intended to consider critically how accepted legal principles regarding licences have been manipulated and expanded to achieve this end. At the present time, there still appears to be much uncertainty and confusion over vital underlying principles. This has led Browne-Wilkinson J., in an often quoted extract from RE SHARPE, to comment:

> "I do not think that the principles lying behind these decisions have yet been fully explored and, on occasions, it seems that such rights are found to exist simply on the ground that to hold otherwise would be a hardship to the plaintiff."(63)

The statement seems to hint at the crux of the matter in so far is it recognises that the licence has been employed as a remedial device. As has already been noted, the plaintiffs in licence cases could often have protected themselves by use of established property concepts but, through inexperience, inadequacy, financial dependence, poverty or old age, they have not taken the necessary steps to do so, or, in the case of certain types of cohabitees, although public opinion and sometimes justice seems to require machinery for resolution of disputes on breakdown of a relationship, there are no statutory provisions to achieve this end(64). Nevertheless, although a remedial device must have flexibilty, it should not be surrounded with the confusion and uncertainty Browne-Wilkinson J. was indicating. Therefore, as the development of the licence as a means of protecting residential security is traced in this section, the first aim is to try and account for and resolve some of the confusion which has arisen out of that development. The second aim is to consider the way forward (if any) for licence principles against the background of the problems which have brought the

possessory licence to the forefront in this sphere. As is most eloquently put by Wallice and Grbich:

> "The underlying problem is to invent a device that enables the legal system to systematically ameliorate the impact of its established rules on the trusting, the foolish, the aged and the infatuated without destroying the framework of those rules and the expectations they support."(65)

References Section IV (a)

1. Law of Property Act 1925, Land Registration Act 1925; Land Charges Act 1925.

2. In 1800 the population was approximately 10.5 million. This had increased to 21 million by 1850 and 37 million by 1900.

3. See Offer "Origins of the Law of Property Act 1916-1925 (1977) 40 MLR 505.

4. The first statutory intervention was the Public Health Act 1848 and the Nuisance Removal and Disease Prevention Act 1848. These had little effect but were greatly extended by the Public Health Act 1875 which, among other things, gave local authorities power to make bye-laws about room size, space between houses and the width of the street. This was a setback for developers and landowners who aimed to maximise profits from building as many houses as possible within each acre.

5. The first planning Act was the Housing, Town Planning and C. Act 1909. This went beyond public health legislation as it was for the first time concerned with amenity and convenience. However, it was of limited effect as it only applied to suburban land. Its provisions were, however, extended to all land in England and Wales by the Town and Country Planning Act 1932.

6. Estate duty was introduced in 1874 and a tax on land values by the People's Budget.

7. See ante pp 65-66.

8. By the Housing Act 1933.

9. Interest payments on capital payment mortgages are deducted from gross income, at present up to a loan of £30,000 (Finance Act 1984).

10. Housing Act 1980.

11. [1970] AC 777 at p. 824.

12. [1981] AC 487 at p. 508.

13. Most notably Professor Charles Reich. See (1964) 73 Yale LJ 733 "The New Property".

14. (1979) Boston College LR 457.

15. See ante Section II.

16. Giving security of tenure to council tenants for the first time.

17. Providing machinery by which a court may allow one spouse to continue in occupation of the matrimonial home on break-down of a relationship.

18. These provisions restrict the mortgagee's right to take possession of property when the mortgagor has defaulted on the mortgage instalments.

19. These Acts allow one spouse security of occupation of the matrimonial home to the exclusion of the other. The provisions of the Domestic Violence and Matrimonial Proceedings Act 1976 extend to cohabitees.

20. See for example RE KEMPTHORNE [1930] Ch 268; COOPER v CRITCHLEY [1955] 1 All ER 520; ELIAS v MITCHELL [1972] 2 All ER 153; WILLIAMS AND GLYNS BANK v BOLAND [1981] AC 777.

21. [1955] 1 QB 234. The reasoning adopted by Lord Denning to justify his conclusion was somewhat dubious. He applied the maxim "equity follows the law" and argued that as it was well established pre-1925, when a tenancy in common could exist at law, that the legal owners were entitled to possession of the land, the same should be true (in equity) post-1925. However the reason for finding that a tenant in common at law pre-1925 had the right to possession, was because the right to possession goes with the legal estate. Moreover there is evidence that pre-1925 tenants in common in equity could only occupy at the discretion of the trustees. This view was supported by RE LAND1[1939] Ch. 823.

22. Supra.

23. See particularly Lord Denning's judgement in QUENNELL v MALTBY [1979] 1 All ER p. 598 and also the decision of Walton J. in ESSO PETROLEUM LTD v ALSTON BRIDGE PROPERTIES LTD [1975] 3 All ER 358.

24. BENDELL v McWHIRTER [1952] 2 QB 466.

25. The decision of the House of Lords in NATIONAL PROVINCIAL BANK LTD v AINSWORTH [1965] AC 1175.

26. Supra.

27. Supra.

28. Supra at p. 1224.

29. Supra at p. 1242.

30. Between 1945-1960 about 5% of births each year were recorded as illegitimate. Despite the availability of abortion and contraceptives, this figure had increased to 19% by 1985. A Law Commission report (Working Paper No. 74) produced in 1979 suggested half the illegitimate births arose from stable illicit unions. These figures were based on the number of cases where the birth of the child is registered jointly. By 1985 this figure had risen to 65%. Also "Social Trends" 17 1987 reveals 4.2% of all non-married women between ages 18 and 49 years were cohabiting in 1984 against only 2.7% in 1979.

31. Family Law Reform Act 1969 removed the major succession and other disabilities of an illegitimate child.

32. Many of these disabilities will shortly be abolished when the Family Law Reform Act (based on a draft annexed to the Law Commission's Second Report on Illegitimacy Law Com. No. 157, 1986) comes into force.

33. [1975] 3 All ER 1030.

34. [1950] 2 All ER 140.

35. Supra at p. 1036.

36. [1972] 2 All ER 38 at p. 42.

37. [1975] 3 All ER 768 at p. 772.

38. [1982] 3 All ER 162 at p. 167.

39. Supra at p. 168.

40. Supra at p. 169.

41. [1984] 1 All ER 244.

42. [1984] 1 All ER 244.

42. [1984] FLR 126.

43. Supra at p. 248.

44. [1980] 3 All ER 399. See also COUSINS v DZOSENS "The Times" 12th December 1981; BERNARD v JOSEPHS [1982] 2 WLR 1052; DENNIS v McDONALD [1981] 1 WLR 810; GORDON v DOUCE "The Times" 18th January 1983 (CA).

45. Supra at p. 403.

46. [1981] 1 WLR 810.

47. So called after the decision in MESHER v MESHER [1980] 1 All ER 126. Such an order directs a transfer of the matrimonial home into the joint names of husband and wife on trust for sale for themselves in (say) equal shares, provided that the property is not sold until the youngest child attains the age of 17 or stop full-time education.

48. See post at p. 218 f.

49. "The case against the legal recognition of cohabitation" published in "Marriage and Cohabitation in Contemporary Societies; Areas of Legal, Social and Ethical Change (1980)" Eekelaar and Katz (eds) pp 309-310.

50. Supra.

51. See for e.g. TANNER v TANNER [1975] 1 WLR 1346. For facts see post at p. 147.

52. Supra.

53. The name given to Lord Denning's liberal approach to constructive trusts, somewhat akin to the American approach whereby constructive trusts are viewed as a remedial device.

54. Legal Aid was introduced in 1950. Prior to this there were limited provisions enabling persons to sue and be sued 'in forma pauperis' and some financial assistance offered from various societies and authorities.

55. The expectation of life has risen from 48 years

for men and 51.6 years for women in 1901, to 71.4 years for men and 77.4 years for women in 1983 ("Social Trends" 17, 1987).

56. [1978] 2 All ER 928. For facts, see post p. 152.

57. [1978] 2 All ER 935 at p. 938.

58. [1980] 3 All ER 710. For facts see post p. 196.

59. [1972] 2 All ER 70. For facts see post p. 167.

60. [1948] 2 All ER 133. For facts see post p. 171.

61. [1952] 1 All ER 149. For facts see ante p. 6.

62. Supra.

63. [1980] 1 All ER 198 at p. 201.

64. See generally Wallace and Grbich (1979) UNSW Law Journal 175.

65. Supra at p. 196

(b) The position of the licensee at common law.

Before looking at the development of licence concepts in equity to meet the needs of, among other things, informal family and domestic arrangements, it is necessary briefly to consider the original position at common law. This may still be relevent as the common law governs the position of a licensee who has no protection in equity. The common law recognised three types of licence in connection with land: a bare licence, a contractual licence and a licence coupled with a grant.

To consider first licences coupled with a grant. If the licence is ancillary to the grant of some proprietary interest in land or chattels on the land, it is a licence coupled with a grant. Two elements are always involved in the case of such licences: firstly, the permission to enter the land, and secondly the grant of the interest, namely a profit a prendre. Examples include a permission to go onto land for the purpose of cutting and removing timber or killing animals on the land and taking them away. Provided the correct formalities had been satisfied, namely that the grant was made by deed, a proprietary interest, enforceable against the successors in title of the grantor, arose, which even the common law regards as irrevocable(1). Moreover, a licence coupled with a grant is itself assignable(2), but, as the licence has no independent existence apart from the grant, it follows that it may only be assigned in conjunction with the interest with which it is coupled. If the licence coupled with a grant was not made, observing the relevant formalities, it was revocable at common law, although equity intervened by analogy with the doctrine of WALSH v LONSDALE(3) and enforced a contract for such a grant. For example, in FROGLEY v EARL OF LOVELACE(4) the defendant granted a tenancy to the plaintiff and endorsed on the lease an agreement whereby he also gave the plaintiff exclusive sporting rights over the land for a fixed period. As the agreement was not by deed, it was revocable at common law. However, in equity, it operated as an agreement for a grant which was specifically enforceable and also capable of protection by means of an injunction until the grant was executed.

Little further need be said about licences coupled with a grant because they do not give rights to occupy land, but only to enter on land for a particular purpose. As such, their scope is limited and does not enable them to be used as a means of protecting occupation of land under informal or family arrangements. Nevertheless, it is worth noting that there has been some confusion over the nature of the interest to which the licence may be coupled, so as to make it irrevocable at common law.

Cases such as VAUGHAN v HAMPSON(5) and HURST v PICTURE THEATRES LTD.(6) seemed to suggest that no recognised proprietary interest in land is required. In HURST v PICTURE THEATRES LTD., a licence to enter and see a cinema performance after acquisition of a ticket was regarded as a licence coupled with a grant, the "right to see the performance", it seems, erroneously being taken as a proprietary interest. The better view, however, is that the grant to which the licence is coupled must be a recognised proprietary interest(7).

To turn to bare licences and their treatment at common law, The main characteristic of a bare licence is that it arises gratuitously. Once it has been established that some form of consideration has been given in return for the permission granted, the licence becomes contractual. A bare licence may give permission to use or occupy land along with others or it may give the exclusive privilege of occupation of land. Prior to the early 1950s, if a bare licensee was in exclusive possession, he would generally have been described as a tenant at will(8). At common law, a bare licence was revocable at will. It therefore followed that it was capable of revocation before or during the act or acts for which the permission was expressly or impliedly granted. However, the fact that a bare licence may have been revoked during the course of the act for which the permission was granted did not make the licensee a trespasser from the moment of revocation. There are several authorities to suggest that even a bare licensee had to be given a reasonable period of time to remove himself from the property in question before he became a trespasser. This view was taken by Viscount Simon in WINTER GARDEN THEATRE (LONDON) LTD v MILLENNIUM PRODUCTIONS LTD.(9) and by the House of Lords in ROBSON v HALLETT(10). In the latter case, it was additionally held that an action in damages lay if the licensor interfered with the person of the licensee in any way during the "packing up" time. The question arises, how long is a reasonable period of time to leave? This would seem to have depended on the circumstances; if the licence was to occupy land, one would expect the "packing up" time to be considerably longer than a licence to enter on land merely to communicate with the licensor. However, even in the case of a licence to occupy land, it is apparent that a "reasonable time" is a comparatively short period of time and thus affords little protection to the licensee. For example, in HORROCKS v FORRAY(11), a wealthy man bought a house for his mistress and the child of their relationship to live in, but title to the property remained in his name. On his death, the executors sought possession of the house, which the mistress resisted, claiming to have an irrevocable contractual licence to remain. The court

was, however, only prepared to infer a bare licence in favour of the mistress and, since this had been revoked by the executors, they gave her just 28 days to leave the premises. This decision was followed in the unreported case of RE MILLARD(12), with what would appear to be very harsh results in the circumstances. Here a couple had cohabited for 36 years in a house bought in the man's name. They had two children. After the man's death, a possession order was allowed against the woman on the ground that she merely occupied the house under a bare licence which had been determined.

Thus, it can be seen that the common law principles relating to bare licences had no scope for providing residential security. Furthermore, it is quite clear that, as, at common law, a bare licence is revocable at will, it is not capable of binding a third party whether such party had notice or otherwise. It is unclear as to the position of the licensee at common law without the protection of equity as regards "packing up" time, if the licensor sold his land without notifying the licensee. Would the purchaser be bound to give the licensee a reasonable period of time to leave before he was able to take action against him? It is arguable that the bare licensee has implied permission to remain until the assignee of the licensor asks him to leave, and, as with the original licensor, he must be given a reasonable time to leave.(13)

To turn, finally, to contractual licences, although it seems that there are some authorities for the proposition that in some circumstances a licence, once acted upon, may be irrevocable(14) at common law, these were generally revocable at will. The leading authority is WOOD v LEADBITTER(15). The plaintiff brought an action for assault. He had purchased a ticket to watch the races at Doncaster Race Course and, during the course of the events, without any misconduct on his part, he was ordered by the defendant to leave. When he refused, he was forceably ejected. The success of the plaintiff's case depended on his establishing that he had a right, as a licensee, to be on the land in question, as opposed to becoming a trespasser once he had been asked to leave, as a trespasser could be lawfully ejected using reasonable force in the circumstances. Alderson B. in the Court of the Exchequer held that an action for assault must fail as the plaintiff became a trespasser once a "reasonable" time in which to leave had elapsed. The reason for this was that a licence, not being an interest in land created by deed, was, by its very nature, revocable at will; the fact that the licence had been granted for valuable consideration was considered irrelevant to the question of whether it could be revoked. However, Alderson B. did

suggest that any aggrieved licensee in this situation would probably have an action for breach of contract.(16)

This view was followed in THOMPSON v PARK(17). Here, after various disagreements, the defendant schoolmaster was ordered to leave school premises where he lived under the same roof as the plaintiff schoolmaster. The defendant refused to leave and some time later assembled a number of friends and supporters, entered the school by forcing several locks, and disconnected the water pump, leaving the school without water. The defendant was described by Lord Goddard as being:

> "...guilty at least of riot, affray, wilful damage, forcible entry and perhaps conspiracy.... "(18)

In these circumstances, equity was not prepared to intervene to prevent revocation of the defendant's licence to live at the school, so the outcome depended on the position at common law. The traditional view that a licensor had no right to revoke the licence but did nevertheless have the power, was invoked with the consequence that the defendant became a trespasser whether the revocation of the licence was in breach of contract or otherwise. Although the opposite conclusion was in fact reached in HURST v PICTURE THEATRES LTD.(19) and, as such, may appear to support the view that a contractual licence may have been irrevocable at common law in some circumstances. This conclusion was largely reached because, as has already been explained(20)the court took the fallacious view that there had been a grant of a proprietary interest and this grant made the licence irrevocable. However, Buckley L.J. did produce a second ground for distinguishing the situation from the decision in WOOD v LEADBITTER(21) which was later developed by the Court of Appeal in WINTER GARDEN THEATRE (LONDON) LTD v MILLENNIUM PRODUCTIONS LTD.(22) This was that the licence on the facts was not revocable because:

> "...there was included in that contract a contract not to revoke the licence until the play had run to its termination."(23)

(c) The intervention of Equity.

The common law, as has been seen, provided little scope for use of licence concepts in relation to real property. How, then, did the intervention of equity turn the licence into a valuable means of protecting residential security? The development involved two distinct steps. First, the finding that in some circumstances the licence may be irrevocable against the original licensor; and secondly, following from this, the finding that a licence may also in some situations be irrevocable as against a successor of the original licensor other than a bona fide purchaser for value without notice. It is now proposed to discuss critically these two stages in order to decide whether the developments were necessary and desirable to protect the needs for residential security outlined earlier(24) and to decide whether the developments were achieved in the best way.

The notion, in connection with the occupation of residential property that a licensee may have an irrevocable right to remain, owes its origins in modern times largely to the decision of the Court of Appeal in ERRINGTON v ERRINGTON(25). Here, where a father bought a house for his son and daughter-in-law in his own name on the understanding that they paid him monthly sums equivalent to the mortgage repayments, it was decided the young couple had an irrevocable contractual licence to remain in the house so long as they paid the mortgage instalments, and this right was binding on third parties who took with notice. In the same year, in BENDALL v McWHIRTER(26) the Court of Appeal extended the scope of occupational licences, expressing the view that a deserted wife had a licence to occupy the matrimonial home "analogous to a contractual licence" which was irrevocable until determined by death, divorce or a court order. This too was binding on third parties who took with notice of the "equity". Later the principle of "equitable estoppel" came to be used in connection with licences, once again operating to make the licence irrevocable and, in some cases, binding on third parties, other than a bona fide purchaser without notice. An examination will first be made of the use of the concept of a contractual licence in this sphere, before going on to consider the use made of estoppel principles. No special attention will be given to the "deserted wives' equity" as this notion was entirely destroyed by the House of Lords decision in NATIONAL PROVINCIAL BANK LTD v AINSWORTH.

References Section IV (b) & (c)

1. See e.g. Doe d HANLEY v WOOD (1819) 2 B + Ald 724 at p. 738; WOOD v MANLEY (1839) 11 A + E 34; JAMES JONES AND SON LTD v EARL OF TANKERVILLE [1909] 2 Ch 440 at p. 442.

2. MUSKETT v HILL (1839) 5 Bing NC 694.

3. (1882) 21 Ch D 9.

4. (1859) John 333. See also JAMES JONES AND SON LTD v EARL OF TANKERVILLE [1909] 2 Ch 440.

5. (1875) 33 LT 15.

6. [1915] 1 KB 1.

7. See decision of Megarry J. HOUNSLOW LBC v TWICKENHAM GARDEN DEVELOPMENTS LTD [1971] 1 Ch 233 at pp 243-245.

8. See ante Section I.

9. [1948] AC 173 at pp 188-189.

10. [1967] 2 All ER 407.

11. [1976] 1 All ER 737.

12. (1976) 127 NLJ 1152.

13. See for further discussion Dawson and Pearce "Licences relating to the occupation of land" (Butterworths) 1979 p. 152.

14. See post pp 186-187. Also see Cullity (1965) 29 Conv 19.

15. (1845) 13 M and W 838.

16. Supra at p. 855. This was not discussed in the court due to the particular pleadings on which the case was based. If confined to the pleadings the position would have been the same in equity, and the only issue is then about property rights and not contractual rights. This view was accepted by Viscount Simon in MILLENIUM PRODUCTIONS LTD v WINTER GARDEN THEATRE (LONDON) LTD [1946] 1 All ER 678.

17. [1944] KB 408.

18. Supra at p. 409.

19. Supra.

20. See ante pp 135-136.

21. Supra.

22. [1946] 1 All ER 678 See post p. 138f.

23. Supra at p. 10.

24. See ante Section IV (a).

25. [1952] 1 All ER 149. For details of facts see ante p. 6. See however the much earlier decision of DILLWYN v LLEWELLYN (1862) 4 De GF and J 517. See post p. 190.

26. [1952] 2 QB 466. See ante pp 119-120.

27. [1965] 2 All ER 472.

(d) Contractual Licences.

(i) Irrevocability and the original licensor.

In ERRINGTON v ERRINGTON(1) reliance for the proposition that a contractual licence may, in certain circumstances, be irrevocable as against the original licensor was placed on the decisions of the Court of Appeal and House of Lords in WINTER GARDEN THEATRE (LONDON) LTD v MILLENIUM PRODUCTIONS LTD.(2) and on the decision in FOSTER v ROBINSON(3) in which Lord Greene M.R. followed the views expressed in the WINTER GARDEN case. The facts of the latter case were comparatively simple. The respondent licensees had entered into a contract which gave them the right to present plays at a theatre for a period of six months commencing 6th July 1942. There was a provision for an extension for an unstated period, terminable by the respondents at one month's notice. No provision was made for termination by the licensors, but in September 1945 the licensors served notice to terminate the licence. The House of Lords, reversing the decision of the Court of Appeal, decided, on a proper construction of the contract, the licence was terminable by the licensors after giving a reasonable period of notice. However, the reasoning of the Court of Appeal concerning principles of revocability of contractual licences was expressly approved by Viscount Simon in the House of Lords, the decision being reversed merely on a construction of the terms of the contract to which the principles had been applied. The leading judgement in the Court of Appeal was delivered by Lord Greene M.R. He expressed the view(4) that a licence could not be regarded as a "thing" determinable at will, having a separate existence distinct from any contract which created it. A licence arising out of a contract was not, therefore, an interest but it created a contractual right to do certain things which would otherwise be a trespass. Consequently, the question of whether a licence was revocable or not is a question of construction of the contract. He went on to explain that in the old days an action for damages for breach of contract would only have arisen, but since the fusion of law and equity by the Judicature Acts 1873-5 equitable remedies were now available to prevent, by injunction, revocation of a licence in breach of contract.

These principles have subsequently been applied in HOUNSLOW LONDON BOROUGH COUNCIL v TWICKENHAM GARDEN DEVELOPMENTS LTD.(5) where Megarry J. refused to grant an injunction to the freeholders of a building site to prevent building contractors continuing to enter the site for the purpose of fulfilling a building contract. The basis of the decision was the finding that there was at

least an implied negative obligation under the contract on the part of the freeholders not to revoke any licence except in accordance with the contract whilst the contract period was still running. Moreover, on the same reasoning, the Court of Appeal has since decided, in VERRALL v GREAT YARMOUTH B.C.(6) that the equitable remedy of specific performance may also be available to enforce a contractual licence to be on land. It is noticeable that the notion that a contractual licence may in some circumstances be irrevocable has developed from commercial cases. Before going on to see how these principles have been applied and used to provide residential security in family arrangement cases, it is desirable to consider more fully the circumstances in which a contractual licence may be regarded as irrevocable and the remedies available. In the WINTER GARDEN case in the House of Lords, Lord Porter expressed the view:

> "...prima facie licences are revocable"(7)

but the other Law Lords did not express any clear opinion on this. In the Court of Appeal, however, Lord Greene M.R. laid down:

> "The general rule is that before equity will grant an injunction there must be on construction of the contract a negative clause, express or implied."(8)

An express negative clause provides few problems, but under what circumstances may a court be prepared to imply such a negative clause? As has already been noted in passing in HOUNSLOW LONDON BOROUGH COUNCIL v TWICKENHAM GARDEN DEVELOPMENTS LTD.(9), Megarry J. was prepared to imply a negative obligation not to revoke a licence in the case of building contractors. This he implied from the fact the contract was one for the execution of specific works on a site during a specified period which was still running in addition to the fact that the contract conferred on each party specified rights on specified events to determine the employment of the defendant under the contract. Similarly, in the WINTER GARDEN case(10) Viscount Simon seemed prepared to imply a term not to revoke when he expressed the view that the licence in HURST v PICTURE THEATRES LTD.(11), namely a licence to see a cinema performance, could not be terminated before the event was over so long as the licensee was behaving properly. It would thus appear that the courts are very willing to imply terms not to revoke a contractual licence consequently providing plenty of scope in family arrangement cases. It should be noted that even where the licence is revocable on the

terms of the contract, "reasonable notice" would seem to be required in order to terminate the permission.(12) What is "reasonable notice" depends on the circumstances of the case.

To turn to the remedies available where the licence is found to be irrevocable. The equitable remedies of specific performance and injunction are of course discretionary and herein therefore lies potential for tailoring to meet the particular circumstances of the case. It seems an injunction will not be granted where the licensee has misbehaved, as the defendant schoolmaster in THOMPSON v PARK(13), or even if the licensee has behaved impeccably, to compel persons to live under the same roof for Goddard L.J. stated in THOMPSON v PARK that the court would not:

> "...enforce an agreement for two people to live peaceably under the same roof."(14)

LUGANDA v SERVICE HOTELS LTD.(15) is authority for the availability of a mandatory injunction to allow a licensee to enter premises and VERRALL v GREAT YARMOUTH B.C.(16) for the availability of specific performance to enforce even a short term contractual licence, in that case involving the hire of a hall for two days only.(17)

If the court is unwilling to grant an equitable remedy then damages will be available as compensation. This appears to have been recognised even in common law cases where it was decided the licensee could be evicted, even though the eviction was in breach of contract. The question did not arise in WOOD v LEADBITTER(18) as the action was in tort for assault, but an action for damages for breach of contract succeeded in KERRISON v SMITH(19) (where a licence to post bills on a hoarding was wrongfully revoked in breach of contract) and was assumed to exist ion HURST v PICTURE THEATRES LTD.(20)

Having set down briefly the circumstances in which a contractual licence to remain on land came to be regarded as irrevocable, it is now intended to consider how these principles were applied in domestic and family arrangement cases to provide residential security. A contractual licence clearly cannot exist unless a contract can be established. The rules of the law of contract provide that an agreement may be written or oral, express or implied. The idea of an implied contractual arrangement in domestic and family affairs seems to owe its origins to the decisions in DILLWYN v LLEWELLYN(21) and WARD v BYAM(22) although the distinction between express and implied agreements has not always been clearly drawn. For example in ERRINGTON

v ERRINGTON(23) it is unclear whether the contractual licence was regarded as being express or implied, but since there was in fact no express agreement to create a contractual licence it would appear to have been implied by the court. In HORROCKS v FORRAY(24), Megaw L.J. explained in these terms the distinction between express and implied agreements in referring to the earlier decision of TANNER v TANNER(25):

> "There was not an express contract; that is to say there was no evidence that one [party] had said to the other, "I promise that I will do so and so". But of course the court is entitled to infer a contract even though it is clear that words have not been spoken expressly stating a contractual promise or an offer and acceptance in express words. The court is entitled to infer the existence of a contract."(26)

But no matter how it is expressed, an agreement must show consensus, consideration (subject to exceptions), an intention to create a legal relationship and certainty of terms. This fact was recognised by Megaw L.J. in HORROCKS v FORRAY(27) with respect to domestic and family arrangements for licences to occupy land. It is arguable, however, that in some of these situations the judges have somewhat stretched the concept of an implied contract to avoid the finding of merely a bare licence and so protect the licensee from the often harsh consequences of the revocability of bare licences. It will therefore now be considered whether the finding of a contractual licence was in law justified in the family and domestic arrangement cases in which this conclusion was reached and consideration will also be given to the factors which may well have motivated such a finding in individual cases.

Certainly it was not without some degree of hesitancy that a contractual licence was implied in some of the decisions. For example, in ERRINGTON v ERRINGTON, Denning L.J. describes the young couple's licence as a "contractual or at any rate an equitable right to remain...."(28) and in TANNER v TANNER where a mistress was found to be occupying premises as a contractual licensee, Browne L.J. confessed to being "troubled" by the duration of the licence and only with "some hesitation" agreed with its terms as outlined in the judgement of Lord Denning in the same case(29). Lord Denning himself appeared in two minds about implying a contracual licence from the facts of TANNER v TANNER as he went on to hypothesise that, if the court could not imply a contract, it could "if need be impose the equivalent of a contract...." on the defendant

licensor(30). There may, however, have been other motives for Lord Denning's oscillation between contractual and equitable licences which will be examined later.(31)

To turn now to the leading case of ERRINGTON v ERRINGTON in which a contractual licence to occupy property was found to exist. The father, it will be remembered, had paid one third of the purchase price of the house bought for his son and daughter-in-law to live in and borrowed the balance on a building society mortgage. He told the young couple if they paid the weekly instalments he would convey the house to them when all the instalments were paid. They duly paid the instalments, although the Court of Appeal found they were under no obligation to do so; if they had not paid them, it was quite clear from the arrangement that the father could not sue them; it simply meant that they would not get the house. The question arises as to whether the finding that the young couple were not bound to pay the instalments is consistent with the finding of a contractual licence. According to Denning L.J., it was. He summarised the position as follows:

> "The father's promise was a unilateral contract - a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on performance of the act but it would cease to bind him if they left it incomplete and unperformed."(32)

Although there has been much academic debate about this(33), the general view seems to be that a contractual analysis is still sustainable despite the absence of an intention to create mutual promises, that is to say, a contract may arise out of a situation where the offeror's promise is dependent upon the offeree's performance of an act. It is, however, questionable whether, on the facts of ERRINGTON v ERRINGTON, there was some confusion with estoppel principles.(34)

Nevertheless an equally fundamental problem in finding a contractual licence on the facts of ERRINGTON v ERRINGTON is the requirement of an intention to create a contractual relationship. It has already been noted that, in his judgement Denning L.J. considered the intention of the parties but only to ascertain whether a "personal privilege" or "an interest in land" was intended(35). It would seem difficult to establish an intention to enter a contractual relationship on account of the presumption against this in the case of domestic and family arrangements. Authorities for such a presumption are SIMPKINS v PAYS(36) and JONES v PADAVATTON(37). The latter decision is interesting

because it both concerns a licence to occupy real property and a parent/child relationship. A mother wished her daughter to come to England to study to become a barrister. She offered her a monthly allowance if she agreed to do so. The daughter reluctantly took up the offer and the mother bought a house in London, in part of which the daughter and her child lived, the rest being let out to tenants. The rent from the tenants was used to cover the daughter's maintenance and expenses. A few years later when the daughter was still studying for Part I of the Bar examinations, the mother and daughter fell out with one another and the former sought possession of the house from the latter. It was alleged there were two agreements between mother and daughter: the first, an agreement by the daughter to come to England and study for the Bar in return for a fixed monthly income, and the second, an agreement by the mother to allow her daughter to live in the London house with the rent from the tenants providing her maintenance. The Court of Appeal granted a possession order in favour of the mother, being unanimous in the finding, in respect of the agreement involving possession of the house, that there was no intention to create legal relations in view of the lack of precision of the contents of the agreement. The daughter was therefore only a bare licensee and consequently her licence could be revoked at will.

In the light of this authority, it is arguable that the finding of a contractual licence both in ERRINGTON v ERRINGTON and HARDWICK v JOHNSON(38) are suspect. HARDWICK v JOHNSON also involved an arrangement between parent and child. Here the husband's mother had agreed to purchase a house for her son and daughter-in-law on the understanding they paid her £28 per month. The nature of the payments was unclear. The conveyance was taken in the mother's name but when the husband left his wife, his mother sought possession of the house from her daughter-in-law, despite the latter's offer to continue paying her monthly sums. Roskill and Browne L.JJ. held the wife, having a contractual licence, was entitled to remain provided she paid the monthly instalments. Lord Denning, however, citing BALFOUR v BALFOUR(39) JONES v PADDAVATON (40) refused to imply a contractual licence, basing his reasoning instead on the finding of an equitable licence.

Cases concerning mistresses and cohabitants, where contractual licences were found to exist may be equally suspect on the grounds of the requirement of intention to contract, as such relationships may reasonably be described as "domestic relationships" and, as such, be caught by the presumption against an intention to contract laid down in SIMPKINS v PAYS(41). For example,

in TANNER v TANNER(42), the occupier of property was found to be a contractual licensee on very tenuous grounds. The facts were: a married man had formed an association with a single woman who had twins by him. The man, never intending to marry the woman, agreed to purchase a house on mortgage to provide accommodation for her and the twins. In pursuance of this suggestion, the woman gave up her rent controlled flat and went to live in the house, the mortgage instalments being paid by the man. Eventually he had an affair with another woman whom he later married and he wanted to get the first woman out of the house so he could live there with his new wife. In the Court of Appeal, a possession order was refused, the view being taken that a contract could be inferred from the fact that the woman gave up her rent controlled flat and the man later offered her £4,000 to leave the property acquired for her. Similarly, in CHANDLER v KERLEY(43), the requirement of intention to create a contract was not seen as an obstacle to prevent the finding of a contract. Briefly the defendant became mistress of the plaintiff and the plaintiff purchased a house owned by the mistress and her husband at a price lower than the market price, on the understanding that the plaintiff and the defendant would thereafter live in the house together. The relationship broke down shortly afterwards and the plaintiff sought possession of the house from the defendant. The Court of Appeal found a contractual licence to occupy had been created, but considered it was terminable on the giving of reasonable notice, which was put as being twelve months. Perhaps such a finding is more justified on the facts of this case, since the licence to occupy was collateral to the contract of sale of the house where there obviously was an intention to contract.

Even if the relationship between cohabitants or lover and mistress cannot be described as a domestic relationship within SIMPKINS v PAYS, an analogy could well be drawn with agreements between husband and wife. This is especially true with regard to cohabitants where the relationship is intended to be permanent or long term. With respect to husband and wife,BALFOUR v BALFOUR establishes that, so long as the spouses are cohabiting in amity, there is a presumption against an intention to enter legally binding agreements. As Atkin L.J. explained:

> "The common law does not regulate the form of agreement between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is natural love and affection which counts very little in these cold courts...."(44)

However, MERRITT v MERRITT(45) establishes equally clearly the presumption does not operate in relation to agreements where the spouses are living apart or are estranged and about to separate. Thus even if the presumptions applied in husband and wife cases were extended to extra-marital relationships, on this basis, on the facts of TANNER v TANNER, the finding of a contractual licence may well have been justified. According to Lord Scarman in HORROCKS v FORRAY(46), the parties in TANNER v TANNER made the arrangement when their relationship was on the point of breaking down so that in effect they were making arrangements for the illegitimate children. This fact was used by Lord Scarman to distinguish TANNER v TANNER from HORROCKS v FORRAY. It was also used in the recent case of COOMBES v SMITH(47) to distinguish TANNER v TANNER;on the facts of the former case where it had been argued an implied contractual licence existed when at the time the arrangements for the occupation of a property were made, there was a continuing and happy relationship.

Returning to situations where agreements are made in clearly amicable circumstances, it is debatable whether, even if extended to extra-marital relationships, the principles in BALFOUR v BALFOUR would or should be much of a problem. In BALFOUR v BALFOUR the Court of Appeal was considering an agreement under which a husband, who was about to go abroad, promised to pay his wife £30 per month during the time they were forced to live apart. The agreement was therefore concerned with everyday continuing domestic financial provision and consequently the court held that it was unenforceable because there was no intention to create legal relations. The case has never been doubted but in PETTITT v PETTITT(48) there are suggestions from some of the members of the House of Lords that at least in the sphere of acquisition of property rights, a narrow view of BALFOUR v BALFOUR should be taken. Lord Diplock pointed out:

> "..many of the ordinary domestic arrangements between man and wife do not possess the legal characteristics of a contract. So long as they are executory they do not give rise to any choice in action for neither party intended that non-performance of their mutual promises should be the subject of sanctions in any court.... But this is relevant to non-performance only. If spouses do perform their mutual promises the fact that they could not have been compelled to do so while the promises where executory cannot deprive the acts done of all legal consequences in proprietory rights, for these are in the field of the law of

> property rather than the law of contract. It would in my view be erroneous to extend the presumptions in BALFOUR v BALFOUR .... to acquisition, improvement or addition to real or personal property."(49)

It is submitted this passage should not be considered as authority for freely implying contracts into family arrangement cases concerning real property. The point which Lord Diplock would appear to be making is one noted as causing confusion in relation to the development of the test of intention for distinguishing between leases and licences to occupy, namely that any relationship between owner and occupier is a legal relationship. Thus once a series of events has occurred, even if those acts, when executory, were not intended to be legally binding, legal consequences inevitably result, requiring the adjudication of the court. This seems to be the approach taken by Lord Denning in HARDWICK v JOHNSON(50) in referring to both BALFOUR v BALFOUR and PETTITT v PETTITT. The rationale behind the presumption against an intention to contract in the domestic and family sphere is that it is considered to be against public policy for courts to regulate in matters of domestic convenience which are or should be motivated by such intangible things as love, friendship and affection. In relation to property, adjudicating on the legal consequences of a course of events which has already altered the relationship between persons and a particular piece of property does not detract from this rationale as the adjudication is not a matter of the law of contract but the law of property.

Apart from the question of intention, a special problem with implying a contractual licence in mistress cases is that of consideration. There are authorities, most notable of which is UPFILL v WRIGHT(51) which suggest arrangements concerning real property to enable visits by a lover to his mistress are void, being immoral and against public policy. In that case, a house was let by the plaintiff with the knowledge that the defendant had taken it for the purpose of enabling her lover to visit her. The contract was held to be void and against public policy with the consequence that the plaintiff was unable to sue for arrears of rent. Darling J. said:

> "I do not think that it makes any difference whether the defendant was a common prostitute or whether she was merely the mistress of one man, if the house was let to her for the purpose of committing the sin of fornication there. That fornication is sinful and immoral is clear."(52)

This decision was not referred to in either of the licence cases concerning mistresses, namely TANNER v TANNER(53) HORROCKS v FORRAY(54)and it is doubtful whether, with the change in moral standards, it is still good law. In DIWELL v FARNES(56), there was a slight suggestion that contracts between cohabitants may be tainted by illegality, but this did not prevent the finding of a resulting or constructive trust.

Even if intention to contract or consideration were not obstacles to finding a contract in the family arrangement cases where a contractual licence was implied, there would appear in many situations to be a problem of satisfying the requirement of certainty of terms. For example, the judgement of Lord Denning in HARDWICK v JOHNSON(56) revealed, from the daughter's evidence, it was uncertain whether the payments made were intended as a kind of rent or were payments towards the purchase price. Nevertheless Roskill and Browne L.JJ. were still prepared to infer a contractual licence. This was so, even though the precise duration of licence was uncertain. Roskill L.J. declined to comment on the circumstances under which the licence might have been terminated, but Browne L.J. expressed the view that the daughter-in-law was not necessarily entitled to stay in the house indefinitely and circumstances might arise in the future which would enable the mother to revoke the licence. Similarly in TANNER v TANNER the duration of the licence remained uncertain. The terms of the alleged contractual licence were that the woman could occupy the house as long as the children were of school age and the accommodation was "reasonably required". How and by whom was the latter to be decided? This view seems inconsistent with the principle of the law of contract that the courts are not prepared to write important terms into a contract. In contrast the requirement of certainty was regarded as a problem in HORROCKS v FORRAY. There, counsel had put forward three alternative durations for the licence to occupy: for the life of the defendant; for so long as the defendant's daughter was in full-time education; or for so long as the defendant and her daughter reasonably needed the accommodation. Lord Scarman commented:

> "Since [counsel] is saying that three or four possibilities arise.... one wonders whether these parties, in fact, entered into a legally binding agreement or intended to create legal relations on the basis of terms sufficiently formulated to be clear and certain."(57)

It is interesting to note in the same case Megaw L.J. expressed the view:

> "It may be that the bringing in of the conception of contract into situations of this sort does give rise to difficulties. It may be some other approach to situations of this sort would be preferable...."(58)

It would seem, not only was the approach of implying contracts somewhat dubious, it was also inconsistently applied(59). For example, although Lord Denning was prepared to imply a contract from the circumstances of TANNER v TANNER, he was not so prepared on the facts of HARDWICK v JOHNSON where such a finding is arguably easier. In HARDWICK v JOHNSON, the couple at least agreed to make regular payments of £28 per month, whereas in TANNER v TANNER no payments were made, the consideration, according to the court, being the giving up of the rent controlled flat. A further inconsistency of approach is apparent by comparing WILLIAMS v STAITE(60) with ERRINGTON v ERRINGTON. In WILLIAMS v STAITE, a mother granted her daughter and son-in-law permission to live in a cottage owned by her for as long as they wished. The cottage adjoined a similar one occupied by the mother and father and one of the ideas behind the arrangement seemed to be that this would enable the daughter to look after her parents as they grew older. The son-in-law was somewhat reluctant to take up the offer as he had a cottage (that went with his job) in another village, but he was persuaded to give this up. Thus, the couple moved into the mother's cottage and subsequently spent a small sum of money improving it. On these facts, the Court of Appeal decided the young couple had an equitable rather than contractual licence. However, the case is very similar to ERRINGTON v ERRINGTON in that both cases concerned family arrangements and in each case the parents allowed the children to reside in property title to which was vested in the parent. A difference, perhaps, is that the consideration was not so clear in WILLIAMS v STAITE in that no payments were made towards the purchase price of the property, and the permission to live in the cottage was described as a wedding present, but the fact that the son-in-law gave up the opportunity of a tied cottage is similar to TANNER v TANNER, where a contractual licence was implied.

Then again, there appear to be inconsistencies in approach between TANNER v TANNER and HORROCKS v FORRAY. The facts of the former case have already been outlined. In the latter case a married man had, unknown to his wife, kept a mistress up until his premature death in a road accident. He had a child by his mistress and had bought a house for her to live in with his child and her

other children by another relationship. The house was conveyed into his name, but there was some evidence that he had intended to transfer it into her name or to create a trust, but decided not to on account of tax disadvantages. By the time of his death the married man had dissipated all his wealth and only if the house could be sold with vacant possession would his estate be solvent. Consequently the executors brought possession proceedings against the mistress. It was argued on her behalf that she had an irrevocable contractual licence to remain in the home either for life or for so long as her daughter was in full-time education, or as long as the daughter reasonably required the accommodation. Despite the apparent similarities with TANNER v TANNER, the Court of Appeal declined to find a contractual licence, and gave the mistress just 28 days to vacate the premises. Although Megaw L.J. was satisfied the requirements of a legally binding agreement were present in TANNER v TANNER, he considered they were not in the case before him. He was unable to infer a contract simply because the deceased had provided "handsomely" for the woman during his lifetime and the fact that he had it in mind to provide some security for her in the event of his death was not sufficient. In any event, even if one could infer a contract there was no consideration provided by the defendant. What factors, therefore, underlay the differences of approach in similar cases such as these?

The explanation for the different results in TANNER v TANNER and HORROCKS v FORRAY can perhaps be explained by a tendency on the part of the courts to give paramount consideration to the merits of the case, and with a certain degree of moral censure. For example, in TANNER v TANNER, the consideration for the agreement to occupy was said to be the giving up of a rent controlled flat. However, in HORROCKS v FORRAY, Megaw L.J. would not accept that the mistress had provided consideration by "subordinating her mode of life and choice of residence to another's". Surely leaving of the rent controlled flat in TANNER v TANNER could just as easily be described as subordination of the mistress's mode of life, or at least of her choice of residence for that of another. Although it was not expressly stated, it is implicit in HORROCKS v FORRAY that the court regarded the cohabitation as immoral consideration and therefore not valuable consideration. The court in refusing to imply a contract in the circumstances of HORROCKS v FORRAY were in effect passing a moral judgement to bring about what they considered to be a just result. It is noticeable that, despite the fact Megaw L.J. says the evidence of the mistress's "life and activities" are irrelevant to the issue, he nevertheless lapses into an account of her

marriage and divorce and the fact that she "had not infrequent sexual intercourse with another man"(61) The general tenor of the judgement suggests the court was concerned for the justice in the situation. It was pointed out that if the mistress was successful, the man's wife, who had been faithful to him throughout and had believed her husband to be a "wonderful man"(62), would be left with nothing. In any case, the deceased had already been "generous beyond what one would reasonably expect the man to accept as a legally binding obligation to provide"(63) for the mistress.

In contrast in TANNER v TANNER, the finding, rather than the denial of the existence of a contractual licence, seems to have been influenced by matters of moral judgement. This is apparent from Lord Denning's response to the suggestion that the defendant mistress had only a bare licence revocable at will. He said:

> "I cannot believe that this is the law. This man had a moral duty to provide for the babies of whom he was father. I would go further, I think he had a legal duty towards them. Not only towards the babies, but also twoards their mother...."(64)

Moral considerations also appear to underlie the decision in CHANDLER v KERLEY. This is suggested by the statement of Scarman L.J. to the effect:

> "It would be wrong.... to infer, in the absence of an express promise, that the plaintiff was assuming the burden of housing another man's wife and children indefinitely and long after his relationship was ended."(65)

The reasoning adopted by Jonathan Parker Q.C. in COOMBES v SMITH(66) is reminiscent of that of Scarman L.J. in CHANDLER v KERLEY. In COOMBES v SMITH, the plaintiff licensee was also married to someone other than the licensor. In rejecting the finding that an irrevocable contractual licence to occupy for life existed, Jonathan Parker Q.C. says that in the circumstance of the case it would be very difficult but not impossible to infer a licence for life and seems to imply, if a lesser duration had been pleaded, it may have succeeded.

One common thread in all these decisions is the stated desire of the courts to give effect to the intentions of the parties. However, considerations of morality and justice lead the court to place the emphasis on one of the parties' intentions over those of the other. For instances in HORROCKS v FORAY, the emphasis was on the deceased's generosity, in TANNER v TANNER, on the woman's

reliance, and in CHANDLER v KERLEY, on the intentions of the man who had bought the house.

Apart from enabling the judges to give effect to the justice of the case, the use of the contractual approach seems to have been motivated by the fact that it provided flexibility enabling provision to be made for children of a relationship, taking into account similar considerations as apply on divorce, nullity or judicial separation. For example, the Court of Appeal in TANNER v TANNER considered the contractual licence to occupy was intended to last so long as the children were of school age, reminiscent of a MESHER order(67) of the divorce court. Again, in HARDWICK v JOHNSON(68), Lord Denning (although not himself adopting the contractual approach) considered the licence would have been terminable had there been no children and the wife had brought another man to live there. It is also noticeable that in this case the Court of Appeal expressly refused to put a precise limit on the duration of the licence, leaving the question of its irrevocability in the air. The consequence of this was that it gave the court jurisdiction to look again and make a new determination when the circumstances changed, similar to the powers under the matrimonial jurisdiction.

Another attraction of the implied contractual approach may well be the flexibility in the remedies available. As has already been noted, in addition to an injunction, damages for breach of contract may be awarded. It may well be that the Court of Appeal was particularly anxious in TANNER v TANNER to base its decision on the finding of an implied contractual licence as the remedy of damages would be available to the woman, who had, by the time of the appeal, left the premises in dispute and found alternative accommodation. It is arguable that an alternative basis for the decision could have been estoppel (69) (the same acts which were regarded as consideration being treated as acts of reliance for the purpose of estoppel), but since possession of the premises had already been given up, no monetary compensation would have been payable to the plaintiff who had been forced out.

A further explanation for the inconsistencies of approach in family arrangement cases seems to be the involvement or otherwise of third parties(70). There are substantial problems associated with the notion that a contractual licence is per se capable of binding a third party(71). It is noticeable that the court or majority thereof, was prepared to take the contractual approach in TANNER v TANNER, CHANDLEY v KERLEY and HARDWICK v JOHNSON, where no third party was affected, but in WILLIAMS v STAITE,

where a successor of the licensor was involved, an estoppel approach was taken. The whole issue of the position of contractual licensees as against third parties will shortly be discussed in Section IV(d)(ii).

In conclusion, it is submitted that the finding of an implied contract in the cases surveyed was unjustified. The whole approach arises out of looking at what the licence creates rather than what it does not create and, as such, is a false trail. The requirements of a contract such as intention to contract, consideration and certainty of terms do not in many instances appear to be satisifed. Nevertheless the approach was desirable in so far as it attempted to protect and provided flexibility in protecting residential security where the merits of the case appeared to justify such protection, although in some cases the justice of the situation was perhaps overshadowed by traditional and outmoded moral judgements. On the other hand, the inconsistencies in approach to individual disputes is undesirable as this leads to unwarranted uncertainty and confusion of concepts and it will be argued that other approaches could well have been used in the implied contract cases so as to produce a more unified but equally satisfactory result. There appears in any event to be an observable move away from reliance on the concept of an implied contract in favour of estoppel. This trend will presumably be continued and enhanced on account of the House of Lords decision in STREET v MOUNTFORD(72) It would now seem, subject to exceptions, whenever there is an intention to create a contractual relationship and exclusive possession is granted for a fixed or periodic term certain and in consideration of a premium or periodic payments, a tenancy will arise. As an intention to create a contractual relationship is a necessary prerequisite to the finding of an implied contract, at least in those situations where payments are made a periodical tenancy may well be considered to arise, unless the court finds exclusive possession has not been granted or that the occupation is not for a fixed or periodic term certain. Presumably, with regard to the latter, if the agreement to occupy is construed as being for life, this would, by virtue of S.149 (6) of the Law of Property Act 1925, take effect as a lease for 90 years and, as such, would be for a fixed term. However arguably no informal family arrangement for the occupation of property will fall within STREET v MOUNTFORD since a subsequent court may be prepared to find that the very nature of the arrangement brings it within the excepted categories outlined by Lord Templeman(73).

References Section IV (d) (i)

1. [1952] 1 All ER 149. For details of facts see ante p. 6.

2. [1946] 1 All ER 678 (CA) revsd HL. [1947] 2 All ER 331.

3. [1950] 2 All ER 342. For facts see ante p. 18.

4. Supra at p. 680.

5. [1970] 3 All ER 326.

6. [1981] QB 202.

7. Supra at p. 195.

8. Supra at p. 685.

9. Supra.

10. Supra.

11. Supra.

12. See Lord McDermott [1948] AC 173 at p. 206.

13. [1944] KB 408. For facts see ante p. 137.

14. Supra at p. 409. See also BRYOWAN ESTATES LTD v BOURNE (1981) 131 NLJ 1212 and HARDWICK v JOHNSON [1978] 1 WLR 683 per Lord Denning at p. 689. .

15. [1969] 2 Ch 209.

16. Supra.

17. It is worth noting that specific performance would not have been available in HURST v PICTURE THEATRES LTD (supra). Consequently Buckley LJ must have intended to say an injunction would be available against breach of the implied term against arbitrary revocation. (See ante p. 98).

18. (1845) 13 M and W 838. See ante p. 136.

19. [1897] 2 QB 445. See also TANNER v TANNER [1975] 3 All ER 776. See post p. 147.

20. Supra.

21. (1862) 4 De GF and J 517.

22. [1956] 2 All ER 318 (CA).

23. Supra. See ante p. 6 for facts.

24. [1976] 1 All ER 737. For facts see ante p. 135 and post p. 151.

25. [1975] 3 All ER 776. See post p. 147.

26. Supra at p. 742.

27. Supra.

28. Supra at p. 154.

29. Supra at pp 780-781.

30. Supra at p. 780.

31. For explanation of the concept of an equitable licence see post p. 185 f. and for the distinction between contractual and equitable licences see Section IV (e) (ii).

32. Supra at p. 153.

33. See for e.g. Cheshire and Fifoot "Law of Contract" 11th Edition p. 59.

34. See post p. 209.

35. See ante p. 36-38.

36. [1955] 3 All ER 10.

37. [1969] 2 All ER 616.

38. [1978] 2 All ER 935.

39. [1919] 2 KB 571. See post p. 148.

40. Supra.

41. Supra.

42. Supra.

43. [1978] 2 All ER 942.

44. Supra at p. 579.

45. [1970] 2 All ER 760.

46. Supra. See post p. 151.

47. [1986] 1 WLR 808. For details see post p. 198 f.

48. [1970] AC 777.

49. Supra at p. 822.

50. Supra.

51. [1911] KB 506. See generally Dwyer "Immoral Contracts" (1977) 93 LQR 386.

52. Supra at p. 510.

53. Supra.

54. Supra.

55. [1959] 1 WLR 624 at p. 640 (Ormord L.J.) and 641 (Willmer L.J.).

56. Supra.

57. Supra at p. 745.

58. Supra at p. 742.

59. See Zuckerman (1980) 96 LQR 248 who makes a useful study of morality considerations which arguably influence the outcome of the decisions and many of whose points have been adopted in the following discussion.

60. [1978] 2 All ER 928.

61. Supra at p. 738.

62. Supra at p. 738.

63. Supra at p. 742.

64. Supra at p. 779.

65. Supra at p. 947.

66. Supra.

67. For explanation of this term see ante, footnote 46 Section IV (a).

68. Supra.

69. See post p. 209 f.

70. Bowie (1981) 11 VUWLR 63 at p. 73.

71. See post, Section UIV (d) (ii).

72. [1985] 2 All ER 289.

73. See ante, Section I (b).

(ii) Irrevocability and third parties.

Given the frequency and comparative ease with which property may be alienated, to develop principles which provide that licences are merely irrevocable as against the original licensor is of limited use. Security is enhanced if the contractual licence is not only binding on the original licensor but also on his successor in title. Consequently it is not surprising that some attempts have been made to develop the law relating to contractual licences by providing the licence may per se bind a third party. It is necessary briefly to consider these authorities and to assess the merits of this approach to protecting residential occupation. What is under consideration to begin with are authorities which provide the contractual agreement for a licence may itself bind a third party, as opposed to authorities where a contractual licence binds a third party on account of some other concept, such as a constructive trust or the doctrine of equitable estoppel.

The principal authority which lends support to the view a contractual licence is per se capable of binding a third party, is the judgement of Denning L.J. in ERRINGTON v ERRINGTON(1). It is, however, possible that the statements concerning the enforcement of the licence against a third party are obiter dicta, as it is unclear from the judgements whether the widow was suing for possession as personal representative, in which case she would stand in the shoes of the original licensor, or as devisee under his will. It has already been noted that Denning L.J. relying chiefly on the decision in WINTER GARDEN THEATRE (LONDON) LTD. v MILLENNIUM PRODUCTIONS LTD.(2) found, on account of the fusion of the administration of common law and equity, a licensor was no longer able to revoke a licence in breach of contract. However, without citing any further directly relevant authorities he concluded:

> "The fusion of equity means that contractual licences now have a force and validity of their own and cannot be revoked in breach of contract. Neither the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice."(3)

As has been pointed out by numerous writers and commentators(4) it is one thing to say a contractual licence creates an agreement irrevocable by the licensor, which is perfectly consistent with a personal right to be

on land, but quite another to claim to make the logical progression from this to say the agreement creates rights irrevocable against third parties, consistent only with a proprietary right. This is especially so as the traditional use of the licence concept in relation to land has been a negative one, to describe the relationship between owner and occupier where no proprietary interest has been created.

Denning L.J. did explain more fully the reasoning he had adopted in ERRINGTON v ERRINGTON, in the deserted wife case of BENDALL v McWHIRTER(5), where he also expressed the view that a deserted wife's licence was "so closely analogous" to a contractual licence that "no valid distinction can be made between them." He began his defence of ERRINGTON v ERRINGTON by placing reliance on a number of cases decided prior to WOOD v LEADBITTER(6) which he claimed supported the proposition that a contractual licence to use and occupy land, once acted upon by entry into occupation, was binding not only on the licensor but also his successors in title and that it was not revocable except in accordance with the terms of the contract. He cited WEBB v PATERNOSTER(7), WOOD v LAKE(8), TAYLER v WATERS(9), as expressing this view, and WALLIS v HARRISON(10) as being consistent with it. He then came to WOOD v LEADBITTER itself and argued the decision does not conflict with the aforementioned cases except in so far as it criticises them on the ground that the licence should have been granted by deed. Of WOOD v LEADBITTER, Denning says the licence would have been good if it had been granted by deed and now since the fusion of law and equity this is no longer necessary. Consequently, every contractual licence to use and occupy land, once acted upon, takes effect according to its tenor and is only revocable in accordance with the terms of the contract. Denning L.J. concluded that cases such as HURST v PICTURE THEATRES LTD.(11) and WINTER GARDEN THEATRE (LONDON) LTD v MILLENNIUM PRODUCTIONS LTD.(12), had restored the law to its position prior to WOOD v LEADBITTER.

Although in NATIONAL PROVINCIAL BANK v AINSWORTH(13) Lord Upjohn seemed to agree the line of cases starting with WEBB v PATERNOSTER(14) did give rise to rights binding on everyone except a purchaser for value without notice, it is doubtful whether such cases provide authority for the proposition that the contractual agreement iself is capable of binding a third party or that Lord Upjohn understood them in this way. In WEBB v PATERNOSTER the plaintiff was granted a licence to lay a haystack on the land of a certain Sir William Plummer until he was able to sell the hay. Sir William Plummer subsequently leased the land to the defendant who let his cattle into the

field. The action was for trespass, as the defendant's cattle ate the plaintiff's hay. On the facts of the case it was held that no action would lie as the permission to lay the haystack had not been for a specific period and more than a reasonable period of time in which to sell the hay had elapsed. However, Dodderidge expressed the view that such a licence would not be revocable in all circumstances; although a licence for mere pleasure and a licence for an uncertain profit were countermandable, a licence for a certain profit was an "interest" and not countermandable. In the same decision Haughton expressed the opinion that a licence once executed was not countermandable. The reasoning adopted would seem to be open to a number of interpretations the most satisfactory of which is that the licence under discussion was a licence coupled with an interest. It was in this way that Goff J. in RE SOLOMON(15) thought Lord Upjohn understood the case in NATIONAL PROVINCIAL BANK v AINSWORTH. An alternative view is that acting on the permission made the licence irrevocable(16). Even if this view is taken, WEBB v PATERNOSTER is not authority for the proposition that a contractual agreement to occupy land is binding on a third party, for it is the conduct subsequent to the agreement which renders the licence binding.

Returning to BENDALL v McWHIRTER, Denning L.J. next placed reliance upon a number of restrictive covenant cases in support of his view a contractual licence can bind a third party, namely TULK v MOXHAY(17), MORELAND v RICHARDSON(18) ANDREW v AITKEN(19) and SHARPE v DURRANT(20). Every contractual licence, he said, carries with it a negative covenant that the licensor will not interfere with the use and occupation of the licensee in breach of contract. It is this negative covenant which is binding on successors in title just as with restrictive covenants. Denning then quoted from the judgment of Lord Cottenham L.C. in TULK v MOXHAY where he said:

> "If an equity is attached to the property, no-one purchasing with notice of the equity can stand in a different situation from the person from whom he purchased."(21)

However, as both Lord Upjohn and Lord Wilberforce pointed out in NATIONAL PROVINCIAL BANK v AINSWORTH(22), the law relating to restrictive covenants does not provide all negative obligations are binding on successors in title of the covenantor, but in fact imposes strict parameters such as the requirement that the benefit of the covenant touches and concerns the land of the covenantee. It is thus questionable whether a valid comparison can be drawn

between restrictive covenants and contractual licences as a contractual licensee does not have to hold land capable of being benefitted and moreover whereas a restrictive covenant requires the covenantor to refrain from doing something on his own land for the benefit of the covenantee, a contractual licence requires the licensor to allow the licensee to make certain use of the licensor's land.

Denning L.J. additionally drew support for his proposition that a contractual licence can bind third parties from two charterparty cases, DE MATTOS v GIBSON (23) and LORD STRATHCONA STEAMSHIP CO v DOMINION COAL CO.(24) where it was held if an owner of goods agrees to allow another to hire them, the agreement is binding not only on the original owner but also on his successors in title. However, in CLORE v THEATRICAL PROPERTIES(25) Lord Wright M.R. had expressed the view that such a proposition was confined to the "very special case" of charterparty agreements and was irrelevant to the case of a licence to use land. Similarly, in the restrictive covenant case of L.C.C. v ALLAN(26), Buckley L.J. maintained the charterparty cases were not intended to set down general principles and would not be extended to land law.

The other main authority, claimed by Denning L.J. to be authority for a contractual licence binding a third party, was IN RE WEBB'S LEASE, SANDOM v WEBB(27). Here, the Court of Appeal accepted a lessee was bound, where before the lease his lessor had given a licence to put up advertisements on the wall of the demised buildings. However, the strength of this authority is substantially diminished by the fact that counsel for the lessee had conceded the point.

It would therefore appear the authorities which Denning L.J. attempts to rely on in BENDALL v McWHIRTER(28) to justify his proposition in ERRINGTON v ERRINGTON that a contractual licence can bind a third party, can at best be described as weak. However, what is more significant are the many authorities against such a proposition, none of which were cited in ERRINGTON v ERRINGTON, and some of which, neither in BENDALL v McWHIRTER. For example, the important decision of HILL v TUPPER(29) was not cited in either case. The facts of this case were that a canal company leased land, backing onto a canal, to the plaintiff, giving him "sole and exclusive right" to hire out pleasure boats on the canal. The defendant was the freeholder of the adjoining plot. In disregard of the plaintiff's right he hired out boats for fishing purposes. The plaintiff thereupon brought an action against the defendant alleging disturbance of his

easement to put boats on the canal. However, it was held that as the right did not accommodate the dominant tenement, no easement could exist. Pollock C.B. concluded the plaintiff's position against the defendant third party was thus:

> "This grant merely operates as a licence or covenant on the part of the grantors and is binding on them as between themselves and the grantee but gives him no right of action in his own name for any infringement of the supposed exclusive right."(30)

As the right granted was not a proprietary right, it was only a licence, and, as such, could not bind a third party. Similarly COLEMAN v FOSTER(31) detracts from the view a contractual licence can bind a third party. In that case it was held a licence necessarily determines on assignment of its subject matter. Pollock B. commented:

> "A licence is a thing so evanescent that it cannot be transferred."(32)

The most significant authorities providing obstacles against a finding that a contractual licence is capable of binding a third party are the House of Lords' decision in KING v DAVID ALLEN(33) and that of the Court of Appeal in CLORE v THEATRICAL PROPERTIES(34). Both these decisions were cited in BENDALL v McWHIRTER and accordingly discussed by the court. KING v DAVID ALLEN concerned an agreement under which the defendant and plaintiff were respectively described as licensor and licensee. The defendant, for valuable consideration gave the plaintiff permission to fix, for four years, posters and advertisements to the flank wall of what was to be a picture house. In addition the defendant agreed whilst the agreement was in force he would not permit any other person to fix advertisements to the wall. The premises were assigned by the defendant to a company of which the defendant was a director. The assignees took with notice of the agreement but refused to accept it was binding on them. The plaintiff licensees brought an action for breach of contract against the licensor, but the success of their claim depended on proving the agreement was not binding on the successors of the licensor, as the House of Lords maintained that only then would the licensor be in breach of contract. Counsel for the licensor argued the agreement was binding on the third party assignees as it was the obvious intention of the parties to the contract that the licence should bind an assignee with notice. Nevertheless, the House of Lords decided no interest in land capable of binding a third party had been created, but merely a personal obligation on the

part of the licensor, who, having put it out of his power to fulfill his obligations, was liable for damages. Various arguments have been put forward to distinguish KING v DAVID ALLEN from ERRINGTON v ERRINGTON(35). Firstly, in BENDALL v McWHIRTER, Denning L.J., no doubt inspired by Professor Cheshire's article(36) on ERRINGTON v ERRINGTON, distinguished KING v DAVID ALLEN on the ground that the contract for the licence was executory in that case as the subject matter of the licence, the picture theatre, was not yet in existence. In contrast in ERRINGTON v ERRINGTON, the young couple had taken up occupation. This would seem to be an invalid distinction in so far as the principle is stated as being that the contractual agreement itself is capable of binding a third party. If it is the "acting upon" the agreement which provides the binding element, this is not the same as saying the agreement itself binds a third party.(37)

A second distinction was drawn by Lord Denning in the later case of BINIONS v EVANS(38). In this case he argued in neither KING v DAVID ALLEN nor CLORE v THEATRICAL PROPERTIES was there a suggestion of an express or implied stipulation that the purchaser was to take subject to the rights of the licensee. However, there appears to be no more reason to suppose there was any such express or implied stipulation on the facts of ERRINGTON v ERRINGTON and moreover it was argued, to no avail in KING v DAVID ALLEN, that it was the obvious intention of the contracting parties the agreement would bind assignees taking with notice.(39)

A further distinction drawn between ERRINGTON v ERRINGTON and KING v DAVID ALLEN, is that put forward by Professor Maudsley(40). He points out, in ERRINGTON v ERRINGTON the licensees were in exclusive possession, whereas in KING v DAVID ALLEN they were not. This he argues should be significant as from the point of view of policy matters it may well be justified to allow the contractual rights of a licensee in exclusive possession to bind a third party with actual or constructive notice as such rights are more easily discoverable. Not so, however, where the permission could take an infinite variety of forms short of exclusive possession, making identification and discovery difficult.(41)

To turn finally to CLORE v THEATRICAL PROPERTIES(42) which was described by Denning L.J. in BENDALL v McWHIRTER as the "only case which gives rise to difficulty"(43). An agreement under seal was made between parties who were described as lessor and lessee respectively for "free and exclusive use of all the refreshment rooms" of a theatre. The "lease" contained terms against assignment and subletting except with the

consent of the lessor. Assignees of the lessor sought to prevent assignees of the lessee from exercising any rights conferred by the grant. The Court of Appeal found the grant was on its construction a licence and not a lease and consequently as a licence conferred only personal rights; it could not be enforced against third parties. The decision was explained by Denning L.J. on the basis the case proceeded on the assumption the licensee had no rights in equity enforceable against the licensor, but since WINTER GARDEN THEATRE (LONDON) LTD. v MILLENIUM PRODUCTIONS LTD.(44) had subsequently altered the assumption, CLORE v THEATRICAL PROPERTIES would have to be reconsidered. It is possible that only the position at common law was taken into account in CLORE v THEATRICAL PROPERTIES as in his leading judgement Lord Wright M.R. said:

> "The defendants who seek to establish their rights under the document are not seeking to establish them against [the original licensor] but against the plaintiff assignee .... which is not possible at common law as there is no privity of contract between plaintiff and defendant."(45)

However, if this was the case, it is somewhat strange as the court was clearly aware of the protection afforded by equity to licensees in the earlier case of HURST v PICTURE THEATRES LTD.(46)

It would seem, therefore, not only was Denning L.J.'s proposition in ERRINGTON v ERRINGTON, that a contractual licence can per se bind a third party, based on very weak authority, but there were also significant and recent authorities against such a proposition which were not cited in the case. In any event, it might have been thought that a death blow had been struck at the notion when, in NATIONAL PROVINCIAL BANK v AINSWORTH(47) Lord Wilberforce in the House of Lords refuted the view of the Court of Appeal in BENDALL v McWHIRTER that KING v DAVID ALLEN and CLORE v THEATRICAL PROPERTIES were irrelevant authorities. Whilst accepting the actual decision in ERRINGTON v ERRINGTON, he went on to say he did not find ERRINGTON v ERRINGTON of assistance on the issue of transmissibility of contractual licences and questioned whether the decision in fact involved a successor in title of the licensor. However, it is significant that Lord Wilberforce quite clearly refused to close the door entirely on the development of contractual licences along these lines. He concluded, after commenting that the position of third parties against contractual licensees was unclear:

> "No doubt the time will come when this whole

> subject will have to be reviewed; this is not the occasion for it and I think that it would be undesirable now to say anything which might impede the development of this branch of the law."(48)

Lord Denning took full advantage of the small opening that remained to resurrect the idea in BINIONS v EVANS(49) although no doubt on account of the substantial opposition to his views, he did produce an alternative ground for the contractual licence in that case binding a third party(50). The facts of the case were that the defendant's husband had worked for his landlords all his life. Consequently, after his death, as an act of kindness, the landlords agreed to allow the defendant, aged 82 at the time of the action, to remain in the cottage which had been her home for life, " as Tenant at Will of them, free of rent for the remainder of her life...." The agreement went on to provide that the defendant could determine the agreement by giving four weeks' notice and that she had only a personal right to occupy with no right to assign or sublet. Two years after making the agreement, the landlords sold the land which included the property expressly subject to the agreement with the defendant, and for a price which was reduced on account of the arrangement. Nevertheless, after completion, the plaintiff purchasers served a notice to quit on the defendant and subsequently brought proceedings for possession on the ground that she was a tenant at will and her tenancy had been effectively determined. The Court of Appeal refused a possession order. The majority of the court (Megaw and Stephenson L.JJ.) were of the opinion the defendant was a tenant for life under the Settled Land Act 1925(51), but Lord Denning based his decision on the finding that the defendant was a contractual licensee with an irrevocable right to remain for the rest of her life, and that contractual licence had a force of its own capable of binding third parties. He posed the question: "What is the status of a contractual licensee?", and answered it by saying:

> "...a right to occupy for life arising by contract gives the occupier an equitable interest in land."(52)

By virtue of the agreement itself, the widow, he believed, had an equitable interest which could be protected by injunction. Once again, the authorities cited by Lord Denning in support of a contractual licence per se binding a third party were equally suspect and the subject of much academic criticism(53). Briefly, he first cited RE BOYERS(54) and RE CARNE'S SETTLED ESTATES(55) both of which would appear to be cases of

life interests under a settlement and not licences at all(56). The next two cases cited, namely FOSTER v ROBINSON(57) and ZIMBLER v ABRAHAMS (58) did not involve successors in title of the licensor and BROWNE v WARNER(59) and RE KING'S LEASEHOLD ESTATES(60) involved respectively a contract to create a legal estate and an equitable lease. Consequently the only relevant authorities cited boil down to ERRINGTON v ERRINGTON which it has already been noted was itself based on inadequate authortity and WEBB v PATERNOSTER(61) which does not support the view a contractual licence per se binds a third party.

Since the decision in BINIONS v EVANS, other reasoning has been developed to substantiate licences to occupy in some circumstances binding third parties(62). But the idea with all its difficulties appears still to be alive. In MIDLAND BANK LTD. v FARMPRIDE HATCHERIES AND ANOTHER(63),the bank lent money on mortgage to a company to enable business to expand. The security for the loan was land owned by the company which included residential premises consisting of a manor house. There was a service agreement with the company whereby a certain Mr. Willey and his wife, who were sole shareholders and directors of the company, were given a licence to occupy the manor house for 20 years, rent free. The existence of the licence was not disclosed or known about by the bank at the time of the mortgage but the bank's negotiator was aware the Willey family were living in the manor house. The company defaulted in the payment of the mortgage instalments and the bank thereupon sought possession with a view to sale. What is somewhat surprising about the case was that the Court of Appeal (Buckley, Shaw and Oliver L.JJ.) was prepared to assume the contractual licence was per se capable of binding a third party and the case was fought solely on the question of whether the bank had constructive notice of the licence and, as such, was bound by it. In the event, it was held that, although the bank did have constructive notice as the negotiator was aware of the occupancy of the house by the Willeys, Mr. Willey was estopped by his own conduct from relying on the doctrine of constructive notice, the precise reasons for the estoppel varying with the different judgments.

Since there appears to be some, albeit limited, mileage in the proposition that a contractual licence may per se bind a third party who takes with notice, it is necessary to consider whether the law should be allowed to continue its development along these lines or whether the route should, by some future decision, be finally closed. To say a contractual licence to occupy of itself is capable of binding a third party is to receive into the law of

property a new accretion from the law of contract and thus create a new interest in land. Of course, when the need has arisen, this has happened many times before. For example, the doctrine of privity of contract was penetrated by SPENCER'S CASE(64) which provided the benefit and burden of certain covenants could run with leases and by TULK v MOXHAY(65) which makes similar provision for certain covenants made between freeholders. But, given one of the main reasons for the development of licence concepts in the twentieth century has been to give effect to informal family and quasi-family arrangements for residential security, is it necessary to upgrade contractual licences to occupy to interests in land and, if so, at what expense? As has already been said, given the degree of geographical mobility within society, if a licence is only enforceable against the original licensor, any protection is illusory as it can be evaded by a sale of the property in question. Professor Wade put forward(66) three main arguments against such an extension. Firstly, he maintained there must be a definite frontier between property and personal rights, otherwise there will be no limit to the new incidents of property rights which could be invented. Secondly, he considered property rights need to be of a limited and familiar kind, otherwise purchasers will have to investigate an infinite variety of circumstances. It is for this reason that the courts have been careful to put strict limits on the running of covenants in leases and between freeholders. Finally, he claimed any attempt to develop a new interest unsettles the law so badly and for so many years, that no new interests in property should be created by the courts.

Certainly, given the necessity that property should be freely and easily alienable, Professor Wade would seem to be right in his belief that it is undesirable to burden land with an infinite variety of incumbrances. But the principle could be narrowed down and confined to contractual licences which give rights to exclusive possession(67). It is already well established in relation to unregistered land by decisions such as BARNHART v GREENSHIELDS(68) and HUNT v LUCK(69) that if a purchaser fails to make proper enquiries of those in possession, whether tenants or occupiers, he is affected with notice of all equities enforceable by the occupier against the vendor. Moreover, since the decision of the House of Lords in STREET v MOUNTFORD(70), the finding of a contractual licensee in exclusive possession will be comparatively rare, for, apart from well established exceptions such as service occupancies, wherever there is an intention to create a legally binding agreement and a person is in exclusive possession paying a rent, a tenancy will arise. If one accepted that contracts could

genuinely be spelled out from the typical informal family arrangement for occupation of property, agreements falling outside the wide definition of a tenancy in STREET v MOUNTFORD may well be almost confined to such arrangements, so long as nothing which could reasonably be described as a rent was paid. Thus by recognising contractual licences, where exclusive possession was given, as interests in land, protection would be given virtually only where it was needed. However, it has been doubted(71) whether such agreements do satisfy the strict requirements of a contract in most cases and, although Professor Wade's opinion that no new interests in land should be created by the courts is unacceptably rigid, new interests should not be created where none are necessary. It will be argued(72) that the same end, that of giving effect to informal arrangements, can be achieved by more satisfactory means, but first consideration needs to be given to the notion that an irrevocable contractual licence can bind a third party by means of a constructive trust.

No doubt because of the conceptional difficulties of saying a licence per se binds third parties and on account of the opposition encountered, Lord Denning, beginning with BINIONS v EVANS(73) slightly altered his approach so as to combine the notion of an irrevocable contractual licence with a recognised proprietary interest, namely the constructive trust. He said:

> "Suppose, however, that Mrs. Evans did not have an equitable interest at the outset, nevertheless it is quite plain that she obtained one afterwards when the Tredegar estate sold the cottage. They stipulated with the purchaser that he was to take the house "subject to" Mrs. Evans' rights under the agreement .... In these circumstances this court will impose on the purchaser a constructive trust for her benefit."(74)

This provides a neat little way around the forcful authorities of KING v DAVID ALLEN(75) CLORE v THEATRICAL PROPERTIES(76) for the constructive trust arises on the conveyance to the purchaser and, as such, does not predate the conveyance. The question arises, as to whether the imposition of a constructive trust was justified on precedent or policy grounds, and is the line of reasoning any more satisfactory than the idea that a contractual licence can per se bind a third party(77). To consider first, precedent. In support of his proposition, Lord Denning M.R. placed reliance on three main authorities, the first of which was BANNISTER v BANNISTER (78) In this case, on the plaintiff's oral undertaking that the defendant would be allowed to live

in a cottage rent free for as long as she desired, the defendant agreed to sell the plaintiff that and an adjacent cottage. The plaintiff's undertaking was not included in the formal conveyance and subsequently the plaintiff, going back on his word, sought possession of the cottage from the defendant on the grounds that she was merely a tenant at will and her tenancy had been terminated by service of a notice to quit. The defendant counterclaimed that the plaintiff held the cottage on trust for her life. The House of Lords held that, on account of the plaintiff's fraud, he held the cottage on constructive trust for the defendant who was a tenant for life under the Settled Land Act 1925(79). However, in BINIONS v EVANS, although the majority of the court (Megaw and Stephenson L.JJ.) followed BANNISTER v BANNISTER in finding Mrs. Evans was a tenant for life under the Settled Land Act, Lord Denning refuted this, yet at the same time imposed a constructive trust. It would seem one thing to impose a constructive trust where a trust in the form of an equitable life interest already existed, and quite another to impose a constructive trust to enforce a personal right such as a contractual licence. Moreover, the constructive trust in BANNISTER v BANNISTER was imposed on account of fraud or unconscionable conduct and, although both Megaw and Stephenson L.JJ followed a similar line of reasoning in BINIONS v EVANS, according to Lord Denning, a constructive trust was imposed:

> "...for the simple reason that it would be utterly inequitable for the purchaser to turn the widow out contrary to the stipulation subject to which he took the premises."(80)

What is more, in BANNISTER v BANNISTER, the constructive trust was being imposed to overcome lack of writing required by S.40 of the Law of Property Act 1925, on the basis that not to recognise the widow's right to occupy for life would be to allow a statute to be used as an instrument of fraud. In contrast in BINIONS v EVANS, the agreement to occupy was in writing, so arguably, if there was a trust, it should have been an express trust. However, it is probable that there was no intention, on the part of the Tredegar estate, to create a trust in favour of Mrs. Evans, the likely motivation for the insertion of the clause concerning the cottage being to protect the Tredegar estate from liability rather than providing security for Mrs. Evans.(81)

A further highly significant difference between BANNISTER v BANNISTER and BINIONS v EVANS, is the fact that in BANNISTER v BANNISTER the constructive trust was imposed in a two party situation, although there were admittedly

dicta wide enough to cover a three party situation as Scott L.J. commented:

> "It is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another."(82)

The second authority Lord Denning purported to obtain support from was the judgement of Lord Diplock in GISSING v GISSING where he said:

> "A resulting, implied or constructive trust - and it is unnecessary for present purposes to distinguish between these three classes of trust - is created by a transaction between the trustee and the cestui que trust in connection with acquisition by the trustee of an estate in land whenever the trustee has so conducted himself that it would be inequitable to deny the cestui que trust a beneficial interest in the land acquired."(83)

As a number of academic writers have pointed out(84), Lord Denning was in fact quoting Lord Diplock out of context, as he fails to refer to the immediate limitations Lord Diplock went on to impose on what otherwise appears to be a very broad principle, namely:

> "And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."(85)

It should also be noted that Lord Diplock prefaced the above statement by saying a trust "is created by a transaction between trustee and cestui que trust...." This suggests he was referring to a two party situation, whereas Lord Denning, in BINIONS v EVANS, applies the principle to a three party situation.

The final authority Lord Denning sought to place reliance on was the well known statement of Cardozo J. in BEATTY v GUGGENHEIM EXPLORATION CO. where he said that :

> "....[a] constructive trust is the formula through which the conscience of equity finds expression."(86)

But, as Oakley has pointed out(87), the constructive trust has developed upon completely different lines in the English Courts as compared to that of the American

courts. In America, it is regarded as a remedial device, whereas traditionally in England the constructive trust has been regarded as an institution. Thus, as Browne-Wilkinson J. commented in RE SHARPE(88), the notion of imposing a constructive trust as a remedy was a "novel concept" in English law. However, there is evidence, at least in some spheres, that the English courts have now altered their approach to coincide with the American view. This can be seen for example in cases concerning intermeddling of trust property involving knowing assistance, such as SELANGOR UNITED RUBBER ESTATES LTD. v CRADDOCK (No. 3)(89) and KARAK RUBBER CO. v BURDEN (No.2)(90). Also in the 1970s, in disputes relating to the acquisition of an interest in property, Lord Denning developed the so-called "new model construtive trust" which appeared to be more akin to the American view. Thus, in HUSSEY v PALMER, he described the constructive trust as:

> "...a trust imposed by law where justice and good conscience require it. It is a liberal process founded on large principles of equity.... It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution."(91)

It has already been indicated that in more recent times, the courts have moved away from this liberal approach in disputes where an equitable interest in property is being claimed. However, the only question which needs to be addressed here is whether a broad remedial type approach to construtive trusts is warranted in licence cases where security of occupation is offered but no direct or indirect contribution has been made to the purchase price to result in an equitable interest in the property.

Before going on to consider this issue, it should be noted that the notion that an irrevocable contractual licence can give rise to a construtive trust binding a purchaser has been followed in both DHN FOODS LTD. v TOWER HAMLETS BOROUGH COUNCIL(92) and arguably RE SHARPE(93), although in the latter case it is not entirely clear whether the licence under consideration was of an "equitable" rather than contractual nature. The former case did not concern an informal family arrangement but raised the question of whether a company, DHN Foods Ltd., had, on compulsory purchase, a compensatable interest in premises which they occupied under an informal arrangement with legal owners, Bronze, an associated company. The Court of Appeal (Goff, Shaw L.JJ. and Lord Denning M.R.) decided DHN Foods Ltd. had an irrevocable contractual licence which gave rise to a construtive trust binding the legal owner of the premises and from this trust resulted a sufficient interest to

entitle the company to compensation for disturbance. The authority of the decision is, however, weakened by the fact that there were three grounds for the decision and only one involved licence reasoning. Furthermore, in adopting the licence reasoning reliance was placed upon SIEW SOON WAH v YONG TONG HONG(94) and as this concerns a tenancy by estoppel, it is difficult to see how the decision can have any bearing on contractual licences.

The fact that the reasoning of Lord Denning in BINIONS v EVANS has been followed in the two aforementioned cases should not be taken as an indication that the principles are being generally accepted. Even before the decision in RE SHARPE(94), the whole approach was disapproved of in CHANDLER v KERLEY(95) where Lord Denning was not a member of the court. The county court judge had held that the contractual licence found to exist on the facts of the case gave rise to a constructive trust. However, in the Court of Appeal, Lord Scarman rejected this idea as being unsound. Moreover, in WILLIAMS v STAITE(96), where the cottage in question had been sold after the death of the licensor to a purchaser who bought expressly subject to the licensee's occupation of the cottage and at a reduced price, no constructive trust argument was put forward, even though, on account of the similarity of the purchaser's position to that of the purchaser in BINIONS v EVANS, this would appear to have been an ideal case for such reasoning.

What problems are therefore associated with combining the notion of a constructive trust with an irrevocable contractual licence, so as to bind third parties with notice? The proposition in BINIONS v EVANS seems to be that if a purchaser takes expressly or impliedly subject to third party rights, whether those rights constitute a recognised proprietary interest, they will bind the purchaser if it is unconscionable for him to ignore these rights. This would appear to open the "floodgates". By the imposition of a "subject to" clause, any burden, whether capable under existing proprietary concepts of running with the land, will bind third parties. This would for example make superfluous the strict requirements concerning the nature of covenants between freeholders which may be annexed to land. Moreover, even for a covenant to be expressly assigned, more is needed than simply a chain of express assignments; it must, for instance, be established that land is capable of being benefitted and is sufficiently ascertainable, and similar restrictions apply for covenants running with leases and recognition of easements and profits. The reason for imposing such restrictions is to ensure that land cannot become burdened with an infinite variety of interests potentially reducing the value of the land and inhibiting

its alienation. However, this is not to say new interests in land should not be recognised where this is necessary and it may well be that a distinction could be drawn between different types of "subject to" clauses, recognition only being given to cases where an irrevocable contractual licence to occupy has been granted by the vendor, and the purchaser had purchased subject to such rights. But the implications of this need to be considered.

Lord Denning did not confine the imposition of a constructive trust to the situation where a purchaser took expressly subject to a contractual licence, for he suggested of a purchaser:

> "But even if he does not take expressly "subject to" the rights of the licensee, he may do so impliedly at any rate where the licensee is in actual occupation of the land so that the purchaser must know he is there and of the rights which he has: see HODGSON v MARKS(97). Whenever the purchaser takes the land impliedly subject to the rights of the contractual licensee a court of equity will impose a constructive trust for the beneficiary."(98)

This of course brings in by the back door a contractual licence to occupy property as a proprietary interest, as, under the doctrine of notice, once executed, it will always bind a purchaser. However, the reason, according to Lord Denning, for imposing a constructive trust in the circumstances of BINIONS v EVANS, was because it would be utterly inequitable for the purchaser to turn the widow out contrary to the stipulation subject to which he took the premises. Even if one accepts this broad basis for the imposition of a constructive trust, as opposed to the traditional narrow fraud basis set down in BANNISTER v BANNISTER(99), it is questionable whether it would be "utterly inequitable" for all purchasers taking, even expressly, let alone impliedly, subject to an irrevocable contractual licence, to turn the licensee out. In BINIONS v EVANS, the purchaser not only bought subject to Mrs. Evans' rights of occupation but also at a reduced price. What would be the position if the purchaser bought either expressly or impliedly "subject to", at the full market price? The decision of Dillon J. in LYUS v PROWSA (100) provides some indications as to the position where a purchaser acquires property expressly "subject to" a certain third party's rights although the case did not involve a licence to occupy. A development company which was the registered proprietor of certain development land, charged the land in favour of a bank. Later the company contracted to sell one plot to the

plaintiff who registered a caution. This caution was clearly not binding on the bank as mortagees, as it was second in time to the legal mortgage. The company became insolvent before the sale to the plaintiff was completed and consequently the bank exercised its power of sale. Although the bank did not take subject to the plaintiff's estate contract which was cautioned off the register, it chose to sell the land to the first defendants "subject to and with the benefit of" the plaintiff's contract. Subsequently, the first defendant sold part of the land including the plaintiff's plot to the second defendant subject to the plaintiff's contract "in so far, if at all, as it may be enforceable against the vendors."

On these facts, even though nothing relating to the plaintiff's estate contract ever reappeared on the register and despite S.20 of the Land Registration Act 1925 which states that transferees take subject to minor interests and overriding interests but "free from any other estates or interests whatsoever", Dillon J. held the first and second defendants took the land subject to a constructive trust. The reasoning adopted by Dillon J., placing heavy reliance on the judgement of Lord Denning M.R. in BINIONS v EVANS(101), was that as the defendants knew of the plaintiff's rights outside the register and agreed to take subject to them, to place reliance subsequently on S.20 of the Land Registration Act 1925 was to use a statute as an instrument of fraud. However, it is difficult to see what the unconscionable conduct justifying the imposition of a constructive trust was, particularly with regard to the second defendants. They had paid the full market price for the land, and, on the precise wording of the clause, had taken the land subject to a disputed right; they were now simply relying, in the dispute, on the conclusiveness of the register. What is more, despite the fact that the purchase had been at the full market value, the effect of the decision was to require the second defendants to put up a house on the plaintiff's plot in 1982 at 1978 building prices. This seems totally unfair on the defendants who had in no way been unjustly enriched at the plaintiff's expense, and consequently the imposition of a constructive trust in these circumstances is totally unwarranted.

Applying these principles to contractual licences it would appear that, if the decision of Dillon J. in LYUS v PROWSA(102) were followed, even if a purchaser bought at the full market value, a constructive trust would be imposed if he at least bought expressly "subject to" an irrevocable contractual licence and thus without unjust enrichment and moreover even though the better view is that an irrevocable contractual licence to occupy is

merely a personal right and, as such, incapable of binding a third party. As to the situation where a purchaser merely takes impliedly subject to an irrevocable contractual licence under the doctrine of constructive notice on account of the licensee's occupation of premises, even if one accepted Lord Denning's broad approach to the imposition of a constructive trust, one could hardly describe the conduct of the purchaser in these circumstances as "utterly inequitable" if he subsequently sought to terminate the licence. This is not to say that a licensee under an irrevocable contractual licence should not be protected against third parties in a wide variety of circumstances but simply that the machinery of a constructive trust is an inappropriate means of providing that protection if the concept of a constructive trust, even if viewed as a remedial device, is to have any meaning at all.

A decided case which illustrates how the constructive trust approach to the enforcement of contractual licences against third parties can operate unjustly is RE SHARPE(103). Sharpe purchased a proprerty in Hampstead for £17,000. He raised the purchase price with the help of an unsecured loan of £12,000 from an elderly aunt who also spent £2,000 on decorations and fittings for the house in addition to paying off some of Sharpe's debts. In return it was agreed the aunt should live in the property purchased and be cared for by Sharpe and his wife. Subsequently, Sharpe became bankrupt and the trustee in bankruptcy contracted with a third party to sell the property with vacant possession. Only after the contract had been made did the aunt claim to have either a beneficial interest under a resulting trust or an irrevocable contractual or equitable right to remain in the property. The court found that although the official receiver had, before contracting to sell the property, sent letters asking her for details as to the nature and amounts of payments towards the purchase price, in view of her age she took no steps to deal with them and had forgotten about their receipt. On these facts, Browne-Wilkinson J. held that, as there was evidence the money advanced towards the purchase price was a loan, no resulting trust arose. However, the aunt did have an irrevocable contractual or equitable licence to remain in occupation until the loan was repaid to her, enforceable by means of a constructive trust on the trustee in bankruptcy. Although the decision only deals with the aunt's position as against the trustee in bankruptcy and not with her position against the purchaser to whom the trustee in bankruptcy had contracted to sell the property, Browne-Wilkinson J. concluded his judgement by saying:

> "It may be that as a purchaser without express notice in an action for specific performance of a contract [the purchaser's] rights will prevail over [the aunt's]."(104)

Despite this dicta, on the reasoning adopted it is difficult to see how the purchaser would not have been bound by the licence, however unjust such a finding may have been. The purchaser became aware of the irrevocable licence before the conveyance of the legal estate to him. He could not therefore claim to be a bona fide purchaser of a legal estate without notice, and therefore once the constructive trust was found to exist as against the trustee in bankruptcy the purchaser must have been bound too.

Finally, whatever the means by which a licence is made to bind third parties, problems will arise on account of the rigidity of the system of registration(105). However, one special problem with using the concept of a constructive trust to protect contractual licensees against third parties arises in relation to registered land on account of the provisions of the Land Registration Act 1925. S.74 provides no ".... person dealing with a registered estate or charge shall be affected with notice of a trust express, implied or constructive...." and S.59 (6) provides that a purchaser shall not be concerned with any protected matter which is not an overriding interest and "which is not protected by a caution or other entry on the register , whether he has or has not notice thereof express, implied or constructive." The issue was not discussed in BINIONS v EVANS(106) as the title to land was unregistered, nor in RE SHARPE(107) as the action involved a trustee in bankruptcy, and in LYUS v PROWSA(108) where the title was registered in imposing a constructive trust Dillon J. failed to give consideration to either of the aforementioned sections. He simply imposed the constructive trust as the defendants had reneged on the agreement. However, in the earlier case of PEFFER v RIGG(109) (which was not referred to in LYUS v PROWSA), Graham J. did, in imposing a constructive trust, consider S.59 (6) of the Land Registration Act. The case concerned a beneficial interest under a trust for sale which had not been protected as a minor interest by entry on the register but of which the purchaser had express notice. In his much criticised decision, Graham J. concluded that a "purchaser" within the meaning of S.59 (6) meant a purchaser in good faith, and a purchaser who bought with express notice of an unprotected minor interest and then claimed to take free from it was not a purchaser in good faith. Nevertheless, it is uncertain

whether PEFFER v RIGG will be followed as it is difficult to see how the decision can be reconciled with the subsequent strict approach of the House of Lords which has confirmed the irrelevancy of the doctrine of notice, both in relation to unregistered land (MIDLAND BANK TRUST CO. LTD. v GREEN (No. 2))(110), and registered land (WILLIAMS AND GLYN'S BANK LTD. v BOLAND)(111). In the latter case, Lord Wilberforce commented of registration:

> "...the system is designed to free the purchaser from the hazards of notice - real or constructive."(112)

It is arguable, however, especially if the imposition of a constructive trust were to be confined to situations where a purchaser took expressly subject to an irrevocable contractual licence, that registration principles are irrelevant. In BINIONS v EVANS, Lord Denning indicated a constructive trust only arose when the Tredegar estate sold the cottage to the purchaser subject to Mrs. Evans' interest. It would therefore seem the constructive trust does not pre-date the transfer of the legal estate to the purchaser as such registration is irrelevant. Moreover, if the constructive trust were seen only as a remedial device, it would only then bind a subsequent purchaser who expressly agreed to take "subject to" the licence and in the same way as the first purchaser. In other words, it would operate like a chain of express assignments in relation to covenants between freeholders. The drawback with this is that it may provide inadequate protection for the licensee whose rights may not be expressly taken " subject to" by a subsequent purchaser.

It seems therefore that to adopt the notion of a constructive trust to make a contractual licence bind a third party is tainted with as many difficulties as the idea that a contractual licence can, per se, bind a third party. In conclusion it would seem the contractual approach to giving effect to expectations of residential security arising out of informal family arrangements is unsatisfactory from start to finish. To begin with, it is doubtful whether contracts can genuinely be spelled out of most such arrangements and, even if the agreements could be classified as contracts, it is unduly problematic to develop the law to make contractual licences, either per se or by means of a constructive trust, bind a third party. It is therefore now proposed to examine whether estoppel principles can be made to operate more satisfactorily.

References Section IV (d) (ii)

1. [1952] 1 All ER 149.

2. [1946] 1 All ER 678 (CA) revsd HL. [1947] 2 All ER 331.

3. Supra at p. 155.

4. Most notable of which is Professor Wade (1952) 68 LQR 337.

5. [1952] 2 QB 466.

6. (1845) 13 M and W 838.

7. (1619) Poph 151.

8. (1751) Sayer 3.

9. (1816) 7 Taunt 374.

10. (1838) 4 M and W 538.

11. [1915] 1 KB 1.

12. Supra.

13. [1965] AC 1175.

14. Supra.

15. [1966] 3 All ER 262.

16. See post pp 187-188

17. (1848) 2 PH 774.

18. (1856) 22 Beav 596.

19. (1882) 22 Ch D 218.

20. (1911) 55 SJ 423.

21. Supra at p. 778.

22. Supra at pp 1237-8 (Lord Upjohn) at pp 1253-4 (Lord Wilberforce).

23. (1858) 4 De G and J 276.

24. [1926] AC 108.

25. [1936] 3 All ER 483.

26. [1914] 3 KB 642.

27. [1951] Ch 808.

28. Supra.

29. (1863) 2 H and C 121.

30. Supra at p. 127.

31. (1856) 1 H and N 37.

32. Supra at p. 40.

33. [1916] 2 AC 54.

34. Supra.

35. Supra.

36. (1953) 16 MLR 1.

37. See post pp 187-188.

38. [1972] 2 All ER 70. For facts see post p. 119.

39. Martin (1972) 36 Conv 266 at p. 270.

40. (1956) 20 Conv NS 281.

41. See post p. 224 f. for general discussion of conveyancing implications.

42. Supra.

43. Supra at p. 482.

44. Supra.

45. Supra at p. 490.

46. [1915] 1 KB 1.

47. Supra.

48. Supra at p. 1251.

49. Supra.

50. By means of a constructive trust. See post at p.

172 f.

51. See post Section IV (f).

52. Supra at p. 75.

53. See Smith (1973) CLJ 123; Martin (1972) 36 Conv 266; Hayton (1972) 36 Conv 277; Oakley (1972) 35 MLR 551.

54. [1916] 2 Ch 404.

55. [1899] 1 Ch 324.

56. See post Section IV (f).

57. [1950] 2 All ER 342.

58. [1903] 1 KB 577.

59. (1808) 14 Vest 409.

60. (1873) LR 16 Eq 521.

61. Supra.

62. In particular the doctrine of proprietary estoppel. See post Section IV (e).

63. (1981) 260 EG 493. See Annand (1981) Conv 67.

64. (1583) 5 Co Rep 16a.

65. Supra.

66. (1952) 68 LQR 337 cf the view of Cheshire (1953) 16 MLR 1.

67. This view is expressed by Cheshire (1953) 16 MLR 1.

68. (1853) 9 Moo PC 18.

69. [1902] 1 Ch 428.

70. [1985] 2 All ER 289.

71. Ante pp 145-151.

72. See post Section IV (e).

73. Supra.

74. Supra at p. 76. For critique of the decision see Oakley (1972) MLR 551; Baker (1972) 88 LQR 336; Hayton (1972) 36 Conv 277; Smith (1973) CLJ 123; Harvey (1973) 117 Sol Jo 23.

75. Supra.

76. Supra.

77. See generally R. J. Smith (1973) CLJ 123 at p. 141 f. and Woodman (1980) 96 LQR 336.

78. [1948] 2 All ER 133.

79. See post Section IV (f).

80. Supra at p. 76.

81. Smith (1973) CLJ 123 at p. 143.

82. Supra at p. 136.

83. [1971] AC 886 at p. 905.

84. Most notably Oakley "Constructive Trusts" (Modern Legal Studies) 2nd edition 1987; also Oakley (1973) CLP 17 at p. 25.

85. Supra at p. 905.

86. (1919) 225 NY 380 at p. 395.

87. Supra.

88. [1980] 1 WLR 219.

89. [1968] 2 All ER 1073.

90. [1972] 1 All ER 1210 and see views expressed by R. M. Goode (1983) 3 LS 283 at p. 392.

91. [1972] 1 WLR 1286 at p. 1289.

92. [1976] 1 WLR 882.

93. Supra. For facts see post p. 177.

94. [1973] AC 836.

95. [1978] 2 All ER 942.

96. [1978] 2 All ER 928.

97. [1971] 2 All ER 684.

98. Supra at p. 76.

99. Supra.

100. [1982] 1 WLR 1044.

101. Supra.

102. Supra.

103. Supra.

104. Supra at p. 226.

105. See post Section IV (e) p. 224 f. for general consideration of the problems posed by the systems of registered and unregistered conveyancing.

106. Supra.

107. Supra.

108. Supra.

109. [1977] 1 WLR 285.

110. [1981] 2 WLR 28.

111. [1980] 3 WLR 138.

112. Supra at p. 142

(e) Proprietary Estoppel

(i) The development of proprietary estoppel and its application to licence cases

Owing to the difficulties posed by the contractual approach to giving effect to informal family arrangements to occupy property, the courts gradually began to adopt and develop estoppel principles in the sphere of licence cases. For some time the concept of both a contractual licence and that of estoppel were used alongside one another particularly by Lord Denning no doubt on account of misgivings with regard to the contractual approach as well as a subtle attempt to cross the chasm from personal to proprietary rights, it being more well established that an estoppel can bind a third party(1). For example, in ERRINGTON v ERRINGTON, he described the licence as:

> "...contractual right or, at any rate, an equitable right."(2)

Similarly, in TANNER v TANNER, whilst basing his decision on the finding of an implied contract, he considered the two notions to be alternative approaches, for towards the end of his judgement he said:

> "Points about estoppel were raised too. There are all ways of stating the legal effect of the facts. The facts were sufficiently pleaded,it seems to me, for the court to deal with it on the basis of an implied contract."(3)

However, by the time of the decision in HARDWICK v JOHNSON(4), Denning appears to have abandoned the contractual approach in favour of estoppel but his fellow judges (Roskill and Browne L.JJ.) adhered to contractual reasoning. This two-pronged approach led to apparent confusion on the part of Browne-Wilkinson J. in RE SHARPE, who at one point in his judgment said of the situation before him:

> "It seems to me that this is a decision that such contractual or equitable licence does confer some interest in the property under a constructive trust."(5)

In addition it led to a flood of articles by academic writers(6) as to whether a licence can be both of a contractual and an estoppel nature, or whether the concepts are mutually exclusive. This issue and its importance will be returned to later(7) but first it is necessary to consider the origins of estoppel principles and how they came to be applied to licence cases.

"Equitable estoppel" is not a principle confined to licences to occupy land but is of general application. The term licence by estoppel seems to owe its origins to the judgment of Dankwerts J. in INWARDS v BAKER(8). It is submitted, however, that the terms "licence by estoppel" or "estoppel licence" should be avoided as it suggests there is a certain type of licence which may be created by estoppel and which is distinct from a bare or contractual licence. Whereas the truth of the matter is that only subsequent to its creation may a licence become irrevocable on account of estoppel principles and these may operate whether the licence to occupy was merely a bare licence or arose by contract.

There are three types of equitable estoppel namely: estoppel by representation; promissory estoppel; and proprietary estoppel. It would appear in the application of estoppel principles to licence cases the different types of estoppel have been confused and the strict requirements, to be satisfied before estoppel principles operate, overlooked. For example, in CRABB v ARUN D.C.(9), Scarman L.J. said he did not find the distinction between promissory and proprietary estoppel useful, and in AMALGAMATED INVESTMENTS AND PROPERTY CO. v TEXAS COMMERCE INTERNATIONAL BANK LTD.(10), Goff J. doubted whether proprietary estoppel was a separate category of estoppel. It is intended to consider briefly the relationship between proprietary and other estoppels and then to trace the development of estoppel principles as applied to licence cases examining how the requirements have become more relaxed and considering the general merits of the approach in giving effect to informal family and quasi-family arrangements.

Estoppel by representation has a very long history and is, moreover, recognised at common law as well as in equity. A classic statement of the principle which was adopted by Evershed M.R. in HOPGOOD v BROWN(11) is that given by Spencer Bower and Turner:

> "Where one person ("the representor") has made a representation to another person ("the representee") in words or by acts or by conduct or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive) and with the results of inducing the representee on the fault of such representation to alter his position to his detriment, the representor in any litigation which may afterwards take place between him and the representee, is estopped as against the representee, from making or attempting to

> establish by evidence any averment substantially at variance with his former representation, if the representee at the proper time and in the proper manner objects thereto."(12)

Two points need to be noted about estoppel by representation: firstly, it depends on a representation as to an existing fact and secondly, apart from a few long established exceptions, it cannot found a cause of action but merely acts negatively.

Equity extended the doctrine of estoppel by representation to apply not only to representations of existing facts but also to those of future conduct or intentions, in what has become known as promissory estoppel. This doctrine began its rise to prominence in an obiter dicta statement of Denning J. in CENTRAL LONDON PROPERTY TRUST LTD. v HIGH TREES HOUSE LTD.(13) although its origins can be traced back much further(14). It is different from estoppel by representation in two respects: firstly, it seems the effect of the estoppel need not be and usually is not permanent, and thus, after giving reasonable notice to the promisee, the promisor may revert to his original position(15). Secondly, the requirement of detriment appears to be less stringent, it only being necessary for the promisee to show he has committed himself to a particular course of action as a result of the representation(16). However, like estoppel by representation, promissory estoppel operates only as a defence and cannot create a cause of action. In COMBE v COMBE(17), it was said that promissory estoppel can only operate as a "shield not a sword".

To turn now to proprietary estoppel, sometimes known as estoppel by encouragement or acquiescence. In contrast to both estoppel by representation and promissory estoppel, proprietary estoppel can act positively, creating a claim to proprietary rights. The doctrine has been concerned almost exclusively with the acquisition of rights relating to land but it seems that it can be extended to other forms of property(18). It operates where one party knowingly encourages another to act in a particular way or acquiesces in that other's actions to the infringement of his own rights, and to the detriment of the party, placing reliance on the encouragement or acquiescence. The classic statement of the doctrine is contained in the dissenting judgement of Lord Kingsdown in RAMSDEN v DYSON, where he said:

> "If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation created or encouraged by the landlord that he

> shall have a certain interest, takes possession of such land, with the consent of the landlord and upon the faith of such promise or expectations, with the knowledge of the landlord and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to the promise or expectation."(19)

It is interesting in passing to note that it appears the common law had "anticipated the result reached by equity in RAMSDEN v DYSON...."(20) in a line of cases which drew a distinction between executory and executed licence, providing that the latter group were irrevocable. Although the principles were not consistently applied as there are cases where a licence had been acted upon but was nevertheless found to be revocable(21), in WINTER v BROCKWELL(22), where X gave a licence by parol to Y to put up a skylight which Y subsequently fitted at some expense, it was held that X, when he realised the skylight stopped light and air coming to his window and therefore brought an action for nuisance, could not succeed, at least not without reimbursing Y the money he had spent. The principle was, moreover, extended in LIGGINS v INGE(23), to operate against a third party. In this case, the plaintiff's predecessor in title by parol licence had authorised the defendant to cut down and lower a bank and erect a weir on his own land which had the effect of diverting water required for the plaintiff's mill into another channel. Consequently, the plaintiff required the defendant to remove the weir and restore the bank to its former height. It was held, however, the defendant was justified in refusing to comply on account of the principle that a licence, once executed, is not countermandable.

Returning to the equitable doctrine of proprietary estoppel in WILLMOTT v BARBER, Fry J. expanded upon the doctrine setting out the following five "probanda":

> "In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the fault of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief to his rights.... Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of

> money or in the other acts which he has done, either directly or by abstaining from asserting his legal right...."(24)

These five probanda have, in recent times, continued to be strictly applied in some cases whereas in others they have been ignored. For example, in the recent decision of COOMBES v SMITH(25), they were applied as they were in E AND L BERG HOMES LTD. v GREY(26), where the plaintiff failed in his action, being unable to satisfy the first and the fifth requirements. In CRABB v ARUN D.C.(27), the probanda were also applied, although Scarman L.J. took a much broader approach. The plaintiff in this case claimed a right of way on account of representations made to him that such a right would be granted to him and his successors in title and his consequential detrimental reliance. According to Scarman L.J., once the court has analysed and assessed the conduct and relationship of the parties, it has to answer three questions:

> "First, is there an equity established? Secondly, what is the extent of the equity if one is established? And thirdly, what is the relief appropriate for establishing the equity?"(28)

In answering his first question, Scarman L.J. commented:

> "The court.... cannot find an equity established unless it is prepared to go as far as to say that it would be unconscionable and unjust to allow the defendants to set up their undoubted rights...."(29)

This would seem to be tantamount to saying the court must do what it considers to be just. In TAYLOR FASHIONS LTD . v LIVERPOOL VICTORIA TRUSTEE CO LTD.(30) a similarly flexible approach was taken; Oliver J., deciding that estoppel by acquiescence was not confined to situations where the defendant knew his rights, went on to say that the principle in RAMSDEN v DYSON:

> "...requires a very much broader approach which is directed to ascertaining whether in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour."(31)

This broader approach to proprietary estoppel was followed in HABIB BANK LTD. v HABIB BANK A-G ZURICH(32) and in AMALGAMATED INVESTMENT AND PROPERTY CO. LTD (in liquidation) v TEXAS COMMERCE INTERNATIONAL BANK LTD where Goff J. said:

> "Of all doctrines, equitable estoppel is surely one of the most flexible.... it cannot be right to restrict [it] to certain defined categories."(33)

Having set out the general principles, it is now proposed to consider how the doctrine of proprietary estoppel has been applied to licences to occupy land. Although the first reference to a "licence by estoppel" occurs in INWARDS v BAKER, the origins of the doctrine in informal family arrangement cases appears to stem from DILLWYN v LLEWELYN(34). In this case, a father, without executing a conveyance, allowed his son possession of a farm and signed a memorandum saying he had done so in order that his son might build a residence for himself. The son went into possession and spent £14,000 on building a house. The father died two years later and, by the terms of his will, the land was left on trust for his widow. In the light of the above events, the son successfully claimed the fee simple. Despite the difficulties in saying so(35), the arrangement between father and son was treated as being a contract and therefore the basis on which equity was required to intervene was to overcome the lack of formalities on account of the fact the son had acted on the agreement. Lord Westbury said:

> "So, if A puts B into possession of a piece of land and tells him, " I give it to you that you may build a house on it", and B, on the strength of that promise and with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform the contract (sic) and complete the imperfect donation which was made. The case is somewhat analogous to that of a verbal agreement not binding originally for want of a memorandum in writing signed by the party to be charged, but which becomes binding by virtue of subsequent part performance."(36)

This reasoning suggests that the basis of equitable intervention was more akin to the equitable doctrine of part performance which was later developed more clearly by the House of Lords in MADDISON v ALDERSON(37). Had the relationship between father and son not been treated as contractual, the circumstances would seem to be equally fitting to estoppel by acquiescence which is

arguably equity's equivalent of the doctrine of part performance in a non-contractual situation. INWARDS v BAKER(38), argued on the basis of RAMSDEN v DYSON, was very similar to the facts of DILLWYN v LLEWELYN although the outcome was slightly different. Here a son had attempted to negotiate the purchase of a piece of land on which to build a bungalow as his own, but the purchase price proved too high. Consequently, his father suggested he build a bungalow on his (the father's land) and use the limited funds he had to make the bungalow bigger. The son took up this suggestion and, encouraged by his father, built a bungalow on the father's land, largely by his own labour. The cost was approximately £300 of which the father contributed about half. The son went into occupation of the bungalow in the expectation he would be allowed to remain there for his life time or for so long as he wished. The father never conveyed a title to the land to his son and, under his will, the land was vested in trustees for the benefit of persons other than the son. When the trustees of the will brought proceedings for possession, the son successfully claimed to have a right to remain in occupation for life. Although the expenditure in money terms was not so great compared with DILLWYN v LLEWELYN, the value of the son's labour made the financial contribution, once again, considerable.

The next reported case in which estoppel principles were adopted was DODSWORTH v DODSWORTH(39). although what was under consideration by the court here was not whether an "equity" could be raised but how the equity, once raised, was to be satisfied. Briefly, the plaintiff, an elderly woman, persuaded her younger brother and sister-in-law to come and live with her in her bungalow on their return from abroad. They agreed to do so and spent £711 on improvements to the bungalow in the expectation, encouraged by the plaintiff, that they would be able to make the bungalow their home as long as they wished. Unfortunately, the sharing arrangement did not prove to be a happy one and so the plaintiff, having asked the couple to leave, began proceedings for possession. Once again, the essentials of estoppel by acquiescence set out above, seem to have been clearly satisfied. As in the earlier cases discussed, the plaintiff had encouraged the defendants to act to their detriment by spending a not inconsiderable amount of money on the property in the belief they could make it their home for life.

GRIFFITHS v WILLIAMS(40) seems to mark the beginnings of a departure from the strict requirements for a claim based on proprietary estoppel to succeed. As with DODSWORTH v DODSWORTH, it concerned an action for possession of a house by executors. Under her will, the

testatrix had left the house in question to her granddaughter but her daughter had lived there with her for most of her life and had, morevover, been assured by the testatrix that the house was her home for life. Consequently, the daughter spent all her own capital savings (£2,000) on the house, partly on improvements but some of the money went on outgoings. On these facts, the Court of Appeal (Megaw, Orr, Goff L.JJ.) decided estoppel principles operated. It is interesting to note that Goff L.J., giving the judgement of the court, described the case as one of "promissory estoppel", despite the absence of any suggestions that there had been a contract for occupation between the testatrix and her daughter. Goff L.J. approached the issue by following the guidance laid down by Scarman L.J. in CRABB v ARUN(41). It was argued by counsel for the executors that on account of the requirements laid down in WILLMOTT v BARBER(42), the daughter's claim must fail because, at the time she carried out the improvements, the testatrix did not know of the daughter's mistake as to her position. However, Goff L.J. expressed the view that this was not necessary and, in so far as it was necessary to show a mistake, the daughter had made a sufficient mistake in believing she would be allowed to stay in the house for her whole life. The case is also noticeably different from those which had gone before it in the respect that this was the first case in which there had been no encouragement for the daughter to expend money on taking up occupation of the house; she had lived in the house and then subsequently, believing she could remain there for life, spent money on it.

WILLIAMS v STAITE(43) continued the trend towards the relaxation of the strict requirements of estoppel by acquiescence in licence cases, although, like DODSWORTH v DODSWORTH, the court was not called upon to determine whether an equity could be raised, but whether it was revocable on account of subsequent bad conduct. Here, it will be remembered(44), a mother granted her daughter and son-in-law permission to live in a cottage owned by her as long as they wished. The young couple made no payments towards the purchase price of the property. Thus, unlike the earlier cases discussed, the arrangement did not involve any encouragement or acquiescence on the part of the licensor to spend money on the property. The mother simply promised they could live in the cottage as long as they wished. The couple did in fact spend some money on the property, although this only amounted to about £100 over a period of eleven years. This is hardly comparable with the sums spent in earlier reported licence cases. Moreover, there is no evidence in the report as to how the money was spent; given the sums involved, it may well have been on repairs

to the property on account of wear and tear, rather than improvements, and, in GRIFFITH v WILLIAMS(45), Goff L.J. said that the former type of expenditure was insufficient to raise an equity. Nevertheless, even though, on the facts of WILLIAMS v STAITE, there was no inducement to spend money on the property, there was encouragement on the part of the mother to take up her offer instead of taking a house which went with the son-in-law's job.

In finding estoppel principles operated, Goff L.J. appeared to be following once again the broader approach to estoppel cases outlined by Scarman L.J. in CRABB v ARUN D.C(46). However, under this approach, an estoppel may only be raised if there is unconscionable behaviour. But on the basis of the details given in the report, it is questionable whether the mother's behaviour could be described as unconscionable. On the evidence accepted by the court, the mother said "You can live in .... and have [the cottage] as a wedding present. You can live there as long as you wish." In the light of the surrounding circumstances, particularly the understanding that the daughter would care for her parents, it may be possible to construe the mother's intention as being merely one to grant rights to remain in the cottage rent free so long as the parents, or at least one of them, was alive. Moreover, factors which might affect a finding of unconscionable behaviour on the part of the mother, such as the value of her estate, the terms of the will, how many children the estate had to be shared between, are left undiscussed in the report. For example, even if the intention had been to grant a life interest, if the estate was small and other children may have been deprived of benefiting from it, given the minimal expenditure on the property, one could argue that the mother's behaviour could hardly be described as unconscionable by her mere failure to perfect an imperfect gift.

Not long after the decision in WILLIAMS v STAITE, PASCOE v TURNER(47) provided an example of equity at its most flexible, laying down minimal requirements necessary in order to rely on principles of proprietary estoppel. The defendant in this case had become friendly with the plaintiff who was a small businessman and had eventually moved into his home, first as a housekeeper and assistant to his business and later as his mistress, although she continued to help with the business. He gave her £3 a week housekeeping money, but she paid for her own clothes and personal effects. Eventually the relationship broke down and the plaintiff left the defendant for another woman and later sued for possession of the house. The court accepted evidence to the effect that the plaintiff had told the defendant not to worry about her security as

the house and its contents were hers, but he never conveyed the title to the house to her. Despite this, the defendant continued to live in the house and, to the plaintiff's knowledge, spend a small sum of money, approximately £230 (this did, however, represent about one quarter of her investment capital) on improving and repairing the property. The defendant's defence to a claim for possession was based on the doctrine of proprietary estoppel. This was accepted by the Court of Appeal who ordered the equity be satisfied by conveyance of the fee simple to the defendant.

Once again, it is noticeable that, in contrast to early cases, the element of expenditure was limited. Furthermore, it is clear from the report not all the money was spent on improvements; some went on repairs, but, in contrast to GRIFFITH v WILLIAMS(48), no issue was made of this. The Court of Appeal was obviously aware of the limited expenditure compared to earlier cases, as Cummings-Bruce L.J. commented:

> "Then it may reasonably be held that [the plaintiff's] expenditure and effort can hardly be regarded as comparable to the change of position of those who have constructed buildings on land over which they have no legal rights. This court appreciates that the moneys laid out were much less than in some cases in the books. But the court has to look at all the circumstances...."(49)

Looking at all the circumstances involves not looking at the money expended in relation to the value of the property, as in earlier cases, but looking at the money expended in relation to the means of the licensee. Much is made of the fact that the defendant was a widow in her middle fifties, with limited financial resources. During the period she had lived with the plaintiff she had reduced her capital from £4,500 to £1,000, and she had now spent a quarter of the £1,000, leaving her with only a minimal amount of capital and an invalidity pension. What is more, the court took into account the considerably more fortunate position of the licensor, Cummings-Bruce pointing out:

> "Compared to her.... the plaintiff was a rich man."(50)

In deciding whether estoppel principles operated, the court appeared to be taking into account the kind of considerations relevant in a divorce court on breakdown of marriage, namely the relative means of the parties and their conduct. It is interesting to note that counsel in

COOMBES v SMITH(51), in considering the way in which the equity was satisfied in PASCOE v TURNER, referred to the conveyance of the fee simple to the defendant as achieving a "clean break", clearly analogous to the considerations a divorce court is required, so far as possible, to give effect to on breakdown of marriage since the passing of the Matrimonial and Family Proceedings Act 1984, amending S.25 of the Matrimonial Causes Act 1973. Although the recognition of acts of detriment other than purely expenditure on property is a welcome relaxation of the requirements to rely successfully on the doctrine of proprietary estoppel, it is questionable as to how far the surrounding circumstances should be taken into account, bearing in mind the problems this could pose where a third party was involved. This issue will be taken up in the Section which discusses possible policy objections to reliance on estoppel principles in licence cases.(52)

The other interesting feature of PASCOE v TURNER is the court's understanding of unconscionability. With regard to this, Cummings-Bruce L.J. said of the plaintiff:

> "....he is determined to pursue his purpose of evicting [the defendant] from the house by any legal means at his disposal with a ruthless disregard for obligations binding on his conscience."(53)

There does not appear to be any evidence of "ruthless" behaviour on the part of the plaintiff. According to the facts, as stated in the report, he merely had a quarrel with the defendant and made up his mind he was going to get her out of the house and rely on what were, after all, his strict legal rights to do so. He may well have promised to make her a gift of the house but he was quite at liberty to change his mind; this is surely what lies behind the maxim, "equity will not perfect an imperfect gift". Moreover, one of the functions behind requiring legal formalities in relation to transactions concerning land is to protect the donor from taking rash decisions. Why then should equity step in and perfect the imperfect gift? Admittedly, the plaintiff had lulled the defendant into a false sense of security but one would have thought that, in those circumstances, the equity could have been satisfied by giving her at most a life interest in the property. One of the reasons for not confining her interest to the latter was apparently because of fears concerning the plaintiff's future behaviour towards the defendant. It was suggested he may find excuses for entering the property, for example, to carry out repairs. However, the report provides no indications of violence or pestering of the defendant by the plaintiff, but

simply evidence he was determined to recover possession of the house and therefore refused to compromise the claim before the hearing. It seems unreasonable to describe a plaintiff as "ruthless" simply because he appears inflexible in reliance on his strict legal rights, and especially in the circumstances of PASCOE v TURNER, where, in the light of earlier reported cases, one might well have described the chances of the defence succeeding on the basis of proprietary estoppel as somewhat slim.

RE SHARPE(54) continued the liberal approach to estoppel in licence cases, although the extent to which the decision was based on estoppel principles is not totally clear. However, Browne-Wilkinson J. did comment on how recent cases had extended the doctrine of proprietary estoppel. After referring to RAMSDEN v DYSON, he observed the doctrine now appeared to be:

> "If the parties have proceeded on the common assumption that the plaintiff is to enjoy a right to reside in a particular property and in reliance on that assumption, the plaintiff expends money or otherwise acts to his detriment, the defendant will not be allowed to go back on that common assumption and the court will imply an irrevocable licence or trust which will give effect to that common assumption."(55)

GREASLEY v COOK(56) was the next reported licence case in which proprietary estoppel was argued. The defendant in this case had in 1938 entered into a household as a maid to the then owner but from 1946 onwards she cohabited with one of the owner's sons, Kenneth. Upon his father's death, Kenneth and one of his brothers, Howard, inherited the house in equal shares. The defendant continued to look after the household generally and in particular a handicapped sister, but she received no payment for her efforts and neither did she ask for payment. She was, however, encouraged by Kenneth and Howard to believe she could regard the house as her home for the rest of her life. When Kenneth died, he left his share in the property to another brother, Hedley. As the defendant was, by this time, alone in occupation of the property, Hedley and the beneficiaries who had inherited Howard's half share on his intestacy, served notice on the defendant requiring possession. The defendant counterclaimed that they were estopped from evicting her and that she was entitled to occupy rent free for the rest of her life. The Court of Appeal upheld this claim.

It is significant to note the similarities between this case and MADDISON v ALDERSON(57) where the House of Lords

dismissed the doctrine of proprietary estoppel as inapplicable. In that case, the defendant had been housekeeper to the plaintiff's predecessor in title for 27 years. She, like the defendant in GREASLEY v COOKE, had received no remuneration and gave up a proposal of marriage on the faith of an oral promise that, if she continued to live with the owner of the property, he would leave her a life interest in the property. He did in fact draw up a will to this effect, but it was unattested and, as such, invalid. Unfortunately, the alternative argument put forward, namely the doctine of part performance, also failed as the acts done by the defendant were not considered to be unequivocally referable to the contract.

The appeal in GREASLEY v COOKE was on a very narrow issue. The trial judge had found that there was no estoppel as the defendant had not proved she had acted to her detriment by reason of the assurances of residential security made to her. It appears that, although the defendant had worked without payment, she could not show that this was by reason of the assurances as, on the evidence, she had worked without payment even before any promises were made to her. However, the Court of Appeal (Lord Denning M.R., Waller and Dunn L.JJ.) reversed the decision of the trial judge on the ground that, once it had been established that the defendant had been led to believe she could stay in the house, it was up to the plaintiffs to prove she had not acted to her detriment in reliance on the assurances. Nevertheless, the judgment of Lord Denning clearly went much further than this as he went on to say that it was unnecessary for the party establishing proprietary estoppel to show an element of detriment at all. He commented:

> "I see that in Snell's Principles of Equity, 27th edition (1973), p. 565, it is said: "A. must have incurred expenditure or otherwise have prejudiced himself." But I do not think that that is necessary. It is sufficient if the party, to whom the assurance is given, acts on the faith of it - in such circumstances that it would be unjust and inequitable for the party making the assurances to go back on it...."(58)

As Johnathan Parker Q.C. pointed out in COOMBES v SMITH(59), this proposition is inconsistent with earlier authorities and not supported by the judgments of Waller and Dunn L.JJ. in the same case. Removal of the requirement of detriment would further the move towards a doctrine of changed position which already seems to be evident in both the judgments in WILLIAMS v STAITE(60) and more particularly PASCOE v TURNER(61), by not

attaching importance to expenditure or other detriment in relation to the land itself. Under such a doctrine, all that is required is to show encouragement or acquiescence which results in the licensee arranging his or her affairs in a particular way on account of a mistaken belief as to their position in the property. Given the cost of giving effect to informal family arrangements in terms of introducing an element of uncertainty in relation to title to land, it is submitted such a liberal approach swings the balance too far in favour of the licensee.

The recent decision of COOMBES v SMITH may, however, mark the beginnings of a reversal to a stricter approach to the use of the doctrine of proprietary estoppel in licence cases. The facts were quite simple. At the time when they formed a relationship, the plaintiff and defendant were both married to other parties. They decided to live together and have a child. Consequently, when the plaintiff became pregnant by the defendant, she left her husband, gave up her job, and moved into a house purchased by the defendant. After the birth of the child, the defendant sold the first house and bought another for the plaintiff to live in, so that she was nearer his place of work. The plaintiff redecorated this house on several occasions, installed decorative beams and improved the garden. She twice asked the defendant if he would transfer the title to the house into their joint names but he refused, although he always assured her he would provide a roof over her head. Ten years later, the relationship broke down. The defendant offered the plaintiff £10,000 to move out of the house, but she refused this and commenced affiliation proceedings. This led the defendant to agree to allow the plaintiff to occupy the house until the child of the relationship reached 17 years of age. Despite this, the plaintiff commenced an action seeking either an order for the conveyance of the property to her absolutely or a declaration that she was entitled to occupy for life either on account of the existence of a contractual licence or proprietary estoppel. The claim on both bases failed.

The proprietary estoppel argument did not succeed, among other reasons, because Jonathan Parker Q.C. was of the opinion that no mistaken belief could be established. On the facts of the case, this involved a mistaken belief on the part of the plaintiff that she could remain in the property after the relationship was over. Although the defendant had assured the plaintiff she would always be looked after and would have a roof over her head, according to the judge, such assurances could only be understood to refer to the situation so long as the

relationship lasted. In any case, agreeing to provide a roof over the plaintiff's head was not the same as agreeing she could stay in the house against his wishes.

Whilst not disagreeing with the outcome of the case, it seems inconceivable that such assurances should be construed as relating only to the continuance of the relationship. Surely, during this time the plaintiff would have presumed her position in the house, or one similar to it, was secure. Any anxiety about her position must have been related to the possibility of the relationship breaking down. Moreover, one ground on which Jonathan Parker Q.C. distinguished PASCOE v TURNER was on the ground that the assurances of security in that case were made after the relationship was ended, whereas, in the instant case, they were made during the relationship. It is submitted that this should make no difference. The encouragement and acquiescence in the majority of licence cases referred to was made during the continuance of a friendly relationship; was the judge suggesting that a friendly assurance is not to be taken seriously?

The case clearly marks a much stricter approach to proprietary estoppel than that taken in recent cases. Instead of following the broader approach of Scarman L.J. in CRABB v ARUN D.C.(61), Jonathan Parker Q.C. insists that the five probanda set out in WILLMOTT v BARBER(62) should all be satisfied. In addition, it has been seen that, in recent cases, the courts have been moving towards a doctrine of changed position, paying less attention to the expenditure or other detriment in relation to the property itself. In COOMBES v SMITH, the plaintiff had argued detriment on the basis of (i) allowing herself to become pregnant and to give birth to the child; (ii) leaving her husband and moving into the house provided by the defendant; (iii) looking after the property and the child of the relationship as well as being prepared for the defendant's visits; and (iv) not looking for a job or other form of security. None of these factors were sufficient in the view of Jonathan Parker Q.C., although not looking for another job or security would appear to be the only element of detriment which could have been claimed by the defendant in GREASLEY v COOKE. Lord Denning M.R. in that case suggested that, had it not been for the assurances made to her, the defendant may well have felt it necessary to leave the employment of the plaintiff and find security elsewhere before she became too old. The only difference between the two cases would appear to be that, in GREASLEY v COOKE, the defendant, Doris Cooke, was a spinster aged 58 and had no capital assets, whereas in COOMBES v SMITH, although the age of the plaintiff is not

given, she was obviously much younger and, moreover, possibly had a claim for financial provision against her husband. Therefore, the degree of insecurity to which Doris Cooke exposed herself was far greater than that of Mrs. Coombes. A greater consistency of approach could perhaps have been achieved by accepting that the plaintiff in COOMBES v SMITH had acted to her detriment sufficiently to raise an equity on the basis of proprietary estoppel, but that when it came to the question as to how the equity should be satisfied, recognising that she had only been lulled into a false sense of security to a limited extent. The equity could then have been satisfied by allowing her to remain in the property until the child of the relationship reached age 17, which was what the defendant had offered her anyway.

It does not appear however, that the strict approach of COOMBES v SMITH will be consistently maintained. This is apparant from the decision in RE BASHAM(deceased)(64). The plaintiff in this case was not specifically claiming to have an irrevocable licence to occupy on account of proprietary estoppel, but was seeking a declaration that she was entitled to her deceased step-father's estate because the step-father had encouraged and induced her in the expectation or belief that she would receive the estate on his death. The deceased owned a cottage and had apparently, on a number of occasions indicated to the plaintiff she would get the cottage on his death in return for all she had done for the deceased in caring for him over the years and in working for the deceased unpaid in his business. In fact the deceased died intestate and consequently the plaintiff had no claim over his estate.

On these facts Mr. Edward Nugee Q.C decided that the plaintiff was entitled to the entire estate under the doctrine of proprietary estoppel, even though the expectation related to a future right and non-specific property(65). In reaching his decision much reliance was placed on the somewhat flexible approach of Lord Denning in GREASLEY v COOKE(66). However, what is of greater significance is the fact that Mr. Edward Nugee expressly denied that it was any longer necessary to satisfy the 'five probanda' set out in WILLMOTT v BARBER(67), religiosly adhered to in COOMBES v SMITH. Quoting the words of Lord Tennyson to the effect that the law "slowly broadens down from precedent to precedent"(68), he explained that the law had developed. In the light of this decision it would be premature to suggest that the courts are tending to revert to a strict approach to the use of the doctrine of proprietary estoppel.

References Section IV (e) (i)

1. See post page 214 f.

2. [1952] 1 All ER 149 at p. 154.

3. [1975] 3 All ER 776 at p. 780.

4. [1978] 2 All ER 935.

5. [1980] 1 WLR 219 at p. 225.

6. See for e.g. Atiyah (1976) 92 LQR 174; Ellis (1979) 95 LQR 11; Briggs (1981) Conv 212; Thompson (1983) Conv 50; Briggs (1983) Conv 285; Anderson (1979) 42 MLR 203; Moriarty (1984) LQR 376.

7. See Section IV (e) (ii).

8. [1965] 2 QB 29 at p. 38. It should be noted however that the doctrine had been applied to a licence to occupy land in the much earlier case of DILLWYN v LLEWELYN (1862) 4 De GF and J 517. See post p. 190.

9. [1975] 3 All ER 865.

10. [1982] QB 84.

11. [1955] 1 WLR 213 at p. 219.

12. "Estoppel by Representation" 3rd edition.

13. [1947] KB 130

14. See HUGHES v METROPOLITAN RAILWAY (1877) 2 App Cas 439; BIRMINGHAM AND DISTRICT LAND CO v LONDON NORTH WESTERN RAILWAY (1888) 40 Ch D 286.

15. See for e.g. TOOL METAL MANUFACTURING CO LTD v TUNGSTEN ELECTRICAL CO LTD [1955] 1 WLR 761.

16. See CENTRAL LONDON PROPERTY TRUST LTD v HIGH TREES HOUSE LTD (supra); ALAN v EL NASR EXPORT AND IMPORT CO [1972] 2 QB 189; ATAYI v R. T. BRISCOE (NIGERIA) LTD [1964] 1 WLR 1326.

17. [1951] All ER 767.

18. See MOORGATE MERCANTILE CO LTD v TWITCHINGS [1976] QB 225.

19. (1866) LR 1 HL 129 at p. 170.

20. Hanbury (1954) CLJ 201; (1955) CLJ 47. See also Cullity (1965) 29 Conv 19.

21. E.g. HEWLINS v SHIPPAM (1836) 5 B and C 221; BRYAN v WHISTLER (1828) 8 B and C 288.

22. (1807) 8 East 308.

23. (1831) 7 Bing 682.

24. (1880) 15 Ch D 96 at pp 105-106.

25. [1986] 1 WLR 808. For facts see post page 198 f.

26. (1979) 253 EG 473.

27. [1976] 1 Ch 179.

28. Supra at p. 193.

29. Supra at p. 195.

30. [1982] 2 WLR 576.

31. Supra at p. 593.

32. [1981] 2 All ER 650 at p. 666 per Oliver L.J.

33. [1982] QB 84 at p. 103.

34. (1862) 4 De GF and J 517.

35. See ante pp 145-151.

36. Supra at p. 521.

37. (1883) 8 App Cas 467.

38. Supra.

39. [1973] EGD 233.

40. [1978] EGD 919.

41. Supra.

42. Supra.

43. [1979] Ch 291.

44. For further details of facts see ante p. 151.

45. Supra.

46. Supra.

47. [1979] 2 All ER 945. See Suffrin (1979) 42 MLR 574.

48. Supra.

49. Supra at p. 951.

50. Supra at p. 951.

51. Supra.

52. See post pp 224 f.

53. Supra at p. 951.

54. Supra.

55. Supra at p. 223.

56. [1980] 1 WLR 1307.

57. Supra. This point is made by Annand (1981) Conv 154 and Suffrin (1979) 42 MLR 461.

58. Supra at p. 1311.

59. Supra.

60. Supra.

61. Supra.

62. Supra.

63. Supra

64. [1987] 1 All ER 405.

65. Contrast the earlier decision of LAYTON v MARTIN (1986) 16 Fam Law 212 where a not dissimilar claim on the basis of proprietary estoppel was denied. The case was not cited in RE BASHAM (deceased).

66. Supra.

67. Supra.

68. Supra at p. 414.

(ii) Can a licence be contracted and irrevocable on account of proprietary estoppel?

Having considered the way in which estoppel principles have been applied to licence cases, we are now in the position to consider the confusion surrounding the characterisation of a licence as contractual and the relevance or otherwise of estoppel principles. Some academic writers have expressed the view that contractual licences and estoppel licences cannot overlap(1); consequently once the court characterises the licence as being contractual in nature, it cannot go on to find that it is also irrevocable on the basis of estoppel. The main tenets of the argument are that contractual licences are precise in nature, whereas estoppel licences are more vague; in a contractual licence situation the licensee acts to his detriment on account of a promise made, whereas in an estoppel situation the act of detriment follows a representation; and finally, a contractual licence involves an element of request not necessary in estoppel situations.

The view that contractual and estoppel principles are mutually exclusive in licence cases would arguably seem to be supported by the judgement of Scarman L.J. in the contractual licence case of CHANDLER v KERLEY(2), which has recently been quoted with approval by Jonathan Parker Q.C. in COOMBES v SMITH(3). He said of the defendant in that case:

> "If she cannot establish.... a licence.... she cannot establish an equity, for no question of estoppel arises.... if the defendant can establish a licence for life, there is neither room nor need for an equitable interest.... If she cannot establish such a licence (express or implied) she cannot establish an equity for no question of estoppel arises in this case."(4)

It has already been noted(5) that there are suggestions in other cases that a licence may be characterised as both contractual and equitable. It was suggested that the probable motivation for the fusion of the two concepts was a subtle attempt to cross the chasm from personal to proprietary rights. Moreover, the view was also expressed that, in many of the informal arrangement cases where a contract has been implied, this finding was unjustified(6). It will be seen later that most of the cases were instances of estoppel(7). However, it is not impossible that a contractual licence may be created in a family situation and, to this extent, it is necessary to consider whether it could also be irrevocable on account

of estoppel.

The importance of the issue of whether contractual and estoppel licences may overlap, lies with the difficulties in finding that a contractual licence per se binds a third party. It seems licences irrevocable on account of estoppel may bind third parties(8). If the finding of a contractual licence precludes enforceability on the basis of estoppel, a contractual licensee may, in some circumstances, be in a more precarious position than a licensee who is found not to be occupying by virtue of some express or implied contract.

In support of the view that contractual and estoppel licences are mutually exclusive, it has been suggested that(9) the difference between contractual and estoppel licences is that a contractual licence may be reasonably precisely defined, whereas estoppels are much more vague in nature. Consequently, where there is an agreement on clear terms, supported by consideration, the licence should be enforceable on the basis of contract; and it is dishonest to rely on principles of estoppel simply to overcome the problem of enforceability against third parties. However, although this brings out one of the important reasons why many of the family arrangement cases are incorrectly characterised as contractual but would be supportable on the basis of estoppel, namely, lack of certainty, it is by no means an adequate explanation for the relationship between licences irrevocable on account of estoppel and contractual licences. In IVES v HIGH(10), where there was an informal agreement to allow the foundations of a building to remain on the defendant's land in return for a right of way over the plaintiff's land, there was a reasonably precisely defined agreement but such agreement was only enforceable on the basis of estoppel. The court found the "agreement was complete"; the reason why no claim could be made in contract was because the contract was not in proper form and therefore unenforceable(11). Nevertheless, rights subsequently arose on the basis of estoppel.

A second distinction between contractual and so-called estoppel licences, drawn by those who believe the concepts are mutually exclusive, is that in the case of both contractual and estoppel the plaintiff acts to his detriment, but in the case of a contractual licence this is because a promise has been made to him, whereas in the case of estoppel, it is because of a representation, mistaken belief or perhaps a common assumption(12). It is on account of the common element of detriment that the two concepts have been confused. However, it is submitted that this analysis is not very helpful.

Applying it to the family arrangement case of WILLIAMS v STAITE(13), where the decision was based on estoppel, if asked why they had acted to their detriment, it is likely the defendants would have responded "because a promise was made to us that we could stay in the cottage as long as we wished". Similarly, in IVES v HIGH(14), where estoppel principles were again applied. In consequence upon the agreement for a right of way, the defendant surfaced the right of way and built a garage in such a position it could only be entered by using the right of way. If asked why he had behaved in this way, his answer ought to have been "because a promise was made to me", as the court found, there was a "concluded agreement". Thus, although it is certainly true that the element of detriment in a contractual situation must be promise-based, it is not true that for the principle of estoppel to operate the detriment must not be promise-based and can only arise out of a representation, mistaken belief or common assumption.

A third way in which it has been suggested contractual and estoppel licences may be distinguished, is that, for the detrimental reliance to amount to consideration and thus a contractual situation, it must be requested(15). This is because one of the basic features of the doctrine of consideration is the idea of "reciprocity"; a contract is a bargain struck by exchange of promises. In contrast, there is no such "reciprocity" required in a situation governed by estoppel principles. Consequently, where there is a contract, the parties are bound from the moment of the agreement, the consideration for each party's promise being the other's promise. Thus, if one party subsequently refuses to execute his part of the bargain, the other may sue at once. Compare this with the estoppel situation where the promise or representation only becomes binding if subsequently acted upon to the party's detriment. This distinction does explain why many of the family arrangement cases were incorrectly classified as contracts. Take, for example, TANNER v TANNER(16); the mistress in that case had given up her rent controlled flat and paid for some of the furnishings not because there had been reciprocal promises made by the parties, intended to be immediately binding, but simply because she wanted to take advantage of the defendant's offer, perhaps because she was lulled into a sense of security by her relationship with him. Lack of reciprocity was one manifestation of a lack of intention to create a legal relationship, essential for the existence of a contract. However, it is not necessarily true that if Mr. Tanner had said "Please give up your rent controlled flat and come and live with me; in return you pay for the furnishing in our joint home", a contract would result. It may well be that the

agreement would still have lacked an intention to create a legal relationship, had it been made when the parties were involved in an amicable relationship. Or, perhaps, it would have failed for certainty of terms, there being no clear duration for the licence to occupy. So the element of request is not a complete answer to the distinction between contract and estoppel; but if one or more of the elements for a valid contract are missing, even if reciprocity could be established, use could only be made of estoppel principles, once there had been detrimental reliance.

In short, all three explanations given for the distinction between contract and estoppel are in themselves but part of the picture. The truth of the matter is that a licence to occupy can only be characterised as contractual if all the elements of valid contract are present, namely intention, agreement, certainty of terms, reciprocity, and, with respect to land, evidence in writing(17). If one or more of these elements is missing, there can be no valid or enforceable contractual licence, but the agreement may still be enforceable on the basis of estoppel if it falls within the principles set down in RAMSDEN v DYSON(18). Equally, estoppel principles are appropriate where there is little or no suggestion of a contractual arrangement, but merely acquiescence or encouragement in a mistaken belief. Confusion has arisen because of a failure to appreciate that proprietary estoppel may be available in some circumstances to step in to give effect to an agreement which lacks one or more of the essentials of a valid contract, as well as being available in wider circumstances where there is no suggestion of a contract.

To conclude, therefore, it would seem that contract and estoppel are mutually exclusive concepts to the extent that, if there is a legally binding agreement in proper form, reliance for irrevocability must be placed on the terms of the contract. Furthermore, if, within this contractual framework, further promises are made which are not supported by consideration, then the doctrine of promissory estoppel must be relied upon. This could be unfortunate as it seems well established that promissory estoppel cannot found a cause of action. Perhaps it was this factor which motivated Scarman L.J., in CRABB v ARUN D.C.(19), to say he did not find the distinction between promissory and proprietary estoppel helpful and similarly Goff J., in AMALGAMATED INVESTMENTS AND PROPERTY CO. v TEXAS COMMERCE INTERNATIONAL BANK LTD.(20), to doubt whether proprietary estoppel was a separate category. If, on the other hand, promises have been made but there is no valid and binding contract on account of factors such as lack of formalities, or vagueness of terms, then,

provided detrimental reliance can be proved, the licence may still be irrevocable on the basis of proprietary estoppel. But, equally, if there has been no element of reciprocal promises, that is to say no suggestion of contract, but merely acquiescence and encouragement resulting in detrimental reliance, the case may be one of estoppel.

Assuming this reasoning to be a correct analysis of the law, what consequences does it have for protection of residential security in informal arrangements to occupy land, bearing in mind the difficulties in finding a contractual licence may bind a third party(21)? It is submitted that this creates little threat at all. It has already been argued(22) that the finding of a contractual licence in many of the informal family arrangement cases was unwarranted and, by their very nature, it is unlikely that such informal arrangements will in future manifest all the characteristics of a valid and binding contract. However, where there is an element of detrimental reliance, it is likely that estoppel principles can be relied upon to provide irrevocability. In support of this proposition, it is proposed to analyse whether the reported cases in which a contractual licence was held to exist and prevent revocation of the licence ought to have succeeded on estoppel principles, along the lines on which such principles have been developed in licence cases.

To take first ERRINGTON v ERRINGTON(23). At the instigation of the licensor, let alone mere encouragement or acquiescence, the young couple entered into possession of the property and paid the mortgage instalments on the understanding or common assumption that they would not be disturbed so long as they continued to pay the instalments. This would not seem to be significantly dissimilar to DILLWYN v LLEWELYN(24) or INWARDS v BAKER(25), which both succeeded on the basis of proprietary estoppel. The only difference in ERRINGTON v ERRINGTON is that the expenditure took the form of a commitment to make periodical payments, whereas in DILLWYN v LLEWELYN and INWARDS v BAKER, there was a capital outlay on the part of the licensees. There seems to be no valid reason for saying a commitment to periodical payments is any less detrimental reliance than making a capital outlay. Once it is accepted that the true basis of irrevocability of the licence in ERRINGTON v ERRINGTON is estoppel, HARDWICK v JOHNSON(26) is indistinguishable. This was in any case treated by Lord Denning M.R. as an "equitable licence", although Roskill and Browne L.JJ. characterised it as contractual. Once again, it will be remembered, a mother had purchased a house for her son and daughter-in-law to be the

matrimonial home, the title to which was, however, conveyed into the mother's name. The young couple paid her £28 per month in the expectation that they could remain in the property.

Thus, cases where the detrimental reliance took the form of periodical payments, made at the instigation or encouragement of the licensor and in the belief that occupation of the property would be undisturbed, would seem to fall clearly within the doctrine of proprietary estoppel. But, what about the arrangements unsatisfactorily classified by the courts as contracts, which did not involve any capital outlay or periodical payments, namely CHANDLER v KERLEY(27), BINIONS v EVANS(28), and TANNER v TANNER(29).

In CHANDLER v KERLEY(30), the plaintiff had bought the matrimonial home of Mr. and Mrs. Kerley for a reduced price of £10,000, instead of the asking price of £14,300. This was on the understanding that the defendant, Mrs. Kerley, could continue to live in the house until she obtained a divorce from her husband and that the plaintiff would move in with her. As a result of this arrangement, the net proceeds of sale, after paying off the mortgage debt to the building society, were not divided equally between Mr. and Mrs. Kerley. It was agreed that Mrs. Kerley should have only £1,000, whereas Mr. Kerley would get £1,800. This would clearly seem to fit into the flexible approach to estoppel principles with its removal of the requirement of detriment and a movement towards the doctrine of changed position(31). The defendant had put herself in a disadvantageous position vis a vis her husband and as such had suffered a financial detriment of £400 and a reduction in the purchase price, on account of her mistaken belief that she would be able to remain in the matrimonial home.

BINIONS v EVANS(32) is arguably more difficult to justify on an estoppel basis, as Mrs. Evans had suffered no financial detriment in any way but had simply been lulled into a false sense of security by being assured she could stay in the cottage for the rest of her life. This is also true of the woman in TANNER v TANNER who had given up her rent controlled flat. However, if the more liberal approach to proprietary estoppel is continued, the move towards a doctrine of changed position would also bring licensees like Mrs. Evans within the protection of the principles of proprietary estoppel. It could be argued that Mrs. Evans had acted to her detriment by not taking steps to move to a secure home at a time when she was more physically and mentally able to cope with such an upheaval. Following GREASLEY v COOKE(33), once it is established that assurances of

security have been made to the licensee, the burden of proof shifts, and it is up to the licensor or his successor in title to prove that the licensee has not acted to his detriment.

It would seem therefore that meritous cases will fit into the principles of proprietary estoppel if the broad approach to raising an estoppel is continued. Claims which have some, but little, merit could be dealt with appropriately by "satisfying" the equity in some suitably minimal way. It is submitted that reliance on proprietary estoppel is a much more straightforward and honest way of dealing with the problem of informal licences to occupy property than the artifical device of an implied contract. Nevertheless there is scope for improvement in the approach taken. At this point, one unacceptable aspect of the way in which the courts have dealt with some estoppel cases will be mentioned. This is a failure to spell out precisely the extent of the rights acquired and the circumstances in which a licence may become revocable. For example, in HARDWICK v JOHNSON(34), where Lord Denning M.R. alone found on the basis of an equitable licence, he declared himself unable to foresee the circumstances in which the licence may in the future be revoked and consequently provided the parties with no guidance at all. However, admittedly, in more recent cases, the practice of the courts has been to explain the extent of the rights acquired more fully and this practice should be continued and enhanced.(35)

References Section IV (e) (ii)

1. Todd [1981] Conv 347; Briggs [1981] Conv 212 and [1983] Conv 285.

2. [1978] 2 All ER 942.

3. [1986] 1 WLR 808.

4. Supra at p. 945.

5. See ante p. 185.

6. See ante pp 143-155.

7. See post p. 209 f.

8. See post p. 214 f.

9. Todd [1981] Conv 347.

10. [1967] 1 All ER 504.

11. A contract to convey an interest in land requires evidence in writing in compliance with S.40 Law of Property Act 1925.

12. Briggs [1981] Conv. 212 and [1983] Conv 285.

13. [1978] 2 All ER 928.

14. Supra.

15. Moriarty (1984) LQR 376.

16. [1975] 3 All ER 776.

17. S.40 Law of Property Act 1925.

18. (1866) LR 1 HL.

19. [1975] 3 All ER 865.

20. [1982] QB 84.

21. See ante Section IV (d) (ii).

22. See ante pp 143-155.

23. [1952] 1 All ER 149.

24. (1862) 4 De GF and J 517.

25. [1965] 1 All ER 446.

26. [1978] 2 All ER 935.

27. Supra.

28. [1972] 2 All ER 70.

29. [1975] 3 All ER 776. For facts see ante p. 147.

30. Supra.

31. See ante pp 197-198.

32. Supra.

33. [1980] 1 WLR 1306.

34. Supra.

35. See for e.g. GRIFFITH v WILLIAMS [1978] EGD 919.

(iii) Proprietary estoppel and third parties.

It is proposed to consider how satisfactory the application of proprietary estoppel to licence cases is from the point of view of precedent, legal theory, and policy, with regard to the position of third parties(1).

(a) Precedent.

In contrast to contractual licences, it is now generally accepted that a licence irrevocable on account of estoppel is capable of binding a third party. In DILLWYN v LLEWELYN(2) and INWARDS v BAKER(3), licences supported by principles of proprietary estoppel were held to be enforceable against the personal representatives of the licensor's estate and, no doubt, by reason of these authorities, licences in such circumstances were assumed to be enforceable against personal representatives in DODSWORTH v DODSWORTH(4), GRIFFITH v WILLIAMS(5) and GREASLEY v COOKE(6). In RE SHARPE(7), a licence to occupy was held to be binding on the licensor's trustee in bankruptcy although it was unclear whether the licence was regarded as being contractual or equitable or a combination of both. HOPGOOD v BROWN(8) and IVES v HIGH(9) are authorities for the proposition that a licence irrevocable on account of estoppel is binding on a purchaser of a legal estate with express notice. However, in both cases, the decision was based on the alternative ground of the doctrine of mutual benefit and burden set down in HALZELL v BRIZELL(10). In IVES v HIGH, only Lord Denning M.R. specifically said equities arising out of acquiescence of themselves bind third parties. In WILLIAMS v STAITE(11), it is assumed that a purchaser of a legal estate who had bought with express notice of a right to occupy based on proprietary estoppel was bound. But, as yet, there is no decision which lays down that a purchaser of a legal estate with merely constructive notice of a licence irrevocable on account of estoppel is bound, although there are obiter dicta to this effect. For example, in INWARDS v BAKER, Lord Denning M.R. expressed the view:

> "I think that a purchaser who took with notice would clearly be bound."(12)

Assuming he is referring to the doctrine of notice, this would of course include a purchaser with constructive notice. Again, in IVES v HIGH, Lord Denning M.R. said that equities arising out of acquiescence:

> "...do not need to be registered as land charges so as to bind successors but take effect in equity

without registration"(13),

more clearly implying that the old doctrine of notice operates. Denning cannot have meant notice of the estoppel as opposed to notice of the alleged right since the report of the facts of this case as stated in his judgment, indicate the defendants were unaware how the estoppel arose. In contrast, in RE SHARPE, although not called upon to determine the position of the purchaser of the property in question from the trustee in bankruptcy, Browne-Wilkinson J. commented:

> "It may be that as a purchaser without express notice in an action for specific performance of the contract, his rights will prevail over [the licensee's]...."(14)

Support for this view may also perhaps be found from the judgement of Lord Wilberforce in NATIONAL PROVINCIAL BANK LTD. v AINSWORTH(15), where he pointed out that just because an obligation binds one man's conscience does not necessarily mean the conscience of another is bound. Since the basis of a claim for proprietary estoppel is that of unconscionability, although express notice of a licence enforceable on the basis of estoppel, especially where the property has been bought at a reduced price, may well bind the purchaser's conscience, it is more difficult to see how this could apply to constructive notice. It thus remains unclear whether a licence irrevocable on account of proprietary estoppel binds a purchaser of a legal estate with only constructive as opposed to express notice. However, a consideration of what precisely it is that makes a licence supported by proprietary estoppel bind a third party may help to resolve this issue.

(b) Legal theory.

The question to be considered here is whether the finding that a licence irrevocable on account of estoppel binds a third party poses the same or similar theoretical problems as saying a contractual licence binds a third party(16). In other words, does it involve crossing a chasm between personal and proprietary rights and, moreover, saying that something, which is traditionally simply a licence because it is not an interest in land, has now become an interest in land?

For a licence to have become an interest in land, it must be possible to say the licence itself, by reason of the estoppel, is capable of binding all third parties except a bona fide purchaser of legal estate without notice(17). It is therefore now proposed to consider how proprietary

estoppel makes a licence bind a third party and what precisely is the nature of the resulting binding interest. As to how estoppel binds a third party, there are indications in WILLIAMS v STAITE that estoppel in connection with licences to occupy operates rather like express assignment of a restrictive covenant relating to freehold land, which the courts in more recent times have maintained requires a chain of express assignments(18) from vendor to purchaser. Thus, in the case of a licence to occupy, a series of personal estoppels arise binding purchasers with notice. On the facts of WILLIAMS v STAITE(19), it was assumed that the operation of proprietary estoppel made the licence binding on a third party, who had bought with express notice of the defendant's rights. However, the defendants were unhappy about the purchaser acquiring the freehold to the premises in question and consequently brought improper pressure to bear on the purchaser in the hopes of, at first, dissuading him from buying and later, preventing him from moving in. The plaintiff purchaser thereupon applied to the county court for an order for possession on the grounds that the defendants' conduct towards the purchaser had terminated their equitable licence. The county court judge agreed with this view, but, on appeal, the Court of Appeal (Lord Denning M.R., Cummings-Bruce, Goff L.JJ.) decided the licence had not been terminated by the misconduct of the defendants. Nevertheless, Lord Denning M.R. expressed the view that an existing claim based on proprietary estoppel could perhaps be lost if the behaviour of the licensee was extremely bad, but, on the facts, it was not so bad as to justify revocation. Similarly, Cummings-Bruce L.J. appears to have viewed the licensees as having a series of personal rights, since he said:

> "I do not think that in a proper case the rights in equity of the defendants necessarily crystallise forever at the time when the equitable right comes into existence.... When the plaintff comes to the court to enforce his legal rights, the defendant is then entitled to submit that in equity the plaintiff should not be allowed to enforce those rights and.... must then bring into play all the relevant maxims of equity."(20)

It is submitted that the notion that an equity based on proprietary estoppel can be terminated by the behaviour of the licensor is unsatisfactory for it creates an unacceptable degree of uncertainty as it involves the purchaser not only in investigating the circumstances in which the right to occupy came into being, but also subsequent behaviour. There are other remedies available to deal justly and adequately with behaviour such as that

of the Staites; for example, actions may be brought in nuisance or trespass and injunctions obtained.

In contrast to Lord Denning M.R. and Cummings-Bruce L.J, Goff L.J., in the same case, took a preferable approach which is consistent with the view that an equity based on acquiescence may give rise to an established proprietary interest. Goff L.J. pointed out that, although grave misconduct may be relevant when attempting to establish an equity because of the maxim, "he who comes to equity must come with clean hands", it was not relevant in the case before the court as the equity had already been established by an earlier court action. A different question was now in issue, namely, once an equity was established, could it be forfeited by misconduct? He answered that question in the negative:

> "Excessive user or bad behaviour towards the legal owner cannot bring the equity to an end or forfeit it. It may give rise to an action for trespass or nuisance or to injunctions to restrain such behaviour but I see no ground on which the equity, once established, can be forfeited."(21)

The view that proprietary estoppel does not create a series of personal rights is endorsed by the dicta in INWARDS v BAKER(22) and IVES v HIGH(23), which suggest that such an interest is binding on purchasers of a legal estate with not only actual but also constructive notice. The basis on which the purchaser with constructive notice is bound would therefore seem to be that the proprietary estoppel, once established by proof of unconscionable behaviour on the part of the licensor, crystallises forever, making proof of unconscionability on the part of successors in title irrelevant.

The better view would therefore seem to be that a purchaser with notice is bound because successful reliance on proprietary estoppel gives rise to an interest in land which pre-dates the conveyance to the purchaser. However, it does not automatically follow from this that a licence itself should now be regarded as capable of binding a third party. There are still two possibilities: either the licence with the aid of the doctrine of proprietary estoppel binds the third party or some other recognised proprietary interest arises. It has been argued that the function of proprietary estoppel in licence cases is merely to enable the informal creation of proprietary interests in land(24). The doctrine is not being used by the judiciary to create some novel type of proprietary interest which does not fit into the orthodox scheme of things, but merely to overcome a defect in procedure by which an orthodox

proprietary right is created. If this view is accepted, there is no scope for saying that the application of the doctrine of proprietary estoppel to licence cases has elevated the licence, at least in some situations, into an interest in land. In order to test the validity of this view, it is necessary to examine whether there are any reported cases in which estoppel was used to enforce a right which would not, even if in the correct form amount to an interest in land. To consider first DILLWYN v LLEWELYN(25). There the court decided that the son was entitled in equity to call for the fee simple from his father's devisee; the son had an equitable estate contract and the court treated the estoppel as supplying the consideration. Here, therefore estoppel principles were being used to overcome the lack of formalities. So, too, in PASCOE v TURNER(26), where the court again ordered a conveyance of the fee simple. In that case, the court accepted the evidence that Sam Pascoe had told Mrs. Turner, "The house is yours and everything in it". Cummings-Bruce L.J. clearly understood the function of proprietary estoppel to be that of overcoming the lack of formality in circumstances where a licensee has acted on a promise or assurance to his or her detriment, for he said:

> "If it had not been for section 53 of the Law of Property Act 1925, the gift of the house would have been a perfect gift. In the event, it remained an imperfect gift.... and if the facts had stopped there, the defendant would have remained a licensee at the will of the plaintiff. But the facts did not stop there...., the defendant having been told that the house was hers, set about improving it within and without...."(27)

Estoppel principles may arguably be performing the same function in cases where the equity is satisfied other than by a conveyance of the fee simple. In INWARDS v BAKER, the son had entered into occupation of the land in the expectation that the bungalow:

> "...was to be his home for life or, at all events, his home as long as he wished it to remain his home"(28)

and in WILLIAMS v STAITE. the young couple were told by the licensor, " You can live there as long as you wish"(29). In each case this might appear to involve an intention to grant a determinable life interest. GREASLEY v COOKE (30) would seem not to be dissimilar except that there was nothing to suggest that Doris Cooke was to have exclusive possession of the property for

life, so at maximum a co-ownership interest, determinable on death, was intended.

To turn to the reported decisions where the licensee made a contribution to the purchase price, such as DODSWORTH v DODSWORTH(31) and RE SHARPE(32), was the court here simply overcoming lack of formalities with the aid of proprietary estoppel and thus giving effect to an intention to grant a co-ownership interest? If so, why were licensees held to have no interests in the property either on the basis of a resulting or constructive trust, neither of which require formalities to be satisfied? Some commentators(33) have suggested that resulting and constructive trusts on the one hand, and licence concepts on the other, are different approaches to the same thing. This has recently received judicial support in the judgement of Sir Nicholas Browne-Wilkinson V.C. in GRANT v EDWARDS(34), where he expressed the view that the principles underlying proprietary estoppel "are closely akin to those laid down in GISSING v GISSING(35)" for resulting and constructive trust. "The two principles", he said:

> "have been developed separately without cross-fertilisation between them; but they rest on the same foundation and have on all matters reached the same conclusions"(36).

Sir Nicholas went on to draw out some undisputed common characteristics:

> "In both, the claimant must to the knowledge of the legal owner have acted in the belief that the claimant has or will obtain an interest in the property. In both, the claimant must have acted to his or her detriment in reliance on such belief. In both, equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention."(37)

Following this line of reasoning, it has been suggested that HUSSEY v PALMER(38), for example, could easily have been decided on the basis of estoppel. In that case, a widow was invited to live with her daughter and son-in-law. She paid £607 for an extension to the house to provide a bedroom for herself. Finding it impossible to live happily under the same roof with the young couple, the widow left the house after only 15 months and claimed to have an interest on the basis of a resulting trust. At one stage, she said she had lent the money to the son-in-law, but, in cross-examination, she told the court the young couple had said "they would give me a home for life

if I wanted it". On these facts, Lord Denning M.R,. and Phillmore L.J. found a resulting trust, whilst Cairnes L.J., dissenting, was of the view that there was only a debtor and creditor relationship. It is submitted that the case would better have been argued on estoppel principles; encouraged by the young couple, the widow spent £607 in building an extension in the belief it could become her home for life. As this was a situation where the parties were at loggerheads and could not therefore continue to live under the same roof, and in any case the widow had moved out before the action, the appropriate way of satisfying the equity would have been to impose an equitable lien for the money spent, as in DODSWORTH v DODSWORTH(39). However, this is not to agree with the proposition that a resulting trust and proprietary estoppel are two approaches to the same thing where money is spent on real property in return for share accommodation. If the parties had been asked what they actually intended in these cases, it is probable they would have replied that they intended to give the licensee a right to the "use benefits" of the land; that is, to occupy the property for life or as long as he/she wished, but they did not intend the licensee to have any share in the investment value, that is to say the increased capital value of the property, almost guaranteed on account of inflation in recent years. The problem lies with the doctrine of estates under which ownership of property can only be seen in terms of a right to occupy for a period of time and which does not, with regard to freehold property, separate out the "use value" from the "investment value". In contrast, the very distinction between freehold and leashold does separate out use from investment value, but for a leashold estate to exist, there must be exclusive possession for a fixed or periodic term at a rent.

Consequently, it is submitted that, despite the common characteristics accurately described by Sir Nicholas in his judgement in GRANT v EDWARDS(40), there is a distinction between resulting trust and equitable estoppel principles in cases where a contribution had been made towards the purchase price or subsequent expenditure on real property. This distinction lies in the courts having to decide whether the benefit intended to be conferred is merely that of use and occupation of the property in question, in which case licence concepts are appropriate, or alternatively whether there is an intention to share in the investment value also, where resulting trust principles are applicable.

It follows from this explanation of the distinction between resulting trust and estoppel concepts, that

proprietary estoppel has not always been used to give effect only to recognised proprietary interests. If one returns to consider cases such as WILLIAMS v STAITE(41) and GREASLEY v COOKE(42), where the court made negative orders, arguably consistent with a determinable life interest, on a closer inspection, in so doing, the court was not giving effect to a determinable life interest. Certainly, in the case of GREASLEY v COOKE, there can have been no intention of Doris Cooke being able to benefit in the increased capital value of the property, the intention was only to provide her with accommodation for life. GRIFFITH v WILLIAMS is not dissimilar. Once again, a woman had been led to believe a particular house could be her home for life and here the court appreciated the distinction between an intention to benefit from only the use value as opposed to both the use and investment value of the property. The court held that the plaintiff was not intended to have a determinable life interest, admittedly being influenced by the consequences of the Settled Land Act 1925 in so finding(43). The equity was more appropriately satisfied by the grant of a lease at a low rent, non-assignable and determinable on death. This was surely more akin to what was intended as it only conferred the benefits of the use value of the property.

Other cases, which arguably should have been decided on the basis of estoppel but where somewhat unsatisfactorily implied contract reasoning was adopted, would also cause difficulty if the role of proprietary estoppel in licence cases was confined to overcoming lack of formalities in giving effect to recognised proprietary interests. Take, for example, TANNER v TANNER(44), where the intention was found to be that the mistress should be allowed to remain in the property rent free so long as the twins she had had by the plaintiff were of school age or the accommodation was reasonably required for her and the children. Such a right to occupy does not satisfy the characteristics of any leasehold or freehold interest, even though estoppel principles would have been appropriate.

Admittedly, on the case law as it stands, where proprietary estoppel principles have actually been adopted in licence cases, the view is sustainable, when looking at the way in which the equity has been satisfied, that estoppel concepts are only used as a means of giving effect to recognised proprietary interests. This is so, as the equity would appear always to have been satisfied by means of a recognised proprietary interest, whether it be the conveyance of a fee simple, a lease determinable on death, with no power to assign, or an equitable lien. This is not to agree, however, that the role of proprietary estoppel has simply

been to overcome a lack of formality in order to give effect to the intentions of the parties. Other factors have also influenced the outcome of the decision. In any case, with respect to the negative protection in INWARDS v BAKER and GREASLEY v COOKE, it is arguable that the court was not giving effect to a determinable life interest and certainly, in the case of GREASLEY v COOKE, it would have been inappropriate to order the grant of such an interest as opposed to merely making an order not to disturb occupation so long as the licensee wished to remain. Moreover, there is some authority, albeit limited, to support the view that something other than a recognised proprietary interest through proprietary estoppel may bind a third party. The first of these authorities is PLIMMER v WELLINGTON CORPORATION(45). The Wellington Corporation purchased compulsorily land including a jetty used by Plimmer. The question before the court was whether Plimmer had an interest in it for the purpose of compensation. The government of the province had encouraged and acquiesced in the building of the jetty but no formal conveyance had been made to Plimmer's predecessor. It was held on account of estoppel that Plimmer had a sufficient right to entitle him to compensation. What is interesting is the court's remarks concerning the nature of the right, for this did not appear to correspond with a known proprietary interest. The right was described as a practically perpetual right to the jetty for the purposes of the original licence. The decision is not a strong authority for the proposition that proprietary estoppel is capable of making rights other than recognised interest in land bind third parties, as, although the land became vested in the corporation after the actions leading to the estoppel, it was treated by the Privy Council as being vested continuously in the government and therefore did not involve a third party. Furthermore, the court appeared to be of the view that the licence could only be regarded as an interest in land for the purpose of construing the statute entitling compensation and that:

> "...in such statutes the expression "estate or interest in, to, or out of land" should receive wide meaning".(46)

The other authority for the view that something other than a recognised interest in land can bind a third party by means of proprietary estoppel is the judgement of Lord Denning M.R. in IVES v HIGH(47). He deemed the rights in that case were neither an estate contract nor an equitable easement, yet through estoppel principles they were capable of binding a third party. In contrast, however, Winn L.J., with whom Dankwerts L.J. seemed to agree, accepted that the original arrangement was an

equitable easement which was void for non-registration, but decided it was not contradictory to find the plaintiffs were nevertheless bound on the basis of estoppel.

In conclusion, it is suggested that to confine proprietary estoppel in licence cases to the role of overcoming a lack of formalities could lead to a dangerous narrowing of the concept depriving deserving licensees of protection in some cases where no recognised proprietary interest could be found to be intended, such as TANNER v TANNER and GREASLEY v COOKE. However, the finding that rights other than recognised property rights can, with the aid of estoppel principles, bind third parties, gives rise to the same conceptual difficulties as saying that a contractual licence is capable of binding a third party; the estoppel doctrine is then being used to bridge the gap in the chasm between personal and proprietary rights. There would seem to be two possible solutions to this problem. Firstly, although it may be recognised that rights based on proprietary estoppel are capable of binding third parties, it need not necessarily follow that all rights arising out of estoppel bind third parties. If the estoppel doctrine is not being invoked to overcome a lack of formality in broadly giving effect to a recognised proprietary interest, then the rights should be classified as purely personal. On a consideration of the case law, it is furthermore arguable that, if the equity has been satisfied by an equitable lien over the property for improvements carried out as, for example, in RE SHARPE, it is unfair that such lien should bind a third party purchaser because the purchase price of the property will already be increased on account of the improvements. It is noticeable that in that case, Brown-Wilkinson J. left open the issue of whether the lien would bind a third party purchaser and indeed indicated that it would probably not be binding on such a purchaser unless he had express notice(48). Nevertheless, there would appear to be drawbacks in accepting the notion that some estoppels do not bind third parties. In the first place, it may leave a licensee unprotected against a third party and, in the second, it may well result in an unacceptable degree of uncertainty as it could be difficult to ascertain or predict before the court hearing whether the estoppel was purely personal in nature. The extent of the latter problem will be explored more fully in more general terms in the Section following.

The second possible solution lies in the courts being prepared to adopt a slightly different approach. The role of the courts in estoppel cases should be to

ascertain the intention of the parties and, if this does not correspond with a recognised proprietary interest, to satisfy the equity by giving effect to the closest recognised interests to the intentions found to exist. GRIFFITH v WILLIAMS(49) shows that this approach is feasible. It is one thing to accept that flexibility and uncertainty should be introduced into a system of rigid and ordered proprietary rights to accommodate the trusting, the foolish, the aged and infatuated, but quite another, and what is more an unnecessary step, to wreak potential havoc by allowing hitherto unrecognised proprietary interests to become, with the assistance of proprietary estoppel, interests in land capable of binding third parties.

(c) Policy.

It is here proposed to consider how satisfactory the current approach to estoppel is from the point of view of the general interests of third parties. The system of registered conveyancing and the concept of a land charge in relation to unregistered conveyancing were introduced, along with other reforms in 1925, to provide a balance in the conflict between the need for safe and quick conveyancing procedures on the one hand, and the protection of holders of equitable interests on the other. Since 1925, this conflict of interests would seem to have become much more acute. Safe and quick conveyancing procedures are arguably more vital now than in 1925, due to the increased number of freehold owners (the small property owning democracy) and increased mobility and the need to facilitate such mobility. At the same time, it has become additionally important to provide security and thereby give effect to the "use" value of property. As has been seen, proprietary estoppel has been made to play an important role in this sphere. The question is however, whether, given that the conflict of aims in the 1925 legislation has become even greater, estoppel principles are maintaining a balance between the competing interests of third parties and licensees of land, or have the scales been tipped too heavily in favour of the licensee? As Lord Wilberforce put it in NATIONAL PROVINCIAL BANK LTD. v HASTNGS CAR MART, with reference to the particular problem of the deserted wife, (although the same would seem to be true of any licensee):

> "The ultimate question must be whether such persons can be given the protection which social considerations of humanity evidently indicate without injustice to third parties and a radical departure from sound principles of real property

law."(50)

The first question to be considered is whether the use made of proprietary estoppel in licence cases has acted against the interests of third parties by increasing the number of burdens on the land in allowing a new category of property right. On the basis of what has been argued in the previous Section, in so far as estoppel principles have been used to overcome a lack of formality in giving effect to a recognised proprietary interest, this is obviously not the case. Moreover, once the notion is accepted that the estoppel doctrine does not necessarily operate so as to give rise to rights capable of binding third parties and thus, where the intention of the parties was to grant rights less than an established proprietary interest (e.g. an equity to remain), the rights are purely personal, it then follows no new burden arises.

However, a possible way in which the estoppel doctrine has arguably unacceptably prejudiced the interests of third parties is by the fact that it may be difficult to discover the existence of rights based on estoppel which may nevertheless be binding. There are two aspects to this. Firstly, the likelihood that the rights based on estoppel may arise out of a purely oral agreement which may not be clearly defined and may be capable of various interpretations(51). Evidence of the latter problem is seen for example by the fact that in many of the reported decisions the case has been brought on quite a number of alternative footings(52), not to mention the wide variety of interpretations given to an arrangement provided by academic writers. This is clearly unsatisfactory from the point of view of third parties and it should be remembered that the social and economic importance of land is one of the reasons for requiring such agreements to be reduced to writing. Writing tends to encourage precision and consequently creates a degree of certainty. The second aspect relates to the way in which rights arising out of estoppel fit into, or more to the point, do not fit into, the registration system. Here it is necessary to distinguish between unregistered and registered conveyancing.

With regard to unregistered conveyancing,Lord Denning in the Court of Appeal in IVES v HIGH(53) decided that rights arising out of estoppel are neither registrable under the Land Charges Act 1972 nor overreachable but depend on the old doctrine of notice retained by S.199 of the Law of Property Act 1925(54); that is to say, a purchaser of a legal estate is bound if he had actual, constructive or imputive notice of such rights. The case itself did not concern a licence to occupy land but, it

will be remembered, an oral agreement for a right of way over the plaintiff's land, in return for allowing the plaintiff's predecessor in title to retain foundations on the defendant's land. On the facts of the case, the plaintiffs had express notice of the rights in question and the decision was furthermore based on the doctrine of approbate and rerobate. It is, however, to be assumed that the same principles would apply to a licence to occupy and that they would operate where estoppel principles are not supported by the doctrine of approbate and retrobate. On this basis, third parties who are not purchasers for value of a legal estate or who are purchasers of only an equitable estate will be bound by licences to occupy irrevocable on account of estoppel, although there is a case for saying that as the rights in IVES v HIGH were described as 'mere equities'(55), they would not necessarily bind purchasers of equitable estates without notice, the maxim "where the equities are equal the first in time prevails" applying. Those who are purchasers for value of a legal estate in good faith with actual, constructive or imputive notice will also be bound. But the question which needs to be asked is when, in this context, will a purchaser be fixed with constructive notice. The extent of constructive notice has been explored in cases concerned with a sale of land by a single trustee for sale where the interests of the beneficiaries are not overreached on account of S.2 (i) (ii) Law of Property Act 1925, which requires the purchase money be paid to two trustees. According to the decision in CAUNCE v CAUNCE(56), the position of third parties is similarly dependent on the old doctrine of notice. The question which arose in that case was whether a mortgagee had constructive notice of a wife's interest in the matrimonial home arising out of a resulting trust in her favour. The husband had, without her knowledge or consent, taken out three successive mortgages to raise capital to enable him to set up home with another woman. He was eventually declared bankrupt. The mortgagees had no actual notice of the wife's interest and Stamp J. held that they had no constructive notice either, as her occupation of the home was not inconsistent with the title offered by the mortgagor. He went on to express the view that whenever the vendor/mortgagor was in possession of property, a purchaser would not be fixed with constructive notice of the equitable interests of any other person resident there whose presence was wholly consistent with the title offered, "e.g. the vendor's father, his Uncle Harry or his Aunt Matilda....". Nevertheless, Stamp J. added:

> "It would be otherwise if the vendor is not in occupation and one finds another party whose presence demands an explanation and whose presence

one ignores at one's own peril."(57)

Thus it would seem that, if the licensee claiming rights on the basis of estoppel is not in occupation with the vendor/licensor, a purchaser will be taken to have constructive notice of such rights. This does not impose an intolerable burden on third parties as such a situation should be comparatively easy to detect and immediately put a purchaser on guard. However, decisions since CAUNCE v CAUNCE have cast doubt on the view that a purchaser will not have constructive notice of the equitable rights of persons in occupation with the vendor. The idea was criticised by the Court of Appeal in the registered land case of HODGSON v MARKS(58) and described by Lord Wilberforce in the House of Lords in WILLIAMS AND GLYN'S BANK LTD v BOLAND as "heavily obselete"(59). Moreover, in the recent decision of KINGSNORTH TRUST LTD . v TIZARD(60), a mortgagee of unregistered land was held to have constructive notice of the equitable interest of a wife found to be in actual occupation of the matrimonial home of which her husband was sole legal owner. In this case, Judge John Finlay Q.C. explained constructive notice in the following terms:

> "If the purchaser or mortgagee carries out such inspections as ought reasonably to be made and does not either find the claimant in occupation or find evidence of that occupation reasonably sufficient to give notice of the occupation, then I am not persuaded that the purchaser or mortgagee is in such circumstances (and in the absence .... of other circumstances) fixed with notice of the claimant's rights. One of the circumstances, however, is that such inspection is carried out as ought reasonably to be made."(61)

This principle applied to estoppel cases, coupled with the evidential problems of establishing rights arising out of estoppel obviously imposes a very heavy, but not intolerable, burden on third parties. It raises exactly the same problems as that of a single trustee for sale and an equitable owner in occupation with an interest based on a resulting or constructive trust, where there is also lack of written evidence. Given the importance now attached to the "use value" of property and the fact that the rights of a person in actual occupation are relatively easily discoverable, the balance would not seem to have been tipped too heavily in favour of the licensee at the expense of third parties. This is especially arguable in the light of the decision in BRISTOL AND WEST BUILDING SOCIETY v HENNING(62) where it was held that, in certain circumstances, the equitable

rights of a person in actual occupation may be postponed to those of a purchaser. On the facts of the case, it was held that it was impossible to impute to an equitable owner, on the basis of a resulting trust, a common intention to take priority over the rights of a mortgagee in circumstances where to the knowledge of the equitable owner the property had been acquired with the aid of a mortgage. The decision in effect amounts to a reversal of the doctrine of notice placing the onus on the occupier to declare his/her rights to a purchaser of whom he/she has notice, lest he/she be deemed to have conceded priority. Given that proprietary estoppel also involves intention, the same principles would seem to apply and would at least provide protection for mortgagees. Nevertheless, BRISTOL AND WEST BUILDING SOCIETY v HENNING leaves it unclear whether mere knowledge of a mortgagee's rights is sufficient to postpone an equitable owner's interest or whether approval and/or benefit to the equitable owner must be established. It would not seem to be unduly harsh on an equitable owner if mere knowledge were to be sufficient.

To consider next registered conveyancing and licences to occupy supported by the estoppel doctrine. In contrast to the system of unregistered conveyancing, such rights would appear to fit within the system. Although S.20 (1) of the Land Registration Act 1925 provides that a transferee takes free of all rights other than overriding interests and minor interests protected by one of the authorised methods provided, it would seem that estoppel rights may fall within the definition of minor interests and where the licensee is in actual occupation, constitute an overriding interest within S.70 (1) (g) of the Land Registration Act 1925. With regard to the issue of a minor interest, S.3(15) of the Land Registration Act 1925 defines minor interests as including "all rights and interests which are not registered or protected by entry on the register and which are not overriding interests". From this very wide definition, it follows that any right relating to land must fall within the system as a minor interest if it is not registrable with a separate title or an overriding interest. The view has furthermore been expressed(63) that, since S.3 (15) refers to "all rights", the right in question need not necessarily be an interest in land to be eligible for protection as a minor interest and would be capable of protection by means of a caution under S.54 (1) of the Land Registration Act 1925. If one accepts the view that not all licences to remain, where the estoppel doctrine can be invoked, give rise to proprietary estoppels, such a finding is of significance.

However, the fact that estoppel rights may in theory be capable of protection as minor interests is of limited

practial importance for two main reasons. Firstly, it may be difficult for a party claiming rights arising out of estoppel to satisfy the registrar of their interest before the court declares such an interest and secondly the type of party the estoppel doctrine has been developed to protect is, in most instances, unlikely to know about their need to register until it is too late. In any case, the estoppel doctrine as applied to licences relating to land is largely about protecting existing occupation of land and it would now seem clear that, where the licensee is in actual occupation, at least with a recognised proprietary right arising out of estoppel, this will be an overriding interest under S.70 (1) (g) of the Land Registration Act 1925 and, as such, binding irrespective of notice or registration. According to the House of Lords in WILLIAMS AND GLYN'S BANK LTD. v BOLAND(64), all that needs to be established is the mere fact of occupation coupled with a proprietary interest. This imposes an even heavier burden on third parties than that experienced under the system of unregistered coveyancing as the concept of constructive notice is more limited in ambit. Nevertheless it should be remembered that the justification for the retention of overriding interests under S.70 (1) (g) was all part of the balancing act between the interests of third party purchasers and the holders of equitable interests, and was based on the fact that rights of persons in actual occupation are relatively easily discoverable. This does, however, leave open the possibility that a prudent purchaser who does not discover a perhaps well concealed occupation of a licensee who can place reliance on estoppel principles, may suffer, but this is likely to be an extremely rare occurrence. A review of the existing case law on licences to occupy reveals that the majority of the cases concern disputes between licensee and licensor or the personal representatives of the licensor and those involving third parties have been cases of third parties with express notice of the rights of the licensee. Moreover, special protection for mortgagees may be available on account of the decision in PADDINGTON BUILDING SOCIETY v MENDELSOHN(65), which parallels the decision relating to unregistered land in BRISTOL AND WEST BUILDING SOCIETY v HENNING(66) already discussed. In PADDINGTON BUILDING SOCEITY v MENDELSOHN, the court imputed an intention to a party with an equitable interest by way of resulting trust, that the mortgagee should have priority over her interest, in circumstances where the house in question had been acquired with the aid of a mortgage and could only have been acquired by this means.

Although it cannot be denied that the acceptance of estoppel rights capable of binding third parties arising

out of licence to occupy makes conveyancing potentially more difficult and risky if, in relation to either registered or unregistered conveyancing, it were to be insisted that such rights should only be enforceable against third parties once protected by registration, one may as well abandon the doctrine to the extent that it affects third parties as it has already been noted that the very people likely to need the protection of the doctrine are unlikely to know of the need to register given they have not even taken steps to protect their occupation against the licensor. Admittedly, under the system as it stands, failure to register would still leave the licence binding on certain categories of third party, namely, in relation to registered land, those who are not purchasers for valuable consideration, and in relation to unregistered land those potentially who are not purchasers for money or money's worth. Moreover if, in relation to registered conveyancing, decisions such as PEFFER v RIGG(67) and LYUS v PROWSA(68) were followed, this would further extend the class of purchaser affected. In PEFFER v RIGG, a purchaser of registered land who arguably(69) took for nominal consideration with express notice of an unprotected minor interest was held to be bound by it on the basis of a constructive trust, not being a "purchaser for valuable consideration" within S.20 of the Land Registration Act 1925. According to Graham J., to be a purchaser for valuable consideration, the purchaser must purchase in good faith for full consideration; if one has knowledge of unprotected minor interest and claims to take free from it, one cannot be said to have purchased in good faith. LYUS v PROWSA also concerned registered land. In this case, Dillon J. held that a third party purchaser, who expressly agreed in the contract of sale to take subject to an unprotected estate contract, was bound by the right on the basis of a constructive trust. It is submitted that both of these decisions are far from satisfactory and involve, to greater and lesser extents, attempts to bring in by the back door a modified doctrine of notice which would, taken the system of registration overall, be far more damaging than in the sphere of licences to occupy, accepting that equitable rights created may bind purchasers in certain circumstances without the need for registration. Given the small number of cases in which third party purchasers are likely to be affected, this would seem to be a comparatively small price to pay to protect deserving and vulnerable members of society - de minimis non curat lex!

Even if one accepts that, in order to protect more vulnerable members of society, admittedly to the detriment of the interests of third parties generally, estoppel rights must continue to exist outside the system

of unregistered conveyancing and not be required to be protected by an entry on the register under the system of registered conveyancing, it would appear that such protection goes too far to the extent that estoppel rights may be unacceptably difficult for a third party to ascertain and predict the consequences of. An examination of the reported case law reveals that, in disputes concerning licences to occupy, equity has already intervened in a very diverse variety of ways. In DILLWYN v LLEWELYN(70) and PASCOE v TURNER(71), the court ordered the conveyance of the fee simple, whereas in INWARDS v BAKER(72), WILLIAMS v STAITE(73), and GREASLEY v COOKE(74) merely negative protection was ordered, an action for possession being dismissed, allowing the licensee to remain for life. Yet again in RE SHARPE(75), the court declared an equitable lien over the property for expenditure incurred, whilst in DODSWORTH v DODSWORTH(76), the court suspended an order for possession until the cost of improvements had been repaid and finally, in GRIFFITH v WILLIAMS(77), the court granted a non-assignable lease at a low rent. It has been argued(78) that if one appreciates what the court is doing in estoppel cases, then the outcome is not difficult to predict despite the variety of remedies which have so far been granted. The court, we are told, is, through estoppel principles, simply overcoming a lack of formality and giving effect to the intention of the parties by declaring and perfecting the relevant established proprietary interest they intended. It has already been argued that, since the parties may well not envisage or think in terms of a recognised proprietary interest, the estoppel doctrine has not simply been used for the purpose of overcoming lack of formality and that this is reflected in some of the remedies granted which do not necessarily correspond to established proprietary interests. However, it is submitted that even where the equity has been satisfied by the grant of some recognised proprietary right, the court is not simply overcoming the lack of formality in the arrangement by giving effect to the intentions of the parties. The court is additionally looking at the surrounding circumstances in order to achieve "justice" between the parties, in a similar way to that of Lord Denning in applying his so-called "new model" constructive trust to co-ownership cases in the 1970s. Under this approach, the intentions of the parties is clearly not the only relevant factor. Potentially, we are seeing the rebirth of new model constructive trust principles under the new name "proprietary estoppel" after meeting what would appear to be a near-death in decisions of the Court of Appeal in the sphere of co-ownership such as BURNS v BURNS(79) and GRANT v EDWARDS(80).

What evidence is there, then, to support the view that wider considerations than the actual or presumed intentions of the parties are being taken into account in deciding how the equity should be satisfied? An examination of the reasoning adopted in PASCOE v TURNER (81) clearly reveals that factors other than the intentions of the parties were taken into account. The facts of the case have already been explained in some detail. The court accepted evidence that the plaintiff had told the defendant that the house in question and its contents were hers, but had then failed to perfect the gift by a conveyance of title to the house to her. Although the court ordered the fee simple in the house be transferred to the defendant, this was not simply in order to perfect the imperfect gift on account of the element of detrimental reliance; there were other considerations. Cummings-Bruce L.J. considered that there were two alternative remedies available to the court: either the defendant should have a right to occupy the house for her life time, or there should be a transfer of the fee simple to her. In opting for the latter remedy, the court took into account that the plaintiff was comparatively wealthy as compared to the defendant, that his conduct in attempting to secure possession had been "ruthless", that if he were to retain an interest in the house, he may make excuses to enter it and thereby bother the defendant. Additionally, given her limited capital, the defendant would not be able to carry out any expensive repairs which became necessary if she had only a licence to remain, as she would be unable to provide security to finance a loan. Similar "justice" considerations were taken into account by Lord Denning in HARDWICK v JOHNSON(82) in finding the daughter-in-law had an irrevocable "equitable licence" to occupy. In this respect, it is interesting to note that he declares "the court has to spell out the terms"(83) of the licence which does not seem consistent with the idea of the court solely giving effect to the intentions of the parties in satisfying the equity. On the facts of the case, in deciding the licence was irrevocable, Lord Denning seemed much influenced by the fact that the daughter-in-law had been deserted by her husband, the son of the licensor, and had moreover been left to bring up a baby. He goes on to suggest that the position may well have been different, had there not been a grandchild and the daughter-in-law had formed an association with another man in the house. It is arguable that in this case, in contrast to PASCOE v TURNER, the wider justice considerations are being taken into account by Lord Denning, to establish whether there has been an element of detrimental reliance so as to make the licence irrevocable in the first place, rather than for the purpose of determining how the equity, once raised,

should be satisfied. This is because Lord Denning does not distinguish clearly between the two elements. However, it is quite clear that he does envisage the duration of the rights arising out of estoppel as being governed by the surrounding circumstances and the conduct of the parties, as he refuses to set out the circumstances in which the licence may, in the future, be determined, concluding:

> "One cannot foresee when it may be possible to determine the licence but it cannot be determined at this stage."(84)

This is highly unsatisfactory for the parties themselves, let alone third parties. Additional evidence that the courts are not simply giving effect to the intention of the licensor and licensee and perfecting imperfect gifts is apparent from the somewhat dubious notion in the judgments of Lord Denning M.R. and Cummings-Bruce L.J. in WILLIAMS v STAITE(85) already discussed, that a licence irrevocable by reason of estoppel may be terminated by bad conduct on the part of the licensee.

It would seem, therefore, that it not as easy as some would have us believe, to determine how the equity may be satisfied in estoppel cases so that even if a third party has been fortunate enough to discover the existence of the rights founded on estoppel principles, they may have to suffer the further uncertainty of not knowing the extent of the rights acquired until a court hearing. Nevertheless, it is submitted, that if one accepts that concepts such as estoppel should have a place in the scheme of property rights in order to protect more vulnerable members of society, then one also has to accept most of the uncertainty that goes with them. One might argue that, in order to introduce an element of certainty, the courts should, in satisfying the equity once raised, only give effect to the expectations of the parties and not take into account wider considerations, but since establishing whether the element of detriment is proved, so as to raise the equity in the first place, involves looking at the surrounding circumstances, the fact that such circumstances are also taken into account in finding a suitable remedy does not seem to increase significantly the problems third parties will inevitably experience. Having said this, however, the courts should assist in providing a minimum degree of certainty by being prepared to set out in precise terms the extent of the rights acquired with the aid of estoppel principles, and by giving effect to them in terms of established proprietary interests, even if these prove to be somewhat artificial as in GRIFFITH v WILLIAMS(86). To attempt to introduce a total element of certainty would take from

the estoppel doctrine much of its force; its very nature requires it has "hazy edges"(87) and, to deny the doctrine has a place in the system because of this characteristic, would deprive the system of the sense of justice which society demands.

References Section IV (e) (iii)

1. For a comprehensive study of the policy considerations see Moriarty (1984) LQR 376 at p. 398 f.from which many of the issues raised in this section have been inspired.

2. (1862) 4 De GF and J 517.

3. [1965] 2 WLR 212.

4. [1973] EGD 233.

5. [1978] EGD 919.

6. [1980] 1 WLR 1306.

7. [1980] 1 WLR 219.

8. [1955] 1 All ER 550.

9. [1967] 1 All ER 504.

10. [1957] 1 All ER 371.

11. [1978] 2 All ER 928.

12. Supra at p. 217.

13. Supra at p. 508.

14. Supra at p. 226.

15. [1965] AC 1175 at p. 1253.

16. See ante Section IV (d) (ii).

17. A purchaser of an equitable estate will automatically be bound by a prior equitable right. See generally on the issue of what it is that binds a third party: R. J. Smith (1973) CLJ 123 at pp 125-129; Bailey (1983) Conv 99.

18. See RE PINEWOOD [1958] Ch 280; RE DOLPHIN'S CONVEYANCE [1970] Ch 654; FEDERATED HOMES LTD v MILL LODGE PROPERTIES LTD [1980] 1 WLR 594 cf. RENALS v CAWLISHAW (1897) 11 Ch 866; ROGERS v HOSEGOOD [1900] 2 Ch 338; REID v BICKERSTAFF [1900] 2 Ch 305.

19. Supra. See Anderson (1979) 42 MLR 203; Bowie (1981) 11 VUWLR 63.

20. Supra at p. 934.

21. Supra at p. 934.

22. Supra.

23. Supra.

24. Moriarty (1984) LQR 376.

25. Supra.

26. [1979] 2 All ER 945. For facts see ante pp 193-196.

27. Supra at p. 948.

28. Supra at p. 217 (per Lord Denning M.R.)

29. Supra.

30. Supra. For facts see ante p. 196.

31. Supra.

32. Supra.

33. E.g. Neave and Weinburg 6 VTasLR 24. Also implied by Moriarty (1984) LQR 376 at p. 384.

34. [1986] 2 All ER 426 at p. 439. The view is also accepted by Mr. Edward Nugee Q.C. in RE BASHAM (deceased) [1987] 1 All ER 405, who additionally broke new ground (it is submitted, unnecessarily) by combining proprietary estoppel with the doctrine of constructive trusts.

35. [1971] AC 886.

36. Supra at p. 439.

37. Supra at p. 439.

38. [1972] 1 WLR 1286.

39. Supra.

40. Supra.

41. Supra.

42. Supra.

43. See post Section IV (f).

44. [1975] 3 All ER 776.

45. (1884) 9 App Cas 699.

46. Supra at p. 714.

47. Supra.

48. Supra at p. 226.

49. Supra. See ante p. 221.

50. [1965] AC 1175 at p. 1242.

51. See Moriarty (1984) LQR 376 at p. 398 f. for discussion of forensic, evidentiary and protective function of formalities.

52. See for e.g. CHANDLER v KERLEY where the plaintiff claimed to have a licence to occupy for life, or for so long as her children remained in her custody and the younger was of school age and so long as she did not remarry, or for a period terminable only on reasonable notice.

53. Supra.

54. This may well be because the rights in question were classified as "mere equities" probably because the Law of Property Act 1925 was thought to preclude the creation of new equitable interests.

55. See also HL SHILOH SPINNERS LTD v HARDING [1973] 1 All ER 90.

56. [1969] 1 All ER 722.

57. Supra at p. 728.

58. [1971] Ch 892.

59. [1981] AC 487 at p. 505.

60. [1986] 2 All ER 54.

61. Supra at pp 63-64.

62. [1985] 1 WLR 778.

63. Hanbury and Maudsley 12th edition p. 863 f.

64. Supra.

65. (1985) 50 P and CR 244.

66. Supra.

67. [1977] 1 WLR 285.

68. [1982] 1 WLR 1044.

69. Graham J. ignored the fact that the ex-wife (purchaser) had taken over the mortgage obligation in return for the conveyance of title which could be said to constitute valuable consideration.

70. Supra.

71. Supra.

72. Supra.

73. Supra.

74. Supra.

75. Supra.

76. Supra.

77. Supra.

78. Moriarty (1984) LQR 376.

79. [1984] 2 WLR 582.

80. [1986] 2 All ER 426.

81. Supra. For facts see ante p. 193f.

82. Supra. For facts see ante p. 147.

83. Supra at p. 939.

84. Supra at p. 939.

85. Supra. See ante pp 216-217.

86. Supra.

87. See generally "A Judge's Guide to Legal Change in Property: Mere Equities critically examined"

Wallace and Grbich (1979) UNSW Law Journal 169.

The Settled Land Act

It has been suggested by some (1) that informal arrangements for residential security for life or for so long as the licensee wishes to occupy the premises give rise to difficult questions as to whether the Settled Land Act 1925 operates. This, it has been said(2), is so, whether the licence is classified as contractual or is regarded as irrevocable on account of the operation of estoppel principles. In the light of the view expressed in early Sections that estoppel principles provide the best way forward for protecting occupation in licence cases, it is proposed to consider how real or insuperable these problems are. If the Settled Land Act 1925 does operate in a licence situation, the licensee would be a tenant for life and, as such, would be able to call for the legal estate to be vested in him or her(3) and, amongst other things, would be able to sell the fee simple or lease the property(4). Furthermore, S.106 of the Settled Land Act 1925 makes it quite clear that such powers could not be ousted or curtailed. The consequence of finding the licensee to be a tenant for life is that a person who has merely been offered residential security ends up with much more than was ever intended. This point was made by Lord Denning in BINIONS v EVANS, where he commented:

> "No-one would expect Mrs. Evans here to be able to sell the property or to lease it. It would be so entirely contrary to the true intent of the parties that it cannot be right."(5)

A similar view is also expressed by both Russell L.J. in DODSWORTH v DODSWORTH(6) and Scarman L.J. in CHANDLER v KERLEY(7). Consequently, even where a licence to occupy has been found to give rise to a strict settlement, there is an obvious judicial reluctance to make such a finding. This is apparent from the judgments of Stephenson and Megaw L.JJ. in BINIONS v EVANS, in expressing the majority view that Mrs. Evans was a tenant for life under the Settled Land Act 1925. Stephenson L.J. observed:

> "Apart from authority I would not have thought that such an interest could be understood to amount to a tenancy for life within the meaning of the Settled Land Act 1925, and I would have thought that the other terms of her tenancy.... are inconsistent with a power to ask for the legal estate to be settled on her or to sell the cottage."(8)

Similarly, Megaw L.J. commented:

> "I confess that I have had difficulty in seeing precisely how the Settled Land Act 1925 was applicable,(9)"

and later,

> "I realise that the application of the Settled Land Act may produce some odd consequences but no odder than those which were inherent in the decision in BANNISTER v BANNISTER."(10)

Such judicial reluctance may account for the fact that other cases with facts, similar to those in which the issue of a strict settlement was raised, make no reference at all to the Settled Land Act 1925; for example, the estoppel cases of INWARDS v BAKER(11) and GREASLEY v COOKE(12), where it would arguably have been easier to find a strict settlement than in the contractual licence cases in which the Settled Land Act 1925 was discussed. It is therefore necessary to decide whether BANNISTER v BANNISTER(13) and BINIONS v EVANS(14), the two cases which support the view that a strict settlement arises where there is an informal arrangement to permit another to occupy premises for life or for so long as the licensee wishes, were rightly decided.

The facts of both BANNISTER v BANNISTER and BINIONS v EVANS have already been related in detail. It will be remembered, in BANNISTER v BANNISTER, the defendant had sold two cottages to the plaintiff at a reduced price on the oral understanding that the defendant could stay in one of the cottages rent free so long as she liked. The plaintiff later sought possession of the cottage on the ground that the defendant was only a tenant at will and her tenancy had been determined by a notice to quit. The Court of Appeal, however, found the plaintiff held the cottage on trust for the defendant for her life, with the consequence that the defendant was a tenant for life under the Settled Land Act 1925. In BINIONS v EVANS, a written agreement had been entered into by the predecessor in title of the plaintiffs, whereby the defendant had been provided with a "temporary home", which she was permitted to "personally occupy and live in" rent free for the remainder of her life. On these facts, relying on BANNISTER v BANNISTER, the majority of the Court of Appeal (Lord Denning dissenting) found that the agreement had the effect of constituting the defendant a tenant for life under the Settled Land Act 1925. One reason for objecting to the finding of a strict settlement in BANNISTER v BANNISTER but not BINIONS v EVANS is the fact that the agreement to allow

the defendant to occupy the cottage was merely an oral one(15), whereas the definition of a settlement in S.1 (1) of the Settled Land Act 1925 requires a "deed, will,.... Act of Parliament or other instrument .... instruments". Any argument to the effect that the deed of conveyance of the cottages to the plaintiff, which was induced by the oral agreement to allow the defendant to occupy, could be regarded as the necessary instrument for the purpose of S.1 (1), would seem to be unjustified; the whole point was that the prior oral agreement had not been embodied in the deed. A slightly stronger argument is that the court order may be regarded as the necessary instrument for the purpose of S.1 (1). Reasoning along these lines was adopted by Goff L.J. in the proprietary estoppel case of GRIFFITH v WILLIAMS where he expressed the view:

> "...it is the court order declaring the equity which is an "instrument" and therefore a settlement."(16)

However, although this may mean that licences irrevocable on account of proprietary estoppel are not precluded from being regarded as strict settlements through lack of a written agreement, in BANNISTER v BANNISTER, the right to occupy was held to be enforceable by means of a constructive trust. This is a significant difference if the view is taken that rights based on proprietary estoppel only come into existence when declared by the court whereas an oral agreement enforceable by means of the imposition of a constructive trust exists from the date of the agreement, the declaration of the court merely making it enforceable. Thus, from S.1 (1), it would appear that lack of writing may of itself prevent a licence to occupy falling within the Settled Land Act, but this would not be so if, as is now increasingly the finding, the oral agreement is irrevocable on account of proprietary estoppel.

In his dissenting opinion in BINIONS v EVANS, Lord Denning presents three objections to the finding of a strict settlement on the facts of that case(17). Firstly, that such a finding would be entirely contrary to the true intentions of the parties. Secondly, that S.1 (1) of the Settled Land Act 1925 requires the land to be "limited in trust" before a settlement can arise, by which it means "expressly limited in trust" and thirdly, S.1 (1) also requires the land to be limited in trust "by way of succession", whereas on the facts of BINIONS v EVANS, there was "no trace of a succession of one beneficiary after another". The validity of each of these objections must now be considered in turn.

On the issue of intention, a similar objection is put forward against the finding that a licensee is a tenant for life under the Settled Land Act 1925 by Lord Justice Russell in DODSWORTH v DODSWORTH(18). In that case, the Court of Appeal refused to find the defendants were tenants for life on the grounds that this would lead "to a greater and more extensive interest than was ever contemplated by the plaintiff and defendants." Bearing in mind that one of the main aims behind the Settled Land Act 1925 is to prevent land from becoming inalienable, it is questionable whether the intentions of the parties in this respect should be relevant. An irrevocable licence to occupy for life which is found to take effect outside the Settled Land Act will render the land less marketable since a purchaser with actual or constructive notice will be bound by such licence which will not be overreachable and the licensee him or herself will not be able to alienate the land by sale, lease or other disposition. Furthermore S.1 (1) of the Settled Land Act 1925 sets out fully the circumstances in which a settlement arises and, in doing so, makes no reference to intention. It would therefore seem to follow that, if an arrangement falls within the statutory definition, a strict settlement must arise irrespective of intention. What is more, there are many reported cases(19) where the provisions of the Settled Land Act have operated against the actual intentions of the parties.

Turning to the second objection put by Lord Denning in BINIONS v EVANS, namely that the Settled Land Act requires the settlement to be expressly limited in trust. It has been rightly argued(20) that there is no justification for imposing such a restriction on the ambit of the Act. Since 1926, S.1 (1) of the Law of Property Act 1925 provides that there are only two interests which are capable of existing as legal estates in land, namely a fee simple absolute in possession and a term of years absolute. All other beneficial interests must subsist behind a trust. It therefore follows, for example, that the provision in S.1(1)(2) of the Settled Land Act 1925 that a settlement arises where land is "limited in trust .... for an entailed interest", will be satisfied whether or not it is expressly limited in trust. Once it is accepted that limited in trust in not confined to expressly limited in trust, it would follow that since, in BANNISTER v BANNISTER, and, on Lord Denning's own reasoning, in BINIONS v EVANS, constructive trusts were found to exist, this factor could not of itself prevent the agreements for occupation coming within the Settled Land Act. However, it is arguable that licences irrevocable on account of proprietary estoppel may, in some circumstances, fall outside the Act. Whether the right to occupy could be said to be

"limited in trust" would seem to depend on how the "equity is satisfied". It this were done in terms of a recognised proprietary interest, this would, since 1925, automatically bring the licence within the Act, provided one of the two legal estates is not created. If, on the other hand, the estoppel is not expressed in terms of a recognised proprietary interest, then, since the term "limited" is only apposite to an estate(21), no strict settlement would arise. This would be the case, for example, with respect to INWARDS v BAKER(22) and GREASLEY v COOKE(23), where there was an "equity to remain", a right not necessarily the same as a determinable life interest.

The third and final objection raised by Lord Denning against the finding of a strict settlement, is that, on the facts of BINIONS v EVANS, there simply was no succession of interests to bring the situation within the Settled Land Act. Given that S.1 (4) of the Settled Land Act 1925 provides that any estate not disposed of by the settlor and remaining or reverting to the settlor is, for the purposes of the Act, comprised in the settlement, Lord Denning cannot have been saying there was no settlement, as there was merely an irrevocable licence followed by nothing more. He must therefore have been expressing the opinion that, where a fee simple absolute is subject to an irrevocable licence, the licence itself cannot create the succession of interests. It is necessary to examine whether this view is in fact correct.

The main authority relied upon by the majority in BINIONS v EVANS, in finding a strict settlement existed, was BANNISTER v BANNISTER. In turn, in BANNISTER v BANNISTER. the Court of Appeal chiefly placed reliance upon the decisions in RE CARNE'S SETTLED ESTATES(24) and RE BOYER'S SETTLED ESTATES(25). In referring to these two cases, Scott L.J. in BANNISTER v BANNISTER commented that:

> "Similar words in deeds and wills have frequently been held to create a life interest determinable (apart from the special considerations introduced by the Settled Land Act 1925) on the beneficiary ceasing to occupy the premises."(26)

It is, however, doubtful whether either of these authorities justify the finding of a strict settlement on the facts of either BANNISTER v BANNISTER or BINIONS v EVANS. In BANNISTER v BANNISTER, the Court of Appeal apparently felt obliged to conclude the defendant had a determinable life interest creating the succession of interests to bring the agreement within the Settled Land

Act, on account of the similar findings in RE CARNE'S SETTLED ESTATES and RE BOYER'S SETTLED ESTATES. The first issue therefore is whether these or any other precedents support the view that an agreement to allow another to occupy premises for life necessarily amounts to the grant of a determinable life interest. In RE CARNE'S SETTLED ESTATES, a mansion house was held by trustees on trust for a term of 1,000 years to allow the plaintiff to occupy the mansion house rent free for as long as she might wish and, subject to this, the property was held for one of the defendants. North J., relying on RE EASTMAN'S SETTLED ESTATES(27), found that the plaintiff had a determinable life interest on the basis that the facts before him were indistinguishable from the earlier case. However, it has been pointed out(28) that North J. appears to have relied upon an incomplete report of RE EASTMAN'S SETTLED ESTATES in "Weekly Notes" and, had he referred to the report of the same case in (1898) 68 L.J. Ch. 122n, he would have found further details of the terms of the trust which revealed significant differences from the facts of RE CARNE'S SETTLED ESTATES and which showed, moreover, a clear intention to create a determinable life interest. RE CARNE'S SETTLED ESTATES was therefore decided per incuriam and cannot be taken as authority for the proposition that an agreement to allow another to occupy property rent free for life necessarily amounts to a determinable life interest. There are, however, other cases where words, similar to those used in RE CARNE'S SETTLED ESTATES, were also held to create determinable life interests. For example, in RE PAGET'S SETTLED ESTATES(29), a determinable life estate was held to have been created where property was devised to the use of the testator's son so long as he should reside in the dwelling house and coupled with a certain condition concerning occupation. However, once again, there were other clear words showing a clear intention to create such an estate, for the will went on to specify that, if he failed to comply with the relevant condition, the property was to pass "on the determination of his estate therein" to the use of the trustees for sale. Similarly, in RE TRENCHARD(30), where a testator gave his wife a certain house, so long as she should desire to make it her permanent place of residence and should remain a widow, she successfully claimed to be tenant for life within the Settled Land Act 1882(31). Nevertheless, although Byrne J. decided that she did not merely have a licence to reside on the premises, it is significant to note that he did so as a matter of construction of the terms of the will and, as such, clearly contemplated that it was possible for a right to occupy or reside in property for life to amount to merely a licence. It is therefore submitted that neither RE PAGET'S SETTLED ESTATES nor RE TRENCHARD supports the view that a

determinable life interest is a necessary finding. There are, furthermore, authorities prior to 1882, which, on the basis of the aforementioned decisions, would not appear to have been altered by the Settled Land Act 1882, whereby licences to occupy were found to exist and the difference between a licence to occupy and the grant of an estate was seen as being a question of intention. For example, in STONE v PARKER(32), a testator devised his house to trustees to permit his wife to occupy and enjoy the same during her life, but, if she should (inter alia) refuse to occupy the house, the trustees were to sell it. The court held that the context showed that a personal right of occupation only was intended. Likewise, in MAY v MAY(33), where a testator provided that his wife might reside rent free in a certain residence during her life, it was held that she was not granted a life estate but merely a licence to live in the house. Finally, it is conceivable that, in the post-1882 case of RE BOYER'S SETTLED ESTATES(34), cited in BANNISTER v BANNISTER, although a strict settlement was found to exist, the rights granted may well have been regarded as merely licences to occupy. Here the testator devised a house to trustees to permit his wife during her life to "occupy" it and, after her death, on trust to permit "such one or more of my children who shall for the time being be unmarried and shall desire to reside [in it] to occupy it...." The question arose, after the death of the widow, as to whether the two only unmarried children were tenants for life under the Settled Land Act 1882. It was argued that the two children had no estate in the land and therefore could not constitute tenants for life. Sargant J. dismissed this argument, maintaining that the Settled Land Act 1882 had to be broadly interpreted and one had merely to consider whether there was a beneficial interest in possession to decide whether a person was a tenant for life within the Act. Along with others, this decision led Harvey C. J. in the Australian case of STEVENSON v MYERS to comment:

> "It may be now taken as settled by a current of English authority that a person who merely has a right of residence in a property for his life has the powers of a tenant for life under the Settled Land Act.... The courts have in effect held that the words.... " A person beneficially entitled to possession of settled land for life" are satisfied by a mere beneficial right of physical occupation of the land and that it is unnecessary that an estate, in the strict use of language, should be vested in him.... In my opinion, a mere right of personal residence in a house cannot be called an estate of any kind, and it is indistinguishable from a mere irrevocable licence."(35)

Whether or not one agrees that RE BOYER'S SETTLED ESTATES proceeded on the basis that the children had a mere licence to occupy, the case law surveyed shows the existing authorities do not deny the possibility of there being a mere licence to occupy or reside in property for life, as opposed to a (determinable) life interest. The question, therefore, now arises as to whether a licence to occupy can in any circumstances exist within the framework of a strict settlement. If one accepts Harvey C.J.'s understandeing of RE BOYER'S SETTLED ESTATES in STEVENSON v MYERS, then the answer would seem to be in the affirmative. This view would seem to be supported by the decisions in both RE BARONESS LLANOVER'S WILL(36) and RE VARLEY(37). In the first mentioned case, a testatrix had devised certain houses to trustees on trust to keep up the same and to permit her daughter at any time and from time to time during her life to "reside" in any of the houses. Similar rights of residence were given to certain remoter issue and subject to such rights, the estate was devised in tail. The case would seem to be comparable to the later decision in RE BOYER'S SETTLED ESTATES in that, once again, the question was, not so much the precise nature of the daughter's interest, but whether she was a tenant for life under the Settled Land Act 1882, and it was decided that she was, purely on the basis of the definition in S.2 (5) of a tenant for life as being "the person beneficially entitled in possession". As it was never suggested that the daughter had an estate in land, like RE BOYER'S SETTLED ESTATES, this would seem to support the view that a licence can exist within the framework of a strict settlement. The second decision, RE VARLEY(38), is a clearer authority for a licence existing within the framework of a strict settlement. Here the testator directed his trustees to allow his wife to reside rent free in a certain house during widowhood and to have the use, occupation and enjoyment of the house and its contents and, subject thereto, the estate, including the house, was held on trust for a nephew for life with remainders in tail. The court was being asked to decide who was entitled to the estate on the nephew's death, but in construing the will, North J. commented that the widow had only been given a personal right of residence and was not a tenant for life, although the land was clearly regarded as settled land.

However, it is one thing to say that a licence to occupy can exist within the framework of an existing settlement, but quite another to say that the licence itself can give rise to a settlement by creating a succession of interests. As has been pointed out(39), in each of the cases of RE VARLEY(40), RE BARONESS LLANOVER'S WILL(41)

and RE BOYER'S SETTLED ESTATES(42), a strict settlement would have existed because, apart from the licence, there was a succession of estates. In contrast, in both BANNISTER v BANNISTER and BINIONS v EVANS, there was no succession of interests unless the licence itself gave rise to such a succession of interests. The fact that in both RE BARONESS LLANOVER'S WILL and RE BOYER'S licensees were arguably found to constitute tenants for life is not the same thing as finding that a licence of itself creates a succession of interests because, as Harvey C.J. pointed out in STEVENSON v MYERS:

> "It is to be noted that the English Settled Estates Act does not require that the person to have the powers of a tenant for life should be a person with any estate. All that is required is that he should have a beneficial right of possession for his life." (43)

It would therefore appear that BANNISTER v BANNISTER was wrong in placing reliance on RE BOYER'S SETTLED ESTATES, for the finding of a strict settlement as, on the facts of that case, there was already a settlement apart from any rights granted to occupy or reside in the premises in question. Moreover, although the grant of such rights was held to constitute the "occupants" tenants for life, this was not on account of an essential finding that the rights granted gave an "estate" in the land. Reliance placed on RE CARNE'S SETTLED ESTATES(44) was equally misguided in so far as it was then assumed that a right to occupy was only on the facts capable of giving rise to a determinable life interest. Given that BANNISTER v BANNISTER was wrongly decided, as the majority in BINIONS v EVANS placed reliance upon the decision, it follows that the latter case was also wrongly decided.

Nevertheless, even if one accepts that BANNISTER v BANNISTER and BINIONS v EVANS were both based on a misunderstanding of the law, it does not necessarily follow that a fee simple, subject to an irrevocable licence to occupy can never give rise to a strict settlement. It would seem that this remains a possibility where the doctrine of proprietary estoppel is relied upon. The view has already been expressed that it is not necessary for the land to be "expressly" limited in trust to fall within the Settled Land Act 1925 and that, although S.1 (1) of the Act may require some form of writing before a settlement may arise, in the case of proprietary estoppel, this may be satified by the court order. It therefore follows, if the "equity is satisfied" by means of a recognised proprietary interest other than one of the two legal estates, this will give rise to the necessary succession of interests to bring

the Act into play. This fact need not, however, give rise to problems; the court, aware of the consequences of bringing the agreement within the Settled Land Act, can always make an order outside the terms of the Act. Indeed, this is exactly what the Court of Appeal did in GRIFFITH v WILLIAMS. In that case, the "equity was satisfied" by giving the defendant a long lease determinable upon her death at a nominal rent, since, in the words of Goff L.J.:

> " that would give her the right of occupation for her whole life and could not in any event give her the statutory powers, under the Settled Land Act."(45)

Although such an approach is both clumsy and artificial, it would seem to be the only option, so long as the Settled Land Act 1925 remains on the statute book. A better solution would be to repeal the Settled Land Act, which arguably no longer serves a useful purpose(46), but simply causes problems to the unwary and the unsuspecting through the accidental creation of strict settlements.

References Section IV (f)

1. Gray and Symes "Real Property and Real People" p. 163 footnote 5 and p. 489. This issue is also discussed by Martin (1972) 36 Conv 266; Smith (1973) 32 CLJ 123; Hornby (1977) 93 LQR 561 and Oakley (1972) 35 MLR 551.

2. Martin (1972) 36 Conv 266; also Smith [1978] Conv 229.

3. S.4(2); S.6(b) Settled Land Act 1925.

4. S.38; S.41-48 Settled Land Act 1925.

5. [1972] 2 All ER 70 at p. 74.

6. [1973] EGD 233 at p. 235.

7. [1978] 2 All ER 942 at p. 946.

8. Supra at p. 79.

10. Supra at p. 79.

11. [1965] 1 All ER 446. For facts see ante p. 191.

12. [1980] 1 WLR 1306. For facts see ante p. 196.

13. [1948] 2 All ER 133. For facts see ante p. 170f.

14. Supra. For facts see ante p. 167.

15. See Hornby (1977) 93 LQR 561.

16. [1978] EGD 919 at p. 926.

17. Supra at p. 74.

18. Supra at p. 235.

19. See RE PATTEN [1929] 2 Ch 276; BACON v BACON [1947] p. 15.

20. Oakley [1972] 35 MLR 551.

21. See Hornby (1977) 93 LQR 561; Sheppard's Touchstone p. 117. A limitation "is the bounds or compass of an estate or the time how long an estate shall continue".

22. Supra.

23. Supra.

24. [1899] 1 Ch 324.

25. [1916] 2 Ch 404.

26. Supra at p. 136.

27. (1898) 43 SJ 114; [1898] WN 170; (1898) 68 LJ Ch 122n.

28. Hawkins (1966) 30 Conv 256.

29. (1885) 30 Ch D 161.

30. (1900) 16 TLR 525.

31. Cited by Hornby (1977) 93 LQR 561.

32. (1860) 29 LJ Ch 874.

33. (1881) 44 LT 412.

34. Supra.

35. (1929) 17 NSW WN 94.

36. [1903] 2 Ch 16.

37. (1893) 68 LT 665.

38. Supra.

39. Hornby (1977) 93 LQR 561.

40. Supra.

41. Supra.

42. Supra.

43. Supra at p. 97.

44. Supra.

45. Supra at p. 927

46. See for e.g. Scammell "The Reform of the Settled Land Act 1925" (1957) CLP 152.

Conclusion

This thesis set out to study and to explain the reasons for the development of licences to occupy land, and at the same time to dispel some of the confusion that has accompanied the development. It was further intended to consider whether the development of licence concepts and, in particular, the notion that a licence could be an interest in land, was necessary and desirable.

It has been shown that the idea of a possessory licence largely owed its origins to a few cases in the early 1950s (1) and was developed for a number of differennt reasons: namely to take account of the impact of statutory controls on the landlord and tenant relationship, to avoid the operation of the Limitation Acts and to provide residential security in the growing number of informal family and quasi-family arrangements. The role for the licence in landlord and tenant cases has now been severely curbed by the House of Lords' decision in STREET v MOUNTFORD (2). Similarly, amendments to the Limitation Act 1939 introduced in 1980 (3) have reduced both the need for and scope of licence concepts in this sphere. Nevertheless, ambiguities in the reasoning in STREET v MOUNTFORD and subsequent case law have shown a narrow route lies open for licence concepts to grow and potentially flourish. Similarly paragraph 8 (4) of the Limitation Act 1980, which allows for the finding of an implied licence as a matter of fact so as to prevent time running, as well as the recent acceptance (4) of the notion of an express unilateral licence, suggest that the role of licences is not over in adverse possession cases either.

The need for and opportunity of using licence concepts to protect residential occupation in informal family and quasi-family arrangements remains. It is in this sphere that much of the confusion has arisen. Firstly, because of the earlier development of the principle that a contractual licence may in some circumstances be irrevocable(5), the idea developed of classifying family arrangements for the occupation of property as contracts. This was dishonest, for as it has been shown, the essentials of a contract were rarely,if ever, satisfied. Furthermore, given the frequency with which land is alienated, this led to another problem, namely protecting the "contractual" licensee against a third party. Unsatisfactory ideas that a contractual licence could per se, or by means of a constructive trust, bind a third party consequently developed. The next stage in the confusion resulted because the doctrine of proprietary

estoppel was beginning to be applied to licence cases on account of the criticism attracted by the fact that the contractual approach was theoretically unsound. This in turn led to confusion as to the relationship between contractual and so-called "equitable licences". Much of the confusion could have been avoided if, instead of inventing labels and creating categories, the judiciary had been prepared to consider more openly the policies behind their decisions (6). No doubt the reason for resorting to fixed categories was in an effort to reduce the element of uncertainty which it was feared would result from a broad-based approach, given that certainty is so important in the sphere of property law. However, it is submitted that a study of the development of the law shows that the rigid conceptual approach adopted has resulted itself in a high degree of uncertainty.

Although some confusion still remains, apparent from the alternative bases on which pleadings continue to be based (7), through the increased flexibility of the doctrine of proprietary estoppel, a satisfactory approach to informal arrangements for the occupation of property is emerging, although some problems still need ironing out. Application of proprietary estoppel to licence cases does not involve the theoretical problems of the contractual approach and enables a balance to be drawn between the interests of vulnerable sections of society and third parties. It has been shown that enforcement of licences to occupy by means of proprietary estoppel does not require the assertion that a licence, essentially a negative thing, binds a third party. It would seem also that confusing notions of quasi-property rights (8) or the idea that a licence is not an interest in land but "somewhere between a right in rem and a right in personam" (9) can be abandoned. Once it is accepted that the role of proprietary estoppel in licence cases is to give effect to the intentions of the parties either in the form of the recognised proprietary right intended or, if none, in the form of the closest proprietary right to that intended (10), then it can be said that it is the proprietary interest given effect to by means of the operation of proprietary estoppel that binds a third party. In addition it has been noted that by careful court orders the Settled Land Act 1925 can be avoided (11).

With regard to the balancing of the interests of licensees with those of third parties, although it must be admitted that proprietary estoppel does increase the risks involved in conveyancing, it is inherent in the very acceptance of a doctrine such as proprietary estoppel that the law should provide protection for vulnerable members of society who fail to take the proper

steps to secure their position, and thus an element of disadvantage to third parties is inevitable. Moreover, it should be remembered that cases concerning proprietary estoppel, let alone proprietary estoppel and third parties are comparatively rare. Furthermore, it is possible to keep the element of risk to a minimum by willingness on the part of the courts to introduce a greater element of certainty into estoppel cases by only taking into account the intentions of the parties in making an order and not concerning themselves with the surrounding circumstances or broader "justice" considerations.

For a time, it looked in the 1970s as though licences to occupy land may have developed beyond the negative terms in which they were described by Vaughan C.J. in THOMAS v SORRELL (12) but in the mid-1980s, although it is clear that the concept of a possessory licence is with us to stay, it is doubtful that the licence will in any circumstances become regarded as an interest in land and it looks as though its role in the future will be kept within fairly strict boundaries.

References Conclusion

1. Most notably ERRINGTON v ERRINGTON [1952] 1 All ER 149.

2. [1985] 2 All ER 289.

3. By the Limitation Amendment Act 1980 now consolidated by the Limitation Act 1980.

4. See BP PROPERTIES LTD v BUCKLER "The Times" 13th August 1987. Ante p. 108.

5. WINTER GARDEN THEATRE (LONDON) LTD v MILLENIUM PRODUCTIONS LTD [1946] 1 All ER 678 (CA); HL [1947] 2 All ER 331.

6. See generally Wallace and Grbich (1979) UNSWLR 175.

7. For e.g. in LAYTON v MARTIN [1986] Fam Law 212. The plaintiff claimed on three alternative bases, namely a constructive trust, proprietary estoppel and a contract. Also COOMBES v SMITH [1986] 1 WLR 808 where proprietary estoppel and a contractual licence were alternative bases for a claim.

8. Everton "Towards a concept of Quasi-Property?" (1982) 46 Conv 118; II (1982) 46 Conv 177.

9. Bandali (1973) 37 Conv 402 at p. 418.

10. See ante GRIFFITH v WILLIAMS [1978] EGD 919.

11. See GRIFFITH v WILLIAMS [1978] EGD 919. Ante p. 249.

12. (1673) Vaughan 330 at p. 351. See ante p. 2.

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