Commission is to propose its wholesale export into the Fatal Accidents Act as a qualifying status (see Law Com. No. 263, *Claims for Wrongful Death*, paras. 3.35–3.46). In this context, the reference of *Bouette* v. *Rose* to the House of Lords for further definitive consideration may have had the desirable effect of clarifying its underlying principles, but leave to appeal was refused.

Ironically, *Bouette* v. *Rose* might also hold out a hope for another, somewhat wider, class of claimant. A single mother cares for her children, and receives child support payments from the absent father. Those payments are calculated by reference to a statutory formula which incorporates an element "with respect to the person with care" (Child Support Act 1991, Sched. 1, para. 1(3)(*b*); Child Support (Maintenance Assessments etc.) Regulations 1992, S.I. 1992/1815, reg. 3(1)(*b*)). Can it now be argued that, in making payments for the children, the father is also assuming responsibility for the mother, such that she, as well as the children, can bring a family provision claim against his estate in the event of his death?

STUART BRIDGE

TANTAMOUNT TO GOOD SENSE

A LANDLORD'S service of a notice to quit by prior arrangement with the tenant is no longer tantamount to a surrender, according to the House of Lords in *Barrett* v. *Morgan* [2000] 2 W.L.R. 284. Lord Millett's sensible judgment draws a clear distinction between the termination of a periodic tenancy by a notice to quit and the termination of a tenancy by surrender. It emphasises that the two processes are quite different, in origin and effect. The innocent reader may wonder why the House of Lords was called upon to affirm such an apparently unexceptional principle, but in the curious looking-glass world of leases, nothing can be taken for granted.

It is well established at common law that a subtenancy granted by a tenant holding under a periodic tenancy determines with the tenancy on the expiry of a notice to quit. The very nature of a periodic tenancy dictates the possibility of termination at the end of any period, inevitably involving the "root and branch" destruction of any derivative interest. The termination of a subtenancy in such circumstances may seem unfair, but the inherent insecurity of a periodic tenant's subtenant has long been recognised and understood. It is equally well established that if a tenant surrenders

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his tenancy to the landlord, it will terminate his tenancy, but it will not bring to an end any subtenancies that the tenant had previously granted. A third party, such as a subtenant, cannot be adversely affected by a subsequent agreement to which he is a stranger. Thus the landlord and tenant cannot, between themselves, decide to *alter* the terms of the tenancy (by surrender), and thereby terminate a subtenancy. The difference in result for a subtenant has been explained (rather misleadingly) as deriving from the consensual nature of a surrender, as opposed to the unilateral nature of a notice to quit.

Such an abbreviated explanation led to the confusion of clear distinctions when *Barrett* v. *Morgan* first came to court. Agricultural land was held in a family trust, and subject to an annual tenancy in favour of two brothers who were members of the family. The brothers in turn sublet the land to Mr. Morgan, a farmer. When the family wanted to sell the land, they discussed with the trustees how to obtain vacant possession. It was arranged that the trustees would serve a notice to quit on the brothers, who would refrain from serving a counter-notice under the Agricultural Holdings Act 1986. *Sherwood* v. *Moody* [1952] 1 All E.R. 389 was clear authority that if a tenant of agricultural land failed to serve such counter-notice, then the 1986 Act (and its 1948 predecessor) did not protect any subtenant—his subtenancy would be destroyed under normal common law principles, and he would have to vacate. So the family proceeded with confidence, and when Mr. Morgan then refused to go, the plaintiff trustees brought proceedings for possession.

All did not go according to plan. The judge refused to make an order for possession, and the Court of Appeal ([1999] 1 W.L.R. 1109) then dismissed an appeal by the plaintiffs. The Court of Appeal explained that surrender did not terminate a subtenancy because it was consensual, and that when a notice to quit was served by agreement, it too was "consensual", and tantamount to surrender; thus it too was ineffective to determine a subtenancy.

In the House of Lords, Lord Millett, with whom all their Lordships agreed, subjected the reasoning of the Court of Appeal to incisive analysis. He examined the assertion by Sir Richard Scott V.-C. that only "unilateral" notices to quit destroyed subtenancies and that consensual acts done by arrangement between landlord and tenant, such as the notice to quit in question, did not. Lord Millett found this doctrine very curious—it meant that a person could not achieve with consent what he could achieve without. His Lordship identified the essential confusion in the Court of Appeal judgments, caused by the different senses of "consensual". He

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clarified that a surrender is essentially "consensual" because it requires the agreement of both parties; it involves a new contract—an agreed alteration in the leases's terms. A notice to quit, whether or not pursuant to an agreement with the other party, is not "consensual" in this meaning of the term, because it can equally be effective if served without agreement—it is essentially a unilateral means of bringing a periodic tenancy to an end in accordance with the pre-existing terms of the lease. The House of Lords returned the common law to a narrow but principled path, reversed the Court of Appeal and granted possession to the plaintiffs.

The House of Lords' decision can be interpreted as yet another judgment in which the contractual nature of a lease is emphasised, but a more interesting issue is not why the House of Lords came to its conclusion, but why the Court of Appeal had ever thought otherwise, in this case and also in the earlier *Sparkes* v. *Smart* [1990] 2 E.G.L.R. 245. The authorities upon which the Court of Appeal had relied were weak and seem insufficient to explain the ratios. The answer probably lies in a judicial attempt to prevent landlords from escaping the net of statutory protection. Such attempts have skewed the common law jurisprudence of leases, both agricultural (consider also *Gisborne* v. *Burton* [1989] Q.B. 390) and residential. Cases such as *Street* v. *Mountford* [1985] A.C. 809 and *Antoniades* v. *Villiers* [1990] 1 A.C. 417, with their convenient but conceptually ill-digested doctrine that a lease has an objective identity distinct from the intention of the parties, have caused continuing confusion, resulting in the latest startling discovery that the proprietary nature of a lease is an optional extra—see *Bruton* v. *London & Quadrant Housing Association* [1999] 3 W.L.R. 150.

Indeed, in the curious looking-glass world of leases at common law, as mediated by the mirror of statutory protection, one finds it increasingly difficult to identify a coherent jurisprudence, and *Barrett* v. *Morgan* is therefore to be particularly welcomed for its orthodox stand. One should also note, of course, that its practical impact upon agricultural tenants will be minimal, in view of the Agricultural Tenancies Act 1995.

LOUISE TEE

COLLECTIVE DOMINANCE: A MECHANISM FOR THE CONTROL OF OLIGOPOLISTIC MARKETS?

IN *Gencor* v. *Commission* (Case T-102/96, judgment of 25 March 1999, not yet reported) the Court of First Instance of the European

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