[HIGH COURT OF AUSTRALIA.]

H. A. WARNER PROPRIETARY LIMITED . APPELLANT; PLAINTIFF,

AND

WILLIAMS AND OTHERS . . . . RESPONDENTS. DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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MELBOURNE, *Oct.* 23-25.

SYDNEY, *Nov.* 25.

Latham C.J., Starke, Dixon, McTiernan and Williams JJ.

Landlord and Tenant—"Lease"—Master and servant—Servant occupying premises owned by master—Occupation necessary for performance of duties—Deduction, by agreement, of weekly sum from wages—National Security (Landlord and Tenant) Regulations, reg. 16.

Procedure—Declaratory judgment—Injunction based on declaration.

For the performance of his duties, W., who was employed as a farm hand, was required by his employer to reside in a cottage on the farm. In the first instance he was given the use of the cottage without charge, but, when an award obliged the employer to increase his wages, he was informed by the employer that 14s. a week would be deducted from his wages for the use of the cottage. W. accepted these terms and remained in occupation of the cottage under the new arrangement.

Held that a finding that after the new arrangement W. occupied the cottage as the tenant of his employer was consistent with the facts and should not be disturbed.

Per Starke and *Dixon* JJ.: Observations on the circumstances which will warrant the making of a declaration of right whether apart from, or together with, an injunction claimed on the basis of the declaration.

Decision of the Supreme Court of Tasmania (*Inglis Clark* J.) affirmed.

APPEAL from the Supreme Court of Tasmania.

H. A. Warner Pty. Ltd. was the owner of an area of land known as "Valleyfield," at New Norfolk (Tas.), which it used as a grazing area, farm and orchard. On the land there were erected a farmhouse

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and outbuildings and also eleven cottages which were used solely for housing employees employed by the company as servants working on the land. One of these employees was Theodore Williams, who until early in 1945 was paid a weekly wage of £3 and was not charged anything for the cottage which he occupied. From about March 1945 he became entitled under an award of the Commonwealth Court of Conciliation and Arbitration to a weekly wage of £4 10s.; thenceforward he was credited with that amount, but 14s. a week was deducted for the use of the cottage. On 2nd May 1945 Williams applied to James Purcell Clark, police magistrate, as a Fair Rents Board under the *National Security* (*Landlord and Tenant*) *Regulations* for a determination fixing the fair rent of the cottage.

The company brought an action in the Supreme Court of Tasmania against Williams and Clark, alleging in its statement of claim that Williams was required by his contract of service to occupy the cottage and was not a lessee of the cottage within the meaning of the *Landlord and Tenant Regulations*; it claimed declarations that Williams was not a lessee and that Clark had no jurisdiction to determine Williams' application and consequential injunctions. Williams and Clark each entered a defence which alleged in substance that the issues raised by the statement of claim were matters proper for the determination of the Fair Rents Board. Clark retired from office before the trial of the action, and, by consent, it proceeded on the basis that the names of Geoff Forbes Sorell and Hubert Mansell Brettingham-Moore, police magistrates exercising the powers and functions of the Fair Rents Board, were substituted for that of Clark. *Inglis Clark* J. gave judgment for the defendants.

From this decision the plaintiff company appealed to the High Court.

Coppel K.C. (with him *C. A. S. Page*), for the appellant. As Williams was required by the company to reside in the cottage for the performance of his duties, his occupation was that of a servant and he was not a tenant (*Fox* v. *Dalby* (1); *Wray* v. *Taylor Bros. & Co. Ltd.* (2); *R.* v. *Inhabitants of Kelstern* (3); *Hughes* v. *Overseers of Chatham* (4); *Dobson* v. *Jones* (5); *Smith* v. *Overseers of Seghill* (6)). The mere deduction or payment of money is not decisive that there is a tenancy (*Bertie* v. *Beaumont* (7); *R.* v. *Inhabitants*

(1) (1874) L.R. 10 C.P. 285.
(2) (1913) 109 L.T. 120.
(3) (1816) 5 M. & S. 136 [105 E.R. 1001].
(4) (1843) 5 Man. & G. 54 [134 E.R. 479].
(5) (1844) 5 Man. & G. 112 [134 E.R. 502].
(6) (1875) L.R. 10 Q.B. 422.
(7) (1812) 16 East 33 [104 E.R. 1001].

of Cheshunt (1)). [He also referred to *Tasmanian Steamers Pty. Ltd.* v. *Lang* (2).] The Fair Rents Board has power to decide the question whether there has been a lease, and no appeal will lie from its decision. [He referred to the *Landlord and Tenant Regulations*, reg. 38.] The Supreme Court has power to grant the declaration and injunction sought, as against Williams at all events, and the fact that the matter is before the Fair Rents Board does not debar the Supreme Court or the High Court from deciding the question. There is a real dispute between employer and employee as to whether the relationship of landlord and tenant also exists between them; the answer to this question is likely in the near future to have a result prejudicial to one or other of them, and either of them is entitled to a declaration of the rights existing between them. [He referred to *The Supreme Court Civil Procedure Act* 1932 (Tas.), Sched. 2, Order 27, rule 5; *Hanson* v. *Radcliffe Urban District Council* (3).]

[STARKE J. referred to *Hume* v. *Monro* (4).]

Gowans, for the respondent Williams. As the legislature has granted power to the Fair Rents Board to determine the question raised here, neither a declaration nor an injunction as sought by the appellant should be granted (*Burke* v. *Abram* (5); *Grand Junction Waterworks Co.* v. *Hampton Urban District Council* (6); *Barraclough* v. *Brown* (7)).

[WILLIAMS J. referred to *Cooper* v. *Wilson* (8).]

Prima facie, the payment of 14s. a week is rent because it is a payment for the exclusive use of the cottage. The trial judge was entitled to find that he was not satisfied that Williams was not a lessee at the time of the making of the application; this Court would not be warranted in disturbing that finding.

Winneke, for the respondents Sorell and Brettingham-Moore, submitted that, as against them, the appeal, not having been pressed, should be dismissed with costs.

Coppel K.C., in reply. There is no evidence from which a tenancy can be inferred, because there is no evidence that any particular cottage was allotted to any particular employee. There is evidence that Williams was moved from one cottage to another; it does not

(1) (1818) 1 B. & Ald. 473 [106 E.R. 174].
(2) (1938) 60 C.L.R. 111.
(3) (1922) 2 Ch. 490, at pp. 502, 507.
(4) (1941) 65 C.L.R. 351, at p. 367.
(5) (1940) V.L.R. 222.
(6) (1898) 2 Ch. 331.
(7) (1897) A.C. 615.
(8) (1937) 2 K.B. 309, at p. 324.

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appear that he was treated as a tenant on that occasion. [He referred to *North London Railway Co.* v. *Great Northern Railway Co.* (1).] Whether or not Williams goes on with his application to the Fair Rents Board, there is at present a decision against the appellant which at least may give rise to an issue-estoppel and may have consequences prejudicial to the appellant quite apart from the fair-rent question. The appellant is at least entitled to be relieved of that decision if this Court thinks it is wrong. The declaration claimed is wider than the injunction and is not sought merely as a basis for the injunction. [He referred to *Guaranty Trust Co. of New York* v. *Hannay & Co.* (2); *Barwick* v. *South Eastern and Chatham Railway Cos.* (3); *Simmonds* v. *Newport Abercarn Black Vein Steam Coal Co. Ltd.* (4).]

Cur. adv. vult.

Nov. 25.

The following written judgments were delivered :—

LATHAM C.J. The *National Security (Landlord and Tenant) Regulations* provide in reg. 16 that a lessee of prescribed premises may make an application to a Fair Rents Board to have the fair rent of the premises determined by the Board. The respondent Williams has given notice of intention to apply to a Fair Rents Board for a determination of the fair rent of a cottage belonging to the appellant. The appellant contends that the respondent is not a lessee of the cottage and brought an action in the Supreme Court of Tasmania claiming a declaration that he was not a lessee and that the Fair Rents Board had no jurisdiction to hear or determine the application of the respondent. In the Supreme Court it was contended also that the cottage was not prescribed premises within the meaning of the Regulations. This contention was abandoned upon the appeal to this Court, and I abstain from expressing any opinion upon this question. *Inglis Clark* J. decided against the plaintiff in the action and an appeal is now brought to this Court.

The respondent Williams is an employee of the appellant, which is the owner of a farm in the Derwent Valley, Tasmania. Upon the farm there are twelve cottages. The cottages are occupied by employees and only by employees of the appellant. When Williams was first employed he was employed at a wage of £2 10s. and later £3 a week and he was soon afterwards given one of the cottages to live in. The occupation of the cottage was very convenient for his work, though it was not imperatively necessary that he should live there

(1) (1883) 11 Q.B.D. 30.
(2) (1918) 2 K.B. 623.
(3) (1921) 1 K.B. 187, at pp. 196, 200.
(4) (1921) 1 K.B. 616, at pp. 626, 631.

in order to do his work. In March 1945 an award of the Commonwealth Conciliation and Arbitration Court fixed wages for the work which Williams was doing at £4 10s. a week. The manager of the appellant company assembled the employees and told them that in future the company, instead of allowing them to live in the cottages for nothing, would charge them 14s. a week for the use of the houses, deducting 14s. each week from the wages of £4 10s. Williams, with the other employees, accepted this proposal and has occupied his cottage on those terms ever since.

Where a servant occupies a house belonging to his employer he may occupy it either as a servant or a tenant. The parties may enter into a lease or make an agreement for a tenancy. Then their relative position is clear—the ordinary relation of landlord and tenant comes into existence. Where there is no such lease or agreement, all the circumstances must be taken into consideration in determining whether a tenancy has been created. Where the occupation is necessary for the performance of his services and the servant is required to occupy the house in order to perform them, his occupation is that of a servant, and there is no tenancy. If, on the other hand, a person who is in fact a servant is in part remunerated for his services by being allowed to occupy a house, then he is prima facie a tenant: See *Smith* v. *Seghill* (1), where the result of the decisions is summed up.

Whatever may have been the position before the new arrangement was made, after the making of the Federal award and the new arrangement Williams was charged by way of deduction from his wages or set off against his wages a sum of 14s. per week for the use of a cottage. Upon these facts it was, in my opinion, open to the learned judge to hold that Williams was a tenant, though it was expressly found that he was "required" (i.e., I understand, by his employer) to occupy the cottage in order to perform his duties. The legal relations of the parties were changed when an arrangement was made under which Williams paid what can only be described as rent for the use of the cottage, which he held under a tenancy at will. In my opinion, therefore, the appeal should be dismissed.

STARKE J. Appeal from a judgment of the Supreme Court of Tasmania for the defendants in an action in which, so far as material to this appeal, the appellant claimed a declaration that the respondent Williams was not the appellant's lessee and an injunction to restrain Williams from proceeding with an application to a Fair Rents Board constituted under the *National Security* (*Landlord and Tenant*)

(1) (1875) L.R. 10 Q.B. 422, at p. 428.

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Regulations for a determination fixing the fair rent of a cottage erected on certain land, known as " Valleyfield," in Tasmania, and occupied by Williams.

The *National Security* (*Landlord and Tenant*) *Regulations* provide for the constitution of Fair Rents Boards and authorize a lessor or lessee in certain cases to apply to a Fair Rents Board to have the fair rent of " prescribed premises " as defined by the Regulations determined by the Board. It was not disputed that the cottage in question here fell within the description of " prescribed premises " defined by the Regulations. It was contended, however, that the defendant Williams did not occupy the cottage as a lessee of the appellant but as its employee or servant and consequently that the Fair Rents Board had no authority to deal with the application made to it or to exercise the powers conferred upon it by the Regulations.

It appears that the appellant had several cottages upon " Valleyfield " which its employees and servants were required, as part of their contracts of service, to occupy for the more convenient performance of their duties. Wages were paid to Williams at the rate of £3 per week with the use of a cottage and garden, free milk and the right to use the appellant's horses and carts to get firewood and he received a bonus at the end of the hop picking season. But in 1945 an industrial award became operative which fixed a minimum rate of wage at £4 10s. per week for persons employed as farm hands, as was Williams. The managing director of the appellant called the employees together and explained the position which the imposition of the minimum rate of wage had created. He said, that as the minimum rate of wage provided in its component parts for house rent, the appellant in future would deduct 14s. per week for the use of their cottages. He also explained the position as to milk and intimated that a deduction from their wage of 6s. per week would be made for the run of a cow or milk when the cow was dry. All the employees including Williams accepted these terms and Williams occupied the cottage in question here pursuant to that arrangement.

The legality of the deductions was assumed in the argument before us and the sole question debated was whether Williams occupied the cottage as a tenant or as an employee of the appellant. The legal principles governing the matter have been thus expressed. " There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest; and if he do so the servant then becomes entitled to the legal incidents of the estate as much as if it

were purchased for any other consideration." *Hughes* v. *Overseers of Chatham* (1).

But the possession "by a servant or agent of premises belonging to his master or principal which he is required by the latter to occupy (or the occupation of which is necessary) for the performance of his duties—as distinguished from the possession of premises which he is permitted to occupy by way of remuneration for his services—creates no tenancy between the parties and the mere fact that the servant may use the premises at the same time for an independent business of his own or that his wages or salary may be diminished by way of rent for his occupation . . . will not make any difference" (*Foa, Landlord & Tenant*, 6th ed. (1924), p. 7; *Hughes* v. *Overseers of Chatham* (1); *Fox* v. *Dalby* (2); *Dover* v. *Prosser* (3); *Hunt* v. *Colson* (4).

It was not disputed that Williams occupied the cottage as an employee, and not as a tenant, of the appellant until the industrial award was made. Even after the making of the industrial award there is no doubt, I think, that the occupation of his cottage by Williams was necessary for the more convenient performance of his duties. But Williams did not, after the making of the industrial award, occupy the cottage as part of the reward or remuneration for his services. The appellant recognized its obligation to pay the award rate of wages but resolved to charge Williams a weekly rent for the use of his cottage wholly independent of wages and deduct that sum from his wages or to set it off against his wages.

The trial judge on this state of facts held that a tenancy was created between the parties terminating, I apprehend, with Williams' contract of service but subject to the provisions of the *National Security* (*Landlord and Tenant*) *Regulations*. The finding of the learned judge is consistent with the evidence and not unreasonable and ought not, I think, to be disturbed by this Court.

But if the learned judge's conclusions were wrong the injunction claimed by the appellant ought not to be granted for reasons that are sufficiently explained in the cases of *North London Railway Co.* v. *Great Northern Railway Co.* (5); *London and Blackwall Railway Co.* v. *Cross* (6); and *Kitts* v. *Moore* (7).

And the declaration sought should not be made as a basis for the injunction claimed. The jurisdiction conferred by the *Judicature Act*, which has been adopted in Tasmania, to make declaratory judgments without any consequential relief must be exercised

(1) (1843) 5 Man. & G. 54, at p. 78 [134 E.R. 479, at p. 488].
(2) (1874) L.R. 10 C.P. 285.
(3) (1904) 1 K.B. 84.
(4) (1833) 3 Moo. & S. 790.
(5) (1883) 11 Q.B.D. 30.
(6) (1886) 31 Ch. D. 354.
(7) (1895) 1 Q.B. 253.

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with care and should not be exercised when claimed as the basis for an injunction that should not be granted. It was suggested that the declaration claimed in this case had other purposes but they are not apparent. Instead of the summary and inexpensive proceedings in relation to fair rents contemplated by the *National Security* (*Landlord and Tenant*) *Regulations* we have a costly action in the Supreme Court of Tasmania.

This appeal should be dismissed.

DIXON J. Two questions were argued before us in support of this appeal. The first was whether, for the purposes of the *National Security* (*Landlord and Tenant*) *Regulations*, the relation of lessor and lessee subsisted between the appellant and the respondent Williams in respect of the cottage occupied by the latter. The second was whether, if this relation did not subsist and the premises were for that reason outside the authority of the Fair Rents Board established under those regulations, the Supreme Court of Tasmania might properly make declarations of right to that effect at the suit of the appellant.

The facts upon which the first question arises lie within a short compass. The appellant has a hopground orchard and general farm. Besides the homestead and farm buildings, twelve cottages for farm hands are situated upon the property. To each of its employees a cottage with its garden has been appropriated. Up till the end of March 1945 the employee was paid a wage but occupied the cottage free and had the use of a cow and some other concessions. Then a Federal award fixed the wages at a considerably higher rate than the appellant had been paying. The award rates were of course based upon the assumption that housing and milk formed part of the cost of living. The appellant called its employees together and informed them that, as this was so, the use of the cottage and of the cow would no longer be free but from the award wages a weekly charge would be deducted of 14s. for the house and of 6s. for the milk etc. What precisely was said is not agreed but so far as concerns the cottages the substance appears to have been that each occupier of a house would be charged 14s. a week therefor without regard to any difference in the cottages, and that the amount would be deducted from his wages. That has been done.

The respondent Williams was one of the employees affected. He and the others have applied to the local Fair Rents Board for determinations fixing the fair rents of their respective cottages. They have no locus standi so to apply unless they hold the cottages as lessees of the appellant. But a tenancy at will is enough. When

an employee dwells in premises belonging to his employer the question whether he has an independent occupation and holds as a tenant or occupies only as employee on behalf of his employer who thus remains possessed of the premises has proved important for many purposes. It has often arisen directly between the parties, of course, but also in actions by the employer against strangers based upon his possession of the premises ; in questions of the employee's settlement under the Poor Laws ; in matters of rating ; in claims to the franchise based upon a property qualification ; in indictments for burglary, when the question is in whom the dwelling may be laid ; and in proceedings for workmen's compensation. The question is whether the employee occupies the premises as employee, by virtue of his service, so that his occupation of the premises is that of his employer, or occupies them in the character of tenant. " There is no inconsistency in the relation of master and servant with that of landlord and tenant " —*Tindal* C. J. in *Hughes* v. *Overseers of Chatham* (1). Where the purpose of placing the employee in occupation of the premises is to give him the benefit of a dwelling place whether as a concession or as part of his recompense for his services or in consideration of a deduction from his wages, he is regarded as having an independent occupation of the premises and the relation is construed as landlord and tenant : *Hughes* v. *Overseers of Chatham* (2) ; *R.* v. *Spurrell* (3) ; *Smith* v. *Overseers of Seghill* (4) ; *Marsh* v. *Estcourt* (5) ; *Dover* v. *Prosser* (6) ; *Wray* v. *Taylor Bros. & Co. Ltd.* (7). But if the occupation of the premises is subservient to and necessary to the service then it is that of the master : *R.* v. *Spurrell* (8). The relation of landlord and tenant cannot be created by the appropriation of a particular house to an officer or servant as his residence where such appropriation is made with a view not to the remuneration of the occupier but to the interest of the employer and to the more effectual performance of the service required from such officer or servant : per *Tindal* C.J. in *Dobson* v. *Jones* (9) ; *Reed* v. *Cattermole* (10) ; *Fox* v. *Dalby* (11) ; *Bertie* v. *Beaumont* (12) ; *R.* v. *Inhabitants of Kelstern* ; (13) ; *R.* v. *Inhabitants of Cheshunt* (14).

In the present case it would appear that the appellant provided cottages for its employees in order that the employees might be

(1) (1843) 5 Man. & G. 54, at p. 78 [134 E.R. 479, at p. 488.]
(2) (1843) 5 Man. & G. 54 [134 E.R. 479].
(3) (1865) L.R. 1 Q.B. 72, at p. 75.
(4) (1875) L.R. 10 Q.B. 422.
(5) (1889) 24 Q.B.D. 147, at p. 151.
(6) (1904) 1 K.B. 84.
(7) (1913) 109 L.T. 120.
(8) (1865) L.R. 1 Q.B. 72, at p. 76.
(9) (1844) 5 Man. & G. 112, at p. 120 [134 E.R. 502, at p. 506].
(10) (1936) 2 All E.R. 526, at p. 531.
(11) (1874) L.R. 10 C.P. 285.
(12) (1812) 16 East 33 [104 E.R. 1001].
(13) (1816) 5 M. & S. 136 [105 E.R. 1001].
(14) (1818) 1 B. & Ald. 473 [106 E.R. 174].

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readily available, particularly at the early hours which must be kept if cows are to be milked and horses fed. But the difficulty in the appellant's way lies in the re-arrangement of the terms of service made to meet the conditions of the Federal award and the findings made by *Clark* J. in the Supreme Court upon that foundation. He said " The plaintiff Company in effect told its employees that for the future they would have to lease their respective cottages in order to enable them to perform their contracts with the plaintiff Company. Although the employees (including the defendant Williams) are still required to occupy their respective cottages in order that they may perform their duties as the servants of the plaintiff Company, their cottages are now, by a special contract, ' let ' to them to enable them to do that." There is some doubt as to what will suffice to discharge an obligation imposed by a Federal award to pay a specified money wage : *Tasmanian Steamers Pty. Ltd.* v. *Lang* (1). But it may be supposed that the appellant contemplated the creation of a cross liability on the part of its employees for 14s. a week each in respect of the occupation of the cottages and that the men so understood the matter. It is evident that each had exclusive occupation of a cottage and apparently there was a garden occupied with the cottage. The conclusion is not unreasonable that in consideration of a weekly payment the employee was to have exclusive occupation of the dwelling and, if so, he might properly be found to be a tenant. As his tenancy would at most be coterminous with his employment, it should be construed as a tenancy at will. In my opinion the finding must stand that the respondent Williams occupied his cottage as a tenant.

The case appears to me to have, in the points that matter legally, greater similarities to *R.* v. *Jarvis* (2) than to any other case I have seen. There the servant occupied a dwelling forming part of the premises on which the master carried on a merchant's business and the whole premises, consisting of the buildings and yard, were entirely enclosed when the gates were shut. It was at the desire of the master that the servant resided in the dwelling house which he occupied. But he paid a rent, though not a full rent. A counting house in the same yard was broken into and robbed and the offenders were indicted for and convicted of a burglary on the footing that the entire close formed the dwelling house of the master and a burglary of part of it had been committed. That is to say, on the footing that the servant had no independent possession of the dwelling, but his master occupied it by him, the whole close became one close partially used as a dwelling. At the trial *Holroyd* J. took the view

(1) (1938) 60 C.L.R. 111.

(2) (1824) 1 Mood. 7 [168 E.R. 1163].

that the servant's holding and occupation was not so entirely *suo jure* or so unconnected with his service as to prevent the whole premises being considered in law the dwelling house of the master and from being properly so described. He " inhabited there for his master's convenience and purposes as well as for his own." The whole premises might therefore be treated as in the master's possession the house by his servant, the rest by himself. But on a reservation the judges thought otherwise. They said that the servant stood in the character of tenant (for the master might have distrained upon him for his rent and could not arbitrarily have removed him) and his occupation could not be deemed the master's occupation (1).

For the reasons I have given I think that the finding of *Clark* J. ought not to be disturbed.

Counsel for the appellant felt unable to contend that, if the cottage was separately let, it could be regarded as premises used or ordinarily used as a farm, and so saved from inclusion in the definition of " prescribed premises " : reg. 8 (1). He did not perceive any hopeful foundation for the suggestion that the cottage might retain its character as part of a farm and thus secure exclusion from the definition. Perhaps there is a parallel in the ill-fated suggestion by *Holroyd* J. with respect to the dwelling in the case of *R.* v. *Jarvis* (2). It is not, however, a matter for us to decide ; an observation I make not for the purpose of casting doubt on the judgment of counsel, but to make clear what is covered by our actual decision.

I think the appeal should be dismissed for the reasons stated. The second matter argued does not in this view call for decision. But perhaps I should add that, as the Fair Rents Board is not a tribunal exercising judicial power, but is administrative, the question whether a declaration of right may properly be made depends upon discretion, not upon fixed rules of law or of equity. At the same time it is only because of the number of cases covered by the declaration sought, viz. the twelve cottages, that I should entertain the claim that it is a fit case for that form of relief. I should not regard an injunction as appropriate.

I would dismiss the appeal.

McTIERNAN J. In my opinion the appeal should be dismissed. The appellant brought the action to challenge the right of the respondent Williams to make an application to a Fair Rents Board to fix the rent of a cottage and garden occupied by him. It is admitted that the cottage and garden are prescribed premises within the

(1) (1824) 1 Mood., at p. 10 [168 E.R., at p. 1165].

(2) (1824) 1 Mood. 7 [168 E.R. 1163].

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meaning of the *National Security* (*Landlord and Tenant*) *Regulations*. Williams, as it appears, was an employee of the appellant. To adopt the words of reg. 58 (*j*), he occupied the premises in question "in consequence of his employment." It is necessary to decide whether Williams is a "lessee" within the meaning of the Regulations.

In deciding whether under the general law a servant occupying premises of his master is his tenant as well as his servant, the courts have distinguished between those cases in which the servant is permitted to occupy premises as part of his remuneration or for the more convenient performance of the service, and those cases in which the servant is required to occupy the premises in order to perform his duties as servant. In the former cases the courts have generally held that the servant is a tenant but not in the latter cases.

The purpose of the Regulations is to fix "the price of shelter—whether the shelter be used for living accommodation or for working accommodation" and to secure persons "in continued possession of premises of which they are in occupation": *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (1), per *Latham* C.J. The Regulations contain their own criteria for deciding who is a "lessee" within the scope and intention of the Regulations. Regulation 8 (1) says that a lessor and lessee mean the parties to a lease: and it is provided in the same sub-regulation that a "lease" includes every contract for the "letting" of any prescribed premises. The question is whether there was a contract between the appellant and Williams for the letting of the cottage and garden occupied by him.

The learned trial judge, *Clark* J., heard oral evidence of an arrangement made by the appellant through its managing director with Williams and the other farm workers with which the case is concerned, after the promulgation of the industrial award determining their rate of wages. The construction which his Honour placed upon this evidence and the conclusion which he drew is stated in these terms: "I think that what he did say was in effect that in future the employee-cottagers would have to pay rent. Therefore, since the new arrangement the services rendered by the defendant Williams as a servant to the plaintiff Company form no part of the recompense he makes to the plaintiff Company for his use of the cottage—what he pays is exclusively true rent. The plaintiff Company in effect told its employees that for the future they would have to lease their respective cottages in order to enable them to perform their contracts with the plaintiff Company."

The rent was fixed at 14s. per week. This was the amount which the appellant's managing director told Williams and its other workers

(1) (1943) 67 C.L.R. 1, at p. 17.

that it would deduct from the wages it was bound to pay under the award. It could not discharge its obligation under the award by paying less than the rate of wages it prescribed : hence the deduction was a discharge of the new obligation which Williams and each of the other workers incurred under the revised arrangement regarding the occupancy of their respective cottages and gardens. There is no ground for disagreeing with the finding which I have quoted from the reasons of *Clark* J. It established that there was a " contract for the letting " of the cottage and garden occupied by Williams. This contract constituted a " lease " as defined by the Regulations. This result could not be altered by the obligation which Williams had as servant. *Clark* J. observed "Although the employees (including the defendant Williams) are still required to occupy their respective cottages in order that they may perform their duties as the servants of the plaintiff Company, their cottages are now, by a special contract, ' let ' to them to enable them to do that." For the purpose of the Regulation there has been a lease to Williams. The inquiry is not whether he is a tenant as well as a servant according to the criteria of the common law. *Clark* J. correctly stated the position when he said : "And if the defendant Williams' cottage is let to him then, so far as the regulations are concerned, it is immaterial that the purpose of the letting is to enable him to continue in the service of the plaintiff Company."

It is not necessary to decide in this case what is the duration of the " lease " constituted by the contract for the letting of the premises in question.

WILLIAMS J. The learned judge below decided against the appellant on two grounds : 1. He found that the respondent was a tenant at will of the cottage in question and therefore entitled to make an application to a Fair Rents Board constituted under the *National Security* (*Landlord and Tenant*) *Regulations* to have the fair rent of the cottage determined. 2. He also found that the cottage was not excepted from the operation of those Regulations as premises for the time being used or ordinarily used as a farm within the meaning of reg. 8 (1).

On the appeal counsel for the appellant refused to argue the correctness of the second finding, and elected to rest his case entirely on the contention that the learned Judge should have found that the respondent occupied the cottage as the servant of the appellant and not as a tenant and so was not a person entitled to apply under the regulations.

I shall therefore confine myself to this contention.

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A number of cases were cited in which it was held that where a servant occupies a cottage of his master and the value of the occupation, whether free or at an agreed sum, is part of the consideration for his services, the servant occupies the cottage in that capacity and not as a tenant where the occupation is necessary for the performance of his duties, or his master requires him to occupy it as a condition of his service.

The learned judge found that it was necessary for the performance of his duties that the respondent should reside in a cottage on the estate, so that it is probable that the respondent occupied the cottage as a servant prior to the date of the award.

But in all these cases the value of the occupation was an ingredient in the computation of the quantum of remuneration payable by the master to the servant. After the award the sole remuneration payable to the respondent for his services was a payment in cash at the minimum rate of £4 10s. per week. From this sum the appellant deducted 14s. per week as consideration for the exclusive use of the cottage by the respondent. This deduction was a set-off of a sum owing by the respondent to the appellant against a sum owing by the appellant to the respondent. The 14s. per week which the respondent was paying for the use of the cottage was no part of his remuneration as a servant but a separate payment made out of his own moneys. With this he purchased an exclusive right to occupy the cottage independent of any remuneration for his services. Each case must turn on its own facts. A servant who is required to occupy a cottage as a condition of his employment may nevertheless occupy it as a tenant. An exclusive right to occupy land is in law a demise of the land: *Glenwood Lumber Co. Ltd.* v. *Phillips* (1). No doubt the intention was that if the respondent ceased to be employed by the appellant his right to occupy the cottage in any capacity would determine. But I think that there was ample evidence to justify the finding of the learned judge that there was a tenancy.

I would therefore dismiss the appeal.

Appeal dismissed with costs.

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E. F. H.

(1) (1904) A.C. 405, at p. 408.