[HIGH COURT OF AUSTRALIA.]

BURLING . . . . . APPELLANT;
APPLICANT,

AND

CHAS. STEELE AND COMPANY PROPRIETARY LIMITED . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE, *June* 16, 17.

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

National Security—Regulations—Landlord and tenant—Determination of tenancy—Notice to quit—Premises reasonably required for occupation by landlord—Proceedings for recovery of possession—Jurisdiction—Order by consent for ejectment of tenant—Application by tenant for rescission of order on ground of invalidity of notice to quit—Evidence that only building on land not required for occupation by landlord—Intention to erect new building—Correctness of ground in notice to quit—National Security (Landlord and Tenant) Regulations, regs. 58, 61, 64* (*S.R.* 1945 *No.* 97—1948 *No.* 22).

A company which was the landlord of business premises gave its tenant notice to quit on the ground that the premises were reasonably required for occupation by it. In proceedings by the company in a court of petty sessions

* The *National Security (Landlord and Tenant) Regulations* provided in Part III. (so far as is here material):—By reg. 58: "(1) Except as provided by this Part, the lessor of any . . . premises shall not give any notice to terminate the tenancy or take or continue any proceedings to recover possession of the premises from the lessee or for the ejectment of the lessee therefrom. (2) A notice to quit given in contravention of this regulation shall not operate so as to terminate the tenancy in respect of which the notice was given. (3) Subject to this Part, a lessor may take proceedings in any court of competent jurisdiction for an order for the recovery by him of any . . . premises . . . or for the ejectment of the lessee therefrom if the lessor, before taking the proceedings, has given to the lessee, upon one or more of the prescribed grounds but upon no other ground, notice to quit in writing for a period determined" as specified, "and that period of notice has expired. . . . (5) The prescribed grounds shall be . . . (*g*) that the premises . . . (ii) not being a dwelling-house—are reasonably required for occupation by the lessor or by a person associated or connected with the lessor in his trade, profession, calling or occupation. . . . (*l*) that the premises are reasonably required by the lessor for reconstruction or demolition." By reg. 61: "A notice to quit shall specify the ground relied upon and . . . the lessor shall not be entitled to rely upon any ground not so specified." By reg. 64, that "the court may . . . (*b*) subject to such conditions (if any) as it thinks fit, vary discharge or rescind any . . . order" for the recovery of possession of premises.

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of Victoria, constituted by a police magistrate (which was a court of competent jurisdiction within reg. 58 of the *National Security (Landlord and Tenant) Regulations*), for recovery of possession of the premises, it was ordered by consent that a warrant of ejectment should issue. The tenant subsequently applied to the court under reg. 64 of the *Landlord and Tenant Regulations* to have the consent order rescinded. Evidence was given that the company intended, on recovering possession of the land let, to demolish a shed which was the only building on the land; it only wanted the land so that it could erect another building. The tenant contended that, if the facts had been investigated at the original hearing, it would have appeared that, notwithstanding the tenant's consent, the order sought was not warranted by the regulations; as the company did not intend to use the only building on the land, it did not require "the premises" for occupation by it, and therefore the notice to quit did not state the appropriate ground under reg. 58 (5). The magistrate refused to rescind the order.

Held that the magistrate's decision should not be disturbed. The matter was within his discretion under reg. 64, and, assuming (without deciding) that the tenant was correct in his contention that the ground stated in the notice to quit was erroneous, it could not be said, in the face of the tenant's consent to the original order, that the discretion could properly be exercised only by rescinding the order.

Per Williams J.:—The ground in reg. 58 (5) (*g*) (ii), which was stated in the notice to quit, was the ground appropriate to the facts of the case. That ground applies whenever the lessor requires the premises (which means the land leased together with the buildings thereon) for his own occupation or for a person associated or connected with him in his trade, profession, calling or occupation; as part of such occupation he is entitled to do what he likes with his own land, including reconstructing or demolishing the existing buildings. The ground in reg. 58 (5) (*l*) applies where the landlord requires the premises for reconstruction or demolition with a view to letting or selling them or making some use of them other than his own occupation or the occupation of a person associated or connected with him in his trade, profession, calling or occupation.

APPEAL from a Court of Petty Sessions of Victoria.

The appellant was weekly tenant of premises owned by the respondent company. On or about 10th June 1947 the company, on the ground that the premises were reasonably required by it for occupation by it, gave the appellant a written notice to quit the premises "at the end of the week of your tenancy which will expire next after the expiration of thirty days from the date of service of this notice." On 30th July 1947, in proceedings in a court of petty sessions, constituted by a police magistrate, at Brunswick (Vict.) by the company against the appellant for recovery of possession of the premises, the following order was made by consent:

" Warrant of ejectment to issue to lie in office of Clerk of Petty Sessions until 1st February 1948. Order for mesne profits at 30/- per week. Warrant to be executed within 30 days of 1st February 1948."

On 17th March 1948, on notice to the company, the appellant applied to the court of petty sessions for an order varying, discharging or rescinding the order of 30th July 1947. Evidence was adduced from which it appeared that the only building on the premises let was a shed which the company intended to demolish ; it " never intended to occupy the shed but only to pull it down " ; it " only wanted the land on which the shed is built so that " it " could erect another building." It was contended for the appellant that, as the company did not intend to make use of the only building on the land let, it did not require " the premises " for occupation by it ; the ground of the company's notice to quit, therefore, had not been substantiated, and, if this evidence had been before the court which made the original order, it would have appeared that the order was not warranted by the *National Security (Landlord and Tenant) Regulations*. For this reason, it was submitted, the order should be rescinded notwithstanding that it had been made by consent. This submission was made by counsel for the appellant, by leave, after the close of the respondent's case. The magistrate then said that the notice to quit had not been produced before him and he did not know what it said or what grounds it was given on. He added that he did not think he " should accede to that submission at this stage " but he thought the appellant was entitled to an extension. He subsequently intimated that " a copy of the notice to quit is now on the file I have before me," but no further argument was directed to it.

The order made was as follows :—" Period for executing warrant extended. Warrant to lie in the office of the Clerk of Petty Sessions until 14th August 1948 and to be executed within fourteen days of that date."

From this decision (on the basis that, by reason of the *Landlord and Tenant Regulations*, the magistrate was exercising Federal jurisdiction) the appellant appealed, by way of order to review, to the High Court.

Bergere, for the appellant. On an application under reg. 64 the court is at large ; it is in the same position as the court at the original hearing. The magistrate did not consider the correctness of the appellant's submission as to the notice to quit ; apparently

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he thought he could not go behind the consent order. A court which has power to rescind or vary can go behind a consent order. *Rossiter* v. *Langley* (1) is authority to that effect, although *Wellesley* v. *White* (2) is to the contrary: see also *Barton* v. *Fincham* (3). The notice to quit is the foundation of the jurisdiction under reg. 58 (3); there is no jurisdiction unless the notice to quit is valid, so that the tenancy is determined by it: see reg. 62. Regulations 58 (3) and 61 contemplate that the notice, to be effectual, shall state the true ground on which the landlord seeks possession; he cannot rely on any other ground even though the evidence shows that there is another ground on which he could have succeeded if he had included it in the notice. In such a case his only course is, subject to the regulations, to start again by giving another notice to quit. In the present case the evidence given on the application under reg. 64 shows that the true ground was that the premises were required for reconstruction or demolition (the ground in reg. 58 (5) (*l*)). Regulation 58 (5) (*g*) (ii) does not cover such a case; when the landlord intends, not to occupy, but to demolish, the only building on the land, it cannot be said that he requires "the premises" (which, in par. (*g*), means or includes buildings) for occupation by him. [He referred to *Macnamara* v. *Quinn* (4); *Simms* v. *Lee* (5)]. If the evidence had been given at the original hearing, it would have been apparent that the court had no jurisdiction to make the order, even by consent. The consent could not give jurisdiction (*R.* v. *Justices of Essex* (6)) especially under regulations such as are here in question, which prohibit contracting out and agreements evading the regulations (regs. 81, 82). Accordingly, the magistrate's order, which assumed the validity of the original order, was not a proper exercise of his discretion under reg. 64.

Gillard, for the respondent. Under reg. 64 the matter was entirely within the discretion of the magistrate. The consent order gave the tenant six-months' further tenure of the premises; thus, he got the value of the consideration moving to him for the compromise, and, prima facie, it would be a vexatious proceeding to litigate the matter again. The ground in the notice to quit was not wrong. In reg. 58 (5) (*g*), the word "premises" has its common-law meaning. [He was stopped.]

(1) (1925) 1 K.B. 741: see particularly p. 744.
(2) (1921) 2 K.B. 204.
(3) (1921) 2 K.B. 291.
(4) (1947) V.L.R. 123.
(5) (1945) 45 S.R. (N.S.W.) 352; 62 W.N. 182.
(6) (1895) 1 Q.B. 38.

The following judgments were delivered:—

LATHAM C.J. This is an appeal by way of order to review from a decision of a Police Magistrate given under the *National Security (Landlord and Tenant) Regulations* refusing to rescind an order made for the issue of a warrant for possession of premises but including a provision for six months' delay before the execution of the warrant.

It is contended for the appellant that the magistrate should have made an order for rescission. Regulation 64 gives a very full power to vary or rescind an order for possession. Upon such an application the magistrate may consider and reconsider all relevant facts and circumstances. In this case an order for possession was made by consent. This fact does not, in my opinion, exclude the exercise by a competent court of the power to vary the order, but the fact that an order was made by consent is an important element for consideration when an application for rescission of that order is made.

Upon the application for rescission it was proved that the landlord company did not require possession of the premises for the purpose of occupying a shed, which was the only building on the land, but that it sought possession of the premises for the purpose of demolishing the shed, putting up a new building and using the building (and presumably the land, in so far as it was not occupied by a building) for the purposes of its business. The ground stated in the notice to quit was that the landlord reasonably required "occupation" of the premises.

It was argued that upon an application for rescission the whole matter should be considered in the same way in all respects as upon an original application for an order under the regulations. In my opinion this proposition cannot be supported. Upon the application for rescission in this case one very relevant fact was that the tenant had consented to an order, one of the terms of which was that six months' further occupation should be allowed to him. It may for present purposes be conceded, without deciding the matter, that if the case had been contested in the first instance the application would probably have failed on the ground that occupation of the premises was not required by the landlord, as distinct from possession of the premises for the purpose of demolition or reconstruction. But rather than contest the case, the tenant agreed to the order that was made, and thereby he obtained six months' unchallenged occupation. If the case had been fought and the landlord had failed it would have been open to the landlord, with the leave of the court, to issue a fresh notice upon a ground which

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it would have been able to support by some evidence. The magistrate was entitled to take all these circumstances, in my opinion, into account upon the application for rescission. Mr. *Bergere* has presented very fully, I think, every argument that could be used in support of the appeal, but in my opinion there is no reason for disturbing the decision of the magistrate, and the order nisi therefore should be discharged and the appeal dismissed.

RICH J. Mr. *Bergere's* very careful argument has not persuaded me to make any order in the case and I agree that the appeal be dismissed.

STARKE J. The magistrate was right in refusing to rescind the consent order in the face of the parties' consent and without any fraud or oppression being proved in obtaining that consent.

DIXON J. I agree. I only desire to add that if the magistrate himself did not, in exercising his discretion, take into account the grounds open to him under the Act, it would be for this Court in its turn to exercise its discretion; and in the particular circumstances of this case, having regard to the fact that, if the notice to quit was in the first instance erroneous, another notice might have been given on another ground that could have been sustained and having regard to the benefit which the tenant obtained through lapse of time, I think the Court ought to exercise its discretion against rescission. The matter remains in the hands of the magistrate, subject to reg. 64A, and is not out of his control yet.

WILLIAMS J. I agree. In the first place, I am of opinion that the magistrate had jurisdiction to make the order consented to by the parties without taking evidence to ascertain whether a ground existed under reg. 58. In the second place, as at present advised, I am of opinion that the evidence given on the application to rescind the consent order proved that the ground taken in the notice to quit, that is ground 58 (5) (*g*) (ii), was the correct ground. This ground applies whenever the lessor requires the premises, which means the land leased together with the buildings thereon, for his own occupation or for a person associated or connected with him in his trade, profession, calling or occupation. As part of such occupation he is quite entitled to do what he likes with his own land, including reconstructing or demolishing the existing buildings. Ground (*l*) applies where the landlord requires the premises for reconstruction or demolition with a view to letting or selling them

or making some use of them other than his own occupation or the occupation of a person associated or connected with him in his trade, profession, calling or occupation.

Appeal dismissed with costs. Order nisi discharged.

Solicitors for the appellant: *Stewart & Dimelow.*
Solicitors for the respondent: *Herman & Coltman.*

E. F. H.