> tribunal should not admit evidence of the husband's means for the purpose of apportioning such means in fair proportion or for the purpose of awarding what would really be maintenance on a scale awarded by the court in divorce jurisdiction."

The Poor Law scale has, of course, been rejected. It is therefore submitted that evidence of the husband's means might be admitted so as to qualify the wife's evidence of needs. But only in cases where those needs are of a standard differing from that reasonably expected of a wife in her particular position in life, assessing that position by reference to all *other* circumstances.

F. G. BRENNAN*

LAND LAW.

Lease or Licence ?

The main development in the Land Law recently has been the rapid building up of a new body of common law concerning licences to occupy premises. There have been two aspects to the development. One is that an occupation may now be classed as a mere licence where formerly it would have been classed as a tenancy at will. The main significance of this is that in such a case the occupier is not protected by the landlord and tenant legislation or the statutes of limitation. The other is that, if the English decisions are correct, a licence to occupy may be irrevocable during a fixed period or during life or some other indefinite period.

In *Booker* v. *Palmer* ([1942] 2 All E.R. 674) a permission to occupy a house rent free was treated as a licence and not as creating a tenancy, on the ground that the circumstances showed no intention to enter into any legal relationship at all. The more recent cases begin with *Foster* v. *Robinson* ([1951] 1 K.B. 149), where an arrangement by which an old employee was allowed to continue to occupy a cottage rent free for the rest of his life was treated as a licence, but without any discussion of the reasons for not holding it to be a tenancy at will.

In *Marcroft Wagons Ltd.* v. *Smith* ([1951] 2 K.B. 496) occurs the first detailed discussion of the problem of determining whether an agreement constitutes a licence to occupy or a tenancy at will. On the death of a woman who was a statutory tenant her daughter, who had been living with her, sought a transfer of the tenancy to herself. This was refused by the landlord, but they allowed her to continue in possession and accepted rent. Six months later they brought proceedings to recover possession. The county court judge found that the daughter occupied under a licence and not a tenancy, and made an order against her. The Court of Appeal held that there was evidence on which he could do so

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It was pointed out that although formerly the law recognised no other basis for exclusive possession of land than a holding involving the relationship of landlord and tenant, nowadays other modes of exclusive occupation have been created, particularly the statutory tenancy under the Rent Restriction Acts, and occupation of requisitioned property with the consent of a Minister of State, who has no estate and therefore cannot be a landlord. Whether or not a tenancy arises depends on the intention of the parties. In the situation created by the Rent Restriction Acts an owner of property may have very good reasons for not creating a tenancy, and yet at the same time not desire to eject immediately a person who is in actual occupation and is willing to continue paying for it. It is no longer a necessary inference from occupation and payment of rent that a tenancy was intended.

Further discussion of the matter by the Court of Appeal is to be found in *Errington* v. *Errington* ([1952] 1 K.B. 290), and *Cobb* v. *Lane* ([1952] 1 T.L.R. 1037). In the former case Denning L.J. reviewed the authorities, and questioned the decision in *Lynes* v. *Snaith* ([1899] 1 Q.B. 486), and in the latter case *Lynes* v. *Snaith* was definitely overruled. *Lynes* v. *Snaith* and *Cobb* v. *Lane* were both cases in which one member of a family allowed another to live in the house rent free, and the occupier subsequently claimed a title under the Statute of Limitation. In *Lynes* v. *Snaith* the claim was upheld, and in *Cobb* v. *Lane* it was disallowed. A New South Wales case following the English cases is *Re May and the Conveyancing Act* (69 N.S.W. W.N. 120). A special development in this field is the new doctrine that a deserted wife has a licence to occupy the matrimonial home. See *Bendall* v. *McWhirter* ([1952] 1 All E.R. 1307) and a critical article by R. E. Megarry in 68 Law Quarterly Review at p. 379.

It is to be noted that in *H. E. Wijesuriya* v. *Attorney-General for Ceylon* ([1950] A.C. 493), which concerned a right to take the produce of rubber trees on Crown land, the Privy Council held that as between lease and licence " the decisive test is whether on its true construction the effect of the document is to give exclusive possession to the holder of the so-called permit." In this case the Privy Council held that there was no right of exclusive possession, and hence no lease. It may be doubted, however, whether this dictum of the Privy Council should be regarded as being irreconcilable with the principle laid down by the Court of Appeal in the later cases referred to above. The case was one where, if exclusive possession had been granted, there were no circumstances to suggest anything but a lease; and the Privy Council did not have in contemplation the sort of cases the Court of Appeal has since been dealing with. The test is decisive to this extent, that if there is no exclusive right to possession there cannot be a tenancy.

These decisions obviously suggest a possible means of evading the recent legislation giving protection to tenants, and already, it is understood, landlords are making agreements in which it is expressly stipulated

that the proposed occupier of premises is to take as a licensee and not as a lessee, and that the landlord is to have at all times a right to enter and make use of the premises. The possibility was put to the Court of Appeal in *Marcroft Wagons Ltd.* v. *Smith* (*supra*); but Evershed M.R. said he was not frightened by the argument *ad terrorem*, and that "where the question arises out of a new relationship between an owner of property and an occupant, the inference to be drawn, when the occupant is first allowed to go into exclusive possession, is prima facie very different from the inference proper to be drawn, though not necessarily to be drawn, in such a case as this, where the person in occupation has lived there, as the defendant has, for a long period of time and has in effect succeeded to the occupational privilege (to use a somewhat colourless phrase) of the previous occupant." Denning L.J. expressed himself similarly. This suggests that the Court may look to the real nature of the transaction, and disregard any actual words used which obviously are designed to exclude the application of the protective legislation. Nevertheless, parties are not bound so to arrange their relationships that they will be caught by some particular legislation, and if they specifically agree that the occupier shall not be entitled to exclude the owner it is difficult to see that a tenancy arises. The remedy for this is further legislation protecting occupiers whether tenants or licensees.

The second aspect of the new development is that a licence to occupy premises may, according to the English decisions, be irrevocable and thus give a right superior to that enjoyed by a tenant at will or periodic tenant. In *Booker* v. *Palmer* (*supra*), where there was a gratuitous licence to occupy for the period of the war, the owner was held to be entitled to terminate the licence. In *Foster* v. *Robinson* (*supra*), however, the licence to occupy for life was in effect given for a consideration, viz., the surrender of an existing tenancy by the licensee, and Evershed M.R. expressed the opinion, *obiter*, that since the decision in *Winter Garden Theatre* (*London*) *Ltd.* v. *Millenium Productions, Ltd.* ([1948] A.C. 173) it may be taken that in such a case a licensor would be restrained from revoking the licence. In *Errington* v. *Errington* (*supra*) the arrangement was that the purchaser of a house let his son and daughter-in-law into possession of it on the terms that they were to pay the instalments due under a mortgage for the balance of the purchase price, and that on payment of the last instalment the property would be theirs. The licensees continued in possession and paid instalments up to the father's death. The father devised the house to his widow, who claimed it from the daughter-in-law, the son having gone to live with his mother. The Court of Appeal held that so long as the licensee paid the instalments the licence was irrevocable, not only as against the licensor, but also as against his successors in title.

In so far as this decision makes a licence irrevocable as against successors in title as well as the original licensor, it is very severely

criticised in an article, "Licences and Third parties," in the Law Quarterly Review, Vol. 68, p. 337. It also raises the question how far the decision of the High Court in *Cowell* v. *Rosehill Racecourse Co. Ltd.* (56 C.L.R. 605) is still binding in Australia.

The High Court decided, contrary to *Hurst* v. *Picture Theatres Ltd.* ([1915] 1 K.B. 1), that a licence is revocable at will, and that if the revocation is in breach of a contract the only remedy is an action for damages for breach of contract. Probably no one would now defend, at any rate after reading the High Court judgment, the actual grounds on which the Court of Appeal decided *Hurst* v. *Picture Theatres Ltd.*, but the view is now taken in the Court of Appeal that in such a case equity will grant an injunction to restrain the breach of an express or implied undertaking not to revoke a licence. See *Millenium Productions Ltd.* v. *Winter Garden Theatre* (*London*) *Ltd.* ([1946] 1 All E.R. 678, 685), *Foster* v. *Robinson* (*supra*) at p. 156, and *Errington* v. *Errington* (*supra*) at p. 298. If this is correct it would appear to follow that where an injunction is not appropriate (*e.g.*, in an action for damages for assault by a licensee who has been ejected by the licensor) an equitable rejoinder will be available to the reply that the licence was revoked. Both these propositions were considered by the High Court, much more fully than they have been in the Court of Appeal, and rejected. When the *Winter Garden Theatre* case went to the House of Lords, the decision of the Court of Appeal that an injunction should issue was reversed, but only on the ground that the licence in question was not perpetual, as the Court of Appeal had held, but terminable on reasonable notice, and that the plaintiffs had not discharged the onus of showing that the period of notice was unreasonable. It has not yet been expressly decided by the House of Lords that equitable principles prevent a licence from being revoked before the period agreed to has expired. In the *Winter Garden Theatre* case Lord Simon approved of the decision in *Hurst* v. *Picture Theatres Ltd.* Lord Porter took a view which led him to say: "It may well be that now that common law and chancery remedies can be administered by any branch of the High Court, a different decision [in *Wood* v. *Leadbitter*] would be given, but even if that be conceded it does not seem to me to have any bearing on the case now presented to your Lordships." Lord Uthwatt said it was unnecessary to consider whether *Hurst's* case was rightly decided, but confessed his present inability to see any answer to the propositions of law stated by the Master of the Rolls in the case under appeal. Lord MacDermott expressed no opinion at all on the question of equitable remedies, and did no more than decide that no breach of contract had been proved.

It might be argued that the House of Lords would not have considered the question whether the contract required reasonable notice to determine the licence unless it took the view that *Wood* v. *Leadbitter* no longer applied. But the action was for damages as well as for an

injunction, the Court of Appeal had held that the licence was perpetual, and the licensor rested his case on compliance with the contract and did not question *Hurst's* case. If in some future case the considerations on which the High Court held that an injunction to restrain revocation of a licence should not be granted were presented to the House of Lords, it is not clear that what was decided in the *Winter Garden Theatre* case would prevent the adoption of the High Court's view. It would seem to follow that for the time being courts in Australia should follow *Cowell* v. *Rosehill Racecourse Co. Ltd.* rather than the English decisions. This would leave a licensee in occupation of premises liable to have his licence terminated at any time, so that he would be entitled to remain only for what Lord MacDermott, in the *Winter Garden Theatre* case called a packing up period.

W. N. HARRISON

PRIVATE INTERNATIONAL LAW.

Foreign Judgments.

Dulles v. *Dulles*[1] is not a case on a *foreign* judgment but the principle there acted upon regarding submission to the jurisdiction would probably be relevant to the question of the competency of a foreign Court when the conduct of the defendant is alleged to constitute a submission to the jurisdiction. In this case the question was whether the father of an infant against whom an order for maintenance was sought had submitted to the jurisdiction inasmuch as he was represented by counsel and solicitor who objected to the jurisdiction on the score of his being an American resident. It was held that an appearance to protest to the jurisdiction and not to argue on the merits is not a submission to the jurisdiction. This is an important decision because the case of *Harris* v. *Taylor*[2] appears to be an authority to the contrary. That case was somewhat unconvincingly distinguished on the ground that it was a case where service out of the jurisdiction had been effected and the defendant in the Manx Court had contested whether such service was authorised by the Manx Rules of Court. As the point was decided by the Manx Court against the defendant the Court would have had jurisdiction without any question of submission. This, however, appears to assume that local Rules of Court authorising service out of the jurisdiction create an internationally recognisable basis of jurisdiction.

Foreign Torts.

Koop v. *Bebb*[3] was the case of an action being brought in Victoria under the Victorian equivalent of the *Fatal Accidents Act* where the negligent act causing death occurred in New South Wales. It was

1. [1951] 1 Ch. 842.
2. [1915] 2 K.B. 580.
3. [1952] A.L.R. 37.