LEASE OR LICENCE ?

ADDISCOMBE GARDEN ESTATES LTD. v. *CRABBE*

Addiscombe Garden Estates Ltd. v. *Crabbe*,[1] a decision of the Court of Appeal, focuses if not a penetrating beam, at least a wan but welcome light on one of the more shadowy regions of property law. What is the difference between a lease and a licence? What principles, if any, do the courts follow in construing a relationship as falling into either of these two classes? The question is, of course, one of some practical importance. A licensee in general has no rights under the Landlord and Tenant legislation.[2] An agreement to grant a licence need not be evidenced in writing, nor need the grant of a licence for a period exceeding three years be under seal as in the case of a lease. A lease is binding on an assignee of the premises even if he takes without notice, whereas a licence being contractual may not bind an assignee taking with notice.[3] While the lessor of premises gives at common law no warranty as to their fitness for any particular purpose, a licensor owes a duty to take reasonable care to prevent damage through want of repair, at any rate if he has control of the premises for the purpose of repairs.[4] Further, it appears that the doctrine of frustration of contract does not apply to leases though it does to licences;[5] and if land is compulsorily acquired, though a lessee has an interest which can form the subject of compensation, a licensee apparently has no such interest.[6]

In the *Addiscombe Garden Case* the Court of Appeal had to decide whether a document which purported to create only a licence was a tenancy agreement or was in fact only an agreement for a licence.[7] The trustees of a members' lawn tennis club which, by its rules, carried on the business of a lawn tennis club, entered into an agreement with the owners of certain tennis courts and a club house whereby the owners purported to license and authorise the trustees to use and enjoy the premises for two years in consideration of monthly payments of court fees. The agreement expired on May 1, 1956 but the trustees continued to occupy and use the premises, asserting that the agreement created a tenancy which was protected by the English Landlord and Tenant Act, 1954. The owners sought an order restraining the trustees from trespassing and requiring them to yield up the premises. It was of course vital to the plaintiff's claim for possession that they establish that the document created nothing more than a licence. The Court however held that the document in fact created a tenancy and the plaintiff's claim failed.

Jenkins, L.J., delivering the judgment of the Court, said:

> The principles applicable in resolving a question of this kind, are, I apprehend, these. 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 of the document must be looked at,

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Harv. L.R. 617; W. W. Cook, "Substance and Procedure in the Conflict of Laws" (1932) 42 *Yale L. J.* 358.

[1] (1957) 3 All E.R. 563 (C.A.); (1957) 3 W.L.R. 980.

[2] Landlord & Tenant (Amendment) Act, 1948 (N.S.W.), Act No. 25, 1948 — Act No. 7, 1958. But see s. 6A in relation to "special premises".

[3] This applies to licences *simpliciter;* a licence coupled with an interest may be assigned: *Muskett* v. *Hill* (1839) 5 Bing. N.C. 694; and covenants may be made to run with it: *Norval* v. *Pascoe* (1864) 36 L.J. Ch. 82.

[4] *Greene* v. *Chelsea Borough Council* (1954) 2 All E.R. 318.

[5] *Taylor* v. *Caldwell* (1863) 3 B. & S. 826.

[6] *Warr* v. *London County Council* (1904) 1 K.B. 713.

[7] The Court also had to decide whether. if there was a tenancy, the premises were occupied for business purposes so as to attract the protection of the Landlord & Tenant Act, 1954 (Eng.); it was held that the premises were occupied for business purposes within the meaning of the Act.

> and if, after it has been examined, the right[7a] 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.[8]

His Lordship then proceeded to examine the agreement in detail and his analysis is worthy of close attention. Though the document was described by the parties as a licence and carefully avoided the use of the words "landlord" or "tenant" or allied terms — except for the use of the phrase "tenantable repair" this was of course not decisive. Looking at the substance of the agreement, he found nothing in the character of the premises making them an unfit subject of a tenancy agreement; they were substantially enclosed and adequately identified. The words in Clause 1, authorising the trustees "to enter upon, use and enjoy" the land, his Lordship thought apt to give "something in the nature of an interest in land". The "licence" was for a fixed period of two years, a term certain, appropriate to a tenancy. The provision in Clause 3 for monthly payment of "court fees" payable in advance on the first day of each month, appeared in all but name to be a provision for payment of rent; and the agreement to pay such "court fees" (Clause 4) was similar to the agreement to pay rent found in leases. Clause 4 also placed on the grantees the burden of repairing and maintaining the clubhouse and tennis courts and of maintaining various items in "good tenantable repair", whereas his Lordship thought it inappropriate that a mere licensee should have the obligation to repair. It would be "curious if a mere licensee, with no interest in the premises, was made liable for insurance" as were the grantees under this agreement. The common form covenant for quiet enjoyment contained in Clause 5, the provision that the grantees were "to deliver up" the premises at the end of the period and provision for re-entry on non-payment of court fees, were all considered as more appropriate to, or pointing strongly towards, a tenancy. Even the restrictions designed to limit the use of the premises to use as a private lawn tennis club for members only were held to be terms usually found in the letting of premises for some prescribed purposes only.

The construction placed by Jenkins, L.J. on certain other restrictive clauses in the agreement is noteworthy. Under Clause 4 the grantees were prohibited from doing certain acts — erecting buildings, cutting down plants and removing soil from the land without the approval of the grantors. Jenkins, L.J. thought that the significance of these restrictions lay in the fact that it was considered necessary expressly to prohibit the grantees from doing certain things which plainly they would have no right to do if they were licensees. His Lordship saw a similar significance in the agreement to permit the grantors at all reasonable times to enter the premises to inspect them and for all reasonable purposes. "The importance of that is that it shows that the right to occupy the premises conferred on the grantees was intended as an exclusive right of occupation, in that it was thought necessary to give a special and express power to the grantors to enter."[9]

It will be noted that Jenkins, L.J. could equally have read these clauses as *either* (a) clauses in a licence agreement, which were merely declaratory

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[7a] The element of judicial choice barely concealed by the word "right" is to be noted. Jenkins, L.J., is implying in effect that there might be more than one conclusion to be logically drawn from the terms of the document, and the judge has to decide which is the "right" conclusion. This decision must apparently be based on sociological or ethical considerations outside the agreement itself, no hint of which seems given in the reasons for judgment. The test enunciated in this passage appears to be a category of concealed circuitous reference which could be used as the basis of two diametrically opposed decisions. See J. Stone, *The Province and Function of Law* (1946) 181 ff. The phrase "in fact" in the same paragraph may be subject to similar comment. And see *infra*.

[8] (1957) 3 All E.R. 563, 565.

[9] *Id.* at 568.

of powers and disabilities normally to be found in licence agreements but not in leases, but which were inserted in the interests of clarity and certainty only; *or* (b) clauses in an agreement for a lease, inserted for the purpose of conferring powers and creating disabilities which would not otherwise be found in a lease, but which would normally exist, without the necessity for express inclusion, under a licence agreement. His Lordship, however, apparently came to the conclusion that the latter construction was the "right"[10] one, without discussing the alternative.

The first practical test then that this case prescribes for determining whether a document is a licence or a lease, is: Does the agreement in fact confer rights and impose obligations which are generally to be found in tenancy agreements?[11] This calls for a careful examination of all the terms of the agreement in question and a comparison with the effect of the usual covenants and agreements found in leases. The alluring appearance of simplicity and utility of this test conceals problems posed by its application and several qualifications which must be appended to it.

First, one must add the obvious caveat — what are these "usual" rights and obligations which are the criteria of leases? Apart from the right to exclusive possession,[12] one might instance certain covenants and terms characteristic of leases, such as the covenants by the tenant to pay rent and taxes, to keep and deliver up in repair and to allow the landlord to enter and view the state of repair; the qualified covenant by the landlord for quiet enjoyment, the proviso for re-entry for non-payment of rent.[13] But these are relatively few in number. Jenkins, L.J., speaks of terms "appropriate" to tenancy agreements, which would cover a wider field but would probably also include many terms in this respect equivocal. Further, how many of such characteristic conditions must one find before one can categorise an agreement as a lease rather than a licence? Presumably the conditions would have to be predominantly those associated with leases; the question of degree will be determined by an exercise of judicial discretion.

Secondly, while this test might be of some use where the agreement in question is in writing and the rights and obligations of the parties are set out in detail, it is not likely to be of much assistance in cases where the rights of the parties are not clearly specified; where, for instance, the agreement must be spelled out of the conduct of the parties or out of a brief conversation between them.[14] It is precisely in this latter type of case that the guidance of a court is required. The *Addiscombe Garden* test will be of no help because, before the rights and obligations of the parties under the agreement can be discovered, it will be necessary to determine whether the agreement is a licence or a lease; the answer must be sought elsewhere.[15]

Thirdly, in propounding this rule of thumb test, Jenkins, L.J. failed to distinguish between the essential and non-essential incidents of a lease. The presence of many conditions which are normally, but not necessarily,

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[10] See n. 7a *supra*. This approach is one that should be kept in mind in the drafting of such documents. Note the similar method of construction in *Winter Garden Theatre London Ltd.* v. *Millenium Productions* (1948) A.C. 173 *per* Lord Porter at 196, Lord Uthwatt at 199.

[11] Licences are apparently infinite in their variety, and it is doubtful whether there are any terms which are common to most licence agreements.

[12] *Infra* 140.

[13] As to what are "usual" covenants in a lease, see *Hampshire* v. *Wickens* (1878) 7 Ch. D. 555; *Hodgkinson* v. *Crowe* (1875) 10 Ch. App. 622; *Re Anderton & Milner's Contract* (1890) 45 Ch. D. 476; *Flexman* v. *Corbett* (1930) 1 Ch. 672. As to "unusual" covenants, see e.g. *Lady de Soysa* v. *De Pless Pol* (1912) A.C. 194; *Propert* v. *Parker* (1832) 3 My. & K. 280.

[14] See e.g. *Booker* v. *Palmer* (1942) 2 All E.R. 674 (C.A.); *E. Moss Ltd.* v. *Brown* (1946) 2 All E.R. 557 (C.A.); *Foster* v. *Robinson* (1950) 2 All E.R. 342 (C.A.).

[15] Surely in an inquiry as to the decisive marks of a lease as distinct from a licence. See 139.

to be found in leases will at the most be indicative, but certainly not conclusive, of the existence of a lease. The parties might very well wish to incorporate in a licence agreement many terms which are usually found in a lease.[16] Perhaps it is a fair criticism of the decision in the *Addiscombe Garden Case* to say that the Court placed undue weight on the clauses in the agreement which were "appropriate" but not "essential" to leases, as opposed to the express declaration of the parties that the agreement was a licence. It is established law that the mere use of the word "licence" will not turn what is really a lease into a licence.[17] But it also appears to be established law that the decisive consideration is always the intention of the parties,[18] and where the actual provisions of the agreement do not compel a finding either way, it is submitted that considerable weight should be attached to the description which the parties themselves deliberately employed.[19]

Attempts to define the essential conceptual differences between leases and licences are made more difficult by the extension of the term "licence" to cover a number of distinct legal relationships.[20] It might once have been said that the distinction lay in the character of a licence as a mere privilege or authority rendering lawful an act which would otherwise have been unlawful and having no other effect in law,[21] as distinct from a lease which creates in the lessee legal rights enforceable against the lessor and third parties. The distinction, if it was the correct one, is blurred in the case of licences coupled with the grant of an interest of land, which are irrevocable and contractual licences the revocation of which will be an actionable breach of

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[16] In the light of the case under review and the general trend of the authorities dealing with the application of tenancy legislation, this is a course fraught with dangers.

[17] *Addiscombe Garden Estates* v. *Crabbe* (1957) 3 All E.R. 563; *Facchini* v. *Bryson* (1952) 1 T.L.R. 1386 (C.A.).

[18] *Booker* v. *Palmer* (1942) 2 All E.R. 674 at 676, 677, *per* Lord Greene M.R., *Cobb* v. *Lane* (1952) 1 All E.R. 1199 (C.A.) *per* Somervell, L.J. at 1201.

[19] Even though this might result in making "a hole in the Rent Acts through which could be driven . . . an articulated vehicle" *Faccini* v. *Bryson*, *supra* n. 17, *per* Denning, L.J. at 1390. *See* generally *Winter Garden Theatre London Ltd.* v. *Millennim Productions Ltd.* (1948) A.C. 173, *per* Viscount Simon at 188-191

[20] Three classes of licence may be distinguished: (1) Gratuitous licences, which are revokable at will in the sense that a Court of Equity will not grant an injunction against revocation nor will the licensor be liable for any damage flowing from such revocation. Such a licence conveys no interest in property and operates as a mere privilege which prevents the licensee from being treated as a trespasser until he has had a reasonable time to quit the premises after notice of revocation: *Thomas* v. *Sorell* (1673) *Vaugh.* 351, *Sed quaere* whether he has a "right" or a "privilege" to remain on the premises until the expiration of a reasonable time after such notice of revocation. (2) Licences for value, or mere contractual licences, revocation of which in breach of the express or implied terms of the contract will found an action for damages; *Kerrison* v. *Smith* (1897) 2 Q.B. 445; *Winter Garden Theatre London Ltd.* v. *Millennium Productions (supra); cf. Llanelly Ry. & Dock Co.* v. *North-Western Ry. Co.* (1875) L.R. 5 C.P. 334. *Sed qu.* whether in Australia at any rate, an injunction would be granted to restrain such a revocation: *Cowell* v. *Rosehill Racecourse Co. Ltd.* (1937) 56 C.L.R. 605. And for a recent Australian example of such a licence see *Todd v. Nicol* (1957) S.A.S.R. 72. (3) Licences coupled with an interest, which are irrevocable in the sense not only that breach may ground a claim for damages but also that a Court of Equity will in a proper case restrain the licensor from revoking in breach of the agreement, and will treat any such purported revocation as having no effect in law: *Cowell v. Rosehill Racecourse Co. Ltd. (supra); Wood* v. *Leadbitter* (1845) 13 M. & W. 838; cf. *Hurst* v. *Picture Theatres Ltd.* (1915) 1 K.B. 1 (C.A.).

It will be noted that classes (2) and (3) are basically different from class (1) in that they confer legal rights, whereas class (1) licences probably confer only legal privilege. As between (2) and (3) the distinction lies essentially in whether the legal remedy accorded avails as against the actual subject-matter of the licence.

In *Dickson* v. *McWhinnie* (1958) 75 W.N. (N.S.W.) 204, the Full Court of the Supreme Court of N.S.W. held that a deserted wife remaining in occupation of the matrimonial home had no special right or interest in the home and was a mere licensee who could be ejected by a purchaser of the property who had notice of her occupation and status. The Court reviewed all the authorities on the subject and expressly dissented from the *dicta* of Denning, L. J., in the cases to the effect that a deserted wife was in a special position somewhere between that of a bare licensee and a tenant. This decision appears to have cut short in N.S.W. the attempt to create a fourth class of licence in addition to those listed above.

[21] *Thomas* v. *Sorell*, *supra*.

contract.[22] Further, the distinction between licences as being essentially transient and perhaps indefinite in nature and leases as having a comparatively certain and substantial duration, is not in all cases a valid one. It is in relation to the third point of distinction or the notion of the grant of exclusive possession as being the hallmark of a lease as distinct from a licence that the *Addiscombe Garden Case* has its primary importance.

Before the decision in *Errington* v. *Errington*[23] the grant of exclusive possession of premises was apparently regarded as an infallible indication of a tenancy. "If the effect of the instrument is to give the holder an exclusive right to occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself."[24]

In *Errington* v. *Errington*[25] however, Denning, L.J., in a judgment approved by Somervell, L.J., and impliedly by Hodson, L.J., held that exclusive possession was no longer decisive of the question. After reviewing recent cases where occupiers had been held to be licensees notwithstanding their exclusive possession of the subject premises, he concluded;

> The result of all these cases is that, although a person who is let into exclusive possession is *prima facie* to be considered to be a tenant nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee.[26]

Errington's Case was followed in England in *Cobb* v. *Lane*[27] and in New South Wales by Roper, C.J. in Equity, in *Re May*,[28] the apparent effect of these decisions being to add to the requirement of exclusive possession, the overriding requirement of intention to create a tenancy,[29] or alternatively, to lay down that exclusive possession is only evidence of intention to create a tenancy, and may be contradicted by evidence tending to negative such intention. In spite of this new judicial attitude however, the old test of exclusive possession was still applied in many cases and by the highest courts.[30]

Against the background of these authorities, Jenkins, L.J., in the *Addiscombe Garden Case* re-asserted the primacy of the test of exclusive possession, and relegated *Errington's Case* and similar decisions to the category of exceptions to the general rule. That this was perhaps always the position may be gleaned from Denning, L.J.'s *dicta* quoted above and from the emphasis placed by Roper, C.J. in Equity, in *Re May*[31] on the exceptional nature of the facts in that case. Jenkins, L.J., referring to *Errington's Case* said:

> In that case it was held that in very unusual circumstances a lady was a licensee and entitled to remain in occupation of premises so long as she paid the instalments on a certain mortgage; and in the course of his judgment Denning, L.J., said 'The test of exclusive possession is by no means decisive.' I think that this wide statement must be treated as qualified by his observations in *Facchini* v. *Bryson*[32] and it seems to me that, save in exceptional cases of the kind mentioned by Denning, L.J.,

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[22] And see n. 20 *supra*.
[23] (1952) 1 K.B. 290 (C.A.), (1952) 1 All E.R. 149.
[24] *Per* Lord Davey in *Glenwood Lumber Co.* v. *Phillips* (1904) A.C. 405 at 408 (P.C.).
[25] (1952) 1 K.B. 290.
[26] *Id.* at 298.
[27] (1952) 1 All E.R. 1199.
[28] (1952) 52 S.R. (N.S.W.) 251.
[29] It seems fairly clear that the intention to create an interest in land which is stated in these cases as the test of a tenancy means nothing more nor less than intention to create a tenancy, and the test therefore appears to be a circuitous one. See *infra*, esp. *per* Lord Cohen at 432.
[30] See e.g. *Wheeler* v. *Mercer* (1957) A.C. 416; (1956) 3 W.L.R. 841 (H.L.), at 851.
[31] (1952) 52 S.R. (N.S.W.) 251. [32] (1952) 1 T.L.R. 1386

> in that case, 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 the first importance. In the present case there is not only the indication afforded by the provision which shows that exclusive occupation was intended[33] but there are all the various other matters which I have mentioned which appear to me to show that the actual interest taken by the grantees under the document was the interest of tenants and not that of mere licensees.[34]

It is submitted that the true effect of the authorities cannot be appreciated until it is realised that the magic words "exclusive possession" have been used with little precision and with more than one meaning in the judgments. When we speak of "exclusive possession" being granted under an agreement, we may mean either the "privilege" of "exclusive occupation" or the right to exclusive occupation.[35] In the former case, we have a licence; in the latter, we have a lease. These two very different meanings of the term have only been hinted at in the cases. It is suggested that, with this distinction in mind, the result of the authorities can be summarised thus: (1) In the cases prior to *Errington's Case*, the proposition that exclusive possession was the mark of a tenancy simply meant that the grant of the right to exclusive occupation was the grant of a tenancy; this is true by definition.[36] (2) *Errington's Case* and the decisions following it decide that the mere fact that under an agreement a person is granted exclusive occupation of premises does not necessarily mean that a tenancy is created: the grant may be either of a *privilege* of exclusive occupation in which case there would be a licence only, or of a *right* to such occupation, in which case there would be a tenancy. Whether it was the privilege or the right which was granted depends on the intention of the parties, which must be gathered from all the circumstances. (3) *Addiscombe Garden Estates* v. *Crabbe* shows that where exclusive occupation is granted under an agreement, but it is not clear whether the grant is of the privilege or of the right, then *prima facie* the agreement will be deemed to confer the right to exclusive occupation, i.e. a tenancy, but this presumption may be rebutted in exceptional cases by evidence showing that there was in fact no intention to create a tenancy.

Assuming then that the general rule provides that where exclusive occupation is granted, it will be presumed that a right to such exclusive occupation (i.e. a tenancy) was created, the question remains, how can one decide whether a particular case falls within the general rule or is one of the exceptions? To this, which may be thought after all to be the central practical point, there is no satisfactory answer. All that can be said is that it is a question of intention and depends on the particular circumstances of each case. Denning, L.J., in *Facchini* v. *Bryson*[37] stated:

> 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 suchlike, to negative any intention to create a tenancy. In such circumstances it would be obviously unjust to saddle the owner with a tenancy, with all the momentous consequences that that entails nowadays, when there was no intention to create a tenancy at all.[38]

To the type of case instanced by his Lordship might perhaps be added cases where the agreement is one of a particular class of business agreement which

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[33] See *supra* 140.

[34] (1957) 3 All E.R. 563 at 571.

[35] "Privilege" and "right" are used here (as elsewhere in this case note) in their Hohfeldian sense. The quotation mark in the text are intended to raise the doubt whether strictly there is not a contradiction in speaking of a "privilege" of "exclusive occupation". But see *supra* at n. 25.

[36] See Lord Davey in *Glenwood* v. *Phillips*, *supra* n. 25; Foa, *General Law of Landlord and Tenant* (8 ed. 1947) 7 ff.

[37] (1952) 1 T.L.R. 1386.

[38] *Id* at 1389.

through usage or for reasons of common sense and business convenience are recognised as licence agreements only.[39] No hard and fast rule can be laid down, and it appears that this is yet another of those categories of indeterminate reference[40] in which the law abounds and that the final test will always be, as hinted by Denning, L.J., the judge's sense of what is just in the circumstances. It seems fair to observe that consequently the general rule enunciated above while *prima facie* lending some reassuring certainty to this branch of the law is itself of uncertain scope, and its application will in many cases be a matter of doubt and difficulty.

Nor is this the only aspect of the "exclusive possession" test which is difficult of application. The question also arises, precisely how exclusive must the occupation be in order that the right to it may constitute a tenancy? It must be "such an exclusive right to . . . possession . . . as to amount to an interest in land",[41] but this is not a *dictum* of much practical assistance, and will in most cases amount to a circuitry. The exclusiveness of this right may be subject to reservations and restrictions[42] and how far these may go is again a matter of degree. Most sharefarming agreements are held not to create tenancies because the possession granted is not exclusive.[43] Guests in an inn or persons having the use and occupation of separate apartments in a house or passengers in a ship with separate cabins have been held to be licensees only, because "it is clear the possession remains in the innkeeper, lodging-house keeper or shipowner."[44] The problem is often met when the court has to determine whether a lodger is a licensee or a tenant, and the question in such cases is always whether the landlord has retained his right of control or dominion so as to prevent the lodger's possession being "exclusive".[45] This again would depend on the terms of the agreement, or if they are not clear, the conduct of the parties and the surrounding circumstances.

"Legal problems," said Lord Wright, "are not as a rule either numerous or exacting".[46] So far as the enunciation of the legal principles applicable in this area of the law is concerned, the problems are but few and not overwhelming. In many cases, too, it will be a relatively simple matter to apply these principles to determine the nature of the relationship existing between the parties. But there is a peripheral area in which it will always be impossible to predict with certainty what the court's decision on the facts will be, because the concepts and the principles involved are of their nature incapable of precise definition and essentially uncertain in scope and content. Practitioners and litigants must accept with resignation the fact that decisions on this branch of the law, though purporting to rest upon the firm foundation of established authority, must often in the last analysis depend on value judgments as to the justice of the case and on the humanly variable answer to a question of degree.

E. SOLOMON, Case Editor — Final Year Student.

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[39] See e.g. *Booker* v. *Palmer* (1942) 2 All E.R. 674: evacuees permitted to stay in a cottage rent-free for duration of the war, held to be licensees only; *Foster* v. *Robinson* (1950) 2 All E.R. 342: tenant permitted to remain in cottage rent-free on expiration of his tenancy, held to stay on as licensee; *Errington* v. *Errington* (1952) 1 K.B. 290; (1952) I All E.R. 149; family arrangement held to create contractural licence. And see *Cobb* v. *Lane* (1952) 1 All E.R. 1199; *Marcroft-Wagons* v. *Smith* (1951) 2 K.B. 496; *Minister of Health* v. *Bellotti* (1944) 1 All E.R. 238.

[40] J. Stone, *The Province and Function of Law* (1946) 185.

[41] *Per* Coleridge, L.C.J. in *Wells* v. *Kingston Corporation* (1875) 10 L.R.C.P. 402, 406; *Clore* v. *Theatrical Properties Ltd.* (1936) 3 All E.R. 483 (C.A.).

[42] *Glenwood Lumber Co.* v. *Phillips* (1904) A.C. 405.

[43] See *Dudgeon* v. *Chie* (1955) 55 S.R. (N.S.W.) 450; *Reid* v. *Moreland Timber* (1946) 73 C.L.R. 1; *Hindmarsh* v. *Quinn* (1914) 17 C.L.R. 622.

[44] Hill, J. in *Smith* v. *Overseers of St. Michael* (1860) 3 E. & E. 383.

[45] *Ancketill* v. *Baylis* (1882) 10 Q.B.D. 577; *Kent* v. *Fittall* (1906) 1 K.B. 72. And see *Todd* v. *Nicol* (1957) S.A.S.R. 72.

[46] *Legal Essays and Addresses* (1939) 186, 191.