On the question whether the union rules authorised the making of the levy, it was clear that there was no specific authorisation in the rules, but the High Court, disagreeing with Burbury C.J. on this point, held that the general object (stated in the rules of the Federation) to protect the interests of members, raise their status and improve their conditions would cover any action which could fairly and reasonably be regarded as likely to further the interests of the organization and its members; in view of the historical connection between trade unionism and the Labour Party both in Britain and Australia, it was impossible to contend that the general statement of objects in the rules of the appellant Federation did not authorise the body to support by propaganda and financial assistance another body whose professed ultimate aims were identical in essential character to its own.

In relation to the question of the liability of the union for *ultra vires* and in fact illegal activities, the judgments are not very illuminating. The union was held civilly liable in conspiracy on the basis of acts which were held to amount to assaults and to involve offences under the *Stevedoring Industry Act.* Accepting the view of Fullagar J. that one cannot have a body with a qualified legal personality, yet it is possible that a body which is given personality by the law may have qualified capacities and it would seem impossible to contend that a union which resorted to illegalities in the course of direct action was acting "for the purposes of" an Act which is devoted to the settlement of industrial disputes by means of conciliation and arbitration. However, it seems that nothing can be drawn from such considerations as the trend of the decisions and of text-book authority is to hold commercial companies and other corporations tortiously liable for acts committed in the course of *ultra vires* activities.[6] There is little discussion of the point in the High Court judgments. Reliance is placed on the *Taff Vale* decision[7] but with respect this is not very convincing because whatever juristic status the English Trade Union Act gives to a trade union registered thereunder, there is no limitation of capacity by reference to the purposes of that Act.

EDWARD I. SYKES*

LAND LAW

Lease or Licence

In *Raidich v. Smith*[1] the respondent by deed granted rights to the appellant which in substance gave to the appellant the

6. See Salmond, *Law of Torts* 12th Ed. p. 67; *Campbell v. Paddington Corporation* [1911] 1 K.B. 869.
7. *Supra* n. 4.
1. (1959) 33 A.L.J.R. 214.

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exclusive occupation of premises for a term of five years for the purpose of carrying on the business of a milk bar. As McTiernan J. put it, in form and matter the deed resembled an ordinary lease, but the term "licence" and its appropriate mutations were sedulously applied to the rights purported to be created. The High Court, on appeal from the Supreme Court of New South Wales, held that the relationship of landlord and tenant had been created, and that the Fair Rents Court had jurisdiction in relation to the premises.

This decision could have been arrived at consistently with the well-known series of English Court of Appeal decisions in recent years on the question of lease or licence. In a number of these, such as *Booker v. Palmer,*[2] *Foster v. Robinson,*[3] *Marcroft Wagons Ltd. v. Smith,*[4] *Errington v. Errington,*[5] and *Cobb v. Lane,*[6] a transaction by which an owner of premises has let another into possession has been held to be a licence and not a lease, on the ground that the parties had no intention of creating the relationship of landlord and tenant. On the other hand the Court of Appeal has continued to apply the long established principle (cf. *Glenwood Lumber Co. v. Phillips*[7]) that whether a transaction operates as a licence or a demise depends on substance and not on words. As Denning L.J. pointed out in *Errington v. Errington,*[8] the parties cannot "turn a tenancy into a licence merely by calling it one"; and this principle was applied by the Court of Appeal in *Faccini v. Bryson*[9] and *Addiscombe Garden Estates Ltd. v. Crabbe,*[10] in which the parties tried to do this, much as they did in *Raidich v. Smith.* This last case could have been decided as it was by the High Court on this principle without questioning the other Court of Appeal decisions mentioned earlier. However the members of the Court went further. They treated the fact of exclusive possession as being more decisive in favour of a tenancy than the Court of Appeal decisions allow; and, although they did not all with equal clearness refuse to recognise the possibility of exceptions to this test, they were clearly not disposed to accept the Court of Appeal decisions as they stand.

McTiernan J.'s view was that "the 'exclusive possession' test has survived intact the criticism it received in *Errington v. Errington.*"[11] This was on the basis of the decision of the Court of Appeal in *Addiscombe Garden Estates Ltd. v. Crabbe,*[12] in which however the Court of Appeal went no further than to hold that Denning L.J.'s statement in *Errington v. Errington* that "the test of exclusive possession is by no means decisive" must be treated

2. [1942] 2 All E.R. 674.
3. [1951] 1 K.B. 149.
4. [1951] 2 K.B. 496.
5. [1952] 1 K.B. 290.
6. [1952] 1 All E.R. 1199.
7. [1904] A.C. 405 (P.C.).
8. [1952] 1 K.B. at 298.
9. [1952] 1 T.L.R. 1386.
10. [1958] 1 Q.B. 513.
11. [1952] 1 K.B. 290.
12. [1958] 1 Q.B. 513.

as qualified by his observations in *Faccini v. Bryson*,[13] and that this test, save in exceptional cases of the kind mentioned by Denning L.J. in that case (these included the cases mentioned earlier in this note), if not decisive is at all events a consideration of the first importance.

Taylor J., after referring to *Addiscombe Garden Estates Ltd. v. Crabbe* and *Faccini v. Bryson*, said that "it must be taken to be beyond doubt that in cases where there is a real contest between the issues of lease and licence the problem may be solved by considering whether the right which is conferred is a right to the exclusive possession of the property in question. This, however, does not deny that exceptional cases may arise in which it will be seen that a right to exclusive occupation or possession has been given without the grant of a leasehold interest." He did not give examples of what these exceptional cases might be, but on the other hand he excluded from this class transactions induced by ties of kinship or by friendship or generosity.

Menzies J. held that in this case the right of exclusive possession of the premises was decisive, but did not discuss the possibility of exceptions.

Windeyer J. was the only member of the Court who committed himself to the principle that exclusive possession is decisive without exception. His argument, if it can be briefly summarised, was that whether a transaction creates a lease or a licence depends upon intention only in the sense that it depends on the nature of the right which the parties intend the person entering upon the land shall have in relation to the land. If he is given an interest in the land he is a tenant; and the test of whether he is given an interest in the land is whether he is given a legal right of exclusive possession. Once it is determined that the occupier has been given exclusive possession the conclusion follows inevitably that he is a tenant. The English decisions otherwise, he said, "are all explicable if they mean, as I think they all do, that persons who are allowed to enjoy the sole occupation in fact are not necessarily to be taken to have been given a right of exclusive possession in law." As to this explanation of the English cases it may be observed that in none of them was the decision rested on the non-existence of exclusive possession. In *Errington v. Errington*[14] the occupation was described as being exclusive possession, and in *Cobb v. Lane*[15] Somervell L.J. treated it and the other recent licence cases as showing that "exclusive possession is not a test negativing the possibility of the occupier's being a licensee". And in none of them was anything made of a distinction between possession in fact and possession in law.

13. [1952] 1 T.L.R. 1386.
14. [1952] 1 K.B. 290.
15. [1952] 1 All E.R. 1199.

Dixon C.J. said that he had read the reasons prepared by the other members of the Court and that he had nothing to add to them.

As can be seen from the summary of the judgments given above, this case leaves it uncertain which of or to what extent the Court of Appeal decisions can still be relied upon in Australia; for only two members of the Court clearly dissented from the principle adopted by the Court of Appeal. Nevertheless the case clearly indicates that in Australia some of the decisions can no longer be followed, and that a more restricted principle must be adopted.

Firstly, it would seem that such cases as *Foster v. Robinson*[16] and *Cobb v. Lane*[17] are not to be followed, and that where in consideration of past services or for family reasons one person allows another to occupy premises rent free, a tenancy arises. *Lynes v. Snaith*,[18] overruled in *Cobb v. Lane*, must be treated as still being good law.

Booker v. Palmer[19] is also probably not to be followed. In this case bombed out refugees from London were, at the request of a neighbour of the owner who was interested in them, allowed to occupy a cottage rent free. This was held to be a case of licence, on the ground that the transaction was not intended to have legal consequences and therefore not to give rise to the legal relationship of landlord and tenant. No doubt the principle is sound that a transaction not intended to give rise to legal consequences does not create a legal relationship, *e.g.* where a husband who works abroad arranges with his wife to give her a certain allowance. But it may be doubted whether a gratuitous letting into possession should be treated as not being intended to have legal consequences unless there is clear evidence to this effect: unless he indicates the contrary the owner might well have had a tenancy at will in mind, and at least have expected to have remedies for failure to use in a tenantlike manner.

More doubtful are those cases in which legal rights are intended to be conferred on an occupier, but rights inconsistent with a tenancy at will terminable at any time by the owner. Thus in *Errington v. Errington*[20] a father purchased a house through a building society and paid a lump sum of £250, the balance of the price being payable by instalments under a mortgage. He let his son and the latter's wife into possession, the arrangement being that they should pay the instalments and that the property would be theirs when they had paid the last instalment. In substance he was making a partial gift of the property, and there was no intention

16. [1951] 1 K.B. 149.
17. [1952] 1 All E.R. 1199.
18. [1899] 1 Q.B. 486.
19. [1942] 2 All E.R. 674.
20. [1952] 1 K.B. 290.

to establish a landlord and tenant relationship. If, despite intention, this transaction gave rise to a tenancy it must have been a tenancy at will, for, unless *Lace v. Chantler*[21] and earlier authorities should be overruled, the law does not recognise a tenancy to continue until the occurrence of an event of uncertain date other than the dropping of a life. A tenancy at will would have frustrated the intention of the parties in this case, and the sort of tenancy which would have given effect to their intention is not recognised by the law. The situation could be met only by holding that there was an irrevocable licence to occupy. Whether in cases of this character the High Court would insist on a tenancy, contrary to and frustrating the intention of the parties, remains to be seen.

It may be objected, of course, with a reference to *Wood v. Leadbitter*[22] and *Cowell v. Rosehill Racecourse Co.*,[23] that the law equally does not recognise an irrevocable licence to occupy, and that if the law is defective and frustrates reasonable transactions the remedy is to reform the law relating to tenancies, and not to introduce an irrevocable licence to cover what is more properly a species of tenancy. To pursue this point would carry this discussion too far, but reference may be made to *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.*[24] This case is usually referred to in connection with easements, and its importance in connection with licences to occupy has not been appreciated. The Privy Council, by restoring the judgment of the trial judge, held that the Company, which had reclaimed land from the foreshore with the implied consent of the Crown, had acquired an irrevocable licence to use the land for the purposes of its business.

Landlord and Tenant: The Fair Wear and Tear Clause

The construction put on a fair wear and tear exception in a covenant to repair by the Court of Appeal in *Taylor v. Webb*[25] has been subjected to criticism, particularly in *Brown v. Davies*;[26] and the decision has now been overruled by the House of Lords in *Regis Property Co. Ltd. v. Dudley*.[27] In *Taylor v. Webb* the Court of Appeal held that the exception extended not only to defects initially due to ordinary use or the ordinary operation of the elements, but also to consequential damage, such as damage to the interior of a house resulting from a leak in the roof that remains unrepaired; and the effect of this was to limit the covenant to disrepair caused by sudden damage by human or natural agency. The House of Lords preferred the view of Talbot J. in *Haskell v. Marlow*,[28] whose judgment contains the passage:—"The exception of want of repair due to wear and tear must be construed as limited

21. [1944] K.B. 368.
22. 13 M. & W. 838.
23. 56 C.L.R. 605.
24. [1915] A.C. 599 (P.C.).
25. [1937] 2 K.B. 283.
26. [1958] 1 Q.B. 117.
27. [1958] 3 W.L.R. 647.
28. [1928] 2 K.B. 45.

to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce".

It follows clearly from this decision that in many cases in which there is a defect due entirely to fair wear and tear the tenant will in practice be bound to repair it, for if he does not he will be liable for consequential damage. Thus as Lord Denning said: "If a slate falls off through wear and tear and in consequence the roof is likely to let through the water, the tenant is not responsible for the slate coming off but he ought to put in another one to prevent further damage".[29] Thus whereas the *Taylor v. Webb* construction reduced the scope of the covenant to substantially less than the parties would in most cases have contemplated, the construction now settled reduces the exception, in practice, to substantially less than what is expressed in its very terms. To take Lord Denning's illustration, the exception frees the tenant from obligation to restore a fallen tile, and yet the tenant must restore it.

It is true that ordinarily this ineffectiveness of the exception would extend only to wear and tear of the outer fabric of a building. But what would the position be if a main bearing of the building decayed and the building was threatened with partial subsidence or even collapse, *e.g.* by the rotting of the timber stumps on which so many Queensland houses rest ? In this case also it would seem that the exception would not relieve the tenant from what might be a major job of re-stumping.

Consideration of the earlier cases on repairing covenants with a fair wear and tear exception (some of which are referred to in a previous note in this Journal on this topic)[30] prompt the speculation whether this exception was first introduced in connection with covenants to *yield up* in repair (as in *Gutteridge v. Munyard*,[31] often cited in this connection), rather than in covenants to repair or to keep in repair during the term. In a covenant to yield up in repair the exception may very reasonably be construed, and probably was intended, to do no more than make it clear that the general depreciation of the premises occurring with the passage of time is a loss that falls on the landlord, and that the tenant is

29. [1958] 3 W.L.R. at 674.
30. 3 U.Q.L.J. 299.
31. (1834) 1 Moo. & R. 334.

not obliged to yield up the premises in as good a state as when they were demised to him. This would still leave him liable to repair specific dilapidations covered by a covenant to repair or by the obligation to use in a tenantlike manner. The same limited scope of the exception may have been intended when it was introduced into covenants to keep in repair during the term. At any rate it was the traditional attitude to regard the exception as being of no great significance, and accordingly something of a shock was caused when in *Taylor v. Webb* the Court of Appeal put a literal construction on the exception and applied the usual rule that a person who is under no duty as regards immediate damage is also free of responsibility for what flows from that damage.

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TORTS

Occupiers' Liability: Negligence not associated with Condition of Premises

In *Slater v. Clay Cross*[1] and other English cases before the passing of the Occupiers Liability Act 1957, Denning L.J. (as he then was) had elaborated his theory that the licensee-invitee distinction had no place where the injury occurred not through the "static condition" of the premises but through "current operations" conducted thereon. Much the same result is achieved, though the phraseology employed is different, in relation to a *prima facie* trespass situation, by the recent decision of the High Court in *Rich v. Commissioner for Railways*.[2]

The situation in this case was that the plaintiff entered a railway level crossing by passing through a wicket gateway. Whilst on the crossing she tripped and fell and whilst prostrate was struck and injured by a passing train. By a railway by-law pedestrians were forbidden to enter the crossing and notification to that effect was given by a sign-board. At the trial the judge excluded certain evidence tending to show that pedestrians were accustomed to use the crossing without interference by the servants of the Railways Commissioner, the suggestion behind such evidence being that the plaintiff was a licensee or an invitee by implication.

The High Court did not find it necessary to decide whether the plaintiff was a trespasser or whether the evidence would be admissible to show some kind of implied licence or invitation. (Fullagar J. indeed said that he was prepared to regard her as a

1. [1956] 2 Q.B. 264. 2. [1959] A.L.R. 1104.

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