Overview | **[1952] 1 KB 290**, | [1952] 1 All ER 149, | 96 Sol Jo 119, | [1952] 1 TLR 231, | 158 EG 630

ERRINGTON v. ERRINGTON AND WOODS. [Plaint G. No. 485.] [1952] 1 K.B. 290

[COURT OF APPEAL]

Somervell, Denning and Hodson L.JJ.

1951 Oct. 25, 26; Dec. 10, 19.

Landlord and Tenant — Dwelling-house — Possession — House purchased by father as home for son and son's wife — Lump sum paid by father — Mortgage instalments to be paid by son and son's wife during occupation — Promise to transfer house to son and daughter-in-law when final instalment paid — Interest of occupiers — Tenants at will or licensees?

A father, wishing to provide a home for his son, who had recently married, purchased a dwelling-house through a building society, paying a lump sum and leaving the balance on mortgage to be paid by weekly instalments. He retained the conveyance in his own name and paid the rates, but promised that if the son and daughter-in-law continued in occupation and duly paid the instalments until the last one was paid, he would then transfer the property to them. He was on affectionate terms with the daughter-in-law and handed her the building society's book, directing her not to part with it. When the father died he, by his will, left all his property, including the house in question, to his widow. Up to that time the son and the son's wife had together occupied the dwelling-house and paid the instalments, but the son then left his wife and went to live with his widowed mother. The wife continued to occupy the dwelling-house and to pay the instalments.

---------- *[1952] 1 K.B. 290 at 291*

The mother brought an action for possession against the daughter-in-law, which was dismissed by the county court judge on the ground that the son and daughter-in-law were tenants at will and the claim was barred by the Limitation Act, 1939. On appeal:-

Held, that the daughter-in-law and her husband were licensees, with no power to assign or sublet, but entitled under a personal contract to occupy the house for so long as they paid the instalments to the building society, and the appeal failed.

Quoere: Whether the defendant and her husband would be entitled to a conveyance of the property when the instalments had been fully paid.

Per Somervell L.J.: The right to a conveyance of the property if and when the instalments had been paid might raise a question under sections 53 and 55 of the Law of Property Act, 1925, since the contract was oral. The issue was not directly before the court, but it would seem to him that the doctrine of part performance would

clearly apply.

Per Denning L.J.: The couple were licensees having a permissive occupation short of a tenancy, but with a contractual right, or at any rate an equitable right, to remain so long as they paid the instalments, which would grow into a good equitable title to the house itself as soon as the mortgage was paid.

Lynes v. Snaith [1899] **1** Q.B. 486, and *Thompson v. Earthy* [1951] 2 K.B. 596, questioned.

Per Hodson L.J.: If and when the instalments were fully paid the question would arise whether the mother was bound to convey the property to her son and daughter-in-law.

APPEAL from Judge Richardson, sitting at Newcastle-upon-Tyne county court.

In 1936 the husband of Mrs. Mary Elizabeth **Errington**, the plaintiff, purchased a dwelling-house, No. 27 Milvain Avenue, Newcastle, as a home for his son, who had recently married the first defendant, Mrs. Mary Duncan **Errington**. The purchase was financed through a building society, the father paying a lump sum of £250, leaving the balance of £500 on mortgage. The father, who was on terms of affection with his daughter-in-law, handed her the building society's book, told her not to part with it, and promised that the property would be hers and her husband's when they had paid the last instalment on the mortgage. He had, however, retained the conveyance in his own name and paid the rates.

The father died in July, 1945, and by his will left all his property, including the house in question, to his widow. Up to that time the first defendant and her husband had occupied 27 Milvain Avenue and had duly, in accordance with the arrangement

---------- ***[1952] 1 K.B. 290 at 292***

with the father, paid the instalments on the mortgage. After the death of his father the son left his wife and went to live with his mother, who now claimed possession of the house from her daughter-in-law, who had remained in the house with her sister, the second defendant, and continued to pay the instalments.

The county court judge dismissed the action. He held that the first defendant and her husband were tenants at will an therefore the claim was barred by the Limitation Act, 1939.

The plaintiff appealed.

J. A. T. Hanlon and **J. D. B. Richardson** for the plaintiff.

J. Marnan for the defendants.

The arguments sufficiently appear from the judgments.

Cur. adv. vult.

December 19. The following judgments were read:-

SOMERVELL L.J. stated the facts and continued:- It was not disputed that since 1945 the first

defendant has continued to pay the instalments, either out of the money provided by her husband or from other resources, if any. After the conclusion of the argument we came provisionally to the opinion that under the agreement the son and his wife were neither tenants at will nor tenants paying rent, but that the plaintiff was nevertheless not entitled to possession. We therefore had the case re-argued and had the assistance of counsel on both sides as to the terms of the agreement as they appealed to us to be on the findings of the judge. I will state what seem to me to be the intended terms of the agreement and then consider whether there are any legal obstacles to their enforcement.

The father was undertaking to convey the house to the son and his wife if and when they had paid all the instalments. If and when they had done that, they would, of course, have paid with interest two-thirds of the purchase price. The gift of the £250 was not a future gift because the father was then undertaking to convey the house for two-thirds of the price which the vendor was charging. The son and his wife were to occupy the house in consideration of their paying the instalments to the building society. Two further questions remain to be considered which are connected. First, were they undertaking to pay the instalments? If they failed, would they have committed a breach of the agreement? I have hesitated about this. It would have

---------- ***[1952] 1 K.B. 290 at 293***

been on the face of it advantageous for them so to undertake. They would be getting a house on ordinary building society terms for two-thirds of its price. I do not think that the transaction, as found by the judge, justifies A finding that they had so undertaken. Further, if this had been the intention, it is difficult to see why the father did not convey the house then and there. If the instalments were not paid I think their rights were at an end. If this happened towards the end of the period the father or his successors in title would have a good bargain, but the parties were not considering future possibilities at arms length and the contemplation was that the son and his wife would complete the payments. Were their rights assignable? I think not. The father desired to benefit his son and daughter-in-law by making a present of the £250. He wanted to assist them to get a house to live in on advantageous terms. If they did not want it to live in, then I think the proper inference from the fact that he remained the owner is that he intended it should come back into his control.

I find it impossible to regard them as tenants at will. In *Foster v. Robinson*,**1** Evershed M.R. considered the possibility of a tenancy at will with a promise that the tenancy should not be determined. Without deciding whether a tenancy could remain "at will" with such a promise annexed, I find the conception a difficult one. We were invited to find a tenancy, for the period of the instalments, the latter, though paid to a third party, being rent as between the parties to the agreement. In the absence of any express agreement to that effect it seems to be impossible to treat as rent payments made to a third party which differed in kind from rent in that they were instalments of the purchase price, with interest, payable under a mortgage. The position here was, as it seems to me, analogous to that of a purchaser who is admitted into possession before completion. One can imagine an ordinary contract of sale in which the purchase price was payable by instalments over a long period. If one also imagines a term that if instalments were not paid the vendor would have a right to rescind, but no other right, one gets near to the present position. It might be suggested that the title of the son and wife, so long as the instalments were paid, was the same as that of a purchaser who goes into possession before completion under an ordinary contract of purchase and sale. The transaction in the present case, although it seems a not unnatural one, is, so far as the

1 [1951] 1 K.B. 149, 156.

researches of counsel and ourselves have gone, legally novel. The equitable title under which a purchaser in possession before completion can rely is based, as I understand it, on the contract of sale under which he has undertaken to purchase and he is regarded in equity as owner subject to his fulfilling his part of the bargain.

The contract here was different. I therefore think the son and his wife were licensees, and for the reasons elaborated by my brother Denning in his judgment, which I have had the advantage of reading, there is no legal obstacle to holding that as licensees they are entitled to retain exclusive possession so long as the instalments are paid. The right to a conveyance if and when the instalments are paid might raise a question under sections 53 and 55 of the Law of Property Act, 1925, as the contract was oral. The issue is not directly before us, but it would seem to me that the doctrine of part performance would clearly apply. Mr. Marnan argued that if it was a licence there would be no relief if an instalment was in arrear for however short a time. Assuming this is so, it would be explicable on the ground that the transaction is an unusual one and neither equity nor the legislature have intervened to modify the letter of the bond.

The position as between the husband and wife does not arise in these proceedings. The wife only was defendant, but subject to any proceedings between husband and wife she was, of course, entitled to rely on the joint contract as showing she was not a trespasser.

With regard to the second defendant, she is a sister of the first defendant and if, as I have held, the defendant is entitled to retain possession, no question was raised as to her. It was not suggested that an order could be obtained against her if the first defendant was entitled to possession. I would certainly have held that a licensee on the terms here could have guests who would not be trespassers.

The payment of rates by the father should, I think, on the evidence be regarded as a gift from week to week which could have been stopped at any time and does not affect the position. I therefore think that the appeal must be dismissed.

DENNING L.J. The facts are reasonably clear. In 1936 the father bought the house for his son and daughter-in-law to live in. The father put down £250 in cash and borrowed £500 from a building society on the security of the house, repayable with interest by instalments of 15*s.* 0*d.* a week. He took the house

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in his own name and made himself responsible for the instalments. The father told the daughter-in-law that the £250 was a present for them, but he left them to pay the building society instalments of 15*s.* 0*d.* a week themselves. He handed the building society book to the daughter-in-law and said to her: "Don't part with this book." "The house will be your property when the mortgage is paid." He said that when he retired he would transfer it into their names. She has in fact paid the building society instalments regularly from that day to this with the result

that much of the mortgage has been repaid, but there is a good deal yet to be paid. The rates on the house came to 10*s.* 0*d.* a week. The couple found that they could not pay those as well as the building society instalments, so the father said he would pay them and did so.

It is to be noted that the couple never bound themselves to pay the instalments to the building society; and I see no reason why any such obligation should be implied. It is clear law that the court is not to imply a term unless it is necessary; and I do not see that it is necessary here. Ample content is given to the whole arrangement by holding that the father promised that the house should belong to the couple as soon as they paid off the mortgage. The parties did not discuss what was to happen if the couple failed to pay the instalments to the building society, but I should have thought it clear that, if they did fail to pay the instalments, the father would not be bound to transfer the house to them. 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. If that was the position during the father's lifetime, so it must be after his death. If the daughter-in-law continues to pay all the building society instalments, the couple will be entitled to have the property transferred to them as soon as the mortgage is paid off; but if she does not do so, then the building society will claim the instalments from the father's estate and the estate will have to pay them. I cannot think that in those circumstances the estate would be bound to transfer the house to them, any more than the father himself would have been.

What is the result in law of those facts? The relationship of the parties is open to three possible legal constructions: (i) That the couple were tenants at will paying no rent. That is what the

---------- ***[1952] 1 K.B. 290 at 296***

judge thought they were. He said that, in this case, just as in *Lynes v. Snaith*,2 the defendant "was in exclusive possession and was therefore not a mere licensee but in the position of a tenant at will." But in my opinion it is of the essence of a tenancy at will that it should be determinable by either party on demand, and it is quite clear that the relationship of these parties was not so determinable. The father could not eject the couple as long as they paid the instalments regularly to the building society. It was therefore not a tenancy at will. I confess that I am glad to reach this result: because it would appear that, if the couple were held to be tenants at will, the father's title would be defeated after the lapse of 13 years, long before the couple paid off the instalments, which would be quite contrary to the justice of the case. (ii) That the couple were tenants at a rent of 15*s.* 0*d.* a week, that rent being for convenience paid direct to the building society instead of to the father, and the tenancy being either a weekly tenancy or a tenancy for the duration of the mortgage repayments. But I do not think that that 15*s.* 0*d.* can possibly be regarded as rent, for the simple reason that the couple were not bound to pay it. If they did not pay it, the father could not sue for it or distrain for it. He could only refuse to transfer the house to them. If the 15*s.* 0*d.* was not rent, then it affords no ground for inferring a tenancy. (iii) That the couple were licensees, having a permissive occupation short of a tenancy, but with a contractual right, or at any rate, an equitable right to remain so long as they paid the instalments, which would grow into a good equitable title to the house itself as soon as the mortgage was paid. This is, I think, the right view of the relationship of the parties. I will explain how I arrive at it.

The classic definition of a licence was propounded by Vaughan C.J. in the seventeenth century

in *Thomas v. Sorrell*3: "A dispensation or licence properly passeth no interest nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful." The difference between a tenancy and a licence is, therefore, that, in a tenancy, an interest passes in the land, whereas, in a licence, it does not In distinguishing between them, a crucial test has sometimes been supposed to be whether the occupier has exclusive possession or not. If he was let into exclusive possession, he was said

2 [1899] **1** Q.B. 486.

3 (1673) Vaughan 351.

to be a tenant, albeit only a tenant at will (see *Doe v. Chamberlaine*4 and *Lynes v. Snaith*5, whereas if he had not exclusive possession he was only a licensee: *Peakin v. Peakin*.6 This test has, however, often given rise to misgivings because it may not correspond to realities. A good instance is *Howard v. Shaw*,7 where a person was let into exclusive possession under a contract for purchase. Alderson B. said that he was a tenant at will; and Parke B., with some difficulty, agreed with him, but Lord Abinger said that "while the defendant occupied under a valid contract for the sale of the property to him, he could not be considered as a tenant." Now, after the lapse of a hundred years, it has become clear that the view of Lord Abinger was right. The test of exclusive possession is by no means decisive.

The first case to show this was *Booker v. Palmer*,8 where an owner gave some evacuees permission to stay in a cottage for the duration of the war, rent free. This court held that the evacuees were not tenants, but only licensees. Lord Greene M.R. said: "To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible. There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind." Those emphatic words have had their effect. We have had many instances lately of occupiers in exclusive possession who have been held to be not tenants, but only licensees. When a requisitioning authority allowed people into possession at a weekly rent: *Minister of Health v. Bellotti*,9 *Southgate Borough Council v. Watson*,10 *Ministry of Agriculture v. Matthews*11; when a landlord told a tenant on his retirement that he could live in a cottage rent free for the rest of his days: *Foster v. Robinson*12; when a landlord, on the death of the widow of a statutory tenant, allowed her daughter to remain in possession, paying rent for six months: *Marcroft Wagons Ld. v. Smith*13; when the owner of a shop allowed the manager to live in a flat above the shop, but did not require him to do so, and the value of the flat was taken into account at £**1** a week in fixing his wages: *Webb Ld. v. Webb*14; in each of those cases the occupier was held to be a

4 (1839) 5 M. & W. 14, 16.

5 [1899] **1** Q.B. 486.

6 [1895] 2 I.R. 359.

7 (1841) 8 M. & W. 118.

8 [1942] 2 All E.R. 674, 677.

9 [1944] K.B. 298.

10 [1944] K.B. 541.

11 [1950] **1** K.B. 148.

12 [1951] **1** K.B. 149, 156.

13 [1951] 2 K.B. 496.

14 Unreported, Oct. 24, 1951.

licensee and not a tenant. Likewise there are numerous cases where a wife, who has been deserted by her husband and left by him in the matrimonial home, has been held to be, not a tenant of the husband owner (*Bramwell v. Bramwell*,15 *Pargeter v. Pargeter*16, nor a bare licensee (*Old Gate Estates v. Alexander*17, but to be in a special position - a licensee with a special right - under which the husband cannot turn her out except by an order of the court: *Middleton v. Baldock*.18

The result of all these cases is that, although a person who is let into exclusive possession is prima facie to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct 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. In view of these recent cases I doubt whether *Lynes v. Snaith*,19 and the case of the gamekeeper referred to therein, would be decided the same way today.

Applying the foregoing principles to the present case, it seems to me that, although the couple had exclusive possession of the house, there was clearly no relationship of landlord and tenant. They were not tenants at will but licensees. They had a mere personal privilege to remain there, with no right to assign or sub-let. They were, however, not bare licensees. They were licensees with a contractual right to remain. As such they have no right at law to remain, but only in equity, and equitable rights now prevail. I confess, however, that it has taken the courts some time to reach this position. At common law a licence was always revocable at will, notwithstanding a contract to the contrary: ***Wood*** *v. Leadbitter*.20 The remedy for a breach of the contract was only in damages. That was the view generally held until a few years ago: see, for instance, what was said in *Booker v. Palmer*21 and *Thompson v. Park*.22 The rule has, however, been altered owing to the interposition of equity.

Law and equity have been fused for nearly 80 years, and since 1948 it has been clear that, as a result of the fusion, a licensor will not be permitted to eject a licensee in breach of a

15 [1942] **1** K.B. 370.

16 [1946] **1** All E.R. 570.

17 [1950] **1** K.B. 311.

18 [1950] **1** K.B. 657.

19 [1899] **1** Q.B. 486.

20 (1845) 13 M. & W. 838.

21 [1942] 2 All E.R. 674, 677.

22 [1944] K.B. 408, 410.

contract to allow him to remain: see *Winter Garden Theatre, London v. Millenium Productions Ld.*,23 *per* Lord Greene, and in the House of Lords *per* Lord Simon; nor in breach of a promise on which the licensee has acted, even though he gave no value for it: see *Foster v. Robinson*,24 where Sir Raymond Evershed M.R. said that as a result of the oral arrangement to let the man stay, he was entitled as licensee to occupy the premises without any payment of rent for the rest of his days. This infusion of equity means that contractual licences now have a force and validity of their own and cannot be revoked in breach of the contract. Neither the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice.

I ought perhaps to mention two cases which appear at first sight to revert to the former view. The first is *Rogers v. Hyde*,25 where a landlord promised that a sharing arrangement (which was really a licence) should "be within the Rent Acts." It was held by this court that the licensee was not protected; because the Rent Acts operate only on tenancies, and that, just as parties could not contract out of the Acts, so they could not contract into them. No argument was put forward that the landlord's promise was equivalent to saying: "I promise to give you, my licensee, the same protection as the Rent Acts give to tenants." If that argument had been put forward, the very point might have arisen which arises in this case; but, as it happened, the point was not taken, so there was no decision on it. The other case is *Thompson v. Earthy*,26 where a husband, for good consideration, gave an undertaking that he would allow his wife and children to remain in his house rent free. It was held that the husband was entitled to defeat his promise by selling the house over her head, even though the purchaser took with full knowledge of the promise. I notice, however, that in coming to this decision Roxburgh J. emphasized that the wife was not a licensee, basing himself on something I said in *Old Gate Estates v. Alexander*,27 but the later decision of this court in *Foster v. Robinson*28 shows that she was a licensee and that the husband could not have ejected her in breach of his promise. I cannot help thinking that, if that case had been cited to the learned judge, the decision might have been different. I see nothing,

23 [1946] **1** All E.R. 678, 680; [1948] A.C. 173, 191.

24 [1951] **1** K.B. 149, 156.

25 [1951] 2 K.B. 923.

26 [1951] 2 K.B. 596.

27 [1950] **1** K.B. 311, 319.

28 [1951] **1** K.B. 149, 154.

therefore, in these recent cases to shake the view I have expressed about contractual licences.

In the present case it is clear that the father expressly promised the couple that the property should belong to them as soon as the mortgage was paid, and impliedly promised that so long as they paid the instalments to the building society they should be allowed to remain in possession. They were not purchasers because they never bound themselves to pay the instalments, but nevertheless they were in a position analogous to purchasers. They have acted on the promise, and neither the father nor his widow, his successor in title, can eject them in disregard of it. The result is that in my opinion the appeal should be dismissed and no order for possession should be made. I come to this conclusion on a different ground from that reached by the learned judge, but it is always open to a respondent to support the judgment on any ground. If there is a dispute between the son and the daughter-in-law as to their respective rights in the house, that must be decided under section 17 of the Married Women's Property Act, 1882. If the father's widow should cease to pay the rates, the actual occupier must pay them, because the father did not bind himself to pay them. He only did so out of paternal affection.

HODSON L.J. I agree that the appeal fails. Having had the opportunity of reading the judgments of my Lords, I will not repeat the facts. The problem in this case is to decide what, upon this apparently simple set of facts, is the true legal relationship between the parties. The county court judge thought that a tenancy at will had been created. This disregards the promise that the tenancy should not be determined. The promise not to determine the tenancy seems to me to be inconsistent with a tenancy at will, and I, like my Lord, find the conception which was referred to by Evershed M.R. in *Foster v. Robinson*29 a difficult one. The alternate finding that there was a weekly tenancy is not, I think, maintainable, since the payments of the instalments by the supposed tenants to the building society cannot be regarded as rent payable to the landlords.

Mr. Marnan put forward as a possible solution a tenancy for the term of years during which the instalments were payable. One objection to this solution is that the length of the term of years would depend on the contract between the father and the

29 [1951] **1** K.B. 156.

building society, which might be varied in length as, for example, by the instalments being spread over a longer period. Would such a tenancy be assignable and subject to forfeiture? These questions do not admit of an easy answer. If there was not a tenancy there is some attraction in the view that here there was a contract of sale followed by part performance when the son and daughter-in-law went into possession, to be completed on payment of the last instalment. If this had been the intention of the parties there seems to be no reason why the father should have taken the conveyance in his own name, and moreover there is the further difficulty that it would be necessary to imply a promise by the son and daughter-in-law to pay the instalments.

The plaintiff contends that there was nothing more than a bare licence revocable at will. Her contention is that the evidence, taken at its highest, shows no more than an imperfect gift which failed on the death of the father, so that the son and daughter-in-law remained in occupation as

licensees, so long as the mother was willing for them to do so. I think that the real position is that they did occupy the house as licensees, but did so under a personal contract providing that the son and daughter-in-law should, so long as they occupied the house, pay the instalments to the building society; that the father, and the mother (as his successor) agreed to permit them to occupy the house as long as the instalments were running and being paid by them. If they left the house the contract would be at an end and if and when the instalments are fully paid the question will arise whether the mother is bound to convey the property to her son and daughter-in-law. Any question between the son and daughter-in-law, who are now it appears at arm's length, will fall to be decided under section 17 of the Married Women's Property Act, 1882.

Appeal dismissed.

A. W. G.

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