

[HIGH COURT OF AUSTRALIA.]

DALBY AND ANOTHER . . . . . APPELLANTS ;  
INFORMANTS,  
  
AGAINST  
  
GAZZARD AND ANOTHER . . . . . RESPONDENTS.  
DEFENDANTS,

Landlord and Tenant—Weekly tenancy—Termination of tenancy—“ Protected  
person ” let into possession by outgoing tenant—No consent by landlord—  
“ Claiming under the lessee ”—Defence (Transitional Provisions) Act 1946-1947  
(No. 77 of 1946—No. 78 of 1947)—National Security (War Service Moratorium)  
Regulations (S.R. 1941 No. 61—1948 No. 109), reg. 30 (6).\*

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The requirement expressed in the words “ claiming under the lessee ” used in reg. 30 (6) of the *National Security (War Service Moratorium) Regulations* is not satisfied merely by the fact that the protected person has been let into possession by the lessee. The lessee must have conferred upon or imparted to the person in possession some right or title which but for the determination of the lease would have entitled that person to possession of the premises.

Dixon,  
McTiernan,  
Williams and  
Webb JJ.

\* 30 (6) (b) Where a tenancy has been lawfully determined and a person claiming under the lessee and actually in possession of the premises or any part thereof is a protected person, an order for the ejectment of persons from those premises or for the recovery of possession of those premises shall not be enforced against the protected person unless the court which made the order is satisfied—(a) that the protected person has failed to pay the rent in respect of a period of not less than fifty-six days; (b) that the protected person has failed to perform or observe some other term or condition of his tenancy and the performance or observance of that other term or condition has not been waived or excused by his landlord; (c) that the protected person has failed to take reasonable care of the premises, or of any goods the property of his landlord, or has committed waste; (d) that the protected person has been guilty of conduct which is a nuisance or annoyance to adjoining or neighbouring occupiers; (e) that the protected person or some other person has been convicted, while the protected person was actually in possession of the premises or part thereof, of an offence arising out of the use of the premises or part thereof for an illegal purpose or that a court has found or declared that the premises or part thereof have, while the protected person was actually in possession of the premises or part thereof, been used for some illegal purpose; (f) that the premises—(i) being a dwelling-house—are reasonably required by the person in whose favour the order was made for occupation by himself or by some person who ordinarily resides with, and is wholly or partly dependent upon, him; or (ii) not being a dwelling

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Paragraphs (a), (b) and (c) of reg. 30 (6) of the *National Security (War Service Moratorium) Regulations* make it incumbent on a protected person in possession to fulfil towards the lessor the obligations which the protected person had incurred, if he himself be a sub-lessee, to his sub-lessor, so that he must perform his obligation with reference to rent, terms and conditions, care of the premises and of goods, and waste, as if he were in privity with the lessor, whom, in effect, he must treat as his lessor in lieu of the sub-lessor.

### APPEAL from a Court of Petty Sessions.

In an information laid by James Henry Dalby on his own behalf and on behalf of Ada Frances Dalby, his wife, it was alleged inter alia, that the defendant, Sheila Gazzard, held from Mr. and Mrs. Dalby by virtue of a tenancy from week to week an unfurnished flat known as Number 1 Flat "Waikato," 1 Hewlett Street, Waverley; that that tenancy was determined by notice to quit on or about 26th July 1948; that at the time of the information the flat was actually occupied by the defendant; that she neglected to quit and deliver up possession of the flat; and that Mr. and Mrs. Dalby then had lawful right as against the defendant to the possession of the flat, and the informant prayed that he and Mrs. Dalby might be put into possession of the flat.

After hearing evidence adduced by the parties the magistrate before whom the information was heard, on 20th August 1948, adjudged the informant entitled to possession of the flat as against the defendant and ordered a warrant to issue forthwith to give possession on 30th August 1948 as against the defendant, but, following the decision in *Callaghan v. Norman* (1), ordered that the warrant of possession be not executed against John Gazzard—a brother-in-law of the defendant—a protected person within the meaning of the *National Security (War Service Moratorium) Regulations* and claiming under the defendant.

house—are reasonably required for occupation by the person in whose favour the order was made or by a person associated or connected with him in his trade, profession, calling or occupation; (g) that the premises are used as, or have been acquired for use as, a parsonage, vicarage, presbytery, or other like premises and are reasonably required for the personal occupation of a minister of religion (including a person who, although not ordained, is performing all the duties of a minister of religion); (h) that the person in whose favour the order was made is a trustee and the premises are reasonably

required by a beneficiary under the trust for his personal occupation or for the occupation of some person who ordinarily resides with, and is wholly or partly dependent upon, him; or (i) that the person, body or authority in whose favour the order was made is a person, body or authority carrying on a hospital, or a trustee for such a person, body or authority, and the use of the premises is reasonably required for the purposes of the hospital (including the accommodation of the staff of the hospital), and gives leave to enforce the order against the protected person.

The Magistrate found the following facts to have been proved :—  
(a) that the subject premises were situated in the Paddington Petty Sessions District, New South Wales ; (b) that the defendant held the premises as a tenant of the informant and his wife from week to week ; (c) that the informant served upon the defendant on 21st June 1948, a notice to quit the premises on the following grounds—(i) that the defendant had given notice of her intention to vacate the premises and in consequence of that notice the informant had agreed to let the premises, and (ii) that the defendant had sub-let the premises by a sub-lease which had not been consented to or approved by the informant ; (d) that the defendant by her agent did in fact on 8th May 1948, notify the informant of her intention to vacate the premises on 15th May 1948 and that as a consequence the informant did agree to let the premises to one John Joseph Minahan as from 31st May 1948 ; (e) that one John Gazzard did enter into possession of the premises on 14th May 1948, with the leave and licence of the defendant and was therefore in occupation prior to the determination of the tenancy ; and (f) that John Gazzard was a protected person within the meaning of the *National Security (War Service Moratorium) Regulations*.

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The magistrate adjudged the informant and his wife entitled to possession of the premises as against the defendant but that the warrant of possession should not be operative against John Gazzard, on grounds (e) and (f) set forth above and the further ground that following the decision in *Callaghan v. Norman* (1), John Gazzard was a protected person claiming under the lessee (the defendant) within the meaning of reg. 30 (6) of the *National Security (War Service Moratorium) Regulations*.

Upon the application of the informant and his wife the High Court, on 25th November 1948, granted special leave to appeal against the order of the magistrate so far as it directed that the warrant should not be executed against John Gazzard.

Further material facts and the relevant provisions of the *National Security (War Service Moratorium) Regulations* appear in judgment hereunder.

*Henderson*, for the appellants. The decision in *Simpson v. Mitchell* (2) was made in respect to the *National Security (War Service Moratorium) Regulations* before they were re-cast, the present reg. 30 (6) being the then reg. 30 (8) and both being in exactly the same terms. The words “ a person claiming under the lessee and actually in possession ” do not apply to a person who was merely

(1) (1948) 66 W.N. (N.S.W.) 1. (2) (1944) 61 W.N. (N.S.W.) 147.

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in occupation with the permission of the lessee but without any legal right of possession as against him (*Mouton v. Abbott* (1)). In *Wilson v. Markham* (2) it was held that a sub-lessee was a person claiming under the lessee within the meaning of the regulations. For this purpose an assignee is not a person claiming under the lessee by reason of the particular definitions of "lessee" and "lessor" included in these regulations by implied reference to the *National Security (Landlord and Tenant) Regulations*. The words "claiming under" in reg. 30 (6) of the War Service Moratorium Regulations do not include a person in the position of the respondent John Gazzard who on the finding of the magistrate was a mere licensee of the premises. He had a right to be on the premises but he did not have any title thereto. A sub-lessee is the only person who is entitled to "claim under." Sub-regulation (6) of reg. 30 contemplates the existence between the protected person and the lessee of the relationship of landlord and tenant and not merely the relationship of, say, licensor and licensee. The respondent John Gazzard, although a protected person, was neither a tenant of the respondent Sheila Gazzard nor an assignee from her, and, accordingly, he is not a person "claiming under" her within the meaning of reg. 30 (6). On 17th May John Gazzard ceased to be a licensee and became a trespasser, and as a trespasser he could not claim under the lessee (*Simpson v. Mitchell* (3)). The phrase "claiming under" in s. 23 of the *Landlord and Tenant Act of 1899* (N.S.W.) was considered in *Ex parte Kelly* (4). The legislature was not really concerned with anything more than a person who derives a title under or through the person against whom the order was made, and it is for the court to decide in any given case whether that conception of derived title is present.

*Seaton*, for the respondents. It was correctly decided in *Callaghan v. Norman* (5) that the phrase "a person claiming under" in sub-reg. (6) of reg. 30 referred to a person who claimed not by reason of title to the land, but with the approval of the lessee, or, in other words, a person who was not on the premises as a trespasser. There must be a termination of tenancy before reg. 30 (6) can come into operation at all. The words "claiming under" should be construed as in *Ex parte Fergusson* (6). Those words should be given a liberal interpretation. If they meant title there would not be any

(1) (1949) 49 S.R. (N.S.W.) 305; (1949) 66 W.N. (N.S.W.) 129, at p. 130.  
(2) (1949) 66 W.N. (N.S.W.) 165.  
(3) (1944) 61 W.N. (N.S.W.) 147.  
(4) (1927) 44 W.N. (N.S.W.) 142.  
(5) (1948) 66 W.N. (N.S.W.) 1.  
(6) (1890) L.R. (N.S.W.) 43; (1890) 6 W.N. (N.S.W.) 125, at p. 126.

need for the words "actually in possession." All the cases cited on behalf of the appellants depend upon the person having some title to the estate, the land itself. A tenant can still claim title by virtue of his assignment, and under the *Landlord and Tenant Regulations* he becomes lessee by virtue of an assignment which has not been consented to. By virtue of the assignment he steps into the shoes of the lessee and cannot be ejected unless there be alternative accommodation available to him under sub-reg. (5) of reg. 30. He has complete protection there as an assignee. *Simpson v. Mitchell* (1), *Callaghan v. Norman* (2) and *Mouton v. Abbott* (3) are cases where there had been a surrender. A surrender protects the sub-lessee. Regulation 30 envisages cases where there has been a notice to quit. The *dicta* in *Walter v. Yalden* (4) with regard to surrender is the ordinary common law. The proceedings in *Towill v. Bailey* (5) were not brought under the *Landlord and Tenant Regulations*, the application was for an injunction. In the circumstances of this case there was not a surrender and the tenancy ensued until the notice to quit was served on 21st June. In view of the possibility of the return of the respondent Sheila Gazzard and her husband to the premises as tenants the respondent John Gazzard was a sub-lessee, the term of the sub-lease being from week to week (*Wilson v. Jolly* (6)). "Rent" means the rent of the whole of the premises and includes rent payable under a sub-lease (*Moulton v. Abbott* (7)). If it had been intended that the provision should apply only to sub-leases it could have been so limited by express words. If there was a surrender there was privity between the lessee and the sub-lessee by virtue of the common law, and if there was a sub-letting with consent there was privity by virtue of the regulations. The phrase "claiming under" has a meaning different from that which has been given it by the Supreme Court, that is, a person who claims some share in the land. It would apply to a person on the premises as a lodger or as a licensee in the broadest sense (*Fink v. McIntosh* (8)). Regulation 30, in its true purport, only applies in cases of notice to quit and proceedings taken under the *National Security (Landlord and Tenant) Regulations*. Once the main estate has been determined the estate of a person claiming as a sub-lessee, that is, without the consent of the lessor, vanishes. It must go with that

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(1) (1944) 61 W.N. (N.S.W.) 147.

(2) (1948) 66 W.N. (N.S.W.) 1.

(3) (1949) 49 S.R. (N.S.W.) 305;  
(1949) 66 W.N. (N.S.W.) 129.

(4) (1902) 2 K.B. 304, at p. 310.

(5) (1949) V.L.R. 248.

(6) (1948) 48 S.R. (N.S.W.) 460;

(1948) 65 W.N. (N.S.W.) 205, at  
p. 206.(7) (1949) 66 W.N. (N.S.W.), at p.  
130.

(8) (1946) V.L.R. 290.

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of the lessee: *Halsbury's Laws of England*, 2nd ed., vol. 20, p. 83, par. 94, note (g). Reference to *Commonwealth Life (Amalgamated) Assurance Ltd. v. Anderson* (1), *Wood v. Eisen* (2) and *Halsbury's Laws of England*, 2nd ed., vol. 20, p. 344, par. 415, shows that, even if there was not any consent by the lessor to a sub-lease, the sub-lessee takes title. A sub-lessee without consent gains title (*Wood v. Eisen* (3)), yet if the sub-lease were consented to there would be privity by virtue of reg. 73 of the *National Security (Landlord and Tenant) Regulations*. If there was a surrender there would be privity by virtue of the common law (*Walter v. Yalden* (4)). The strict interpretation given by the Supreme Court arises only in such cases where there was a common law ejectment action and there was a surrender, but the cases are distinguishable where there is a notice to quit which in fact terminates the lease and anybody "claiming under" unless their rights are preserved by virtue of a surrender by reg. 73. The magistrate fell into error by considering that a statement of intention to vacate was equivalent to surrender. That took place in May and the notice to quit was not issued until June. Although at common law a tenancy terminates at the expiry of a notice to quit, by virtue of reg. 8 (2) of the *National Security (Landlord and Tenant) Regulations* it continues in fact until an order of the court is made adjudging the lessor entitled to possession (*Combley v. Clark* (5)). That case was referred to in *Fink v. McIntosh* (6). The word "tenancy" in reg. 30 (6) (b) of the *War Service Moratorium Regulations* would apply only if in fact there was a sub-lease. An order should not be enforced against a lodger who is a "protected person" (*Frauenfelder v. Franzi* (7)). *Wilson v. Markham* (8) is a case of assignment and is not of any assistance to the court. The respondent John Gazzard need not be an assignee; he was still in bona-fide possession: *Halsbury's Laws of England*, 2nd ed., vol. 20, p. 121, par. 133. The word "landlord" as used in reg. 30 (6) has a much broader meaning than the word "lessor" (*Ex parte Kelly* (9)). The whole intendment of the regulation was to give protection to ex-members of the Forces, and they were not to be ejected from premises if they had that protection. The regulation should not be given a narrow interpretation but should be construed liberally provided there was a claim to possession under a sub-lease and/or

(1) (1945) S.R. (N.S.W.) 47; (1945) 62 W.N. (N.S.W.) 240.

(2) (1948) S.R. (N.S.W.) 5; (1947) 64 W.N. (N.S.W.) 195.

(3) (1947) 64 W.N. (N.S.W.), at p. 198.

(4) (1902) 2 K.B. 304.

(5) (1944) 46 W.A.L.R. 49, at p. 57.

(6) (1946) V.L.R. 290.

(7) (1944) V.L.R. 158.

(8) (1949) 66 W.N. (N.S.W.) 165.

(9) (1927) 44 W.N. (N.S.W.), at p. 143.

an assignment of the premises. Regulation 30 (6) applies to all cases where a protected person is let into possession of the premises or part of the premises before the lease has been lawfully terminated. It applies to persons who had an interest in the possession of the property with the privity or authority of the lessee; they "claim under" in that sense, and do not "claim under" an estate in the narrow sense stated by the Supreme Court. It is competent for this Court to make such order as should have been made: *Judiciary Act* 1903-1948, s. 37. The Court should not make any order as to costs (*Ex parte Benson*; *Re Harris* (1); *National Security (Landlord and Tenant) Regulations*, reg. 75).

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*Henderson*, in reply. There is not any evidence that there was a sub-tenancy in existence.

*Cur. adv. vult.*

The Court delivered the following written judgment:—

Aug. 13.

This is an appeal by special leave from portion of an order made by a Court of Petty Sessions exercising Federal jurisdiction.

The order was made upon an information exhibited in the name of one, on behalf of both, of the appellants. By the information they seek to be put into possession of an unfurnished flat which they allege had been held by them as landlords by the respondent Sheila Gazzard as tenant upon a tenancy that had been determined. They claimed that the respondent Sheila Gazzard retained possession. It appeared, however, that the respondent John Gazzard was in actual occupation and that he was a "protected person." The magistrate adjudged that the informant was entitled to possession as against the respondent Sheila Gazzard, but ordered that the warrant of possession should not be executed against the respondent John Gazzard, being a protected person. The appeal is by the landlords against so much of the order as directs that the warrant should not be executed against the respondent John Gazzard.

In giving the direction the magistrate acted under reg. 30 (6) of the *National Security (War Service Moratorium) Regulations*. That sub-regulation provides that where a tenancy has been lawfully determined and any person claiming under the lessee and actually in possession of the premises or any part thereof is a protected person an order for the ejectment of persons from those premises or for the recovery of possession of those premises shall not be enforced against the protected person, unless the court is

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satisfied of the existence of one or other of certain states of fact which the sub-regulation defines.

The respondent John Gazzard is a protected person within the meaning of the definition of that expression in reg. 28A and within the further limitations upon the application of the expression imposed by reg. 30 (1). He is or was in actual occupation of the premises, but the question is whether he is a "person claiming under the lessee" within the meaning of those words in reg. 30 (6).

The respondent Sheila Gazzard and her husband William Gazzard had occupied the flat until Saturday, 15th May, 1948, when they left it. On the previous day the respondent John Gazzard came into the premises and he remained there. He is a brother of William Gazzard, Sheila Gazzard's husband. William and Sheila Gazzard had lived in the flat for some years. It was held from the appellants on a weekly tenancy in Sheila Gazzard's name. Having obtained in a ballot another place of residence, William and Sheila Gazzard determined to leave the flat and they so informed the appellant J. H. Dalby. On Saturday, 8th May 1948, William Gazzard notified him that they would leave the premises on the following Saturday, that is 15th May, the date on which, in the event, they did leave the flat. The appellant J. H. Dalby then let the premises to another tenant. On Thursday, 13th May, the respondent Sheila Gazzard confirmed the statement that they would leave on the Saturday. She had come to pay the rent. She paid it for the current week ended Monday, 17th May. On Saturday, 15th May, the appellant J. H. Dalby asked William Gazzard to hand the key of the flat to the former's wife when they got the furniture out. William Gazzard then said that he would not do so as he was giving the key to his brother. Dalby sought the assistance of the police, but the respondent John Gazzard and his wife insisted on remaining in possession. From time to time John Gazzard tendered rent to Dalby, but the latter refused it. Afterwards he sent money orders for the rent to Dalby. Dalby did not cash them. On 17th May Dalby gave John Gazzard a notice to quit the flat on 24th May. The notice said that the latter purported to hold the flat of the former as tenant and that he had entered into possession purporting to act under an assignment or transfer of the tenancy from Sheila Gazzard. On 21st June the appellants Dalby gave the respondent Sheila Gazzard notice to quit the flat on 26th July. This notice assigned grounds under reg. 58 (5) (f) and (n) of the *National Security (Landlord and Tenant) Regulations*, which were then in force and remained in force until 16th August 1948. The notice alleged that Sheila Gazzard as lessee had given notice of her intention to vacate the premises on

17th May and that on or about 14th May she had sublet the premises to John Gazzard without the lessor's consent or approval.

Sheila and John Gazzard both gave evidence of the arrangement they had made. It amounted to no more than an arrangement by her husband and herself to let him into possession of the flat and hand him the key when they left. John Gazzard and his wife brought some of their furniture there on the night before. William and Sheila Gazzard took their furniture away and John and his wife simply remained in occupation.

It is clear that there was no sub-lease. John was to deal with the landlord as best he could and pay him the rent. It was not intended that he should be a tenant of Sheila or of William. It is clear also that there was no assignment. There was, of course, neither deed nor writing. There was no contract for valuable consideration. There was, moreover, no intention to assign an estate or interest. The whole transaction between John on the one side and Sheila and William Gazzard on the other rested on the conception that under the regulations he would be able to hold possession of the flat as against the landlord if he once obtained possession. Accordingly he came upon the premises and they gave him the key and left him there. Further, Sheila Gazzard held on a weekly tenancy and the notice given to the landlord of the intention of her husband and herself to vacate on Saturday, 15th May, and the payment of rent to the end of the current week, namely to 17th May, constituted a sufficient notice terminating the tenancy on 17th May. It was an oral notice to quit but a tenant may give an oral notice to quit.

It is true that under reg. 58 of the *National Security (Landlord and Tenant) Regulations* proceedings for the recovery of possession could not be maintained by the landlords, that is the appellants Dalby, against the respondent Sheila Gazzard, notwithstanding the termination of the tenancy by the operation of her verbal notice to quit, unless the landlords on their part first served upon her a notice to quit based upon one of the grounds specified in sub-reg. (5). But that does not mean that the tenancy was not terminated. The ground given by par. (f) of sub-reg. (5) shows that. It follows that the only possible subject of assignment, had assignment been intended, was a tenancy with only three days to run.

This appeal is limited to the question whether in the foregoing circumstances John Gazzard falls within the immunity given by sub-reg. (6) of reg. 30 of the *National Security (War Service Moratorium) Regulations* to protected persons actually in possession of premises and claiming under a tenant whose tenancy has been

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lawfully determined. No question is raised as to the correctness of the order for the recovery of possession made against Sheila Gazzard. She is named as a respondent to the landlords' appeal but she does not appeal against the order made against her. We are not, therefore, concerned to inquire whether within the meaning of the *Landlord and Tenant Act of 1899* (N.S.W.), s. 23, Sheila Gazzard could properly be said to have refused or neglected to give up possession. It may be that Sheila Gazzard's true defence before the magistrate was that her tenancy had ended and she had vacated possession: see s. 23 (2) (c). But an order was made against her and, apart from the direction that the warrant should not be executed against John, the tenor of the warrant would put the latter in peril of ejection. For the warrant would be expressed to authorize and command the officers executing it to enter into and upon the land and eject all persons thereout and therefrom and give possession of the same to the appellants. Section 22A (c), it is true, authorizes the execution of the warrant not only against the defendant to an information but also against every person claiming under him who is in actual occupation, but we are not concerned in this appeal with any questions that may be raised under that section as to the operation of the warrant against persons in independent possession of the premises. Probably it ought not to be construed as limiting the effect of the warrant as it is set out in Schedule E. From s. 30 it is to be inferred that if the person in possession has no right as against the landlord he may be ejected.

The whole question before us turns on the words "claiming under the lessee." The meaning and application of such an expression is governed by the context in which it is found. Here it is found in a context where the subject matter of the "claim" is possession of premises, where the character of the person under whom possession is claimed is that of lessee of the premises and where the person claiming must have actual possession of the premises. The purpose of the provision evidently is to give to the person so in actual possession, provided the other conditions specified are fulfilled, a protection notwithstanding the determination of the lessee's title. The thing which makes the protection of his possession necessary is the determination of the lessee's title.

Two different views have been taken of what, in these conditions, is necessary to satisfy the requirement expressed in the words "claiming under." One view is that it is enough that the person has been let into possession by the lessee. The other view is that the lessee must have conferred upon or imparted to the person in possession some right or title to possession good against him, that

is to say some right or title which but for the determination of the lease would have entitled that person to possession of the premises. The best exposition of the first view is to be found in the judgment of *Herron J.* in *Callaghan v. Norman* (1). The second view has been adopted in one form or another by the Supreme Court of New South Wales in *Mouton v. Abbott* (2), in *Wilson v. Markham* (3), and perhaps in a previous decision of *Herron J.* himself, *Simpson v. Mitchell* (4), and by the Supreme Court of Victoria in *Fink v. McIntosh* (5), *Lowe J.* and *Towill v. Bailey* (6), *O'Bryan J.*

The first view is based partly on a wide meaning attributed to the words "claiming under" and partly upon a policy discovered in the regulations of insuring that once a protected person was let into possession of premises his possession should be preserved against disturbance by legal remedies. Some support for a wide interpretation of the words "claiming under" was sought in the cases decided upon covenants for quiet enjoyment. But there the context shows that what such covenants contemplate is an act disturbing quiet enjoyment committed by a person deriving the estate interest, authority or capacity in virtue of which he acts from the covenantor.

The more limited interpretation of the expression "claiming under" in reg. 30 (6) appears to be the sounder. The sub-regulation bears upon its face evidence of an intention to preserve from the operation of an order for ejectment the possession of a protected person whose right to possession would or might be defeated by the determination of the tenancy of the lessee. Sub-regulation (4) of reg. 30 provides that an order shall not be made for the recovery of possession of premises from a lessee (being a protected person) or for the ejectment from premises of a lessee (being a protected person) unless the court making the order is satisfied of the existence of one or other of certain states of fact. Although the expression "lessee" is used it must be remembered that by sub-reg. (2) the expression is defined to mean the parties to a lease or their respective successors in title and to include a mesne lessee and a sub-lessee. Sub-regulation (4) therefore covers lessees, assignees of a lease and sub-lessees. The purpose of the provision is to control proceedings against protected persons, falling within the categories covered by the expression "lessee" as so defined, for the recovery of possession or for ejectment. For only in proceedings to which they were parties would an order for the recovery of possession from them or

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(3) (1949) 66 W.N. (N.S.W.) 129.

(4) (1944) 61 W.N. (N.S.W.) 147.

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for their ejectment be made. Sub-regulation (6) seems to be the counterpart of sub-reg. (4) dealing with proceedings in which an order is made against someone else for the recovery from him of possession of premises or for his ejectment therefrom. The purpose is to safeguard the protected person who is actually in possession from the operation of a warrant granted in such proceedings. But it is made a condition that he must claim under the lessee. It speaks of the tenancy being lawfully determined and "lessee" must mean lessee under the tenancy that is determined. Of course subject to that limitation it will cover persons occupying any of the characters falling within the defined meaning of the expression "lessee."

But the limitation to persons claiming under the lessee distinguishes between protected persons in under an independent possession and those in under a derivative possession. Now this distinction is made with reference to the determination of a lease and the person protected must derive from the lessee whose lease has determined. When this is considered it almost necessarily appears to follow that he must have a right to possession which is dependent upon the continuation of the lessee's title. It is of course both difficult and unsafe to attempt to make an exhaustive statement of transactions by which such a right to possession may be imparted by a lessee to another person. But it is clear that much more is required than for the tenant merely to let that other person into possession as the next occupier. To make a sub-lease to him whether of the whole or part of the premises, and to place him in possession as sub-lessee accordingly, is a transaction which of course would bring the protected person within sub-reg. (6). Indeed there cannot be much doubt that the interest of a sub-lessee is the case for which the sub-regulation was primarily intended to provide.

In *Wilson v. Markham* (1) it was decided that an assignee of the residue of a term did not come within the provision; but that seems to have been less because of the meaning of the word "under" than because an assignee becomes the lessee and because it is against him that the proceedings to recover possession should be brought and not against his assignor. In *Towill v. Bailey* (2) *O'Bryan J.* expressed the same view. The present case does not necessarily involve the question. For there was no assignment and little or nothing to assign. But it may be proper to remark that if once it be assumed that notwithstanding the assignee's position as tenant, an order for the recovery of possession of the premises has been

(1) (1949) 66 W.N. (N.S.W.) 165.

(2) (1949) V.L.R. 248.

made against his assignor as lessee, a situation would arise to meet which it would not seem unnatural to invoke reg. 30 (6). The difficulty really lies in the assumption itself. For if the proceedings are properly framed the case of an assignee should be governed by sub-reg. (4) because he should be the party against whom the order is sought. It must however be borne in mind that the purpose of sub-reg. (6) is to safeguard protected persons against warrants granted in proceedings against others. It does not seem to matter why an order was made or whether the proceedings were properly framed. It is enough that there is a warrant against which a protected person needs to be secured. It is difficult therefore to see any sound ground differentiating the position of an assignee from that of a lessee. The nature of the provision and the context alike point to the conclusion that the typical case reg. 30 (6) contemplates is that of a sub-lessee. That must provide the analogy in other cases that may arise. The characteristic feature of the case of a sub-lessee is that his title to possession depends on the continuance of the head lease and is defeated by its determination. But a further consideration of importance is that the conditions contained in pars. (a), (b) and (c) of reg. 30 (6) seem appropriate only to a sub-lessee. These paragraphs raise difficulties of their own. Paragraph (a) speaks of the protected person failing to pay the rent. Does that mean the rent reserved by the lease that has determined? It is difficult to suppose it refers to the rent of that, the head, lease. For sub-reg. (6) expressly includes the case of a protected person being in possession of part only of the premises. Paragraph (b) is concerned with the failure of the protected person to perform or observe some *other* term or condition of *his* tenancy. This must refer to the terms or conditions under which he holds. But par. (c) speaks of "goods the property of his landlord." Does this mean the mesne landlord? That seems improbable because the purpose of the paragraph is to create in favour of the lessor of the lease that has determined an exception to the rule securing the protected person against dispossession. What interest has that lessor in the goods of the mesne landlord?

On the whole the better interpretation of these three paragraphs appears to be that they intend to make it incumbent on the protected person in possession to fulfil towards the lessor the obligations which the protected person has incurred, if he himself be a sub-lessee, to his sub-lessor, so that he must perform his obligation with reference to rent, terms and conditions, care of the premises and of goods, and waste, as if he were in privity with the lessor, who, in effect, he must treat as his lessor in lieu of the sub-lessor.

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This view of pars. (a), (b) and (c) of sub-reg. (6) derives some support from a consideration of sub-reg. (4), pars. (a), (b) and (c), of which the corresponding paragraphs of sub-reg. (6) seem the counterparts.

The foregoing considerations seem to strengthen the conclusion that the words "claiming under the lessee" do not extend to persons who are merely let into possession by the lessee whose tenancy is determined.

The application of reg. 30 (6) is not either expressly or by implication confined to sub-lessees but the provision makes it clear that the possession of the person claiming under the tenant must be founded on a right or title good as against him and depending upon the continued existence of his tenancy. In the circumstances in which he entered and remained in possession of the premises the respondent John Gazzard cannot satisfy this condition.

The appeal should therefore be allowed as against him and so much of the order of the magistrate as directed that the warrant of possession be not executed against John Gazzard should be discharged.

There is no difficulty concerning the jurisdiction of this Court to award the costs of an appeal arising out of a case involving the *National Security (War Service Moratorium) Regulations* and the provisions they incorporate of the *National Security (Landlord and Tenant) Regulations*: see *O'Mara v. Harris* (1). The respondent John Gazzard should pay the costs of the appeal to this Court.

*Appeal allowed. So much of the order of the magistrate as directed that the warrant of possession be not executed against the respondent John Gazzard discharged. Costs of the appeal to this Court to be paid by the respondent John Gazzard.*

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Solicitors for the respondents, *Abbott, Tout, Creer & Wilkinson.*

J. B.