MORE SUPPORT FOR THE DESERTED WIFE

The recent decision of the English Court of Appeal in *National Provincial Bank Ltd.* v. *Hastings Car Mart Ltd.* [1964] 1 All E.R.688, has brought into prominence again the position of the deserted wife in the matrimonial home. The effect of the decision would appear to alter in some respects what was thought to be law, whilst at the same time clarifying other of the issues previously in dispute. As the decision is a majority one only, some examination of previous cases is necessary in order to appreciate the reasoning of the learned Lords Justices.

BASIS OF WIFE'S RIGHT

Bendall v. *McWhirter* [1952] 1 All E.R.1307, can fairly be said to be the first case in which the question of the deserted wife's right to remain in the matrimonial home was canvassed at any length. In this case the trustee in bankruptcy of the husband brought an action for possession of the matrimonial home against the deserted wife and the Court held that no action would lie.

The judgment of Romer L.J. (with whom Somervell L.J. concurred) indicates that the question was decided purely on bankruptcy law. The trustee in bankruptcy is in no better position than the bankrupt into whose shoes he steps. He is entitled to all rights and subject to all liabilities of the bankrupt unless provision is made otherwise. The rule is that the trustee in bankruptcy takes the property of the bankrupt subject to all equities, (cp. s.123(2) Land Transfer Act 1952). If therefore, the wife has certain rights against her husband with respect to the matrimonial home the trustee in bankruptcy of the husband would take the property subject to those rights. This is clear from his remarks at p.1316:

> 'The question is whether the special protection which a wife enjoys against ejectment at the instance of her husband avails her against a similar action by the husband's trustee in bankruptcy.'

However Denning L.J. (as he then was) based his judgment on much wider grounds. He compared the rights of a deserted wife to remain in the matrimonial home with the right of the deserted wife to pledge her husband's credit for necessaries. The most important necessary in this day and age is the right to have a roof over one's head and this the wife is entitled to retain if her husband deserts her.

'What is the nature of this right of the deserted wife which the courts have thus evolved? It bears, I think, a very close resemblance to her right to pledge her husband's credit for necessaries. Under the old common law when a husband deserted his wife, or they separated owing to his misconduct, she had an irrevocable authority to pledge his credit for necessaries: *Bolton* v. *Prentice* (7), quoted in the notes to *Manby* v. *Scot* (8) (2 Smith L.C. 13th ed.469). One of the most obvious necessaries of a wife is a roof over her head, and if we apply the old rule to modern conditions it seems only reasonable to hold that when the husband is the tenant of the matrimonial home the wife should have an irrevocable authority to continue the tenancy

on his credit, and that when he is the owner of it she should have an irrevocable authority to stay there. This authority, like the old one, is based on an irrebuttable presumption of law' (p.1310).

It is quite clear that the rights of the wife, as envisaged by Denning L.J., prevail not only against her husband and his trustee in bankruptcy, but also against third parties in certain circumstances. What circumstances will bind a third party are not definitively laid down but one instance is given: that of a conveyance to the husband's mistress (a situation which subsequently arose in *Street* v. *Denham* [1954] 1 All E.R.532).

Attention has been focused on another paragraph in the judgment where the following observations are made:

'A wife is no longer her husband's chattel. She is beginning to be regarded by the law as a partner in all affairs which are their common concern. Thus, the husband can no longer turn her out of the matrimonial home. She has as much right as he to stay there even though the house does stand in his name. This has only been decided in the last ten years. It started in 1942 when Goddard, L.J., said that the husband's only way of getting his wife out of the house was to make an application under s.17 of the Married Women's Property Act, 1882: see *Bramwell* v. *Bramwell* [1942] 1 K.B.374. That section gives the court a very wide discretion in the matter, and, accordingly, in 1947 when a husband claimed that he had an absolute right to turn his wife out it was held that he had no such right, but that it was a matter for the discretion of the court: see *Hutchinson* v. *Hutchison* [1947] 2 All E.R.792. Very shortly afterwards this court took the same view (*Stewart* v. *Stewart* [1947] 2 All E.R.813), and it is now settled law that a deserted wife has a right, as against her husband, to stay in the matrimonial home unless and until an order is made against her under s.17. . . . . In short she has a right of her own, derived no doubt from her husband, but still a right of her own, to assert, on his behalf, the tenant-right in the premises, no matter what her husband may say or do about it.'

From this it is argued that the deserted wife's right to remain in the matrimonial home is based on procedural grounds, i.e. as the husband cannot sue the wife in tort he cannot turn her out of the matrimonial home. This is clear from an article by R. E. Megarry Q.C. in (1952) 68 L.Q.R.379 where in criticizing the decision in *Bendall* v. *McWhirter* he makes this observation.

'Yet is it right to say that to deprive X of one of his remedies against Y and provide another, but discretionary remedy, gives Y any positive right?' (p.380).

He points out that the lack of a remedy does not necessarily bear on the question of a persons rights e.g. a contract unenforceable by action is still a contract. The mere fact that a husband has no remedy against his wife does not of itself create a positive right in her which she may assert against other persons. The view that the deserted wife's right is based on procedure is also advanced by I. D. Campbell in his article 'The Matrimonial Fortress (1957) 33 N.Z.L.J.344.

The effect of basing the wife's right on her husband's ability to sue her in tort gives rise to criticism on two grounds. First, it is contended, although there may be an inability on the part of the husband to sue, this does not in itself create a disability on the part of some other person. (See *Doe de Merigan* v. *Daly* (1846) 8 Q.B.924.)

Secondly, it has been suggested that if the husband's procedural disability is removed, there can no longer be any foundation for the wife's right.

The first criticism appears to be well founded but it is indeed arguable whether the second is valid. The history of English law shows many examples of rights based upon fictions. It is not necessarily true to say that since a rule of law is abolished all rights and remedies in some way dependent upon it become nugatory. Be that as it may, the question would appear to have been settled in the *Hastings Car Mart Case* (supra) where Lord Denning M.R. (with whose judgment Lord Donovan agreed) said at p.693:

'These procedural grounds have now disappeared: for by the Law Reform (Husband & Wife) Act 1962 [cp. Matrimonial Property Act 1963 s.4 (N.Z.)] a husband can now sue his wife in Tort. But substantive law has a habit of being secreted in the interstices of procedure. And that is so here. The right of a deserted wife remains the same after the Act of 1962 as it was before.'

That the right of the deserted wife was ever based on her husband's disability is, it is submitted, a matter for dispute.

In only one case subsequent to *Bendall* v. *McWhirter* (supra) is it made clear that the basis of the wife's right is to be found in her husband's inability to sue her in tort. This is seen in a remark by Harman J. in *Barclays Bank Ltd* v. *Bird & Ors* [1954] 1 All E.R.449 at p.450.

'That status [the status of irremovability] can be explained by the fact that a husband cannot sue his wife in tort as Goddard L.J. pointed out in *Bramwell* v. *Bramwell* which lies at the foundation of these cases.'

On the other hand Upjohn J. obviously considered that the right had no such basis. In *Lloyd's Bank Ltd.* v. *Oliver's Trustee & Anr.* [1953] 2 All E.R.1443 at p.1446: he referred to *Bramwell* v. *Bramwell* (supra), in these words:

'. . . . Goddard, L.J., suggested that a husband could not bring an action for recovery of land against his wife, for that would be an action for tort which could not be maintained by a husband against a wife having regard to s.12 of the Married Women's Property Act, 1882, and the only remedy available to the husband was under s.17. That authority was dealing with a matter of procedure, and, with all respect to the argument, had nothing to do with the true nature of the right of a wife to continue in the matrimonial home.'

It would appear that many writers on the subject have been misled by the references to cases on the English Rent Restrictions Acts and have adopted an approach which is, with all respect, quite contrary to the tenor of the remarks of Denning L. J. in *Bendall* v. *McWhirter* (supra). Whilst it is quite true that Denning L.J. cited the Rent Restrictions Act cases as authority for the proposition he laid down, it is also quite clear that the basis of the proposition was not to be found in procedural disabilities but in the authority presumed in law to be given a wife, analogous to the right of a wife to pledge her husband's credit for necessaries.

In *National Provincial Bank Ltd.* v. *Hastings Car Mart Ltd* (supra) even Lord Denning himself inclined to the view that the wife's right had been based on procedural grounds but he made it clear

what the true grounds were, and these were almost identical with the observations he made in *Bendall* v. *McWhirter*.

'When the right of a deserted wife was first recognised, it was based on procedural grounds. The husband, it was said, could not sue the wife in tort. He could not sue her in trespass. He could not recover possession by action at law. He could only apply for possession under s.17 of the Married Women's Property Act, 1882; and under that section the court had a discretion whether to order her out or not; see *Hutchinson* v. *Hutchinson* (supra); *Stewart* v. *Stewart* (supra) per Tucker, L.J. . . . . It must now be based, not on procedural grounds, but on the true ground that the husband is presumed to have given authority to his wife to remain in the matrimonial home—and this is a conclusive presumption, which he is not at liberty of his own head to revoke.' (pp.693-694).

The right of the deserted wife to remain in the matrimonial home is based upon the authority the husband is presumed in law to have given her, and is a right analogous to that given to a wife in olden days to pledge her husband's credit for necessaries. This is quite clear from the most recent case even if it has been obscured in earlier cases.

THE NATURE OF THE WIFE'S RIGHT

The precise nature of the wife's right has been the subject of much disagreement amongst academic writers and in the Courts themselves. In the *Hastings Car Mart* case Lord Denning M.R. and Russell L.J. (who dissented) differ over this very question.

That the wife has no legal interest in the land is clear. 'It does not give her any legal interest in the land' (per Denning L.J. in *Bendall* v. *McWhirter*, p.1311). However, the wife's right has been variously described as an equity, a licence coupled with an equity, as purely personal, as a licence coupled with a special right and as a clog or fetter. In *Bendall* v. *McWhirter*, (supra), Denning L.J. covered most of these possibilities. He took the view that the deserted wife was a licensee with a special right under which her husband could not turn her out except by an order of the Court. This he later described as an equity (p.1315). Nevertheless, the right is purely personal to her in that she cannot assign it. It is not however 'personal' in the sense that her right to maintenance is personal, but is in the nature of a clog or fetter on the land itself like a lien.

Harman J. would have preferred to regard the wife as merely having the status of irremovability vis-à-vis the husband but agreed, with considerable reluctance, that the wife had something in the nature of a licence to remain in occupation of the matrimonial home (*Barclays Bank Ltd.* v. *Bird* [1954] 1 All E.R.449, 450). He held, nevertheless, that the rights of a prior equitable mortgagee prevailed against those of the deserted wife.

The view that the deserted wife's right was an equity was affirmed in *Jess B. Woodcock* v. *Hobbs* [1955] 1 All E.R.445 but in *Westminster Bank* v. *Lee* [1955] 2 All E.R.883 Upjohn J. was forced to examine the nature of this equity more closely. Although inclining to the view of Harman J., Upjohn J. nevertheless felt bound by the decision in *Street* v. *Denham* (supra) to hold that the wife's right was an equity which prevailed against third parties who take with notice. He was

anxious to point out that there is a distinction between an equity which creates an interest in land and an equity which falls short of this. The wife's right was a mere equity, i.e. an equity which created no interest in land. If therefore a third party subsequently gains an equitable interest in the land, he is not bound by any prior equities (i.e. mere equities as opposed to equitable interests or equities creating an interest). The decision in *Phillips* v. *Phillips* (1862) 4 De G.F & J.208 is cited as authority for this. It is clear from the passage approved by Upjohn J. that Lord Westbury did in that case distinguish between an equitable estate and an equity, and that he held that in certain cases a purchaser could take free from a prior equity as opposed to a prior equitable estate, but he nowhere said that an equity gave no interest in land. Further, it may be noted that the examples given by Lord Westbury as equities—namely, the right to set aside a deed for fraud or to correct it for mistake—are of quite different nature from the equity of a deserted wife.

The approach of Upjohn J. was adopted by a Canadian court with respect to the rights of a deserted husband in *Willoughby* v. *Willoughby* (1960) 23 D.L.R.(2d)312 as may be seen from the following extracts from the judgment:

'All that need be said is that his rights whatever they are, are purely personal and do not extend to or embrace any interest or estate in land' (at p.317) and again (at p.318),

'Even the Judges who were parties to those far reaching decisions have never said that the deserted wife had a proprietary interest in the land. At the highest her right against persons other than the husband, has been called an equity and not an equitable interest. *Westminster Bank* v. *Lee*.'

The *Hastings Car Mart* case, although approving *Westminster Bank* v. *Lee* (supra) makes it quite clear that the deserted wife does have some interest in the matrimonial home. This is apparent in the judgment of Lord Denning M.R. who poses the question as to the nature of the wife's right. He then goes on to answer it as follows:

'The wife has no tenancy. She has no legal estate or equitable interest in the land. All that she has is a licence. But not a bare licence. She has a licence coupled with an equity. I mean an "equity" as distinguished from an equitable interest. It is an equity which the court will enforce against any successor except a purchaser for value without notice.'

It has been suggested by one learned commentator (S. J. Bailey (1963) 27 Mod.L.R.593) that what Upjohn J. meant by an equity is clearly not that which Lord Denning conceives of as an equity. While indeed an 'equity' as it was in the old Court of Chancery is clearly something less than the deserted wife's rights, it would appear that Lord Denning has noted this, for in deciding that the wife had an interest in the matrimonial home, as he did in the *Hastings Car Mart* case, he was speaking not of merely 'an equity' but of 'a licence coupled with an equity'. It is this latter which creates an interest in land and not merely an equity of itself. There would appear to be no reason to suppose that Lord Denning was using the word to mean anything other than what Upjohn J. intended it to mean.

The *Hastings Car Mart* case clearly raised the issue whether or not the deserted wife had any 'interest' in land, for in order to resist the Bank's claim to possession she had to show her rights

amounted to an 'overriding interest' within the meaning of the Land Registration Act 1925 (U.K.). In consequence, the rights of the deserted wife have been clearly defined as that of a licence coupled with an equity, which is binding on third parties with notice. In his dissenting judgment Russell L.J. considered the right of the wife insufficient to protect her from third parties as it did not amount to an 'interest' in land. Before any application of the section was made, it had to be ascertained whether or not the wife's right could amount to an interest. From his remarks it would appear that he considered interest was something which connoted proprietary rights. If a licence did not create an interest then there was nothing to bind a third party.

LICENCES, INTEREST AND THIRD PARTIES

The principal reason why Russell L.J. considers the wife's right cannot be an overriding interest is that it is only a licence and a licence cannot bind third parties taking a mortgage or purchasing from the licensor. He refers to an article by Professor H. W. R. Wade in (1952) 68 L.Q.R.337 with approval.

In his learned article Professor Wade considers the question from two aspects—a broad and a narrow aspect. The first or broad aspect is 'Can a new equitable interest still be invented?' He examines the question in the following manner:

'The crucial element in converting a contractual right, enforceable only against the promisor or his estate, into a proprietary interest enforceable against third parties generally, is the availability of an equitable remedy by specific performance or injunction. When such a remedy may be had in respect of some specific piece of property, a contractual right which is primarily personal acquires a 'specific' flavour; it begins to look like a proprietary interest . . . Other equitable remedies which may be asserted against third parties are the right to have a conveyance rectified, or set aside on the ground of fraud or undue influence. These rights amount in effect, to equitable interests in land since they may be enforced against successors in title to the land—provided of course that they are not purchasers of the legal estate without notice of the existence of the equitable interest.' (p.340.)

It may be noted first, that some of the rights mentioned by the learned author as, in effect, equitable interests and binding on successors in title, are regarded by Lord Westbury as 'equities' as contrasted with equitable interests. If, then, such equities can create interests in land and bind third parties, it would seem that it is not true to say that an equity cannot create an interest in land. Professor Wade seems to equate 'interest in land' with 'enforceability against successors in title' and since there can be no doubt that the deserted wife's right binds successors in title who have notice, it can fairly be regarded as an interest. If of course, the test for ascertaining an interest in land is not whether the right is binding on successors in title, it may be possible to say that the deserted wife has no interest in the matrimonial home, but no other test seems to have been suggested (unless it is assignability). Secondly it is to be observed that the crucial element in converting a purely contractual right into a proprietary interest is present in the case of a deserted wife. Her equitable remedy is an injunction restraining her husband from selling the matrimonial home and this was obtained by a wife in *Lee* v. *Lee* [1952] 1 All E.R.1299. In

the opinion of Russell L.J. this does not give her an interest, however—

'Nor are they made proprietary rights, estates or interests by virtue of the fact that an injunction will be granted against the husband to prevent him interfering with her right as against him to occupy, whether such interference be direct, or whether it be achieved indirectly by disposing of his interest to another. The fact that in appropriate cases the courts will grant the equitable relief of an injunction to restrain revocation or breach of a licence is not a ground for asserting that it is other than a licence.' (p.701.)

Professor Wade's second or narrow aspect is 'Do the authorities permit the Court of Appeal to hold that contractual licences may bind third parties at all?' The author has in mind the case of *Errington* v. *Errington* [1952] 1 All E.R.149 and he considers that the proposition there laid down is founded in inferences from cases in which no third parties appear. He considers, further, that the case is in direct conflict with the decisions of the House of Lords in *King* v. *David Allen & Sons, Billposting Ltd.* [1916] 2 A.C.54 and the Court of Appeal in *Clore* v. *Theatrical Properties Ltd, and Westby & Co. Ltd.* [1936] 3 All E.R.483.

The former case involved a licence to display advertising posters on a wall of a picture house. Before anything had been done in pursuance of the licence, the licensor let the picture house to a company who refused to honour the licensing agreement. *Clore's* case involved the rights of a licensee to use the refreshment rooms of the picture theatre. The agreement was in the form of a lease under seal but th Court held that this could not alter the nature of the agreement—it was a licence and merely reciting that it was a lease could not transform it into a lease. The action however was between the assignee of the licensor and the assignee of the licensee and not the original parties.

It would appear that the contention is that only an interest in land is binding on third parties and that if a right amounts only to a licence third parties may choose to ignore it with impunity. Thus an equity like a licence, may give certain rights, but it does not amount to an interest and therefore does not bind successors in title. It is quite clear that Denning L.J., whilst he was prepared to concede that a licence created no interest in land, did hold that it was binding on successors in title. This is seen in remarks he made in *Bendall* v. *McWhirter*:

'It [a licence] is not therefore, an interest in property, but, nevertheless, once the licensee has entered into occupation it is, as PARKE, B., put it in 1838 in *Wallis* v. *Harrison* (17) (4 M. & W.544) "a sort of interest, against the licensor and his assigns", by which he meant, as I understand it, that it was a clog or fetter, like a lien, which is not an interest in property, but only a personal right to retain possession: *Legg* v. *Evans* (21) (6 M. & W.42); but nevertheless it is, of course, effective against the owner and his assigns.' (p.1313).

The question may perhaps be more easily discussed by considering two separate, but no doubt related, issues:

1. Can licences bind third parties and
2. Can licences or equities create an interest?

It seems that both in law and in equity the early cases have held that licences can bind third parties. First, in law. In *Webb* v.

Paternoster (1619) Poph.151 an owner of land granted a licence to put a stack of hay on land until the licensee could sell it. The licence was held binding not merely on the licensor but also upon his successors. In *Wood* v. *Lake* (1751) Say.3 a licence to stack coal was held to be similarly binding. Again in *Liggins* v. *Inge* (1831) 7 Bing.682 a licence to use the flow of water from the licensor's premises was held to be binding on his successor in title as the licensee had expended money in pursuance of the licence. Even at law, it seems, the licensor or his successor in title could not reap the benefit unless he tendered to the licensee his reasonable expenses for the improvements to the property. However, in *Wood* v. *Leadbitter* (1845) 13 M. & W.838, it was held that a licence is revocable at will and cannot bind successors. Lord Denning has distinguished this case on the grounds that it concerned the revocability of a licence not under seal only, but it is clear from Alderson B's remarks that this factor was not material to his decision. He did point out, however, that a licence coupled with a grant (i.e. something which can be made by deed) is not revocable at will. One case is quite contrary to the general principle that a licence may bind third parties. This is *Coleman* v. *Foster* (1856) 1 H. & N.37 where it was held that an assignment of the subject matter in respect of which the licence is granted determines the licence. If this were the law, a licence could never be binding on third parties. The conclusion, if one may be drawn, is that the weight of authority before *Wood* v. *Leadbitter* (supra) is in favour of the view that licences may in some circumstances (notably those which have been acted upon to the detriment of the licensee) be binding upon successors in title to the licensor.

Secondly, in equity. *Duke of Beaufort* v. *Patrick* (1853) 17 Beav. 60 laid down the principle that where a licensee has expended money in pursuance of a licence and the licensor has acquiesced therein, the licensor's successor in title is bound by the licence. This case has been followed in *Plimmer* v. *Wellington Corporation* (1884) 9 App. Cas. 699. A similar situation is where Equity will intervene to protect such rights by correcting a conveyance ostensibly completed (or conversely, compelling the completion of a conveyance)—see *Dillwyn* v. *Llewelyn* (1862) 4 De G. F. & J.517. Even, then, if the question of the rights of a licensee in regard to third parties was doubtful at law, equity, it seems, has regarded third parties with notice as bound by the rights of a licensee. (See *Inwards* v. *Baker* [1965] 1 All E.R. 446 (C.A.))

Lord Denning has made it clear in his judgment in *Bendall* v. *McWhirter* (supra) that since the fusion of law and equity the rules of equity prevail and third parties taking with notice are, therefore, bound by the licensee's rights. The case of *King* v. *David Allen Ltd.*, (supra) having been decided subsequent to the fusion of law and equity, must pose a problem if, in fact, it lays down that a contractual licence is revocable. In the *Hastings Car Mart* case, the Master of the Rolls has distinguished *King's* case on the grounds that in order to bind third parties the licence must be followed up by actual occupation. If there is no actual occupation it may be that a particular licence would not necessarily be binding on a third party. (*King's* case is one in which actual occupation was required in order to bind the assignee of the licensor.) The distinction did not meet with the approval of Russell L.J. who had this to say of it:

'I cannot accept that that decision depends for its validity on the fact that the licence had not yet been acted on. In this connexion I venture to repeat that the actual occupation is not the right: it is a form of notice of a right; the right must be sought elsewhere. Since in *King's* case there was actual notice of the licence which conferred the right, the question of occupation would not seem to affect the matter.' (p.702)

Although indeed there is much force in the contention of the learned Lord Juctice in that it would seem that actual occupation should not be the crucial test as to whether or not a third party is to be bound, it is submitted, with respect, that it is an important and relevant test as to the effect of the licensee's rights. If one may be permitted to take an analogy; in the case of equitable estoppel it is not the promise to accept something less than the full contractual obligations which creates the right (cf. *Foakes* v. *Beer* (1884) 9 App. Cas.605), but rather it is the alteration of the promisee's position in reliance upon the promiser which is the important factor. (See *Ajayi* v. *R. T. Briscoe (Nigeria) Ltd.* [1964] 3 All E.R.556 (P.C.)). This sort of consideration would appear to lie behind some of the early cases, both in law and equity, previously mentioned. In cases of licences relating to the use of land, actual occupation would be an important consideration in deciding whether the licence should bind the licensor's successor in title, but it need not always be a vital test. Occupation may not be the manner in which the licence is to be acted upon—see the charter party cases, e.g. *De Mattos* v. *Gibson* (1858) 28 L.J.Ch.165. The alteration of the licensee's position would seem to be the important factor.

In *Bendall* v. *McWhirter* (supra) a different way of distinguishing King's case was adopted. The latter case decided not that a right to put up advertisements on a wall, which right had been acted upon, is not binding on the licensor's successor in title, but that 'a right to put up advertisements on a wall, not yet built, is not binding on successors in title because that is not itself a licence but only a contract to procure that licence will be granted in the future' (per Denning L.J. at p.1314). This may indeed be a way of distinguishing *King's* case, but it does not appear to be the way in which the House of Lords viewed the matter. Lord Buckmaster L.C. actually said it was a licence given for good and valuable consideration. It is submitted, however, that *King's* case was decided on a construction of the agreement which their Lordships held not to create an interest in land but merely amounted to a personal obligation between the parties.

It has been suggested that the Court of Appeal itself has decided against a licence binding the licensor's successors in title in *Clore* v. *Theatrical Properties Ltd* (supra). This case is easily distinguished. Lord Denning has done so in *Bendall* v. *McWhirter* where he said:

'The only case which gives rise to any difficulty is *Clore* v. *Theatrical Properties Ltd & Westby & Co. Ltd.* (32), where the licensee of the "front of the house rights" in a theatre, who was in occupation of them, was held to be unable to enforce them against an assignee of the licensor. That case, however, proceeds on the assumption that the licensee had no right which equity could enforce against the licensor: see [1936] 3 All E.R.490. That assumption is no longer true: see *Winter Garden Theatre (London) Ltd.* v. *Millenium*

Productions Ltd. per Lord Uthwatt [1947] 2 All E.R.343; and the case may some day have to be re-considered accordingly.'

Since in the *Winter Garden* case (supra) it was held that an injunction was available to the contractual licensee as a means of protecting his rights, this distinction may well be valid, but it may be that *Clore's* case was correctly decided. This is not for the reason that has been suggested by most writers (i.e. licences are not binding on third parties), but because that case decided that the assignee of the licensee could not succeed in his claim to "front of house" rights against the assignee of the licensor. It should surely be apparent that the position of an assignee of the licensee might involve different considerations vis-à-vis the licensor and his successors in title.

The weight of authority would appear to be against the proposition that a licence can create an interest in land. In *Thomas* v. *Sorrell* (1673) Vaugh.330, Vaughan C.J. maintained that a dispensation or licence passed no interest but only made an action lawful which without it would have been unlawful. The analogy given to illustrate the distinction is this: A licence to hunt in a man's park and carry away the deer killed to his own use; to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licences as to the acts, of hunting and cutting down the tree, but as to the carying away of the deer and the tree cut down, they are grants. In *Musket* v. *Hill* (1839) 5 Bing N.C.694 a licence was granted permitting the licensee to search for and raise metals and also to carry them away and convert them to the licensee's own use. Such a licence passed an interest which was capable of being assigned although as a general rule a licence properly passed no interest but only made an action lawful which without it would have been unlawful. In *Heap* v. *Hartley* (1889) 42 Ch.D. 461 the position of a licensee was was further outlined. An exclusive licence, it was held, is a leave to do a thing and a contract not to allow anyone else to do the thing. Unless the licence were coupled with a grant, it would not confer, any more than any other licence, any interest or property in the thing and the licensee would have no right to sue in his own name. It is typical of these, and other early cases, that the procedural question of the licensee's right to sue is important.

It is interesting to note, however, that in 23 Halsbury's Laws of England, 3rd ed.430, the postion has been put thus: A mere licence does not create any estate or interest in the property to which it relates. The deserted wife is not, of course, a mere licensee, nor is a contractual licensee who has acted upon the licence, it would appear. In contrast to the position he took in *Bendall* v. *McWhirter*, Lord Denning M.R. has held in the *Hastings Car Mart* case that the deserted wife does have an interest in the land. He says at p.695:

'The common law courts have, of course, for centuries protected a licence coupled with an interest. It has been always held that a licensor, who has granted an interest, cannot derogate from his grant so as to destroy the interest granted; nor can his successor in title. Some difficulty has been felt in deciding what is an "interest" within this rule. But it seems that a contractual licence to occupy, followed up by actual occupation, was regarded as an interest, or rather as a "sort of interest", within the rule. The first case on this point was *Webb* v. *Paternoster* (1619) Poph.151, when an owner of land granted a man a licence to put a stack of hay on his land until he (the licensee)

could conveniently sell it. It was a typical contractual licence, but no tenancy. It was held that the licence, coupled as it was with actual occupation of the land on which the stack stood, was binding, not only on the licensor, but also on his successors. Montague, C.J. with the concurrence of Haughton, J., said:

"This is an interest which chargeth the land into whosoever hands it comes."

The reasoning of the cases on this point was discussed in *Wallis* v. *Harrison* (1838) 4 M. & W.538, where Lord Abinger, C.B., said at p.543:

"The grant of the licence to put the haystack on the premises was in fact a grant of the occupation by the haystack, and the party might be considered in possession of that part of the land which the haystack occupied",

and PARKE, B., said at p.544:

"The licence was executed by putting the stack of hay on the land. The plaintiffs there had a sort of interest, against the licensor and his assigns."

That "sort of interest" is now recognised to be, not a legal interest but an equity: see *Winter Garden Theatre (London), Ltd.* v. *Millenium Productions, Ltd.*'

If this line of cases is to be followed, it would appear that there is an 'interest' in land not merely when a licensee has the right to remove something on the land but also when the licensee has followed up the licence by some sort of occupation. It is submitted that the question as to whether or not there is an interest in land has been confused by two different uses of the words 'interest' and 'personal'. The word 'personal' may be used to denote rights which belong to a person and that person alone, or conversely may be used to denote rights a person has against another person and against that person alone. Similarly with 'interest' it may mean rights in or relating to property which a person has for himself and rights he may have against others. In some of the cases concerning the deserted wife's right to occupy the matrimonial home the word personal clearly relates only to the second sense of the word but in other cases it relates to the first sense. The questions in issue in such a case are (1) Are the licensee's (wife's) rights assignable, and (2) Do the licensee's (wife's) rights bind third parties? If the two questions are kept quite separate no confusion need arise. However, the wife's rights have been discussed on the basis of whether or not she has an interest since only this will (or should in law) bind third parties. If to have an interest one must (a) have rights which bind third parties and (b) be able to assign such rights it is clear that a wife has no interest as she cannot assign her rights (see *Bendall* v. *McWhirter* (supra))— in that sense they are purely personal. On the other hand, it would not appear that 'interest' may be used only when both aspects are present. The better solution would seem to be to look at the purpose for which it is necessary to decide whether there is an interest or not. If the question is one of assignability, then the test will be whether the licence or rights may be assigned. In the case of a deserted wife, it is not possible to assign, whereas in the case of a contractual licence, it will depend upon the terms of the agreement and this is a matter of construction, as it was in *King's* case. Should the question be one of the rights of third parties, a different issue would be raised

—namely that of notice. If the third party knew of the rights why should he be entitled to ignore them? He does not have to proceed with his purchase or mortgage if he does not wish to. This seems, consonant with reason and justice and not in conflict with recently expressed views on the law.

LAND TRANSFER SYSTEM AND THE WIFE'S RIGHTS

The question of notice raises in turn further issues as to the precise scope, if indeed any, of the wife's right against the background of the system of registered land titles. The matter has been raised in New Zealand, Canadian and Australian Courts, the former two following the English cases and the latter declining to do so.

The view that the approach taken in the Australian courts will be followed in New Zealand has been taken by at least one commentator (see Inglis Family Law, 587-97). In support of his contention Dr Inglis advances a number of propositions mainly derived from the Australian authorities.

The principal Australian case is that of the Full Court of New South Wales in *Dickson* v. *McWhinnie* (1958) S.R. (N.S.W.) 179 (F.C.). In this case, a number of earlier Australian state authorities were cited, most of these having been decided prior to *Jess B. Woodcock* v. *Hobbs* (supra).

In the earliest case, the Supreme Court of Victoria declined to follow the position laid down in *Bendall* v. *McWhirter* (supra). In reviewing the position Sholl J. made a number of remarks on the rights of the wife as he saw them in Australia. He considered the rights of the wife purely personal, and, approving Professor Wade's views, held third parties were not bound by such licences. He went even further and said at p.123:

'Nor am I prepared to hold that such procedural provisions have created some non-proprietary right which is nevertheless binding upon purchasers for value from the husband, or on such purchasers with notice.' (*Brennan* v. *Thomas* [1953] V.L.R.111).

He considered any such right would introduce uncertainty into the conveyancing system in Victoria. Similar sentiments were voiced by Ligertwood J. in *Maio & Anor.* v. *Piro* [1956] S.A.S.R.233. He considered that it was not consonant with the general scheme of the Land Transfer Acts to recognise the right of the wife as some sort of clog or as binding on third parties. He also considered that when the Land Transfer Acts refer to 'equities' they mean only those equities which were recognised by former Courts of Chancery. (Equity is dead?) He said that in *Brennan* v. *Thomas* (supra) Sholl J. had discussed the question of the wife's equity and thought his judgment meant that an Australian Court of first instance should not take the responsibility of recognising this new concept, the consequences of which were still being worked out in the English Courts. He agreed to follow this view for the sake of uniformity.

The view that the wife's right is based on procedural provisions has already been discussed, but the view that the equity was not consonent with the Land Transfer system has been adopted in *Dickson* v. *McWhinnie* (supra). This was the reason that the Court was prepared to hold that even had *Jess B. Woodcock* v. *Hobbs* (supra) been binding on them, they should have declined to follow it. The Court's

distinguishing of that case is, with respect, illusory. It was held by the Court, and has since been adopted by some commentators, that all the case decided was that, assuming the wife to have a right, the Court had a discretion to order her to go. This may have been the approach of Parker L.J. but it cannot be said that it is true of either Denning or Birkett L.JJ. Denning L.J. went into the question of the wife's rights at some length and with his reasoning Birkett L.J. was content to agree. It also became necessary to restrict the operation of *Bendall* v. *McWhirter, Street* v. *Denham* and *Ferris* v. *Weaven.* The former, the Court held, decided only that the trustee in bankruptcy was bound by the wife's rights and it approved the dicta of Jenkins L.J. in *Hole* v. *Cusen* [1953] 1 All E.R.87 which read thus:

'If the trustee was simply in the position of an ordinary assignee of the house, I should have thought that there would be grave difficulty in seeing how there was any interest in the wife which could override his interest as assignee, for the husband's obligation to the wife was, as I have said, a purely personal obligation.' The subsequent cases, however, make it clear that *Bendall* v. *McWhirter* (supra) was not to be confined merely to the trustee in bankruptcy of the deserting husband. The latter two cases were distinguished on the ground that the husband's sale to a purchaser who took with the express intention of removing the wife from the premises, was collusive and contrary to public policy. It is surprising that the Court should have adopted this approach when it had been clearly rebuffed by Denning L.J. in *Jess B. Woodcock* v. *Hobbs* (supra) where he says at p.448:

'Counsel for the plaintiff company said that those three cases were to be explained as cases of collusion; but they were not put on that ground and I do not think it is the correct explanation. The conveyances were real enough. They were not shams. They were intended, it is true, as a means of getting round the law; but that is not in itself a ground for denying their validity. I may instance the transaction by which hire-purchase finance companies do business. All those transactions are a means of getting round the law concerning bills of sale; but so long as there is a real purchase by the finance company and a real hiring back, the transactions are good. The true explanation of the three cases is, I think, the ground taken by the judges, namely, that the mistress and the purchasers respectively took with full knowledge of the facts. They were, therefore, in no better position than the husband and took subject to the wife's right to stay in the house.' These remarks have been reiterated by the Master of the Rolls in the *Hastings Car Mart* case, in which he said that those cases could only have been correctly decided on the footing that the wife had a right to stay.

It would seem to be a fair conclusion, then, that if the Australian (and therefore New Zealand) courts wish to avoid following the English decisions, they must do so on the grounds that to recognise the wife's rights would be contrary, to the spirit and intention of the Land Transfer Acts. It has been said that the cardinal principles of the Land Transfer Act are certainty and simplicity. The objective of the Act is to ensure that a purchaser may purchase land by finding the true owner and not be plagued by various claims to other interests of which he was not aware at the date of his purchase. Therefore the system should be kept free from the intrusion of any interests which may adversely affect the purchaser who buys on the faith of the

State guaranteed register. Now the principles of certainty and simplicity are laudable and no doubt desirable, but they are not the only principles to be considered in property law. One would have thought that justice was a consideration. Balancing various considerations in order to achieve justice is not a simple matter and a choice may have to be made between two systems neither of which is ideal.

Under the old system, two principal rules applied as between vendor and purchaser, namely (1) no vendor could give a better title than he himself had and (2) no interest could pass if the instrument of conveyance was irregular (per Salmond J. in *Boyd* v. *Mayor of Wellington* [1924] N.Z.L.R.1174). Plainly, the second aspect of the rule need not be considered here, but the first is important. If a vendor sold land which was subject to certain rights, then as a general rule, the purchaser took subject to those rights. Here the doctrine of purchaser for value without notice came into play. The rule developed that a purchaser for value without notice of the legal estate took free from all equities affecting the land, so that if one dealt with the legal owner, one took the land unencumbered provided one had no notice of any other rights. The purchaser of an equitable estate took subject to prior but equal equities however. Thus, although a purchaser of an equitable estate had no notice of a prior equity he was bound to recognise it.

The Land Transfer System has chosen to place emphasis on the legal estate at the expense of the equitable estate. The old rule has been completely abolished as regards purchasers of the registered title provided they purchase bona fide. (The question of notice has been deliberately avoided up to this point so as not to unnecessarily complicate the issue. It would appear that the question of notice could only arise under the Land Transfer System to prove that the purchaser was not acting bona fide.)

It is clear that although the Land Transfer Act 1952 does not recognise equities, nevertheless the Court recognises and will enforce equities so far as that is possible. This is not only implicit in the Act but also has been decided in numerous cases. The important sections giving protection to a bona fide purchaser are s.182 and s.183. The former provides that 'except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire into or ascertain the circumstance in or the consideration for which that registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.' The latter provides, inter alia that the title of a bona fide purchaser for value may not be impeached except in the case of fraud. It is quite clear that if a purchaser for value from the registered proprietor takes without notice his title is secure. What is in issue is in what circumstances when he has notice of an interest he is not acting bona fide. The Act, in order to clarify the position, has laid down that mere knowledge of an unregistered interest will not give rise to an action disputing the purchaser's title, but where there

is more than mere knowledge, the Act is silent. The cases seem to show that if the purchaser knows he is acting in such a way as to defeat an unregistered interest, he will be unable to ignore it and will take subject to it. The following cases illustrate this principle—first, *Thomson & Chipp* v. *Finlay* (1886) N.Z.L.R.5 S.C:

'If there is a valid contract affecting an estate, and the estate is sold expressly subject to that contract, it would be a distinct moral fraud in the purchaser to repudiate the contract, and the Act does not protect moral fraud.' (per Williams J. at p.206)

Secondly, in *Locher* v. *Howlett* (1894) 13 N.Z.L.R.584:

'It may be considered as the settled construction of this enactment that a purchaser is not affected by knowledge of the mere existence of a trust or unregistered interest, but that he is affected by knowledge that the trust is being broken, or that the owner of the unregistered interest is being improperly deprived of it by the Transfer under which the purchaser himself is taking.' per Richmond J. at pp.595-596 and again at p.597,

'. . . . where the circumstances are such as should raise in the mind of a purchaser a strong suspicion that the transaction in which he is engaged is fraud on the right of another he is bound to go no further in it without full enquiry, and that to omit such enquiry is a want of honest dealing. Voluntary ignorance is in law generally equivalent to knowledge.'

Finally, the position is clearly stated by Salmond J. in *Wellington City Corporation* v. *Public Trustee* [1921] N.Z.L.R.423, 434:

'The true purpose and effect of the provisions of s.197 [s.182 of the 1952 Act] is to enable a purchaser from a registered proprietor to defend and retain an unencumbered title if he honestly believed he was purchasing such a title—not to enable him to purchase a title which he knows to be subject to an equitable encumbrance and then to hold it as unencumbered in fraudulent defiance of another's rights.' (This view of the nature of 'fraud' under the Land Transfer Act appears to be that adopted more recently by Stanton J. in *Webb* v. *Hooper* [1953] N.Z.L.R.111 in which it was held that a purchaser receiving notice of an interest between the date of settlement and the time of registration took subject to that interest.) The cases seem to show that if a purchaser registers knowing that by so doing he is defeating another's right he will not be entitled to hold the land free from those rights. If this is so, and it is submitted that it is, the New Zealand case of *Shakespear* v. *Atkinson* [1955] N.Z.L.R.1011 (where a transferee who had notice of the wife's rights prior to registration took subject to them) is correctly decided. Suspicious circumstances would also come within the section, it would appear.

Some brief observations might be made with regard to the wife's right against a Land Transfer System background. First, although the Australian cases have declined to follow the English authorities, both the Canadian and New Zealand courts have decided in favour of them. Secondly, the arguments advanced in the Australian courts have been considered and rejected, albeit, unwillingly, by Findlay J. in *Shakespear* v. *Atkinson* (supra). Thirdly, it is to be noted that the interpretation of the Australian Land Transfer Acts has been much more in favour of registered as opposed to unregistered interests. The Australian courts appear to have been quite rigorous in their refusal to qualify the title of the registered proprietor and this may

be seen clearly in the interpretation of 'fraud' under the Act. It is submitted, therefore, that as New Zealand courts have given more scope for the recognition and enforcement of unregistered instruments, the Australian cases on the deserted wife's rights should be treated with some reservation.

If the above contentions are correct, it would seem that in New Zealand the onerous duties placed on a purchaser by the rule in *Hunt* v. *Luck* [1901] 1 Ch.45, that occupation is notice of rights, and enumerated by Lord Denning M.R. in the *Hastings Car Mart* case, would not apply. This, no doubt, would go some way to dispelling the doubts expressed by some of the English judges on the danger that results from giving a deserted wife such wide rights. It is reasonable to expect a purchaser to be bound if he takes knowing he is or fearing he may be defeating the wife's rights; it may not be so reasonable to expect a purchaser to make enquiries of the wife personally in order to ascertain the domestic situation.

It has been suggested by some commentators (principally Dr Inglis) that the wife would not be able to protect her rights by a caveat under the Land Transfer Act. A caveat against dealings may be lodged by 'any person (a) claiming to be entitled to or beneficially interested in any land, estate or interest under this Act by virtue of any unregistered agreement or other instrument or transmission, or or any trust expressed or implied, or otherwise howsoever; or (b) transferring any estate or interest under this Act to any other person to be held in trust?' (s.137). It would appear from this section, in order to caveat under the Act it is necessary to show an 'interest' in land. The question what is an 'interest' has already been discussed, but it could be mentioned at this stage that the point of the right to caveat is surely to give notice to any person dealing with the registered land that some rights relating to that land are not noted on the title. This would seem to be reinforced by the fact that it is over to the caveator to prove his interest in order to prevent lapse upon the presentation for registration of an instrument affecting the land, i.e. a caveat does not of itself give protection. If, as has been suggested, the right to caveat is to protect an interest by giving notice to third parties, it would seem that what is to count as an interest should be considered from the point of view of binding third parties and not from the aspect of assignability. It is interesting to note that the question of a caveat vis-à-vis husband and wife was the subject of brief comment by Haslam J. in *Ruapekapeka Sawmill Co. Ltd* v. *Yeatts* [1958] N.Z.L.R.265. The learned judge raised the question of a deserted wife but held that in the instant case her rights were that of an equitable life tenant. Nevertheless, he said at p.272:

'In my view of the deed, the second defendant could have protected her rights by caveat; but she did not do so. It is possible that, had she been entitled only to a *bare* right to reside in the property, she could have protected herself in the same manner. Salmond J., in *Wellington City Corporation* v. *Public Trustee* [1921] N.Z.L.R.423, 434; [1921] G.L.R.283, 287, was not prepared to accept the dictum to the contrary in *Staples* v. *Corby* (1901) 19 N.Z.L.R.517; 3 G.L.R.158. If the second defendant had registered a caveat, with an adequate recital of the nature of her claim, she would have given the plaintiff some warning of her rights, even if the registration had itself been outside the scope of s.137 of the Land Transfer Act 1952.' The passage would

seem to support the view that a deserted wife would be entitled to protect her rights by a caveat against dealings.

Although the matter has not been pronounced upon by the Courts, two instances where a caveat on behalf of a deserted wife has been lodged have come to the knowledge of the writer. In each case the interest protected was simply described as 'a deserted wife in occupation of the matrimonial home and with a right to remain in such occupation.' Though lodged within only nine months of one another, the first was accepted and the second rejected. Some correspondence between the Solicitors for the caveator and the District Land Registrar resulting in the latter outlining the reasons for his refusal to register the caveat. The Assistant Land Registrar adopted the tests proposed by E. C. Adams in his book on the Land Transfer Act. His objections may be summarized thus:

(1) The interest sought to be protected by the caveat must be registrable which is not the case here.

(2) The caveat, when challenged, must have a reasonable chance of defeating the instrument which challenges it. That is to say, if the caveat must lapse when challenged and has no hope of preventing registration of the instrument challenging it, it will not be accepted.

(3) The words "otherwise howsoever" in the Land Transfer Act 1952 s.137 are not all-embracing but refer back to "any trust" so as to mean "a trust created by any means howsoever."

(4) The task of the Land Transfer Office is to keep the Register Books clean and if a beneficial interest such as this were to be accepted, the Register Books would be swamped with similar vague and ephemeral interests.

(5) It must be shown that the caveator has an interest in the land descending to her from the registered proprietor.

With regard to the first test proposed, it is submitted with respect that this is erroneous. The paradigm case for lodging a cavaet is the protection of an interest under a trust; yet it is stated specifically in the Land Transfer Act that no entry of trusts may be made upon the register. Although the rights of a beneficiary are not registerable in that only the name of the trustee may appear on the register, it seems that by 'registrable interest' what is meant is an interest which may be registered were there no trust; thus, a beneficiary under a trust entitled to a life interest could, apart from the trust, register his interest. There are however interests and rights created under a trust which would not be registrable in this sense, yet the Act provides that a person claiming to be beneficially interested in the land by virtue of a trust may lodge a caveat. For instance, consider the case of a beneficiary who is granted free use occupation and enjoyment of property for a period of ten years immediately subsequent to the testator's death. It would appear that in these circumstances the beneficiary would have only a licence to remain in occupation, since exclusive occupation of property is no longer the test of a lease, and since he pays no rent (see *Errington* v. *Errington* (supra)). He has, therefore, no "registrable interest". It would be rather odd if he were to be unable to get protection, by means of a caveat, for his undoubtedly substantial beneficial interest. To say that he

is not beneficially interested in the land would be quite contrary to the facts.

Two further objections may also be noted here. First, it has already been contended that what is to constitute an "interest" should be considered from the point of view as to whether the rights purporting to be an interest bind third parties (see above). The District Land Registrar seems to favour the interpretation of "interest" from the point of view of assignability. Secondly, the only support adduced for this first test which he proposes is the dictum of Stout C.J. in *Staples & Co.* v. *Corby* (1900) N.Z.L.R.517 to the effect that the interest that will support a caveat must be "a legal interest . . . or an equitable capable of being made legal" (p.536). However, this case concerns a caveat against bringing land under the Act to which, it is submitted, quite different considerations would apply, and further it has been doubted by Salmond J. in *Wellington City Corporation* v. *Public Trustee* (supra) and by Haslam J. in the *Ruapekapeka Sawmill* case (supra).

The second test is more substantial. The basis of this would seem to be that the mere lodging of a caveat must not be the sole reason why the registration of an instrument challenging it cannot be effected, i.e. the interest protected by the caveat must be capable of affecting the rights of the person presenting the instrument for registration. The system of caveats is designed to protect interests which might otherwise be defeated by registration, and not to prevent registration as such. The corollary of this argument is found in the Registrar's proposed fourth test, and the objections noted there apply also to this test. However, two other points may be noted. It has been held that if a purchaser takes knowing there is a trust affecting the land, he may in some circumstances be declared a constructive trustee. Since even a purchaser for value taking with notice of the wife's rights, takes subject to her rights (see above and *Shakespear* v. *Atkinson*), it would seem that in some sense the transferee's rights are successfully challenged—they are certainly limited. The "interest" of the deserted wife is capable of affecting the rights of a purchaser. Further, if the husband were to grant a registrable lease of the property to a person with notice of the wife's rights, would not the caveat which she had lodged be capable of defeating the lease when presented?

It is submitted that the interpretation of 'or otherwise howsoever' as proposed by the Assistant Land Registrar is incorrect. This is purely a question of statutory interpretation upon which it is not proposed to embark here, but it seems clear that the phrase does not refer to 'any trust' but rather to the initial clause in the section i.e. 'entitled to or beneficially interested in any land, estate or interest.'

The fourth objection is no doubt of practical concern, but it is submitted that the interest of the deserted wife is hardly 'vague and ephemeral' in view of the lengths to which the English courts have been prepared to go in order to protect it. Furthermore, it is submitted that the District Land Registrar has no right to refuse a caveat provided it is proper in form. This is the view taken by Adams *Land Transfer Act* (para.407) and is supported by two decisions. In *C.P.R.* v. *District Land Registrar of Dauphin Land Titles Office* [1956] 4 D.L.R.(2nd) 518 it was held that the Registrar has a duty and not a discretion to file a caveat proper in form. He may not refuse to do so on the grounds

that he believes the claim to be invalid. This was also the view taken in *Concrete Buildings of N.Z. Ltd* v. *Swaysland* [1953] N.Z.L.R.997. It may be argued that all that these cases decide is that if a person lodges a caveat proper in form alleging an interest capable of supporting a caveat then the Registrar has a duty to enter the caveat against the title. He may therefore still have a discretion as to whether to accept a caveat, as it must be shown to his satisfaction that the interest is caveatable. However, the language of the *C.P.R.* case seems to indicate otherwise—indeed, were it not so, the Registrar wold be usurping the jurisdiction of the Court. No doubt, if the interest supporting the caveat were one which the Court had declined to recognise as so doing, the Registrar would be obliged to refuse it, but it is clear that the deserted wife's right does not fall into this category. If it is clear that the interest could not support a caveat then the Registrar might be correct in rejecting it, but if it is equivocal, then it is submitted that the Registrar has no right to substitute his judgment for that of the Court. The only requirement is that the interest be stated with sufficient certainty (see *In re Peychers Caveat* [1954] N.Z.L.R.285). If the interest does not support a caveat, any person adversely affected thereby has his remedy in damages against the caveator as provided by s.146 of the Act.

Finally it may be noted that the interest of the wife does 'descend to her from the registered proprietor' (i.e. her husband). This is so by virtue of an irrevocable licence he is deemed in law to have conferred upon her.

What attitude the Courts would take on this question is not clear, but it would certainly seem that the authority in favour of allowing her to caveat is no less persuasive than the authority adduced for denying her such a right. The position can only be settled by a decision of the Courts in which this issue is squarely raised.

CONCLUSION

The precise nature and extent of the deserted wife's rights have been the subject of much divergent opinion in the various Courts in which they have been raised, but it would seem that certain features are now clear. The deserted wife is entitled to occupy the matrimonial home until such time as the Court, in the exercise of its discretion, orders her to go. This she is entitled to do even though the husband conveys the house to a third party (unless that third party had no notice—actual notice in New Zealand). She may obtain an injunction to prevent her husband from disposing of the property, but whether she may caveat under the Land Transfer Act is uncertain. Her position with regard to the landlord of her husband seems to be covered at least in part by s.45 of the Tenancy Act 1955. Whether the protection afforded to a deserted wife applies equally to a deserted husband is not clear. The decision in *Willoughby* v. *Willoughby* (supra) would indicate that it does, but some dicta in *Rawlings* v. *Rawlings* [1964] 2 All E.R. 64 are against any such rights being available to the husband. It seems clear, anyway, that the husband in our society is not generally in need of such protection.

Although many judges, and no doubt more lawyers, have been sceptical about the value of affording the deserted wife protection of such a wide nature, there is much force in the findings of the Royal

Commission on Marriage & Divorce (Cmd. 1956, No. 9678, para 664):

'We think it has been right to afford this protection to a deserted wife, to allow her to keep a roof over her head: it would be shocking to contemplate that a husband could put his wife and children into the street, so that he could himself return to live in the home, perhaps with another woman.'

Perhaps the safest way to ensure protection for the wife is to adopt the practice of some American states and pass legislation making it compulsory for both husband and wife to be registered as proprietors of the matrimonial home. If this course were adopted, no need to protect a wife would arise.

ADDENDUM

After this article went to press the decision of the House of Lords in *National Provincial Bank* v. *Ainsworth* [1965] 2 All E.R. appeared. This was an appeal from the decision in the *Hastings Car Mart* case which their Lordships unanimously reversed. Their Lordships took the view that the deserted wife is not a licensee, that her rights were limited to those of maintenance and cohabitation and such rights could only be enforced against her husband, not being able of their very nature to bind third parties.

J. W. TIZARD, B.A.