Interests and Clogs

GLANVILLE L. WILLIAMS*
London, England

What is an "interest" in property? English cases leave the answer in some doubt. Rowlatt J. said that it "is a precise expression having a well understood legal meaning",[1] but he did not define it. Lords Russell and Simon called it a word of wide connotation, but they also refrained from defining it.[2] A professor of jurisprudence, rushing in where the judges fear to tread, might say that an interest in property is a right *in rem* in respect of property — a *jus in re* — as distinct from a right *in personam* to receive property (*jus ad rem*) or other right *in personam*. The creditor, for instance, has no interest in tangible property; the most that can be said is that he has an interest in the "debt" as something existing in a mysterious incorporeal way in contemplation of law.

However, to assert that an interest involves a right *in rem* in respect of property seems to be in at least one respect a little too narrow. The beneficiary under a trust has an interest in the trust property, and it is not necessary for this purpose to decide the vexed question whether the right of a beneficiary is *in rem*. At any rate, the weight of authority is in favour of this view. In *Miller* v. *Collins*[3] Lindley L. J. held that the interest of a person beneficially entitled to money invested on mortgage held by his trustee was an interest in land within the Fines and Recoveries Act. So also it has been held that the beneficiaries under a trust for sale of land have an interest in the land, notwithstanding the doctrine of conversion, and consequently that a mortgage of this interest is a mortgage of an interest in land within the Real Property Limitation Act, 1833, section 1.[4] In effect a contrary conclusion was reached on a different statute (the Yorkshire Regis-

* Glanville L. Williams, Ph.D., LL.D., Quain Professor of Jurisprudence in the University of London (University College).

[1] *A.-G.* v. *Pearson*, [1924] 2 K.B. 375, at p. 388.

[2] *Tennant* v. *Lord Advocate*, [1939] A.C. 207, at p. 213; *British American Tobacco Co. Ltd.* v. *I. R. Commrs.*, [1943] A.C. 335, at p. 339.

[3] [1896] 1 Ch. 573.

[4] *In re Fox: Brooks* v. *Marston*, [1913] 2 Ch. 75, following an earlier decision of the Court of Appeal.

tries Act, 1884) by the Court of Appeal in another case,[5] but the earlier cases just mentioned do not appear to have been cited. More recently it has been decided that even the beneficiary under a discretionary trust has an interest in property within a revenue statute, notwithstanding that, since the trust is discretionary, he has no right against the trustees to receive payment of any part of the property: *A.-G.* v. *Farrell*.[6] It may perhaps be said that such a person participates in a kind of collective right on the part of all the beneficiaries that one at least of them shall be benefited; it is because there is this kind of collective right that the beneficiaries under a discretionary trust can collectively put an end to it.

That one who has no right of any kind has no interest seems to be borne out by *Re Miller's Agreement*,[7] where the facts were that *A* contracted with *B* to pay an annuity to *B*'s daughter *C* at *B*'s death. *A* made the payment as agreed. Wynn-Parry J. held that no binding trust was created, and that since as between *A* and *C* the payment was voluntary, *C* was not entitled to a "beneficial interest" in the annuity within the meaning of the (English) Finance Act, 1894, section 2(1)(d). Consequently no estate duty was payable.

The view that an interest is not only a right but a right *in rem* (subject to what has been said about the beneficiary under a trust) is borne out by the time-honoured distinction in the books on real property and landlord and tenant between a lease or easement on the one hand (which are interests in land) and a licence on the other (which is not). The difference is that a lease or easement avails *in rem*, against people generally, while a licence until quite recently has been regarded as, in principle, purely personal. The difference between a licence and a lease is traditionally said to be that the licence does not give possession; the difference between a licence and an easement is that a licence does not comply with the rules for the creation of easements.

Recent English decisions, however, have worked a great change in the conception of a licence. The pressures of the Rent Acts, which apply only to tenancies, have led the courts in some instances to try to do substantial justice between the parties by denying that a tenancy has been created. They have held that exclusive occupation is not inconsistent with the conception of a licence, and does not necessarily create a tenancy. Hitherto this

[5] *Gresham Life Assce. Socy.* v. *Crowther*, [1915] 1 Ch. 214.
[6] [1931] 1 K.B. 81 (C.A.).
[7] [1947] Ch. 615.

doctrine does not seem to have been employed to evade the Rent Acts in cases to which they were intended to apply; and it is unlikely that the judges would allow any attempt of this kind to succeed. More recently the Court of Appeal has used the doctrine of occupational licence to avoid injustice that would otherwise have been caused by the Limitation Act.[8]

At common law a licence was a fragile thing, being generally revocable at will (whether or not the revocation would be a breach of contract for which damages might be given). Now, however, a contractual licence will be irrevocable if such was the intention of the parties: *Winter Garden Theatre (London), Ltd.* v. *Millenium Productions, Ltd.*[9]

To the concept of the possessory licence and the irrevocable licence we must now, according to the English decisions, add the conception of the licence as giving rights *in rem*. This is perhaps the most remarkable instance of judge-made law in England in recent years. Although there are old cases to the effect that a licence may be binding in law upon the successors in title of the licensor,[10] and although a similar result has been reached by courts of equity in the doctrines of equitable easements and equitable estoppel, the first modern case to state the rule for licences in general terms is *Errington* v. *Errington*.[11] The facts of that case were unusual. A father bought a house in 1936 for his son and daughter-in-law. He paid £250 in cash and borrowed £500 from a building society on the security of the house; the house and mortgage were in his name. He told the daughter-in-law that the £250 was a present to her and her husband, handed the building society book to her, and said that if she and her husband paid all the instalments the house would be their property. The daughter-in-law paid the instalments as they fell due out of money given her by her husband. Then the father died and by his will left the house to his widow. The widow sued the daughter-in-law for possession.

Applying the bloodless conceptions of the law it might have been thought that the widow was bound to succeed, whatever might be the position as regards the repayment of the instalments

[8] *Cobb* v. *Lane*, [1952] 1 All E.R. 1199; *Errington* v. *Errington*, [1952] 1 K.B. 290, 1 All E.R. 149. See further Crane (1952), 16 Convey. 323.

[9] [1948] A.C. 173. The only doubt is where the contract is not specifically enforceable or subject to an injunction; but it seems from the foregoing case that no exception exists in this respect. Cf. H. W. R. Wade (1948), 64 L.Q. Rev. 57.

[10] *Bendall* v. *McWhirter*, [1952] 2 Q.B. 467, at p. 479; 1 All E.R. 1307 (C.A.); but see the examination by Crane in (1952), 16 Convey. 323, at pp. 334-5.

[11] [1952] 1 K.B. 290; 1 All E.R. 149 (C.A.).

paid by the couple. The father had made no legal conveyance of the house, nor made any written declaration of trust of it. As for the delivery of the building society book, that might conceivably have taken effect it if had been made as a *donatio mortis causa*, but such were not the facts. Evidently much judicial valour and ability were required if a solution was to be reached that would accord with the substantial justice of the case. Fortunately, neither of these qualities was lacking in a Court of Appeal consisting of Somervell, Denning and Hodson L.JJ.

The court, though plainly desirous of giving effect to the father's original intention, refused to accede to an argument of the daughter-in-law that she was protected by the Limitation Act. Had she been a tenant at will she would have been so protected, but to accept this easy way out would have had the consequence that in some other case on similar facts the couple would get the house after thirteen years without paying any more instalments. In order to exclude the Limitation Act, therefore, the court held that the couple were not tenants at will but occupational licensees. In effect the court assumes the power either to apply or not to apply this part of the Limitation Act in conformity with the justice of the case, by holding according to the result desired that the claimant is a tenant at will or a licensee.

If the son and daughter-in-law were occupational licensees, was the licence given for value? On this the judges differed. Hodson L. J. thought it was, there being an implied contract by the couple to pay the building instalments. The other members of the court thought there was no such implied contract, and that the licence was not given in return for any promise; but they agreed with Hodson L. J. in holding that the licence was irrevocable so long as the couple occupied the house and paid the instalments, and was binding even on the licensor's devisee. Denning L.J., with whom Somervell L.J. agreed, explained the matter by saying:

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

This is a decision of considerable importance on the law of contract, and it is to be hoped that it will be taken to settle for English law a point much discussed in American legal literature.

It seems, incidentally, that Denning L. J. would have been prepared to reach the same result even though there had been

no condition as to the payment of the instalments: he thought that a licensor cannot eject a licensee in breach of a promise on which the latter has acted, even though the licensee gave no value for it; but the authority quoted[12] does not go so far as this.

The decision that a licence given for value is binding upon others than the licensor is criticized by Mr. H. W. R. Wade.[13] He is apparently ready to admit that the decision constitutes "a logical and attractive thesis", but argues that the Court of Appeal was precluded by two binding authorities from reaching the conclusion that it did. The first was the decision of the House of Lords in *King* v. *David Allen & Sons, Billposting, Ltd.*,[14] which seems not to have been cited to the Court of Appeal. Had it been cited, it could perhaps have been distinguished on the ground that it did not deal with an occupational licence. The licence related to the display of advertisement posters, and did not give a right of occupation. A different ground of distinction, and perhaps a more satisfactory one, was suggested by Denning L. J. in *Bendall* v. *McWhirter*,[15] a case in which *Errington* v. *Errington* was approved and applied. He cited *King's* case for the proposition that "a right to put up advertisements on a wall, not yet built, is not binding on the successors in title [of the licensor] because that is not itself a licence but only a contract to procure that a licence will be granted in the future". The point is, therefore, that the licensee must have "entered" under the licence if it is to be binding upon third parties.

The second decision was that of the Court of Appeal in *Clore* v. *Theatrical Properties Ltd.*[16] This again does not seem to have been before the court in *Errington* v. *Errington*; but it was effectively dealt with by Denning L. J. in *Bendall* v. *McWhirter*.[17] He pointed out that the decision proceeded on the assumption that the licensee had no right that equity could enforce against the licensor. That assumption, he said, is no longer true — quoting the *Winter Garden Theatre* case. In other words, *Clore's* case belongs to the era of *Wood* v. *Leadbitter*,[18] and disappears with that decision.

At the end of his article[19] Mr. Wade takes objection to *Errington* v. *Errington* in point of policy, saying that "rights which

[12] *Foster* v. *Robinson*, [1951] 1 K.B. 149 (C.A.).
[13] Licences and Third Parties (1952), 68 L. Q. Rev. 337.
[14] [1916] 2 A.C. 54.
[15] [1952] 2 Q.B. 466, at p. 482 (C.A.).
[16] [1936] 3 All E.R. 483 (C.A.).
[17] [1952] 2 Q.B. 466, at p. 483.
[18] (1845), 13 M. & W. 838.
[19] *Op. cit.*, at p. 347.

can bind third parties ought to be of a limited and familiar kind; for otherwise purchasers might have to investigate an infinite variety of incumbrances, and would often have no means of knowing the real effect of some fancy or imaginative transaction to which they were strangers". This does not seem to be a very substantial objection. The purchaser of a definite piece of land does not have to investigate an infinite variety of incumbrances: he only has to investigate the incumbrances that affect the particular land he is buying. It is the better view that even legal easements, provided that they satisfy the rules for easements, may be of altogether novel character.[20]

If an occupational licence given for value is irrevocable when the occupation has started, and is binding on devisees of the land, wherein does it differ from a lease? Is it a mere matter of what the parties choose to call it? Denning L. J. said: "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 of the parties 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 to be a licensee only."[21] The key to this sentence seems to be the phrase "personal privilege". Denning L. J. explained it in a later sentence by saying, "They had a mere personal privilege to remain there with no right to assign or sub-let". The other members of the court agreed that the licence was not assignable. On the face of it this view seems to provide a remarkable avenue of escape from the Rent Acts. A landowner lets another person in as "licensee" for value and stipulates that he is to have a mere personal privilege which is not assignable. Then the "licensee", if that is what he is, will have no protection in respect either of his possession or of his maximum rent. It remains to be seen whether the courts will allow this consequence to follow. We may well find that the courts will do the same as they have done under the Limitation Act—call the occupier a tenant when they want the Act to apply, and a licensee when they do not want it to apply. Where the so-called licence is an ordinary commercial transaction it will probably be found to be a tenancy within the Rent Acts.

The Court of Appeal in *Errington's* case did not have to decide what the position of the occupiers would be when all the building society instalments were paid. Hodson L. J. left the question open. Denning L. J., however, thought that the equitable

[20] Cheshire, The Modern Law of Real Property (6th ed., 1949) pp. 222-4.
[21] *Errington* v. *Errington*, [1952] 1 K.B. 290, at p. 298.

right to remain would grow into a good title to the house itself as soon as the mortgage was paid; and Somervell L. J. expressed the opinion that the doctrine of part performance would enable the occupiers at that stage to claim a conveyance of the house.

To continue the recent history of occupational licences in the English courts it is necessary to turn to the cases on the spouse's right of consortium. It has always been the law that a wife has a right of access to her husband's house for the purpose of consortium, and *vice versa*. Thus in *Symonds* v. *Hallett*,[22] a married woman was granted an interim injunction to restrain her husband from entering her house *not for the purpose of consorting with his wife* (a point emphasized by Cotton L. J.) but for his own purposes. In *Shipman* v. *Shipman*[23] the right of entry by the husband for the purpose of consortium was again recognized, though held on the facts to have been forfeited by misconduct (cruelty and drunkenness). These cases and others[24] show that the limits of the husband's right of consortium can be settled by the courts in an action by the wife against the husband. On the other hand, the limits of the wife's right of consortium can only be settled in an application under section 17 of the Married Women's Property Act, 1882;[25] the husband cannot, it seems, sue his wife for an injunction or in ejectment, because these are proceedings in tort, which are not allowed by husband against wife.[26]

The courts have lately increased the protection given to the right to occupy the matrimonial home. As recently as 1948 it was held by the Court of Appeal that a rent-protected tenant by giving up his key to the landlord could effectively surrender his tenancy and defeat the claim of his wife.[27] This decision has had no effect on subsequent cases, and can no longer be regarded as law. The position as it is now settled by the Court of Appeal is that a statutory tenant is unable to give up possession so long as his wife is on the premises, and accordingly there is nothing the husband can do to defeat the protection that she enjoys through him under the Rent Acts.[28]

[22] (1883), 24 Ch. D. 346 (C.A.).

[23] [1924] 2 Ch. 140 (C.A.).

[24] *Boyt* v. *Boyt*, [1948] 2 All E.R. 436 (C.A.); *Teakle* v. *Teakle*, [1950] 2 T.L.R. 588, [1950] W.N. 452.

[25] *Per* Denning L. J. in *Bendall* v. *McWhirter*, [1952] 2 Q.B. 466, at pp. 475-6.

[26] A husband's action in ejectment succeeded in *Bramwell* v. *Bramwell*, [1942] 1 K.B. 370 (C.A.), but this question was not raised by the defendant, and Goddard L. J. expressed the opinion that the proceedings were wrongly constituted. Cf. *Pargeter* v. *Pargeter*, [1946] 1 All E.R. 570 (C.A.).

[27] *Taylor* v. *McHale*, [1948] Estates Gazette Digest 299 (C.A.).

[28] *Old Gate Estates Ltd.* v. *Alexander*, [1950] 1 K.B. 311 (C.A.); *Middleton* v. *Baldock*, [1950] 1 K.B. 657 (C.A.); *per* Denning L. J. in *Bendall* v. *Mc-*

Although the judgments invoke the doctrine of possession, it is a novel proposition that a man possesses through his wife notwithstanding his clearly expressed desire not to do so. In fact the rule is motivated by a desire to protect the wife, not by a deduction from the theory of possession. If the wife commits adultery, the husband can probably revoke her so-called "authority" to remain in the house under his tenancy; but until he does so the landlord can take no advantage of it.[29]

In *Bendall* v. *McWhirter* the Court of Appeal, by an elaborate course of reasoning,[30] protected the wife's right of occupation against the husband's trustee in bankruptcy. In *Thompson* v. *Earthy*[31] Roxburgh J. had refused to protect it against a purchaser from the husband even if (which was not decided) the purchaser had notice of the wife's claim. After *Bendall* v. *McWhirter* it became clear that this decision could no longer be supported, and accordingly in *Ferris* v. *Weaven*[32] Jones J. refused to follow it, holding that a purchaser with notice could not recover possession from the wife. There was no discussion of the question whether the wife's interest should have been registered under the Land Charges Act.

It may be observed that in the course of these decisions a subtle change has taken place in the extent of the spouse's right. Originally it was a right of consortium, a right of access to the other spouse; if the husband had gone away and deserted his wife, she could have no right of access to the former matrimonial home, because he was no longer there. A change in the conception of the wife's right came with *Hutchinson* v. *Hutchinson*[33] when Denning J., as he then was, refused to exercise his discretion under section 17 in favour of a husband, who had deserted his wife, to turn her out of the husband's house. Similiarly in *Lee* v. *Lee*,[34] where the husband had deserted his wife, the Court of Appeal sanctioned the use by a county court judge of his discretion under section 17 to restrain the husband from selling what had formerly been the matrimonial home.[35] The change in the right was emphasized by Denning L. J. in *Bendall* v. *McWhirter*, when he said

Whirter, [1952] 2 Q.B. 466, at p. 476. But "a wife cannot claim the benefit of her husband's statutory tenancy after his interest as statutory tenant has been validly determined": *per* Romer L. J. at p. 487.

[29] *Wabe* v. *Taylor*, [1952] 2 All E.R. 420 (C.A.).

[30] [1952] 2 Q.B. 466.

[31] [1951] 2 K.B. 596.

[32] [1952] 2 All E.R. 233.

[33] [1947] 2 All E.R. 792.

[34] [1952] 1 All E.R. 1299, [1952] 2 Q.B. 489 (C.A.).

[35] Cf. *Murcutt* v. *Murcutt*, [1952] 2 All E.R. 427 (injunction in Divorce Court).

that the wife's right is now a right to have a roof over her head, analogous to her old right to pledge her husband's credit for necessaries. From this it seems to follow that a wife can sue her husband in tort if he unreasonably shuts her out of the house.

If this is the position, it seems that the courts have, by judicial legislation, added a new and powerful section to the otherwise somewhat pusillanimous Inheritance (Family Provision) Act. *Errington* v. *Errington* decides that an irrevocable occupational licence is binding upon the licensor's devisee; *Bendall* v. *McWhirter* decides that the wife (or the husband) has in law an irrevocable occupational licence (subject to the discretion of the court under section 17 or otherwise); *ergo*, the interest of the wife or husband in the matrimonial home must be superior to that of the devisee.

The decision in *Bendall* v. *McWhirter* is worth more detailed consideration, and it is convenient to start with the judgment of Romer L. J., who spoke also for Somervell L. J. According to him, the wife's right is not a legal or equitable interest in the home; hence the extensive protection of her right does not create a novel species of interest in property. She is in a special position, being "a licensee with a special right". She cannot be ejected by her husband except by an order made under section 17, and his right of dealing with the property is therefore subject to a "clog or fetter"; this clog binds the husband's trustee in bankruptcy, because he can take no better title to property than the bankrupt had. Denning L. J. used similar language: the wife has an equity, an equitable right to stay in the house, which avails against third parties; it is a species of licence, and is not an interest in property, but is a clog or fetter, like a lien, which is not an interest in property but only a personal right to retain possession.

At this point the professor of jurisprudence may be allowed to emerge again and protest that this is throwing the concept of legal interest into dire confusion. Would it not be better to admit frankly that this right of the wife with the new measure of protection that has been given to it is an interest in property? The fact that it is not assignable is nothing to the purpose, for some interests in property are not assignable, as, for example, the interest of a beneficiary under a protective and discretionary trust.[36] There is, in fact, a contradiction in Romer L. J.'s judgment, because by applying the rule that a trustee in bankruptcy

[36] In England the question may be affected by the Law of Property Act, 1925, s. 4 (2): "All rights and interests in land may be disposed of". But it is submitted that these general words must be read subject to the exceptions indicated in the text above. Also, a contractual licence is assignable if such appears to have been the intention of the parties.

can take no better title to property than the bankrupt had, the learned lord justice impliedly admits that the husband's title to his house is not complete and perfect; and whatever bit is missing from that title must be something that is vested in the wife. Yet this he elsewhere denies.

According to all the judges the wife's right is a species of, or very analogous to, a contractual licence to occupy land. Denning L. J. said: "It is, indeed, so closely analogous that I think no valid distinction can be made between them".[37] Yet earlier he said: "She may perhaps sub-let some of the rooms so as to help keep herself; but even then, she does so, not out of any legal interest of her own in the land, but on the presumed authority of her husband".[38] "Presumed" here means constructive. If the suggestion is correct, it is a point of difference from the contractual licensee, for he cannot let the property, though he may grant a sub-licence or assign his own licence if such was the intention between him and the licensor.

The rule that the wife's right is binding upon purchasers is a new headache for the legal advisers of those who buy a dwelling-house from the occupier, or advance money upon the security of it. The question is more important for the mortgagee than for a purchaser, because a purchaser who buys with vacant possession will normally satisfy himself that the house is empty before he completes. For mortgagees the question of registrability of the licence is important. Denning L. J. expressed the opinion that the right of the occupational licensee is not registrable as a land charge, because possession or occupation is itself notice of the right. This, however, is far from being clear law. A different line of argument might be to say that married women's rights in respect of the matrimonial home, and indeed licences in general, are not registrable because they do not fall under any of the specific heads of interest registrable under the Land Charges Act; consequently they are still governed by the rules as to notice developed by courts of equity, including the rule that occupation of land is constructive notice of the equitable rights of the occupier. But it would be more sensible to say that they are registrable as equitable easements, for otherwise there would be a gap in the protection accorded by the Land Charges Act to the purchaser of property.[39]

Whether or not the wife's right is registrable, there are plenty

[37] [1952] 2 Q.B. 466, at p. 478.
[38] *Ibid.*, at p. 477.
[39] For further discussions see Wade (1952), 68 L. Q. Rev. 337, at p. 349n; Crane (1952), 16 Convey. 343 ff.

of other doubts regarding it. Does the right arise upon marriage or upon desertion, and is constructive desertion enough? Several difficult questions arise on priorities. Again, Denning L. J. in *Bendall* v. *McWhirter* likened the wife's right in respect of the house to her agency of necessity; but it is now settled that no agency of necessity arises if the wife has adequate means of her own.[40] Does it follow that in such circumstances she has no right to continue occupation of her husband's house? Perhaps the answer is that she has such a right until it is ended by judicial decision. This seems to follow from some remarks in *Bendall* v. *McWhirter*, where the court considered the position of a purchaser or trustee in bankruptcy if the wife's claim to remain in occupation is unmeritorious. Denning L. J. suggested that he could apply in the husband's name under section 17; or the trustee in bankruptcy could apply under section 105(1) of the Bankruptcy Act, 1914. Romer L. J., with whom Somervell L. J. agreed, doubted the former suggestion but agreed with the latter. The latter helps only the trustee in bankruptcy, and if the former is unsound the question is left open how the purchaser is to be protected against an unreasonable claim by the wife. It is submitted that his case can be tried out in an ordinary action of ejectment. The reason why the husband can never bring ejectment against his wife is that this is in theory an action in tort; the disability does not apply to a purchaser from the husband. If the purchaser takes subject to the wife's right to occupy the home, the extent and application of the wife's right must be determined by the court in the action of ejectment, just as the extent of the husband's right of consortium was decided in *Symonds* v. *Hallett* and *Shipman* v. *Shipman* in actions by the wife for an injunction. If, for example, the husband has not deserted his wife but is genuinely offering her a different matrimonial home elsewhere, her right in respect of the present house ceases and there is no reason why the purchaser should not have his remedy.

However these detailed questions may be settled, it is difficult not to agree with Mr. Megarry's contention that they are more suitable for legislation than litigation.[41] Yet with an inert legislature, improvement of the law by the judicial process is better than no improvement at all.

In conclusion, the judgment of Denning L. J. in *Bendall* v. *McWhirter* is of importance in the approval it gives to *De Mattos*

[40] *Biberfeld* v. *Berens*, [1952] 2 All E.R. 237 (C.A.).
[41] R. E. Megarry, The Deserted Wife's Right to Occupy the Matrimonial Home (1952), 68 L. Q. Rev. 379, at p. 389.
[42] (1858), 4 De G. & J. 276.

v. *Gibson*[42] and *Lord Strathcona S. S. Co.* v. *Dominion Coal Co.*,[43] which held that an agreement to allow another to use goods is binding on a purchaser from the licensor who takes with notice. These decisions had previously been doubted,[44] but Denning L. J. not only supported them but called attention to the unsatisfactory nature of the decision in *Clore* v. *Theatrical Properties Ltd.*, which was one of the cases that impugned them.

The American Way

Nor was the process of fractionizing governmental power limited to the distribution of it among the three branches of government or its division among the national, state and local governments. The elaborate system of checks and balances superimposed on the doctrine of the separation of powers, including such devices as two houses in the legislature and the executive veto on legislation, the legislative power of impeachment over the executive, the judiciary and legislators alike, and judicial review of legislation, are ample proof of the grim determination of our forefathers not to permit the concentration of political power in any one person or in any one organ of government. Despotism, benevolent or otherwise, was a concept that they intended to lay to rest. Government, they firmly believed, was the creature and slave of the people. It was merely an instrumentality of limited power designed for their mutual welfare. They never doubted their right to change their form of government. They were sure that that society was best governed that was least governed. They had in mind not merely protecting themselves against all governmental power as such; they were aiming affirmatively at safeguarding themselves so far as they were humanly able from a not unreasonable fear of what an unrestrained majority might do to a minority, especially with respect to its political, religious and intellectual freedom and its right to private property. It was inevitable as the nation expanded from the Atlantic seaboard across the continent and changed from a simply agrarian economy to a complicated agricultural, mining, manufacturing and commercial nation that first one department of government and then another should push to the fore in solving the problems of each successive age. In the post-Revolutionary era the legislature was clearly the predominant department of government. Then the judiciary forged ahead, but the twentieth century has obviously witnessed the hegemony of the executive. The extent of the growth in power of the executive branch of government is dramatically illustrated by the increase in the number of citizens on the public payroll. . . . The old fear of government obviously has passed and in its place we find everywhere a tendency to rely on government, especially the Federal Government, for the satisfaction of individual needs. This change would seem ominous to both the leaders and the plain people of our Revolutionary era, but it would be more comprehensible to them than the fading interest of our citizens in their government. (Hon. Arthur T. Vanderbilt, Law and Government in the Development of the American Way of Life. A lecture delivered at the University of Wisconsin on November 12th, 1951)

[43] [1926] A.C. 108 (P.C.).
[44] See my note in (1944), 7 Mod. L. Rev. 74.