

Exclusive possession or the intention of the parties? The relation of landlord and tenant in Northern Ireland

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Abstract

The seminal House of Lords judgment in Street v Mountford established that the test for distinguishing between a lease and a licence is whether the occupant has been granted exclusive possession of the premises. The test is objective: the relation of landlord and tenant exists where exclusive possession has been granted, regardless of the intention of the parties. However, this stands at odds with the law in both parts of Ireland, where s 3 of Deasy's Act states that the relation of landlord and tenant 'shall be deemed to be founded on the . . . contract of the parties'. This article analyses the historical background that led to Deasy's Act, surveys contemporary case law in both parts of Ireland on leases vs licences and argues that the law in this area in Northern Ireland differs from that in England and Wales.

Keywords: exclusive possession; landlord and tenant; leases; licences; Deasy's Act.

Until 1860 the law of landlord and tenant was the same in Ireland as in England. The doctrinal basis of the relationship has always been difficult: at its heart lies the notion that two people can enjoy the same property for two differing purposes, despite one of the foundational principles of land law being the ability of the owner to exclude the world. Thus, the ability to rent land was, at its earliest stage, an essentially heretical idea, arising as a practical response to the population decrease occasioned by the Black Death.² Shaped by both contract and land law, the common law gradually came to recognise a hybrid basis for the relation of landlord and tenant: initially viewed as a contractual relationship, the relation became governed by classic land law principles (anchored in tenure and the doctrine of estates),³ so that the rights and obligations inherent in the relation would run with the land rather than be confined to the privity of the contracting parties.

However, the application of strict land law principles to the relation created problems in Ireland. One such principle was the need for the landlord to retain a reversion.⁴ Most Irish landlords were absentee and employed middlemen to manage their properties, often

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2 R Megarry and W Wade: *The Law of Real Property*, C Harpum, S Bridge and M Dixon (eds) (8th edn, Sweet & Maxwell 2012) para 2–007; H Lesar, ‘The Landlord–Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?’ (1960–61) 9 *University of Kansas Law Review* 369.

3 P Bordwell, ‘The Common Law Scheme of Estates’ (1933) 18 *Iowa Law Review* 425.

4 *Pluck v Digges* (1832) 5 Bli NS 31, 5 ER 219 (HL), followed in *Porter v French* (1846–47) 9 ILR 514 (Exch).

failing to retain a reversion and thereby losing the remedies open to landlords. Statutory intervention was felt to be necessary, resulting in Deasy's Act.⁵ Specifically, s 3 of that Act purports to found the relation of landlord and tenant in contract rather than tenure and removes the requirement for a reversion.

Yet, rather than clarifying the law, s 3 has resulted in permanent confusion over the nature and incidence of the relation of landlord and tenant. This confusion has once again recently been recognised in *Northern Ireland Renewables Ltd v Carey*, where the Court of Appeal called for legislative reform.⁶ One particularly problematic question created by s 3, an area where there is most scope for divergence in Northern Ireland law from that of England and Wales, is the importance to be placed on the intention of the parties in determining whether the relation of landlord and tenant has arisen.

If, as seems to be the purpose behind s 3 of Deasy's Act, the relation arises out of the contract of the parties, then, in order to decide whether the relation has arisen, the contractual agreement will need to be construed and, in so doing, particular importance is placed on the intention of the parties as evidenced in the agreement. However, this approach to deciding whether the relation has arisen would appear to be incompatible with the House of Lords' decision in *Street v Mountford*, which held that the only relevant consideration is whether the tenant had exclusive possession of the premises, the parties' intentions being irrelevant.

This article will argue that the exclusive occupation test, though of primary relevance in construing the intention of the parties, cannot be the sole factor in determining the incidence of the relation of landlord and tenant in the sense expounded in *Street v Mountford*, and that the law in Northern Ireland must of necessity differ from that in England and Wales. Through the lens of the 'lease vs licence' debate, English case law will be contrasted with that in the Republic of Ireland and Northern Ireland, grounded in an analysis of s 3 of Deasy's Act.

***Street v Mountford* and the exclusive possession test**

Street v Mountford has now been accepted as embodying the law on differentiating between a lease and a licence.⁷ However, before analysing the ratio of the case and its later application, it is useful to outline the state of the law prior to that decision, as this enables a full understanding of the decision in *Street v Mountford*. Traditionally, if an occupant had exclusive possession, this was viewed as a conclusive indication that the agreement under which he held was a tenancy rather than a licence. In *Lynes v Snaith* (the leading case on the matter) a father gave permission to his daughter-in-law to live in a house which he owned; the Divisional Court held that by virtue of her exclusive possession the daughter-in-law was a tenant-at-will.⁸

However, in a line of cases whose common attribute seems to have been Lord Denning, a different test gradually evolved. This was initially apparent in *Errington v Errington*, where Denning LJ stated that '[t]he test of exclusive possession is by no means decisive' and that while '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

5 For a history of land in Ireland, see J A Dowling, 'The Landlord and Tenant Law Amendment Act (Ireland) 1860' (PhD thesis, Queen's University Belfast 1985) ch 1. See also A Dowling, 'The Genesis of Deasy's Act' (1989) 40 Northern Ireland Legal Quarterly 53.

6 [2016] NICA 30, [23].

7 [1985] AC 809 (HL).

8 [1899] 1 QB 486 (QB), 489.

to create a tenancy'.⁹ The nature of the relation is to be determined according to the intention of the parties: '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'.¹⁰ The importance of intention was emphasised in *Cobb v Lane*, where Denning LJ stated that 'the old cases can no longer be relied upon'.¹¹ Instead, '[t]he question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land?'¹²

Yet, the acknowledgment that parties might attempt to contract out of the Rent Acts by purporting to have an intention to create a licence only, where in fact a tenancy had actually been in view, meant that some objective test was needed in order to decide what the true intentions were: 'the parties cannot by the mere words of their contract turn it into something else'.¹³ Applying the above cases, Jenkins LJ stated in *Addiscombe Garden Estates Ltd v Crabbe* that:

... the important statement of principle is that the relationship is determined by the law, and not by the label which parties choose to put on it, and that it is not necessary to go so far as to find the document a sham. It is simply a matter of ascertaining the true relationship of the parties.¹⁴

As exclusive possession was no longer accepted as the correct test,¹⁵ another test had to be devised. In *Shell-Mex and BP Ltd v Manchester Garages Ltd*, Lord Denning MR considered whether an agreement was a licence or a tenancy:

This does not depend on the label which is put on it. It depends on the nature of the transaction itself . . . Broadly speaking, we have to see whether it is a personal privilege given to a person, in which case it is a licence, or whether it grants an interest in land, in which case it is a tenancy.¹⁶

The new test, therefore, was whether an agreement granted an interest in land, or whether it only represented a personal privilege.¹⁷ Yet, this was hardly satisfactory, for, as has been pointed out, the result was that '[w]hat was once a consequence of a finding that a licence existed had been transformed into a determining factor in establishing the existence itself'.¹⁸

Street v Mountford presented the House of Lords with the opportunity to review the law. The parties had entered into an agreement for accommodation, with the agreement being expressly described as a licence. At the bottom of the document Mountford had written

9 [1952] 1 KB 290 (CA), 297 and 298.

10 Ibid 298.

11 [1952] 1 All ER 1199 (CA), 1202.

12 Ibid.

13 *Facchini v Bryson* [1952] 1 TLR 1386 (CA), 1389–90 (Denning LJ).

14 [1958] 1 QB 513 (CA), 528.

15 'The modern cases show that a man may be a licensee even though he has exclusive possession, even though the word "rent" is used, and even though the word "tenancy" is used. The court must look at the agreement as a whole and see whether a tenancy really was intended.' *Abbeyfield (Harpden) Society Ltd v Woods* [1968] 1 WLR 374 (CA), 376G (Lord Denning MR).

16 [1971] 1 WLR 612 (CA), 615E.

17 'What is the test to see whether the occupier of one room in a house is a tenant or a licensee? . . . All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only a permission for himself to occupy the room, whether under a contract or not? In which case he is a licensee?': *Marchant v Chambers* [1977] 1 WLR 1181 (CA), 1185F (Lord Denning MR).

18 K Lewison, *Lease or Licence: The Law after Street v Mountford* (Longman Professional 1985) 5.

and signed a statement explaining that she understood the agreement to be only a licence and that it did not give rise to a tenancy under the Rent Acts. Nevertheless, she later sought to benefit from the Rent Acts' protections and Street sought an order for possession. The House was asked to decide whether the agreement gave rise to a tenancy despite both parties having clearly indicated their understanding that it was a licence.

Counsel for the occupier argued that the entering into a legal relationship is determined by the parties' intentions and that the content of a contract so entered into is entirely a matter for the parties. However, the intention of the parties is irrelevant in construing the legal effects of rights and obligations contained in the contract, which are entirely matters of law. This includes whether or not an agreement gives rise to a tenancy. Where a landlord, having an estate in the land, grants exclusive possession of that land to a rent-paying tenant then, at law, a tenancy has arisen and the parties cannot avoid its creation by the description which they give to their agreement. Counsel for the landlord, on the other hand, argued that while 'exclusive possession' may describe the legal right of an occupier to exclude the world, it may also describe the right of a contractual occupier to obtain an injunction to prevent the owner from entering the land in what would be a breach of the contract – which right would be held alike by a licensee and by a tenant. There being two possible types of exclusive possession, it is for the parties, by their contract, to agree which possession is being granted. Whether exclusive possession of a sort that creates a tenancy was granted must therefore be determined according to the intention of the parties.

Lord Templeman, delivering the only speech, reaffirmed the traditional view. He attributed the outcome of the more recent cases as being explicable by either the lack of intention to create legal relations, or the existence of 'special circumstances which prevent exclusive possession from creating a tenancy'.¹⁹ Lord Templeman agreed with Denning LJ's assertion in *Errington v Errington* that exclusive possession was not decisive,²⁰ but only because '[s]ometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy',²¹ such as that of 'vendor and purchaser, master and service occupier, or where the owner, a requisitioning authority, had no power to grant a tenancy'.²² Similarly, the absence of intention to create legal relations would negative the existence of a tenancy, even if there had been exclusive possession.²³

Thus, while parties were at liberty to contract and negotiate regarding the decision to contract,²⁴ the 'only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent'.²⁵ This is because 'the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement'.²⁶ If the parties intended to enter into legal relations, and provided that no special circumstances existed, then the only relevant question is whether there is exclusive possession for a term at a rent, as '[n]o other test for distinguishing between a contractual tenancy and a contractual licence appears to be

19 *Street v Mountford* (n 7) 822E.

20 *Ibid* 823E.

21 *Ibid* 826H.

22 *Ibid* 821B.

23 *Ibid*.

24 *Ibid* 819E.

25 *Ibid* 826G.

26 *Ibid*.

workable'.²⁷ If the test is met, then at law the relationship of landlord and tenant has been created: 'The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.'²⁸

A noteworthy aspect of Lord Templeman's speech is that no reliance was placed on any doctrine of land law. Other than the adoption of the High Court of Australia's ratio in *Radaich v Smith*,²⁹ no reference was made to the principle that the creation of the relation of landlord and tenant passes to the tenant a proprietary interest in the subject lands. The consequence of the absence of land law doctrine in *Street v Mountford* became clear in the case of *Bruton v London & Quadrant Housing Trust*.³⁰ Lambeth Borough Council had entered into an agreement to allow the Trust to use property belonging to the council to house homeless persons, in keeping with the Trust's charitable purposes. The Trust in turn allowed Bruton to occupy one of the flats in the property under a licence agreement. It was found that both parties intended to enter into a licence agreement only. The council was statutorily prohibited from disposing of any interest in property which it owned without the consent of the Secretary of State.³¹ It could therefore not have granted any proprietary interest in the property to the Trust, and the Trust in turn would not have had any estate out of which to grant a further proprietary interest to Bruton.

Nevertheless, the plaintiff sought to enforce repairing obligations which were statutorily implied into certain tenancies, and the question thus arose as to whether he occupied the flat by virtue of a tenancy rather than a licence. In deciding the question, the House held that the relationship of landlord and tenant was divorced from the doctrine of estates: while a lease generally does create a leasehold estate, this is dependent on whether there is a proprietary interest to pass on. If there is no such interest, then the lease does not cease to be a lease, it simply fails to create an estate.³² Having established the possibility of creating a tenancy devoid of proprietary interests, the House then simply adopted a straightforward analysis by applying the exclusive possession test: as Bruton enjoyed exclusive possession of his flat, then the relation of landlord and tenant existed between him and the Trust; the intention of the parties was irrelevant.³³

The *Bruton* judgment, and its creation of 'non-proprietary tenancies', has been the subject of some academic controversy.³⁴ In the Republic of Ireland, the Law Reform Commission has expressly doubted the decision.³⁵ Nevertheless, as far as the jurisdiction of England and Wales is concerned, the relation of landlord and tenant now arises as a

27 Ibid 824E.

28 Ibid 819F.

29 'What then is the fundamental right that a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right to exclusive possession is a tenancy and the creation of such a right is a demise': *Radaich v Smith* (1959) 101 CLR 209, 222 (Windeyer J), cited at 827C of *Street v Mountford* (n 1).

30 [2000] 1 AC 406 (HL).

31 Other than to create a secured tenancy with a residential occupier: Housing Act 1985, s 32.

32 *Bruton* (n 30) 415B.

33 Ibid 413G.

34 See e.g. M Dixon, 'The Non-Proprietary Lease: The Rise of the Feudal Phoenix' (2000) 59 Cambridge Law Journal 25, cf J P Hinojosa, 'On Property, Leases, Licences, Horses and Carts: Revisiting *Bruton v London & Quadrant Housing Trust*' [2005] Conveyancing 114.

35 Law Reform Commission, *Consultation Paper on General Law of Landlord and Tenant* (LRC CP 28–2003) para 1.18.

matter of law where exclusive possession has been granted for a term. The intentions of the parties are only relevant in deciding, first, whether the parties intended to create legal relations and, second, whether their agreement granted exclusive possession.³⁶ No other intention is relevant.

Section 3 of Deasy's Act

Any discussion of the law in either jurisdiction in Ireland must begin with the Landlord and Tenant Law Amendment (Ireland) Act (universally known as Deasy's Act after the law officer responsible for its introduction),³⁷ specifically s 3. The provision reads as follows:

The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent.

As first blush, this provision appears to constitute a radical shift in the law of landlord and tenant, seemingly removing from it any land law considerations and inscribing it wholesale within the scope of contract law. However, even from other provisions within the statute itself, it would appear that such a radical change was not the intention of the legislature.³⁸ Part of the difficulty in reconciling subsequent Irish case law on the nature of tenancies (especially when contrasted with licences) is due to the fact that the true significance of the section has eluded most attempts at a satisfactory explanation.

This becomes apparent from the early controversy over the interpretation of the section in the decades following its enactment. One line of authorities seems to espouse the radical view. An early example of this can be seen in an *obiter dictum* by Pigot CB, who was of the view that s 3 'creates a new relation, perfectly distinct from that which existed before.'³⁹ In a later case, Christian J stated that a written agreement (made after the passing of the Act) that one person would hold land from or under another should be understood by the courts as signifying 'that the new statutable relation of landlord and tenant should exist, – a relation discharged of the element of tenure and reversion, and resting exclusively in contract'.⁴⁰ In a case concerning an ejectment for non-payment of rent, where a question arose as to whether the landlord had sufficient title, Fitzgerald J stated that since Deasy's Act 'the party entitled to the rent need not have any legal estate in the premises to maintain an ejectment' because '[t]he relation of landlord and tenant is regarded as springing from contract and not from tenure'.⁴¹ In a later case, Fitzgerald J said that '[t]he relation of landlord and tenant in this country rests not, as in England, on tenure as at common law, but on contract alone'.⁴² Similarly, in a forceful statement,

36 See e.g. *Esso Petroleum Co Ltd v Fumegrange Ltd* [1994] 2 EGLR 90 (CA).

37 J C W Wylie, *Landlord and Tenant Law* (3rd edn, Bloomsbury 2014) para [1.08]; but Palles CB refers to 'what we are told not to call Deasy's Act' in *Irish Land Commission v Holmes* (1898) 32 Ir LTR 85 (QB), 86.

38 E.g. s 4 refers to the 'relation of landlord and tenant' in the context of an 'estate or interest', clearly a foundational land law concept.

39 *McAreevy v Hannan* (1862) 13 ICLR 70 (Exch), 81. It is interesting to note that, having been elevated to the Bench, Deasy B expresses no opinion on whether the Act which he introduced to Parliament was retrospective (86).

40 *Chute v Bustweed* (1866) 16 ICLR 222 (Exch Cham), 247.

41 *Hanson v Burke* (1876–77) 10 IRCL 322 (QB), 325.

42 *Russell v Moore* (1881–82) 8 LRI 318 (QB), 330. The decision was reversed on appeal, (1881–82) 8 LRI 332 (CA), but Fitzgerald J's *dictum* seems to have been approved by Palles CB (339).

Madden J explained that s 3 of Deasy's Act 'effected a radical change in the principles on which the relation of landlord and tenant was founded'.⁴³

The radical approach, however, was never unanimously endorsed by the courts. As early as 1865, Christian J rejected a submission by counsel that the entirety of the law of landlord and tenant was now to be found within Deasy's Act.⁴⁴ In *Gordon v Phelan*,⁴⁵ a tenancy agreement provided that if the rent was in arrears the landlord could only distrain after 21 days, rather than the day after rent was due, which was the rule at common law.⁴⁶ The landlord attempted to distrain after only nine days, following the common law rule, and the tenant sued for trespass, arguing that the common law rules that had governed the incidents of landlord–tenant relation had been abolished by Deasy's Act and that the right of distress could only survive by contractual agreement. Deciding against the tenant on that point, Fitzgerald B held that the common law rules survived Deasy's Act:

Section 3 of the Landlord and Tenant (Ir.) Act, 1860, shows an intention that something there called the relation of landlord and tenant should continue to exist, but that from that time it was to continue, not as founded on tenure, but as founded on the contract of the parties. This being so, I am of the opinion that the relation must continue with the incidents it had before.⁴⁷

Thus, Deasy's Act was not a revolutionary reworking of the law governing landlord and tenant, since the common law rules applying to tenancies continued in full force (except where expressly modified by the Act). Rather, that which changed was the manner in which the relation arose: no longer as a result of the operation of the rules concerning tenure, but instead out of the intentions of the parties.

Very few cases have considered the interpretation of s 3 of Deasy's Act in the twentieth century. In *Lewiston v Somers*,⁴⁸ in which a landlord sought to recover rent arrears, a tenant no longer in possession disputed the validity of the landlord's title. In a dissenting judgment, Meredith J (Geoghegan J concurring) was of the opinion that since s 3 deemed the relation of landlord and tenant to be founded on the contract of the parties, the question of the validity of a landlord's title did not arise.⁴⁹ It is worth noting that Meredith J considered the meaning of 'deemed' within the section: 'the relation is "deemed" – that is to say, whatever be the position at common law – to be founded on the contract of the parties'.⁵⁰ In *Todd v Unwin*,⁵¹ the Court of Appeal in Northern Ireland was asked to decide whether a deed constituted a sublease or an assignment. Counsel for the lessors argued that the second clause of s 3 operated independently from the first (so as to read 'the relation of landlord and tenant . . . shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent') and that therefore, as long as there is an agreement to hold land at a rent, a tenancy inevitably arises and the intentions of the parties are irrelevant. The Court of Appeal rejected this argument and adopted the Lands Tribunal's analysis of

43 *O'Sullivan v Ambrose* (1893) 32 LRI 102 (QB), 107.

44 *Bayley v Marquis Conyngham* (1865) 15 ICLR 406 (Comm Pl), 415–17.

45 (1881) 15 Ir LTR 70 (Exch Div).

46 On the remedy of distress, see Wylie (n 37) [12.15]–[12.24].

47 *Gordon v Phelan* (n 45) 72.

48 [1941] IR 183 (SC).

49 Ibid 203. The majority judges did not refer to Deasy's Act. The effect of Meredith J's opinion would have been to abolish tenancies by estoppel; there does not appear to be any support for this proposition from other Irish cases: Wylie (n 37) [4.48] fn 365.

50 *Lewiston v Somers* (n 48) 203.

51 [1994] NIJB 230 (CA).

s 3 as constituting 'a statutory intervention to allow the parties to reflect their intention'.⁵² Thus, the starting point under s 3 is to decide whether the parties intended to create the relation of landlord and tenant and only if this is established is the second clause of the section operationalised. Other modern cases in which s 3 has been at issue have concerned the distinction between a lease and a licence and will be considered later.

Though judicial debate over the significance of s 3 receded after the end of the nineteenth century, the academic debate has continued uninterrupted. Some commentators have expressed regret that the full implications of basing the relation of landlord and tenant have never been realised.⁵³ Nevertheless, it is now too late to reconsider 150 years of case law on the matter, and it is unlikely that the section can ever be interpreted more expansively than it has been. Others, in contrast, would further restrict the interpretation of the provision. Two such interpretations have been advanced: (a) that Deasy's Act simply represents an alternative means of creating the relation of landlord and tenant, and that it operates in parallel to and has not abolished the common law rules, or (b) that the sole purpose and effect of s 3 of the Act was to reverse the decision in *Pluck v Digges*.

Proponents of the first view effectively argue that the definition of a tenancy given in s 3 of Deasy's Act applies only to tenancies created under that Act, and that it is still possible, in parallel, to create common law tenancies outwith Deasy's Act. Thus, Pearce and Mee argue that, in view of the requirement for rent under the Act, the better understanding of the section is that 'it is inclusive rather than exclusive, clarifying one case in which a lease or tenancy may exist, so that a rent-free holding may create a leasehold interest'.⁵⁴ The proposition is advanced most forcefully by Montrose, who points out that because the section contains two grammatically independent clauses, there may be situations in which the relation of landlord and tenant might be compatible with one of the clauses and not with the other; in such cases he argues that the courts would likely recognise the existence of the relation, and that the way in which such recognition can be reconciled with existing (contradictory) case law is to hold that the relation arose by the operation of the common law.⁵⁵

The first scenario that he suggests is one where two parties enter into an agreement to form the relation of landlord and tenant, but do not reserve a rent: under the first clause of the section the relation would be recognised, but the second clause requires the payment of rent. Montrose recognises that the creation of the relation of landlord and tenant in this case would be difficult to reconcile with *McAreavy v Hannan* (where the absence of rent led to the absence of the relation under s 3),⁵⁶ but argues that '[f]or some practical purposes' the courts would still hold that it existed.⁵⁷ This proposition has been displaced by *Northern Ireland Renewables Ltd v Carey*, where the Court of Appeal expressed

52 Ibid 234B (Carswell LJ citing HHJ Gibson).

53 See Dowling (n 5) paras 3.26–7; see also Land Law Working Group, *The Law of Property* (vol 1, Final Report, HMSO 1990) para 4.2.4.

54 R A Pearce and J Mee, *Land Law* (3rd edn, Round Hall 2011) 161. See also T B Hadden and W Trimble, *Northern Ireland Housing Law* (SLS Legal Publications 1986) 27 and A Lyall (with A Power), *Land Law in Ireland* (3rd edn, Round Hall 2010) 594.

55 J L Montrose, 'The Relation of Landlord and Tenant' (1939) 3 Northern Ireland Legal Quarterly 81, 89–90.

56 A demised property to B (the mortgagee), and A and B granted a lease to C, with the rent being payable to A. Fitzgerald B (Hughes and Deasy BB concurring) held that the relation of landlord and tenant did not exist between A and C because C did not hold the land under A, and that the relation did not exist between B and C because no rent was payable to B: *McAreavy* (n 39) 85.

57 Montrose (n 55) 89.

the view that Deasy's Act created a statutory requirement for rent whether a tenancy was created under the Act or under the common law.⁵⁸

The second scenario is one where the parties do not propose to create the relation, but the agreement provides for the holding of land and the payment of rent: Montrose argues that under the second clause the relation of landlord and tenant would arise irrespective of the intentions of the parties, and that such a relation would be recognised by the courts. However, this scenario has since been decided by the courts in *Todd v Unwin*, which held that the relation of landlord and tenant does not arise automatically from the payment of rent in respect of land; indeed, *Todd v Unwin* is authority that the two clauses of s 3, though grammatically independent, cannot be read in isolation one from the other.⁵⁹

Yet, it is noteworthy that in both *Todd v Unwin* and *Northern Ireland Renewables Ltd v Carey* the Court of Appeal remained agnostic as to the possibility of creating the relation under either the common law or Deasy's Act. In *Todd v Unwin* the court agreed with the Lands Tribunal finding that s 3 is 'a permissive or enabling provision, which extends the situations in which the relationship of landlord and tenant is created and does not purport to define them'.⁶⁰ Although in *Northern Ireland Renewables Ltd v Carey*, the court expressed its view that the possibility of creating the relation both within and without the Act was 'hardly a satisfactory position', it felt bound by *Todd v Unwin* and held that correction of the position was a matter for the legislature rather than the courts.⁶¹

Whilst doctrinally unsatisfactory, the problem created by the existence of two routes to a tenancy is largely academic. The only practical difficulty was whether a rent was necessary,⁶² and this has now been resolved. There are no reported cases in either Irish jurisdiction where a tenancy has arisen as a result of common law since Deasy's Act, and we have seen that the effect of *Street v Mountford* when read with *Bruton v London Quadrant Housing Trust* has been to create a new basis for the relation that is not founded in the common law principles relating to land law.

The second view – that s 3 of Deasy's Act is limited to effecting a reversion of *Pluck v Digges* – is perhaps best articulated by Wallace, in an article in which he also analyses the first five years of post-*Street v Mountford* case law.⁶³ Wallace argues that the second part of the section, which deems the relation of landlord and tenant to exist where there is an agreement to hold land for a rent, 'appears to negative the paramountcy of subjective intention', and that therefore the principal purpose was only to 'legislatively overrule' the House of Lords and enable the creation of reversionless leases.⁶⁴ We have seen that it has since been decided that the second part of the section is dependent on the first and is only engaged if the intentions of the parties were to create the relation of landlord and tenant. However, the section also clearly states that 'a reversion shall not be necessary', and it is plain that one of the principal immediate effects of the enactment was to overturn *Pluck v Digges*. Wallace's thesis must therefore be accurate, yet it is submitted that it is incomplete.

58 *Northern Ireland Renewables Ltd v Carey* (n 6) [50]–[54].

59 *Todd v Unwin* (n 51) 234D.

60 *Ibid* 233E.

61 *Northern Ireland Renewables Ltd v Carey* (n 6) [23] (Weatherup LJ). In the Republic of Ireland the Irish Law Reform Commission is strongly critical of the ambiguity (n 35) para 1.17. The draft Landlord and Tenant Law Reform Bill 2011 (published by the Department of Justice but not yet introduced in the Dáil) re-enacts a version of s 3 with universal application (head 10).

62 Wylie (n 37) para 2.19.

63 H Wallace, 'The Legacy of *Street v Mountford*' (1990) 41 *Northern Ireland Legal Quarterly* 143, 146–8.

64 *Ibid* 148.

Effectively, Wallace's view is that the mischief that the Act sought to remedy was the House of Lord's decision in *Pluck v Digges*; while this is accurate, it does not represent a complete picture: the outcome in *Pluck v Digges* was a result of a wider confusion that then existed about the conceptual basis for the relation of landlord and tenant and it is this confusion that Deasy's Act sought to remedy. In other words, while the 'mischief' of *Pluck v Digges* was indeed one of the targets of the legislation, it was subsumed within the wider mischief of conceptual confusion and it was this wider mischief that the Act sought to cure. In fact, this is hinted at within the section itself: were its chief aim to abolish the need for a reversion, a much more circumspect phrasing could have been adopted.⁶⁵ Thus, in order to understand the purpose of s 3 it is necessary to understand the confusion that led to *Pluck v Digges*, and in order to understand that confusion it is necessary to understand some of the history of the concept of landlord and tenant in Ireland.

The two foundational concepts of the law of real property in common law countries are the doctrine of estates and the doctrine of tenure.⁶⁶ The doctrine of estates governed the object of what was 'owned' and the doctrine of tenure governed the manner of the ownership. Thus, land itself could not be owned, but only an estate in the land: the largest of which (the fee simple), for example, extended from below the ground to the air above, extended in time indefinitely, and could be subdivided, both physically and temporally.⁶⁷ The doctrine of tenure governed the manner in which an estate was held: in principle, the king was the paramount lord of all land in the kingdom, and in theory the occupant of any given estate could trace his ownership, or tenure, of that estate up through a complex pyramid back to the king.⁶⁸ Generally, the type of tenure under which one owned land reflected the estate that was held.⁶⁹ The closest equivalent to the landlord and tenant relation that existed within this feudal scheme of tenure and estates was that of copyhold,⁷⁰ but this gradually died out in England and probably never extended to Ireland.⁷¹ The expansion of the pyramid was halted by *Quia Emptores* (18 Edw 1, c 1), which prohibited further subinfeudation,⁷² and eventually all types of tenure other than freeholdings were abolished by the Tenures Abolition Act (Ireland) 1662 (14 & 15 Chas 2, sess 4, c 19).

The importance of the above concepts lies in the fact that the relation of landlord and tenant arose entirely outside the feudal system,⁷³ and initially constituted a mere contractual relationship.⁷⁴ However, to base the occupation of land entirely within the contractual sphere was manifestly unsatisfactory: as the tenant had no security in the land there was no incentive to care for it, which could lead to overexploitation, and as there was no privity of estate neither the landlord nor the tenant could pass their interests along to their inheritors. Most problematic, though, was the extremely unequal nature of the relationship: the landlord could end the tenancy at any time and, as the tenant only had

65 Cf Dowling (n 5) para 3.26. In fact such a Bill was introduced in the House of Lords but ultimately failed: see HL Bill (1850) 551, cl 4.

66 On the distinction, see J C W Wylie, *Irish Land Law* (5th edn, Bloomsbury 2013) paras [2.04]–[2.05]. On the doctrine of tenure generally, see *ibid*, ch 1; on the doctrine of estates, ch 4.

67 P Bordwell, 'The Common Law Scheme of Estates' (1933) 18 *Iowa Law Review* 425, 428.

68 Wylie (n 66) para 2.07.

69 *Ibid* para 4.03.

70 W S Holdsworth, *A History of English Law* (vol 7, Methuen 1925) 296–312.

71 Wylie (n 66) para 2.34.

72 Though in Ireland a measure of subinfeudation continued under '*non obstant* *Quia Emptores*' grants that led to the evolution of the fee-farm: Wylie (n 66) para 4.60.

73 C Sweet (ed), *Challis: Law of Real Property* (3rd edn, Butterworth 1911) 63.

74 Wylie (n 37) para 1.02.

personal rights against the landlord, he could not hope to recover the land.⁷⁵ The common law intervened gradually, and over time established a set of rules that governed the relation. The turning point came with the action of ejectment. Until then, if the nature of an interest in land was in dispute, the parties' only recourse was to one of the real actions, which settled the question.⁷⁶ As the law did not recognise a tenant as having any interest in the land, the real actions were not open to him.⁷⁷ Ejectment arose out of an action for trespass, which was personal, rather than real (i.e. relating to property) in nature; it eventually evolved so as to enable a tenant to recover the term of his tenancy and re-enter the land.⁷⁸ The availability to a tenant of an action which enabled him to recover the land thus signified that the tenant had acquired an interest in the land: the creation of the relation of landlord and tenant therefore also now created an estate, which came to be known as the leasehold estate.⁷⁹

Thus the leasehold estate was grafted into the doctrine of estates and it is from here that the confusion can be traced. Indeed, the leasehold estate was never fully integrated into realty but remained personalty, though with proprietary interests: it therefore acquired the label 'chattel real',⁸⁰ which might be seen as a contradiction in terms. Nevertheless, an interest in land that was recoverable by action must be an estate, which presented a conceptual problem: by what tenure, if any, was a leasehold estate held? Generally, tenure reflected the estate that was held, but as a leasehold estate had been grafted into the scheme of estates it was unclear to which tenure it corresponded. This was further complicated by the recognition that *Quia Emptores* had prohibited the creation of inferior tenures, but that a leasehold was created by granting an inferior estate out of a superior one: how was it possible to create an inferior estate if it was impossible to create an inferior tenure?⁸¹ It seems, therefore, that the evolution of the landlord and tenant relation sat on an unstable conceptual foundation: having acquired proprietary interests, it was no longer purely contractual, but neither did it fit into the well-defined scheme of tenure and estates. As is readily apparent, this conceptual difficulty was principally an academic one: it did not prevent the operation of the law, nor did it inhibit the creation of leaseholds. However, the potential remained for situations to arise where the solution to a legal conflict was only to be found by resorting to first principles, which in the case of the relation of landlord and tenant would prove to be a difficult task.

It was against this conceptual background that *Pluck v Digges* was considered. Pluck was in arrears on his rent, and Digges distrained under the Distress for Rent Act (Ireland) 1751 (25 Geo 2 Ir c 13). Pluck then sued in replevin⁸² for the recovery of the cattle that had been seized. Digges himself had leased the property from the head landlord, and had then leased his entire interest to Pluck, who argued that as Digges had not retained a reversion in the land the agreement in law constituted an assignment, rather than a lease. Digges was thus an exemplar of the Irish phenomenon of the middleman: a practice had

75 W S Holdsworth, *An Historical Introduction to the Land Law* (Clarendon Press 1927) 49.

76 Holdsworth (n 70) 4–19, especially 16.

77 Holdsworth (n 75) 19–20.

78 Ibid 71–3.

79 *Megarry and Wade* (n 2) para 4–019.

80 Wylie (n 37) para 1.04.

81 Wylie points out that the question of tenure in relation to leaseholds has never been fully resolved: *ibid*, para 1.02, fn 6.

82 The 'process to obtain a redelivery to the owner of chattels which have been wrongfully distrained or taken from him', *Halsbury's Laws* (vol 6, 5th edn, LexisNexis 2012), para 409. Note that the remedy of distress was abolished by the Judgments (Enforcement) Act (NI) 1969, s 122 (re-enacted by Judgments Enforcement (NI) Order 1981, art 143).

arisen in Ireland where the landed classes let out their estates to middlemen, who in turn parcelled out and sublet the land, generally letting out their entire interest (not retaining a reversion).⁸³ As vast swathes of land were held under middlemen leases, the outcome of the case would therefore have wide consequences on the validity of leases throughout Ireland. The decision that a reversion was necessary to the relation of landlord and tenant was ultimately made by the House of Lords,⁸⁴ but the defendants apparently having presented no arguments the judgment of the House is minimal, and the *ratio* must therefore be found in the judgments given in the Exchequer Chamber.⁸⁵

Ten judgments were given in the Exchequer Chamber, with a majority of seven judges holding that a reversion was not necessary. Two strands of argument are evident from these judgments: that an instrument should be construed according to the intentions of the parties even if a rule of law would lead to a different conclusion, and that the legislation should be interpreted purposively. Thus, Torrens J said that the legislation expressed 'an intention to extend the provisions to other persons than those who stand in the precise, strict, legal relation of landlord and tenant',⁸⁶ and that therefore the tenant should not be allowed to go against his contractual agreement.⁸⁷ Moore J was of the view that the legislature had used the terms 'tenant' and 'demise' generally and did not contemplate 'tenure in its strict sense' and that therefore, 'under this statute it is the nature of the contract, and not of the estate that we are to look to'.⁸⁸ Smith B stated that 'to refuse to the party the benefits which the statute has conferred, would be to place him in a worse state than the party with whom he contracted intended, and to hold that the statute meant to place him in that worse state'.⁸⁹ Lord Plunket CJ, who gave the most developed judgment, argued that a party should not be allowed to contradict an instrument that he has executed:⁹⁰ the purpose of the Act was to remove impediments to the remedy of distress where there was enjoyment of the land under an instrument that provided for a right to distrain, no matter what the nature of the instrument was.⁹¹ Therefore, 'it still is competent to a court of law to look into the instrument for the intention of the parties, and, if they find that construing it to be an assignment would defeat their manifest intention, to refuse to give it such an effect',⁹² especially given the potential impact this would have in Ireland.⁹³

The three dissenting judges, whose judgments must be taken to represent the view of the House of Lords, focused on the objective effect of the instrument according to common law rules. Vandeleur J stated that the difference between a sublease and an assignment is the existence of lack of a reversion, that the granting of an entire interest being less than a fee simple cannot create tenure, and that the intentions of the parties cannot displace the law.⁹⁴ Jebb J held that if a grant did not include a reversion, then at law the instrument constituted an assignment and not a lease, even if it was in the form of the lease, and that deeds should be construed based on their legal effects and not on

83 See Montrose (n 55) 83, see also Wylie (n 66) para 1.35.

84 *Pluck v Digges* (1831) 5 Bli NS 31, 5 ER 219 (HL).

85 *Pluck v Digges* (1829) 2 Hud & B 1 (Exch Cham).

86 *Ibid* 20.

87 *Ibid* 23.

88 *Ibid* 61–2.

89 *Ibid* 64.

90 *Ibid* 71.

91 *Ibid* 77.

92 *Ibid* 82.

93 *Ibid* 87.

the intention of the parties.⁹⁵ Johnson J was of the view that a lease for lives that grants an entire estate creates an assignment even if the instrument shows a different intention, because intentions ‘cannot prevail against a rule of law’.⁹⁶ He therefore concluded: ‘I cannot call that person landlord who has no estate in the land.’⁹⁷

While *Pluck v Digges* settled the legal question of whether a reversion was necessary to the relation of landlord and tenant, it did not silence the controversy: the issue arose again in *Porter v French*.⁹⁸ There, Brady CB stated that ‘the course of opinion and decision ever since [Quia Emptores] has been, to hold, that to constitute tenure – in other words, to create the relation of landlord and tenant – a reversion is necessary in all cases’.⁹⁹ He rejected the submission that the relation could arise by contract, as did Pennefather and Richards BB.¹⁰⁰ This conclusion, however, was questioned by Lefroy B who noted that the legislation referred both to landlord and ‘minutes or contracts in writing’ as well as to lessor and lessee, and that it would appear that the legislature intended that the remedy therein should apply not only to the relation of lessor and lessee, which could only arise at common law, but also to the relation of landlord and tenant, which could be created by contract.¹⁰¹

It is therefore apparent that the debate over the necessity of a reversion was but a symptom of a wider judicial controversy over whether the relation could arise only by operation of the common law, or whether it might also arise from the agreement of the parties. That this controversy over its conceptual foundations remained current after the above two cases is shown by an 1851 report into the law of landlord and tenant, which began with an analysis of the degree to which the relation was founded in contract as opposed to feudal law.¹⁰² The authors note that ‘[t]here is ground to fear, that, by confusing those different aspects of the subject, not only has error been propagated, but the wild theories that are afloat as to the rights of property have been countenanced’.¹⁰³ This report led directly to a Bill the following year to amend the Irish law of landlord and tenant which, though ultimately unsuccessful,¹⁰⁴ in turn served as the basis for Deasy’s Act, including a virtually identical third section.¹⁰⁵

Clearly, then, s 3 of Deasy’s Act was intended not simply as a legislative reversal of a controversial House of Lords decision (though it also served that purpose), but primarily as a clarifying measure that served to settle, once and for all, the conceptual foundations of the landlord–tenant relation. In that context, the words ‘shall be deemed’ evidence of a recognition that, according to the rules of the common law scheme of tenure and estates, the relation of landlord and tenant could not arise solely out of a contractual agreement, but that such a relation would henceforth be recognised on contractual terms notwithstanding the fact that, objectively speaking, the relation did not exist and could

94 Ibid 29–34.

95 Ibid 40.

96 Ibid 57.

97 Ibid 63.

98 (1846–47) 9 ILR 514 (Exch).

99 Ibid 539.

100 Ibid 540 (Brady CB), 541 (Pennefather B), 544 & 547 (Richards B).

101 Ibid 555; nevertheless Lefroy B felt bound by *Pluck v Digges* and concurred in the result.

102 W D Ferguson and A Vance, *The Tenure and Improvement of Land in Ireland, Considered with Reference to the Relation of Landlord and Tenant, and Tenant-Right* (E J Milliken 1851).

103 Ibid 2.

104 The Landlord and Tenant Law Amendment (Ireland) HC Bill (1852–53) [796]. See Dowling (n 5) 54.

105 Ibid 58.

not have existed.¹⁰⁶ Combined with the effect of the nineteenth-century cases (which determined that the overall law of landlord and tenant had not been affected by the section), it becomes apparent that the import of s 3 of Deasy's Act was mainly theoretical. This theoretical nature would explain the scarcity of case law relying on the section; however, this does not indicate that its merit was merely academic: on the contrary, it has been shown that only by clarifying the conceptual basis for the relation was the question of reversion resolved and, it is submitted that, occasionally, other questions will arise that go to the heart of the definition of the landlord–tenant relation, and which therefore require a conceptual answer. The 'lease vs licence' debate is just such a question and it is striking to note the degree to which the arguments that were recurrent in the reversion cases (objective law vs contractual agreement) have been replicated in the more recent lease vs licence cases.

Lease vs licence: Republic of Ireland

The starting point for a discussion of the Irish cases that concern the distinction between a lease and a licence must be *Allen & Sons v King*, in which a question arose as to whether a licence to affix bills to a cinema wall was in fact a lease.¹⁰⁷ The defendant, who was the cinema owner, had granted the licence to the plaintiffs, but had subsequently leased the cinema to a company which then revoked the licence. As there was no privity of contract between the plaintiffs and the company, they sued the owner for breach of contract. The owner argued that the licence was in fact a lease of an incorporeal hereditament,¹⁰⁸ which was then assigned to the company and that therefore the company was liable. At first instance, Gibson J resolved the question by construing the intention of the parties, and found that it was unlikely that they had intended to create the relation of landlord and tenant,¹⁰⁹ a conclusion that was endorsed by the Divisional Court.¹¹⁰ Similarly, the Court of Appeal found that as the parties had no intention of creating a lease: 'I am sure that the parties . . . would have been very much surprised if they thought that the contract which they were entering into was anything more than a licence.'¹¹¹ When the case came to the House of Lords, Lord Buckmaster LC stated that the references in the agreement to the parties as licensor and licensee had no bearing on the construction of the document, but that 'it is the description in the body of the document of what the parties intended that the document should be' that was determinative.¹¹² *Allen & Sons v King*, therefore, is a marker for the weight given to parties' intentions in determining whether an agreement is a lease or a licence. However, as there was no question of exclusive occupation, the decision is of little usefulness in analysing the comparative weight given to the parties' intentions or exclusive occupation.

The first case in the Republic of Ireland where the importance of exclusive possession was considered is *Gatien Motor Co Ltd v Continental Oil Company of Ireland Ltd*.¹¹³ Gatien Motor Co held the lease for a petrol station that was due to expire. Continental refused to renew the lease unless Gatien vacated the premises for a week; this was to prevent Gatien

106 See Meredith J in *Leviston v Somers* (n 48).

107 [1915] 2 IR 213 (KB).

108 As permitted by Deasy's Act, s 1.

109 *Allen & Sons v King* (n 107) 220.

110 Ibid 244.

111 *Allen & Sons v King* [1915] 2 IR 448 (CA), 478 (Molony LJ), see also 450 (O'Brien LC), 458 (Ronan LJ).

112 *King v Allen & Sons* [1916] 2 AC 54 (HL), 59. Note that in a brief concurring speech Earl Loreburn held that the agreement could not be a lease because it did not create any interest in land (62).

113 [1979] IR 406 (SC).

from acquiring a statutory right to a tenancy under the Landlord and Tenant Act 1931. Gatien was concerned that a week's closure would impact the goodwill of the business and a compromise was reached whereby Gatien was allowed to remain in possession of the petrol station under a caretaker's agreement during the intermediary period. Both parties understood and acknowledged that the caretaker's agreement did not constitute a contract of tenancy. At the expiration of the second tenancy period, Gatien gave notice of its intention to claim a statutory tenancy. Whether an entitlement to such a tenancy existed turned on whether the caretaker's agreement legally constituted a tenancy.

Gatien argued that as it had had exclusive possession of the premises during the caretaker period the caretaker's agreement must be viewed as having created an implied tenancy. This was firmly rejected by Griffin J, who said:

Whilst exclusive possession is one of the factors to be taken into account in determining whether an implied tenancy exists, it is not a decisive factor. To find whether it was intended to create the relationship of landlord and tenant, one must look at the transaction as a whole and at any indications that are to be found in the terms of the contract between the two parties.¹¹⁴

While Griffin J relied on the English case law,¹¹⁵ he also cited s 3 of Deasy's Act as stating that 'the relationship of landlord is deemed to be founded "on the express or implied contract of the parties"', and that 'it would be doing violence to language to hold that an implied contract could exist on the facts of this case', especially as the agreement had been at arm's length.¹¹⁶ Kenny J agreed, stating that 'exclusive possession . . . is undoubtedly a most important consideration but it is not decisive.'¹¹⁷ While the existence of the relationship could not be determined by the labels the parties put on their agreement, '[a]ll the terms of the document and the circumstances in which it was entered into have to be considered'.¹¹⁸ Thus, *Gatien* showed that, while the Supreme Court would consider the existence of exclusive possession as a potential factor indicating a tenancy, it was not prepared to allow exclusive possession to displace the intention of the parties.

The distinction between a lease and a licence was again considered by the Supreme Court in *Irish Shell and BP Ltd v John Costello Ltd (No 1)*.¹¹⁹ The defendants operated a petrol station under an agreement from the plaintiffs, termed a licence. A number of successive agreements had been signed and a key consideration for the majority was the inclusion in earlier agreements of a clause expressly precluding the granting of exclusive possession or the creation of the relation of landlord and tenant; this clause was omitted from the last two agreements. Relations between the parties soured and the plaintiffs demanded possession of the premises which the defendants denied, claiming that the agreement amounted to a tenancy. Griffin J said that '[o]ne must look at the transaction as a whole and at any indications that one finds in the terms of the contract between the two parties to find whether in fact it is intended to create the relation of landlord and tenant or that of licensor and licensee'.¹²⁰ While Griffin J recognised that 'the right to exclusive possession is no longer conclusive that a tenancy exists', the absence of the clause precluding exclusive possession, coupled with his finding of actual exclusive possession,

¹¹⁴ Ibid 414.

¹¹⁵ *Shell-Mex and BP Ltd v Manchester Garages* [1971] 1 WLR 612 (CA).

¹¹⁶ *Gatien Motor Co v Continental* (n 113) 415.

¹¹⁷ Ibid 420.

¹¹⁸ Ibid.

¹¹⁹ [1981] ILRM 66 (SC).

¹²⁰ Ibid 70, citing *Shell-Mex v Manchester Garages* (n 115) and *Gatien Motor Co v Continental Oil* (n 113).

appears to have played a key role in his decision.¹²¹ However, it should also be noted that Griffin J did not treat exclusive possession as determinative, but merely as 'one of the important indicators',¹²² alongside four other factual circumstances which he said also indicated the existence of a tenancy.¹²³ Griffin J also implicitly recognised Deasy's Act as the legislative basis governing the creation of the relation of landlord and tenant, recognising the periodic payments made by the defendants as constituting rent for the purposes of the Act.¹²⁴ *Irish Shell (No 1)* thus treats exclusive possession as an important, but not conclusive, factor in determining the intention of the parties. As Henchy J observed in follow-up litigation involving the same parties: 'In all cases it is a question of what the parties intended, and it is not permissible to apply an objective test which would impute to the parties an intention which they never had.'¹²⁵

The Supreme Court cases have been considered in a number of Irish High Court cases. In *Governors of the National Maternity Hospital Dublin v McGouran*,¹²⁶ there was a dispute as to whether a coffee shop operated by McGouran in the hospital was to be regarded as a lease or a licence. An analysis of the agreement and of the facts led the court to find that the defendant had never had exclusive possession of the premises, and that the acceptance by McGouran of clauses in the agreement that precluded exclusive possession 'must be taken as an acknowledgment that the hospital had the right to use the premises irrespective of whether they sought to exercise that right or not'.¹²⁷ Thus, the absence of exclusive possession showed that the parties had never intended to enter into a tenancy agreement: 'there are clauses in the agreements which make it clear beyond doubt that what is being granted by the hospital and taken by Mrs McGouran is no more than a licence'.¹²⁸

In *Texaco v Murphy*, the court was confronted with a discrepancy between the substance of written agreements and the defendant's understanding of what he had been offered.¹²⁹ The defendant was successful in his application to become the operator of a petrol station and was told he would be granted a tenancy. When he was presented with the written agreement, this was only in the form of a three-month licence. The defendant asked for the lease and was told that the licence was a temporary document until the lease was prepared. The defendant signed a series of licence agreements every three months, on each occasion requesting a lease and on each occasion being told that the lease was being prepared. During this time the company's policy was to grant licences only, and it was fully aware that no lease was being prepared and that no lease would be offered to the defendant. Barron J held that the defendant had entered into possession of the premises as a tenant, as there had been an unconcluded agreement until the entry into possession. The existence of exclusive possession was a key factor in arriving at this decision, Barron J holding that it was 'one of the important indicators that a tenancy and

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid 71.

¹²⁴ Ibid, Kenny J dissenting on the existence of rent.

¹²⁵ *Irish Shell and BP Ltd v John Costello Ltd (No 2)* [1984] IR 511 (SC), 517. The question was under what capacity had the defendants continued in occupation after the expiration of the lease, the court deciding that the defendants were either under tenants at will (O'Higgins CJ) or licensees (Henchy J) and that the plaintiffs were entitled to possession (McCarthy J dissenting).

¹²⁶ [1994] 1 ILRM 521 (HC).

¹²⁷ Ibid 528 (Morris J).

¹²⁸ Ibid 527.

¹²⁹ *Texaco (Ireland) Ltd v Murphy t/a Shannonway Service Station* (HC, 17 July 1991).

not a licence has been given'.¹³⁰ Barron J noted that '[t]he Plaintiff had admitted to the Defendant that he was entering as a tenant under a lease which was being prepared'.¹³¹ Thus, Barron J held for the defendant on the basis that his entry into exclusive possession of the premises was conclusive of the parties' intentions to create a tenancy rather than a licence, even though the plaintiff's intention was only purported and not actual.

In *Kenny Homes & Co Ltd v Leonard*,¹³² the plaintiff had bought land previously occupied by the defendant as a filling station and car park under a hiring and licensing agreement with Irish Shell Ltd. When the plaintiff sought to terminate that relationship the defendant argued that the agreement was in fact a tenancy. Applying the principles in *Irish Shell (No 1)*, the court examined the terms of the contract in order to decide whether the parties 'in fact intended to create the relationship of landlord and tenant rather than that of licensor and licensee'.¹³³ By reference to the terms of the agreement the court found that '[q]uite explicitly . . . the relationship of landlord and tenant was not to be created', and that this was confirmed by the court's finding that the parties never intended to grant exclusive possession. The court followed the approach adopted in *Irish Shell (No 1)* of considering whether exclusive possession was granted as being 'one of the important factors' in determining the intentions of the parties.¹³⁴

The case of *Smith v CIÉ*¹³⁵ stands in contrast to the previous cases, largely because, as one commentator put it, the 'Irish courts discovered *Street v Mountford*'.¹³⁶ Smith was the operator of a newsagents in a train station owned by CIÉ, under an agreement described as a licence. It was accepted that when the agreement was executed all parties intended to create the relation of licensor and licensee only. However, relying on *Street v Mountford*, the applicant submitted that the existence of exclusive possession indicated that what had been granted amounted to more than a personal privilege, and therefore constituted a tenancy. This was accepted by Peart J, who held that the legal consequence of an agreement 'is not simply a question of the intention of the parties. It is in essence a matter of law'.¹³⁷ The court found that what had been granted amounted in fact to exclusive possession,¹³⁸ and that the agreement therefore constituted a tenancy.¹³⁹ The court accepted the respondent's argument that in certain instances exclusive possession could exist within a licence arrangement, but limited these to the exceptional situations outlined in *Street v Mountford*.¹⁴⁰ The court reconciled the Irish Supreme Court cases with *Street v Mountford* by holding that the test in those cases was whether what had been granted amounted to an interest in land or a mere personal privilege.¹⁴¹ This view of the case law is problematic, as Peart J does not acknowledge that in the cases referred to the Supreme Court had construed the relevant agreements expressly by reference to the

130 Ibid (applying *Irish Shell (No 1)* (n 119)).

131 Ibid.

132 HC (11 December 1997).

133 Ibid (Costello P).

134 Ibid.

135 *Sub nom Smith v Irish Rail* [2002] IEHC 103.

136 A Power, 'Licence versus Lease: *ClearChannel UK Ltd v Manchester City Council and the Implications for Ireland*' (2006) 2 Conveyancing and Property Law Journal 41, fn 38.

137 *Smith v CIÉ* (n 135) [39].

138 Ibid [40].

139 Ibid [39].

140 Ibid [53].

141 Ibid [44]–[47].

intention of the parties, nor does he refer to s 3 of Deasy's Act, which also played a key role in those judgments.¹⁴² The Irish Law Reform Commission has noted that the decision stands at odds with the Supreme Court's endorsement of the parties' intentions in *Kenny Homes*¹⁴³ and has expressed considerable doubt over the judgment,¹⁴⁴ concerns which have been echoed by Wylie.¹⁴⁵

Lease vs licence: Northern Ireland

In Northern Ireland, the courts have generally emphasised the parties' intentions as the primary consideration. In *NIHE v McCann*,¹⁴⁶ the Northern Ireland Housing Executive sought to evict a squatter from one of its properties. Mr McCann, who had entered the house illegally, claimed to have been granted a tenancy. The Executive's policy at the time was to charge squatters a charge for 'use and occupation' while it reviewed the circumstances around the occupation with a view to deciding whether or not to evict. The Executive had sent Mr McCann a letter explaining these charges, and also explicitly stating that the charges did not constitute rent and that he was not being offered a tenancy, but that he was illegally occupying the premises. He was sent a rent book with the words 'Rent Book' crossed out and 'mesne profits' stamped over them. He was later sent a second letter explaining that the weekly charges were to be increased, but again explicitly stating that he did not hold a tenancy and that he was in illegal occupation. Finally, apparently due to an oversight, he was sent another standard rent book, this time with no amendments but including references to a tenancy and associated rights and responsibilities. The defendant submitted that the actions by the Executive constituted a tacit recognition of a tenancy even though the terms used were generally to the opposite effect. This was rejected by the court, which based its decision on s 3 of Deasy's Act in finding that the relationship of landlord and tenant was to be founded on the express or implied intentions of the parties. Therefore, on the facts of the case 'it seems . . . to be flying in the face of reality to say that there was an express or implied contract between the respondent and the appellant that the relation of landlord and tenant should exist between them'.¹⁴⁷

The decision in *NIHE v McCann* was followed in *NIHE v Duffin*,¹⁴⁸ even though the facts of the latter case were slightly less straightforward. Mr Duffin entered into illegal occupation of an Executive house and was sent a letter by the Executive explaining that his occupation was illegal and that he would be charged a weekly amount for use and occupation. The letter explicitly stated that he was not being granted a tenancy. He was given a payment book where each page was stamped 'use and occupation'. Later, however, he was sent a larger payment book; while each payment slip was again stamped 'use and occupation' the book also contained a number of information pages relating to various matters strictly related to a tenancy, with Mr Duffin's name and address printed on each

¹⁴² It should also be noted that *Irish Shell (No 2)* (n 125) does not appear to have been cited to him.

¹⁴³ *Kenny Homes & Co Ltd v Leonard* (SC, 18 June 1998).

¹⁴⁴ Law Reform Commission (n 35) paras 1.28–1.31.

¹⁴⁵ Wylie 2014 (n 37) paras 2.34–2.35. The resulting uncertainty in the law is in evidence in *Esso Ireland Ltd v Nine One One Retail Ltd* [2013] IEHC 514, where McGovern J appears to rely equally on the absence of exclusive possession (demonstrating that no tenancy existed as a matter of law) and on the party's intention to create a licence only, without stating whether he was following the objective or subjective test ([42]–[46]). He does, however, warn that a 'court should be slow to look behind the clear terms negotiated by the parties at arm's length and in circumstances where each was legally represented' ([44]).

¹⁴⁶ *Northern Ireland Housing Executive v McCann* [1979] NI 39 (HC).

¹⁴⁷ *Ibid* 43D (Murray J).

¹⁴⁸ [1985] NI 210 (HC).

one, as well as a table on the back cover entitled 'rent payment record'. Mr Duffin fell into arrears and, after having arranged a repayment schedule, was sent a document that referred to rent and the occupier as tenant. The defendant argued that these documents were consistent with a tenancy rather than a licence and that therefore a tenancy had been created. This proposition was rejected by the court, which applied *NIHE v McCann* in stating that s 3 of Deasy's Act required an express or implied contract that a tenancy was to be created, which could not be said to be the case in the circumstances. Carswell J explained that his view was that it was 'necessary to look at all the facts, and to seek the true intentions of the parties'.¹⁴⁹

In neither of those cases (decided before *Street v Mountford*) was the relevance of exclusive possession directly explored. The only relevant Northern Ireland case reported since *Street v Mountford*, *Hayes v Shell (UK) Ltd*,¹⁵⁰ is of little assistance. Shell sought to end its relationship with the operator of one of its filling stations and the operator attempted to argue that the agreement was a tenancy despite being termed a licence. The court quickly ruled out the possibility of the agreement constituting a lease, relying on *Esso Petroleum Co Ltd v Fumegrange Ltd*¹⁵¹ in holding that various terms of the licence agreement were incompatible with the existence of exclusive possession.¹⁵² However, Pringle J also stated that he would have arrived at the same conclusion without reference to *Fumegrange*, as the terms of the agreement made it clear that it could not be a lease, therefore seeming to indicate that the case could have been decided by sole reference to the parties' intentions. It appears that Deasy's Act was not cited to the court.

A small number of Lands Tribunal judgments have considered the question of whether an agreement is a lease or a licence. In *Tubman v Department of the Environment*,¹⁵³ the tribunal was asked to decide whether compensation for land compulsorily acquired should take into account the value of that land with or without a tenancy. The question was whether the person living in the property at the date of acquisition was a tenant, or whether she was merely a caretaker. The agreement governing the residence was titled 'caretaker's agreement' and a rent book had been provided where entries were made under 'cash received' rather than 'rent due'. It had been the owners' intention to have a caretaker live in the property until it was sold. The claimant argued that the existence of exclusive possessive and the weekly payment of rents indicated that a tenancy had arisen by implication. This was rejected by the tribunal, which adopted the respondent's argument that common intention was necessary to create the relationship of landlord and tenant and that, on the facts, the intention had been to create a licence only.

Beattie v NIHE was another case where a house had been compulsorily acquired and the amount of compensation payable depended on whether the occupants were tenants or licensees.¹⁵⁴ Both parties agreed that they were bound by *Street v Mountford*. The claimant conceded that the occupants had exclusive possession, but argued that the ensuing presumption that a tenancy existed was negated by their entry under a caretaker's agreement. The claimant also argued that special circumstances also surrounded the agreement: the landlord and occupants were friends and the landlord had purchased the house from the occupants' daughter and let it out to the occupants as a result of their friendship. However, the tribunal held that, on the facts of the case (no written agreement

149 Ibid 214E.

150 [1995] NIJB 82 (Ch).

151 [1994] 2 EGLR 90 (CA), itself applying *Street v Mountford*.

152 *Hayes v Shell* (n 155) 87J–88A.

153 [1982] RVR 235 (Lands Trib).

154 R/6/1985 (Lands Trib, 2 May 1986).

could be produced), there was no caretaker's agreement, that though friendship existed there had been no act of generosity, and that therefore no special circumstances arose that negated the presumption of a tenancy arising from the occupants' exclusive possession. Deasy's Act does not appear to have been cited to the tribunal.

In *SD Bell & Co Ltd v Department of the Environment*,¹⁵⁵ the tribunal was asked to decide whether the claimant held a tenancy over land that was compulsorily acquired. The land in question had been held under a tenancy that expired in 1951, yet the claimant continued to regularly pay rent after this. The claimant argued that, following *Street v Mountford*, where an occupier had exclusive possession of the land, then a tenancy would be presumed. The respondent argued that the existence of a family relationship (as existed in this case) negated a presumption of tenancy,¹⁵⁶ that the House of Lords in *Street v Mountford* did not have to consider s 3 of Deasy's Act and that, while in Great Britain exclusive possession as a sole consideration might be sufficient to find a tenancy, in Northern Ireland the creation of a tenancy can be avoided by agreement. Unfortunately, the tribunal did not fully address the argument advanced by the respondent. It found that a tenancy had been created, and stated: 'The recent House of Lords decision in *Street v Mountford* supports the conclusion that the Company was a tenant and not merely a licensee; the Company had exclusive possession and control and there was not anything in the circumstances to negative an intention to create a tenancy.'¹⁵⁷ The tribunal thus expressed no view on the relevance of s 3 of Deasy's Act; its decision clearly rests on the claimant's exclusive possession but does not decide whether this existence of exclusive possession creates a tenancy by operation of law or whether it merely constitutes a convincing indication of the parties' intentions.

In *Eccles v NIHE*,¹⁵⁸ the tribunal was again asked to decide whether compensation for compulsorily acquired land should be calculated on the basis of the properties being subject to tenancies. The properties in question had been occupied under documents entitled 'Caretaker's Agreement'. Both the claimant and the respondent agreed that the relationship of landlord and tenant was created by contract as a result of Deasy's Act, but disagreed on the nature of the contract. The respondent argued that the substance of the agreement was that of a tenancy and the conduct of the parties indicated this understanding. The respondent also argued that the existence of exclusive possession had given rise to a tenancy. The tribunal held that the caretaker's agreement was in the nature of a personal right only and (following *Street v Mountford*) that its terms did not indicate an intention to grant exclusive possession and that therefore a licence only existed. The tribunal did not address the respondent's argument that the actions of the parties indicated an intention to grant a tenancy and that such an intention should be enforced under Deasy's Act.

Conclusion

In *Street v Mountford*, the House of Lords created an inflexible test whereby, whenever exclusive possession of land was granted at a term, then a tenancy was created. *Bruton v London Quadrant Housing Trust* applied the test expansively, so that in England and Wales tenancies can be created even when the grantor has no estate out of which to pass a proprietary interest. As a result of this test, the intention of the parties is largely

¹⁵⁵ R/1/1987 (Lands Trib, 11 March 1988).

¹⁵⁶ Relying on a *dictum* by Denning LJ in *Cobb v Lane* [1952] 1 All ER 1199 (CA) quoted by Lord Templeman in *Street v Mountford* (n 7) 821H.

¹⁵⁷ *SD Bell v DoE* (n 155).

¹⁵⁸ R/38/1988 (Lands Trib, 8 March 1990).

irrelevant. It serves only a preliminary purpose: to determine whether the parties agreed to enter into legal relations. If the answer is positive, then the second stage is to decide whether, as a matter of fact and law, what has been granted amounts to exclusive possession. If it does, then a tenancy has been created, even if the result is contrary to what the parties understood to have been agreeing.

This sits uneasily with the statutory landscape in both parts of Ireland, where a tenancy is deemed to be founded on contract. If *Street v Mountford* were to be applied in Ireland, then there would be no place for contractual construction (other than to determine whether a contract existed). Such an application appears to be incompatible with s 3 of Deasy's Act and the *Street v Mountford* version of the exclusive occupation test has not been applied in reported cases in either jurisdiction.

It would be wrong, however, to let the pendulum swing too far and state that exclusive occupation is irrelevant in Ireland. The Republic of Ireland case law, in particular, does place an emphasis on whether an occupant enjoys exclusive occupation of premises, but the emphasis does not serve, without more, to decide whether the relation of landlord and tenant has been created. Rather, the test of exclusive occupation is applied as a useful, often determinative tool to ascertain whether the parties intended to create a tenancy. The difference is more than simply one of form: if exclusive occupation is merely a factor to be considered in deciding whether the parties intended to create the relation of landlord and tenant then, no matter the weight attached to that factor, it is always open to being displaced by other factors pointing to a contrary intention. Such an outcome would be unthinkable in England and Wales.

In Northern Ireland, the legal landscape is woefully murky. There is a dearth of cases concerning the difference between a lease and a licence that postdate *Street v Mountford* and its compatibility with the law of Northern Ireland has not yet been tested. This may perhaps be explained by the likelihood of practitioners being more familiar with the English case than the nineteenth-century Irish statute, but, if that is so, then there is a danger that agreements are being entered into on a mistaken legal basis. It is submitted that, as long as Deasy's Act remains in force in Northern Ireland, the Republic of Ireland Supreme Court cases should be considered to be more persuasive than the judgments in *Street v Mountford* and *Bruton v London Quadrant Housing Trust*. The test of exclusive occupation should therefore not be viewed, in this jurisdiction, as being determinative of the existence of the relation of landlord and tenant; instead, the test should be viewed as a factor in construing the parties' intentions, so that the relation can only arise when the parties so intended.

