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Digesting the Licence

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The recent series of "licence" cases has aroused a good deal of attention in legal periodicals,[1] which, for the most part, has been directed towards considering the propriety of the decisions. It now seems opportune to consider what has emerged and the possible shape of things to come.

Characteristics of the Licence

1. *The Occupational Licence Distinguished from Other Transactions*

The first and perhaps only thing that has clearly emerged from the recent cases is that the term "licence" is used to cover an increasing variety of different situations. But this is by no means inimical to the processes of English legal development, the keynote of which is evolution rather than revolution. The result of such cases as *Errington* v. *Errington*[2] and *Cobb* v. *Lane*[3] seems to be that, if a

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[1] See H. W. R. Wade, Licences and Third Parties (1952), 68 L. Q. Rev. 337; R. E. Megarry, The Deserted Wife's Right to Occupy the Matrimonial Home (1952), *ibid.*, 379; F. R. Crane, Licensees and Successors in Title of the Licensor (1952), 16 Conv. 323; D. Pollock, Possession and the Licence to Occupy Land (1952), *ibid.*, 423; Glanville L. Williams, Interests and Clogs (1952), 30 Can. Bar Rev. 1004; G. C. Cheshire, A New Equitable Interest in Land (1953), 16 Mod. L. Rev. 1. See also a note by O. Kahn-Freund in 16 Mod. L. Rev. 215.

[2] [1952] 1 K.B. 290.

[3] [1952] 1 All E.R. 1199.

transaction in relation to land[4] does not give rise to some known legal or equitable interest, it may nevertheless create a licence. The licence is, therefore, a residuary concept on which to fall back after having exhausted, by trial and error, other possibilities. A transaction, the factual essence of which is to confer a right to occupy land, may thus create any one of four different legal situations:

(a) A tenancy at common law—a legal estate,—see *Murray Bull & Co. Ltd.* v. *Murray*,[5] *Errington* v. *Errington, supra,* and *Cobb* v. *Lane, supra;*

(b) A tenancy at will—presumably equitable,—see *Errington* v. *Errington* and *Cobb* v. *Lane;*

(c) An equitable interest arising under a trust,—see *Bannister* v. *Bannister*,[6] *Re Duce and Boots Cash Chemists Ltd.'s Contract*[7] and *Cobb* v. *Lane;*

(d) A licence,—see *Errington* v. *Errington, Cobb* v. *Lane* and *Murray Bull & Co. Ltd.* v. *Murray, supra.*

It will probably be in few cases that a given transaction will genuinely call for a consideration of all four possibilities, and there seems to be no reported case in which it has been done, though one or two cases would seem to have implicitly raised all four. In *Errington* v. *Errington,* (a) and (b) were eliminated and the conclusion was (d); (c), which might appear to have been a likely conclusion in view of the somewhat similar facts of *Bannister* v. *Bannister,* was completely ignored. The difference in legal effect between these different titles is, of course, considerable. A legal tenancy may attract the Rent Restrictions Acts, the Landlord and Tenant Act, 1927, the Agricultural Holdings Act, 1948, and the Leasehold Property (Temporary Provisions) Act, 1951 (as extended), to mention only a few important statutes. A tenancy at will has an operation under the Limitation Act, 1939, different from any of the other titles (see *Cobb* v. *Lane*) and seems to be equitable. An equitable interest arising under a trust normally attracts the Settled Land Act, 1925, if, as is usually the case, the interest brings about a state of affairs falling under section 1 (1) of the Act (see *Bannister* v. *Bannister* and *Re Ogle's S. E.*[8]), whilst a licence, because it does not arise under a trust, cannot constitute the land settled land.[9]

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[4] If a licence relates to a future building, then it is not an occupational licence but only a contract to grant a licence in the future: *per* Denning L.J. in *Bendall* v. *McWhirter,* [1952] 2 Q.B. 466.

[5] [1953] 1 Q.B. 211.

[6] [1948] 2 All E.R. 133.

[7] [1937] Ch. 642.

[8] [1927] 1 Ch. 229.

[9] In *Vaughan* v. *Vaughan,* [1953] 1 All E.R. 209, Romer L.J. is reported as having said, at p. 213. "Further, it seems to me that if the position of

In determining which of these legal situations is created by any given transaction, it appears that the *ultimate* test is the test of intention, whatever combination of the four transactions arises for consideration.[10] Words taken by themselves will not be conclusive. Thus, in *Glenwood Lumber Co., Ltd.* v. *Phillips*,[11] a document couched in the language of a licence was held to create a lease;[12] whilst in *Clore* v. *Theatrical Properties Ltd.*[13] and *Murray Bull & Co. Ltd.* v. *Murray* documents couched in the language of a lease were held to create licences only. Sometimes, the characteristics of the transaction itself will conclude the matter, as in *Glenwood Timber Co.* v. *Phillips* and *Clore's* case, but where this fails, then the ultimate test of intention must be resorted to as in *Errington* v. *Errington*, *Cobb* v. *Lane* and *Vaughan* v. *Vaughan*.[14] Having regard to the importance of the outcome, it becomes a matter of some moment to discover what factors can be taken into account as indicative of intention. Logically, no regard should be paid to the legal *consequences* of the different possibilities, since these only flow *after* the nature of the transaction has first been determined. Thus, in construing a limitation conferring a future interest in property, the fact that the effect of applying the rule against perpetuities may defeat the intention of the settlor to create a valid interest is ignored.[15] In both *Errington* v. *Errington* and *Cobb* v. *Lane*, the judges of the Court of Appeal, in deciding that licences had been created, seemed to stop short of considering the legal consequences in applying the test of intention. In *Errington* v. *Errington*, Denning L.J., after deciding that the transaction did not create a tenancy at will, said,[16] "I confess that I am glad to reach this result because it would appear that, if the couple were

the wife in this case was as her counsel suggested it was, the result would be that (subject only to the arrangement being embodied in a written instrument) the wife would have the powers of a tenant for life under the Settled Land Act, 1925, and could sell the premises". It does not appear from the report or the context what particular suggestion of counsel was being referred to, nor is the passage reported in the Weekly Law Reports, [1953] 1 W.L.R. 236. But if the passage referred to the possibility of the wife having at one and the same time a licence and an interest under a trust it is incorrect. Licence and trust are alternative and not cumulative solutions. It is significant that the passage quoted above does not appear in the revised report of the case: [1953] 1 Q.B. 762.

[10] See *Booker* v. *Palmer*, [1942] 2 All E.R. 674; *Errington* v. *Errington*, *supra*; *Cobb* v. *Lane*, *supra*; *Murray Bull & Co. Ltd.* v. *Murray*, *supra*; *Vaughan* v. *Vaughan*, *supra*.

[11] [1904] A.C. 405.

[12] See also *Three D's Co. Ltd.* v. *Burrows* (1949), 99 L.J. 564.

[13] [1936] 3 All E.R. 483.

[14] [1953] 1 Q.B. 762.

[15] See *Re Coleman*, [1936] Ch. 528, *per* Clauson J. at p. 534; *Re Legh*, [1938] Ch. 39, *per* Sir Wilfred Greene M.R. at p. 44.

[16] [1952] 1 K.B. 290, at p. 296.

held to be tenants at will, the father's title would be defeated after the lapse of thirteen years, long before the couple paid off the instalments, which would be quite contrary to the justice of the case", the clear implication being that such consequences were intentionally ignored in applying the original test of intention to determine the nature of the transaction. On the other hand, in *Vaughan* v. *Vaughan*, Sir Raymond Evershed M.R. and, to an even greater extent, Romer L.J. do seem to have thought it justifiable, in applying the test of intention, to have express regard to legal consequences. It is, perhaps, inevitable that regard to the consequences will affect the decision on the nature of the interest, but consequences by themselves should not be made the basis of it.

2. *Basis of Greater-than-Contractual Enforceability*

The cases of *Errington* v. *Errington*, *Bendall* v. *McWhirter* and *Ferris* v. *Weaven*[17] have recognized that the licence may, in certain circumstances, have a greater-than-contractual operation. The cases do not, however, seem to proceed on any clearly defined and consistent principle, and in these circumstances, and since the future development of this branch of the law will depend upon the ultimate view taken of these cases, it seems profitable to consider the different constructions which may be put upon them. There would seem to be at least four different ways in which the cases may eventually be regarded: (a) as being limited to licences conferring rights of possession or occupation; (b) as applying only to executed licences; (c) as proceeding upon equitable principles hitherto overlooked; (d) as being confined to the specific types of successors in title in question.

(a) At the time when the first of the trilogy of cases just mentioned was decided (*Errington* v. *Errington*), the possibility of a licence conferring exclusive occupation had only recently (and somewhat obscurely) become recognized.[18] Accordingly, it is possible that the existence of exclusive occupation in these cases will be regarded in future decisions as the basis of the increased enforceability of the licence. Such treatment, however, would, it is suggested, be the least satisfactory of all as proceeding upon no signi-

[17] [1952] 2 All E.R. 233.

[18] The first case was *Booker* v. *Palmer*, [1942] 2 All E.R. 674. Later cases are *Minister of Health* v. *Bellotti*, [1944] K.B. 298; *Southgate B.C.* v. *Watson*, [1944] K.B. 541; *Minister of Agriculture and Fisheries* v. *Matthews*, [1950] 1 K.B. 148; *Foster* v. *Robinson*, [1951] 1 K.B. 149; *Marcroft Wagons, Ltd.* v. *Smith*, [1951] 2 K.B. 496; *Webb Ltd.* v. *Webb*, [1951] Estates Gazette Digest 163, referred to by Denning L.J. in *Errington* v *Errington, supra.*

ficant principle and producing unnecessarily arbitrary results. Moreover, that Lord Justice Denning did not regard *exclusive* occupation as the determining factor in his general remarks in *Bendall* v. *McWhirter* is shown by his disapproval of *Clore's* case which, whilst it concerned a licence conferring rights of occupation, expressly denied that such rights were exclusive. On the other hand, Professor Cheshire has said about *King* v. *David Allen & Sons*:[19] "At the time of the action the subject-matter of the licence, a picture theatre, was not even in existence, and one of the admitted essentials of a licensee's equity to specific performance is that he should have entered into occupation of the premises".[20] Even without the epithet "exclusive" before "occupation", it seems that the "admission" contained in this statement is false, for entry into occupation is by no means an essential prerequisite of the availability of an equitable remedy in every type of case. An obvious example is an action to enforce a formal contract for the sale of an estate in land. Moreover, in *Lord Strathcona S. S. Co.* v. *Dominion Coal Co.*,[21] the charterers were successful in obtaining an injunction even though they were not in possession of the ship at the time. In these circumstances, and having regard to the arbitrary consequences which would follow, it is submitted that entry into occupation should not *per se* be regarded as an indispensable element in the enforceability of the licence against third parties.

(b) In *Bendall* v. *McWhirter* counsel for the plaintiff (the trustee in bankruptcy of the licensor) placed considerable reliance on *King* v. *David Allen & Sons*. In this case, a licence to display advertisements on the wall of a picture house, which was not then built, was held by the House of Lords not to be binding on a lessee of the land on which the building was to be erected. Denning L.J. distinguished the case on the ground that the "licence" to display the advertisements was not in fact a licence but merely "a contract to procure that a licence will be granted in the future"; emphasis thus being placed on the executory character of the licence. On the other hand, *Clore* v. *Theatrical Properties Ltd.* was admittedly a case of an executed licence and Denning L.J. could do no more than doubt its present authority. There is, further, earlier authority tending to support the proposition that executed licences may bind third parties, namely, *Duke of Beaufort* v. *Patrick*,[22] *Somerset Coal Canal Co.* v. *Harcourt*[23] and *Mold* v. *Wheat-*

[19] [1916] 2 A.C. 54.
[20] (1953), 16 Mod. L. Rev. 1, at p. 12.
[21] [1926] A.C. 108.
[22] (1853), 17 Beav. 60.
[23] (1857), 24 Beav. 571.

croft,[24] and these cases went *sub silentio* in *Clore's* case. Accordingly, there does seem to be some basis for the view that enforceability of a licence against third parties is dependent upon the licensee having taken active steps in performance of the licence. Uniformity might be achieved by this route, though much would depend upon the view taken by the courts as to when a licence becomes executed for this purpose. It is suggested that entry into occupation is not the only method of executing the licence. Expenditure of money, which is referable to the contract, but which takes place before entry, ought to be sufficient.

(c) It was not fully appreciated in *King* v. *David Allen & Sons*, and does not appear to have been argued in *Clore's* case, that a licensee may have an *equitable* right to enforce a licence, but *Winter Garden Theatre (London) Ltd.* v. *Millenium Productions Ltd.*[25] finally recognized that he has such a right against the *licensor*. The existence of an equitable right against the licensor does not, however, necessarily give the licensee a similar right against third parties. Denning L.J. recognized this when he said in *Bendall* v. *McWhirter*:[26] "It is, of course, necessary in all these cases that the party who seeks to enforce the contract against a successor in title should have a sufficient interest to warrant the intervention of equity. He must, as the Privy Council put it in the *Strathcona* case, [1926] A.C. 121, 'have, and continue to have, an interest in the subject-matter of the contract'." Denning L.J. then went on to say: "This does not mean that he must have a legal estate to be protected. Possession or actual occupation of the land or chattel is sufficient." This, however, was inconsistent with the decision of the Court of Appeal in *Clore's* case but, in the view of Lord Justice Denning, that case "may some day have to be re-considered" in the light of equitable principles which were not there fully considered. This pronouncement may be regarded as a further illustration of the modern application of section 25 (11) of the Judicature Act, 1873, which has been used in recent times to negative the effect of strong common law decisions by the incantation of conflicting rules of equity.[27] The propriety and limits of this process have recently been considered, extra-judicially, by the Master of the Rolls,[28] who puts forward the view that the famous subsec-

[24] (1859), 27 Beav. 510. [25] [1948] A.C. 173.

[26] [1952] 2 Q.B. 466, at p. 482.

[27] Cf. the effect of the principle laid down by Denning J. in the *High Trees* case, [1947] K.B. 130, on the House of Lords decision in *Foakes* v. *Beer* (1884), 9 App. Cas. 605, and of *Solle* v. *Butcher*, [1950] K.B. 671 (C. A.), on *Bell* v. *Lever Bros. Ltd.*, [1932] A.C. 161.

[28] In an address to the Bentham Club in February 1953 entitled "The

tion 11 must be applied having regard only to the principles of common law and of equity *as they existed in 1875* at the time of the passing of the Act. In so far as common law principles are concerned, the traditional theory that the judges merely *declare* the law presumably applies. But with regard to equitable principles, this theory never has been advanced and, indeed, Sir George Jessel M.R. on one occasion[29] went so far as to say that we knew the names of the Chancellors responsible for many equitable rules and doctrines. Accordingly, where law and equity conflict, post-1875 equitable developments should, on this view of the matter, be disregarded. In so far as the law of licences is concerned, the possibility of treating the recent cases now under discussion as having proceeded upom equitable principles hitherto overlooked may well be affected by these considerations, but an historical inquiry into this aspect of the matter is outside the ambit of the present article.

If this method of treating the recent cases is ultimately adopted by the courts, the problem will arise as to exactly what circumstances will suffice to actuate equitable principles, for whilst "possession or actual occupation" may be "sufficient", they cannot and should not be regarded as exhaustive.[30] Professor Crane's suggested conditions are (i) that the licence should be irrevocable against the licensor, and (ii) that the licence should have been followed by "entry" by the licensee.[31] The first condition would seem to be a practical necessity for, if a licence is revocable by the licensor, it presumably follows that it is revocable by a successor in title of the licensor and the problem would not therefore usually arise.[32] But if "entry" in the second requirement is intended to be conditioned by "into possession or occupation", then it is submitted that the test is unnecessarily narrow and would lead to inconsistencies and injustices as between the efficacy of licences conferring rights to possession or occupation and licences not conferring such rights, for example, licences in the nature of easements but attaching to no dominant tenement.

(d) Leaving aside for the moment the decision of Jones J. in

Influence of Remedies on Rights", now published in volume 6 of Current Legal Problems (1953) p. 1.

[29] *Re Hallett's Estate* (1880), 13 Ch. D. 696, at p. 710. Further, this inherent ability of equity to expand has been recognized by the Law of Property Act, 1925. See, *e.g.*, the proviso to s. 4(1), which prohibits the creation of new equitable interests in land except such as could have been created in real or personal property before 1925. There would be no need for the proviso if equity could not develop.

[30] See discussion *supra* under (a).

[31] (1952), 16 Conv. 323, at p. 341.

[32] Except, possibly, where the period of reasonable notice to determine the licence is lengthy.

Ferris v. *Weaven*, all that the recent cases have actually decided is that an occupational licence is binding on the devisee (*Errington* v. *Errington*) and trustee in bankruptcy (*Bendall* v. *McWhirter*) of the licensor. None of the earlier authorities[33] was concerned with such successors in title who, it must be recognized, may be regarded as standing in a special position. The decision in *Bendall* v. *McWhirter* was expressly founded by all three judges upon the special position of a trustee in bankruptcy, and though it was given a wider interpretation by Jones J. in *Ferris* v. *Weaven*,[34] it was regarded as being limited to trustees in bankruptcy by Jenkins L.J. in *Bradley-Hole* v. *Cusen*,[35] who thought that if a trustee in bankruptcy were not in any special position but merely stood in the position of any other assignee, then "the decision in *Bendall* v. *McWhirter* must, as it seems to me, have gone the other way".[36]

Errington v. *Errington* might be similarly "explained" (though not so explained by Denning L.J., in whose judgment on this point Somervell L.J. agreed, though the latter appears to have changed his mind in *Bendall* v. *McWhirter*) on the ground that the rule laid down is a peculiar rule of the law of succession (with its independent history) and not of general application. Moreover, if (which does not appear from the report) the plaintiff-devisee in the case was also the testator's personal representative and had not completed administration, she would be *contractually* bound to recognize the licence in her capacity as personal representative.

Turning to the case of *Ferris* v. *Weaven*, Jones J. there held a licence to occupy land to be enforceable against a purchaser who, acting in collusion with the vendor-licensor, took the land with notice of the licence and with the sole object of assisting the licensor in his bid to oust the licensee. Jones J. applied a general principle delivered *obiter* by Denning L.J. in *Bendall* v. *McWhirter*, but as appears from what has been said, Jenkins L.J. has discounted the possibility of the existence of any such general principle. *Ferris* v. *Weaven* is not, of course, binding on the Court of Appeal, but it can perhaps be upheld on the less general ground of fraudulent

[33] See especially, *King* v. *David Allen & Sons*, *supra*, and *Clore's* case, *supra*.

[34] [1952] 2 All E.R. 233, at p. 236: "Counsel for the plaintiff referred me to the judgment of Romer, L.J., and submitted that the court was considering particularly the position of a trustee in bankruptcy, but it seems to me that the effect of the decision is to support the contention of the wife in the present case".

[35] [1953] 1 Q.B. 300.

[36] *Ibid.*, at p. 306. As to the special position of a trustee in bankruptcy generally, see *Ex p. James* (1874), L.R. 9 Ch. 609: *Ex p. Simmonds* (1885), 16 Q.B.D. 308; *Re Tyler*, [1907] 1 K.B. 865; *Re Thellusson*, [1919] 2 K.B. 735; *Re Wigzell*, [1921] 2 K.B. 835.

collusion.[37] As Professor Crane has said,[38] "A genuine purchaser with notice, even at a deflated price by reason of doubts about his ability to gain possession, is in an entirely different category, it is submitted, from the plaintiff in *Ferris* v. *Weaven*".

It is not without significance that the Master of the Rolls has, extra-judicially, felt the need for caution in extending the licensee's rights against third parties[39] and this lends force to the method of treating the recent cases now under consideration. The advantage of this treatment is that uniformity throughout the law of licences would obtain, *King* v. *David Allen & Sons* and *Clore's* case merely being subject to "special" cases.

3. *The Significance of Occupation*

Entry into occupation by a licensee may be of legal significance in connection with one or more of the following five matters: (a) as an essential constituent of the licence; (b) to give the licence greater-than-contractual enforceability; (c) as an element affecting third parties with notice; (d) as an element attracting section 14 of the Law of Property Act; (e) as a factor taking the licence out of sections 40 and 53 of the Act.

(a) *Occupation as an essential constituent of the licence.* Occupation appears to be an essential constituent of two types of licence:

(i) The deserted wife's licence to remain in the matrimonial home. The cases have all been concerned with the wife who *remains* in occupation after desertion[40] (see *Bendall* v. *McWhirter*, *Ferris* v. *Weaven*, *Wabe* v. *Taylor*[41] and *Lee* v. *Lee*;[42] and compare *Taylor* v. *McHale*,[43] *Thompson* v. *Earthy*[44] and *Bradley-Hole* v. *Cusen*) and there has so far been no decision on the claim of a wife, whose husband has been guilty of constructive desertion, to obtain possession of the matrimonial home.[45] It would be premature to assume that the law is incapable of developing to this extent, but it is by no means certain that it will do so, and it may be that the deserted

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[37] Or, possibly, as an application of the principle of public policy: cf. the decision of Hallett J. in *Savage* v. *Hubble*, [1953] 6 Current Law 355.
[38] (1952), 16 Conv. 323, at p. 330.
[39] See footnote 28, *supra*.
[40] But see *Silverstone* v. *Silverstone*, [1953] P. 174, as to a wife's wider rights to exclusive possession *pendente lite*.
[41] [1952] 2 Q.B. 735.
[42] [1952] 2 Q.B. 489.
[43] (1948), 151 E.G. 371.
[44] [1951] 2 K.B. 596.
[45] See Megarry, The Deserted Wife's Right to Occupy the Matrimonial Home (1952), 68 L. Q. Rev. 337.

wife's licence will be regarded as bearing similar characteristics in this respect to a tenant's statutory tenancy which arises out of and depends for its continued existence on occupation.

(ii) Licences which are not supported by valuable consideration but which nevertheless cannot be revoked at the will of the licensor because the licensee has acquired a supervening equity either by acting on the promise of the licensor in accordance with the principle in the *High Trees* case,[47] or by entry into possession coupled with the expenditure of money referable to the terms on which he entered (see *Dillwyn* v. *Llewelyn*,[48] *Plimmer* v. *Mayor of Wellington*[49] and *Duke of Beaufort* v. *Patrick*, *supra*). On the other hand, entry into or continuance in possession unaccompanied by any other act is insufficient to raise the equity: *Vaughan* v. *Vaughan*.

(b) *Occupation as giving the licence greater-than-contractual enforceability*. In the case of occupational licences, the actual taking of and continuance in occupation by the licensee may be important so as to vest in the licensee an equitable right which is enforceable against successors in title of the licensor. The relevance of occupation in this connection has already been considered.[50]

(c) *Occupation as an element affecting third parties with notice*. Since the enforceability of licences against third parties is now founded in equity, it follows that the equitable doctrine of notice applies save in so far as its place has been taken by registration under statute. Whilst some licences *may* be capable of registration as "land charges",[51] it seems that licences conferring rights of occupation do not *prima facie* fall within any of the provisions of the Land Charges Act, 1925,[52] and it has been so assumed in the cases.[53]

In *Errington* v. *Errington* and *Bendall* v. *McWhirter*, a devisee and trustee in bankruptcy were respectively the successors in title of the licensee and, accordingly, the question of notice was irrelevant. Should it be conclusively decided, however, that a licence

[46] This is supported by implication in the judgment of Romer L.J. in *Vaughan* v. *Vaughan*, *supra*.

[47] [1947] K.B. 130. Cf. *Foster* v. *Robinson*, *supra*, and the judgment of Denning L.J. in *Vaughan* v. *Vaughan*, *supra*.

[48] (1862), 4 De G. F. & J. 517.

[49] (1884), 9 App. Cas. 699.

[50] See under "Basis of Greater-than-Contractual Enforceability", especially sections (a), (b) and (c).

[51] See Geoffrey Cross, Equitable Easements (1935), 15 Bell Yard 18. This raises the whole question as to whether such licences are interests in land: *vide infra*.

[52] No reference is made to the position under the Land Registration Act, 1925, in respect of which there is at present no agreement on fundamental principles affecting the question. See Crane (1952), 16 Conv. 323, at pp. 345-346.

[53] See, especially, Denning L.J. in *Bendall* v. *McWhirter*.

may be enforceable against a *purchaser* (see *Ferris* v. *Weaven*), then the question of notice becomes of crucial importance for, unless affected by it, a purchaser takes free from equities. *Hunt* v. *Luck*[54] is authority for the proposition that a purchaser is affected with notice of the rights of persons in possession or occupation of land, but factors other than possession or occupation should also suffice to affect third parties with notice, and the rules of equity and of statute relating to notice (express, constructive and imputed) are presumably applicable. It is one thing to say that possession will affect a purchaser with notice; it is a *non sequitur* to argue that possession is the only factor which will do so. In the *Strathcona* case, the assignees of the ship were held bound by a charterparty of which they had express notice, even though at the time of the assignment the ship was in the possession and control of the owners.

(d) *Occupation as an element attracting section 14, Law of Property Act.* This section provides that part I of the Law of Property Act (sections 1-39) "shall not prejudicially affect the interest of any person in possession or in actual occupation of land to which he may be entitled in right of such possession or occupation". It is not quite clear what saving or savings (if any) may be effected by this provision but there are several possibilities:

(i) If it is later found convenient to promote the licence or any species of licence to the status of an equitable interest in land, or if this has already been done,[55] section 14 may serve to avoid the obstacle *prima facie* provided by the proviso to section 4(1) of the Law of Property Act that, "an equitable interest in land shall only be capable of being validly created in any case in which an equivalent equitable interest in property real or personal could have been validly created before" the commencement of the Act. Professor Crane has suggested that the answer to this provision may be the *Strathcona* case,[56] but in any event it is useful to have additional support.

(ii) If a licence conferring rights of occupation should chance to satisfy the description of "equitable interest" within the meaning of section 2(2) of the Law of Property Act, then section 14 may be instrumental in avoiding the possible overreaching effect of an *ad hoc* trust for sale, though it could not similarly limit the operation of an *ad hoc* settlement created under section 21 of the Settled Land Act.

(iii) It appears to be suggested by Denning L.J. in *Bendall* v.

[54] [1902] 1 Ch. 428.
[55] As to this, *vide infra*.
[56] (1952), 16 Conv. 323, at p. 342.

McWhirter[57] that even if a licence conferring rights of occupation were capable of being protected by registration under the Land Charges Act, 1925 (see section 10, Class D (iii), making provision for "any easement right or privilege over or affecting land created or arising after the commencement of the Act, and being merely an equitable interest"), nevertheless "no such questions arise where the licensee is in possession or actual occupation of the land, because that itself is sufficient notice of his rights: see s. 14 of the Law of Property Act, 1925". It is, however, difficult to see how section 14, which excludes the prejudicial operation of sections 1-39 of the Law of Property Act can be regarded as excluding the operation of section 13(2) of the Land Charges Act and section 199(1) of the Law of Property Act.

(e) *Occupation as a factor taking the licence out of sections 40 and 53 of the Law of Property Act.* If a licence can now create an interest in land, then a contract to grant such a licence would require to be evidenced in writing (section 40(1), Law of Property Act), and the licence itself would require to be created in writing (section 53(1)(a), Law of Property Act).

(i) Non-compliance with section 40, Law of Property Act. In this case, entry into occupation would be an act of part performance letting in parol evidence of a contract to grant the licence of which there was no note or memorandum in writing (sections 40(2) and 55(d), Law of Property Act).

(ii) Non-compliance with section 53(1)(a), Law of Property Act. The parol grant of a licence would create only an interest at will whether consideration was given or not (section 54(1), Law of Property Act), but if equity will construe an informal attempt to create a licence as an agreement to create a licence, then this, coupled with the taking of possession, would have the same effect as before. It is not certain, however, that equity will do this for, whilst there are decisions showing that equity will regard an informal attempt to create a *legal* interest as an agreement to create such an interest, there seems to be no decision on the effect of an informal attempt to create an *equitable* interest. The general principle that equity will not allow a statute to be used as an instrument of fraud is, however, wide enough to cover the case: see *Rochefoucauld* v. *Boustead*[58] and *Bannister* v. *Bannister*.[59]

[57] [1952] 2 Q.B. 466, at p. 483.
[58] [1897] 1 Ch. 196.
[59] [1948] 2 All E.R. 133.

4. *Assignability of Licences*

It is submitted that assignability of licences is dependent, in the first instance, upon the licence in question being held to bear proprietary characteristics. Once this hurdle has been overcome, it would seem to be a pure question of construction of the particular licence. Professor Crane[60] concludes that "the assignability of licences must, it seems, depend on the nature of the particular licence. Probably most licences involving full occupation or possession will be personal in character, but the benefit of commercial licences—such as the advertising arrangements in *Re Webb*[61]—ought to be assignable."

The Licence as a New Equitable Interest in Land

In a public lecture delivered in December 1952,[62] Professor Cheshire considered the question whether a new equitable interest had been incarnated by the courts in the recent licence cases, and came to the conclusion that it had. He seeks to show that this conclusion is a happy one by referring to the basic expediency of recent decisions. It is, indeed, true that in all the reported cases which have so far come before the courts justice has undoubtedly demanded that the licensee in occupation should be afforded protection against the particular successors in title of the licensor, but if, as Professor Cheshire concludes, the result of this is to give the licensee an equitable interest in the land, then in other cases justice may well be denied. In the first place, it would seem that, if the licensee's interest is an equitable interest in the land, the actual results achieved in *Errington* v. *Errington* and *Bendall* v. *McWhirter* might be capable of being destroyed by an *ad hoc* settlement under section 21(1) of the Settled Land Act (though possibly not by an *ad hoc* trust for sale under section 2(2) of the Law of Property Act, by virtue of section 14, Law of Property Act). This will not be so, however, if the licence to occupy land is held to be an "easement, liberty, or privilege over or affecting land", within the meaning of section 21(2)(iii) of the Settled Land Act, but it seems likely that these interests will be construed *ejusdem generis* as *incorporeal* interests only, and will not extend to the corporeal licence (compare *Lewisham B.C.* v. *Maloney*[63]). If this is so, it seems that, had the husband in *Ferris* v. *Weaven* used the correct machinery, he might

[60] (1952), 16 Conv. 323, at p. 343.
[61] [1951] Ch. 808.
[62] Published in (1953), 16 Mod. L. Rev. 1.
[63] [1948] K.B. 50.

have succeeded in accomplishing his object of evicting the wife from the matrimonial home, that is, the *ad hoc* settlement may give, by a different route, the *Thompson* v. *Earthy* position.[64]

Secondly, once admit the licence to be an equitable interest in the land and the problem of enjoyment falls within the law of property with all its complications. Is the licensee to be liable for waste? To what extent will equity follow the law of leases as it has done the law of freeholds in corresponding interests arising under trusts? Are any covenants to be implied on the part of either the licensor or licensee? Has a licensee any right to estovers or emblements or any right to remove fixtures?

Thirdly, if the licence may be an equitable proprietary interest, the question arises as to the power of limited estate owners to create licences. A tenant for life has power under section 38, Settled Land Act, to "sell the settled land, or any part thereof, or any easement, right or privilege of any kind over or in relation to the land" and, whilst this may be taken as conferring power to grant an incorporeal licence (see *Lewisham B.C.* v. *Maloney*), the question remains whether it extends to the new corporeal licence. It would, indeed, be a little strange if, although a tenant for life may, under the Settled Land Act (section 41) only grant an occupation lease for fifty years, he is held to be able to achieve similar results in equity under section 38 of the Act without any limit of time.

A similar question arises in connection with the powers of a registered proprietor in the case of registered land. If, as has been suggested,[65] section 18 of the Act defines exclusively a registered proprietor's powers, it is difficult to see under which provision an *occupational* licence would fall. The most likely provision—section 18(1)(c)—would seem *not* to cover the creation of such a licence.

The snares do not all lie on one side however. If a licence *is* capable of being an interest in land, then it will at least be reasonably certain that the perpetuity rule will apply to the remote vesting of such licences. But if it is something less than an interest in land —a mere clog or fetter[66]—then the question will arise whether the licence bears more affinity to a contractual right or to a proprietary interest for the purposes of the perpetuity rule. If the former, contractual licences (with their newly increased efficacy) could be created so as to take effect at any time, no matter how remote, for "It is settled beyond argument that an agreement merely per-

[64] [1951] 2 K.B. 596.

[65] Potter, Principles of Land Law under the Land Registration Act, 1925 (2nd ed., 1948) pp. 30-34.

[66] See Denning and Romer L.JJ. in *Bendall* v. *McWhirter*, and *infra*.

sonal, not creating any interest in land, is not within the Rule against Perpetuities" (*per* Farwell J. in *S. E. Ry.* v. *Associated Portland Cement Ltd.*[67]). Should it be that for purposes of perpetuity the occupational licence remains assimilated to the contract, then the question to what extent possession or occupation is a condition precedent to the enforcement of licences against successors in title becomes of immediate importance. Partially upon the answer to these questions will depend the extent to which the recent licence cases will be found to have provided (unconsciously) a satisfactory alternative to the trust for sale or strict settlement as a means of conferring successive rights to enjoy land, an alternative which may provide an escape from the perpetuity rule and which leaves the legal estate and powers of disposition in the "settlor". It would seem, however, that a licence for an interest equivalent to an entail could not be created, at any rate if the licensee's right *is* an interest in the land, since section 130(1) of the Law of Property Act seems to require such interests to be created behind a trust. Subject to this, *Bendall* v. *McWhirter* may be the modern *Sambach* v. *Dalston*.[68]

From what has been said it will be apparent that in some cases justice will require the licence to be, or at least to have the characteristics of, a proprietary interest in land (as in *Ferris* v. *Weaven* and possibly also for the purposes of the perpetuity rule), but in others it will require the licence not to be or seem to be such an interest (as for the purposes of section 21 of the Settled Land Act, and so as to avoid a lengthy hammering-out process similar to that which occurred in the case of leases at common law and restrictive covenants in equity). The question of greatest moment is, therefore, to what extent, if at all, have the courts so far "cooked the goose of justice" where licences are concerned.

In the manner not uncommon in the evolution of English legal doctrines, the courts themselves have not faced the problem squarely and, in these circumstances, it is safest to apply the process of induction and consider, in the first instance, the results of what the courts have actually done rather than what they have said. The essence of an equitable interest in property is that it is enforceable against all persons who hold the property, except the *bona fide* purchaser of the legal estate in it, who takes for value and without notice of the interest. In the case of the occupational licence, however, all that has so far been *decided* is that such a licence may be

[67] [1910] 1 Ch. 12, at p. 33.
[68] (1634), Tot. 188.

binding on a devisee, a trustee in bankruptcy and a purchaser acting in collusion with the licensor and taking with notice, and it has been suggested previously that this stops far short of the general enforceability of equitable interests in property.[69] In these circumstances it is submitted that the Court of Appeal, at least, is not bound by any single principle. Further, the occupational licence has been called a "clog or fetter" by both Denning and Romer L.JJ.[70] and Sir Raymond Evershed M.R. has stated, extra-judicially,[71] that it may be desirable for the courts to develop the licence on that indeterminate basis rather than to regard it as a traditional equitable interest, so that its characteristics might not be circumscribed by any *a priori* principles. In these circumstances, and in view of what has been said earlier on the requirements of justice, it seems likely that the courts may seek the best of both worlds and decide differently according to the problem which is called into question. To do so would not be conducive to symmetry, but this need not cause much concern. Thus, for some purposes, the interest of a beneficiary under a trust for sale of land is treated as an interest in pure personalty (see, for example, *Re Kempthorne*[72]), whilst for other purposes it is regarded as an interest in the land (see, for example, *Re Fox*,[73] *Att.-Gen.* v. *Harley*,[74] *Re Wood*,[75] *Briggs* v. *Chamberlaine*[76] and *Re Thomas*[77]).

Conclusion

The licence to occupy land is not yet beyond its teething stages. Its future character and speed of development will depend to a large extent upon the environment in which it is brought up, upon the particular conflicts of human interest which present themselves before the courts demanding resolution not only by the law but also by justice. Taking a wider view, it may be that upon developments in this comparatively limited sphere will depend whether and how soon the remedies of specific performance and injunction prove themselves to be "fertile mothers of action" over the whole field of equitable jurisprudence.

[69] See "Basis of Greater-than-Contractual Enforceability", section (d)
[70] In *Bendall* v. *McWhirter*.
[71] See footnote 28, *supra*.
[72] [1930] 1 Ch. 268.
[73] [1913] 2 Ch. 75.
[74] (1821), 5 Madd. 321.
[75] [1896] 2 Ch. 596.
[76] (1853), 23 L.J. Ch. 635.
[77] (1886), 34 Ch. D. 166.