REF. 77 W.N. 114
" 60 S.R. 372

[HIGH COURT OF AUSTRALIA.]

MASSART . . . . . APPELLANT;
DEFENDANT,

Cons'd 52 (N.S.W.) S.R. 67: 69 WN 71

AND

BLIGHT AND ANOTHER . . . . . RESPONDENTS.
COMPLAINANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 19, 20, 23; *May* 10.

Dixon, McTiernan, Williams, Webb and Fullagar JJ.

Landlord and Tenant—Prescribed premises—Recovery of possession—Lease—Covenant against assigning without consent of lessor—Breach by assignor—Notice to quit given to assignee—Operation of notice—Hardship—Discretion of magistrate—Landlord and Tenant (Amendment) Act 1948-1949 (N.S.W.) (*No.* 25 *of* 1948—*No.* 21 *of* 1949), *ss.* 36, 62 (5) (*b*) (*n*), (7) (*b*), (10), 70 (1) (*a*), 74, 91.

Under the combined operation of sub-ss. (5) (*b*), (*n*), (7) (*b*) and (10) of s. 62 of the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W.), an assignment of a lease which has not been assented to or approved by the lessor is a ground for giving a notice to quit under that section if there is not any covenant against assigning contained in the lease, but is not a ground if there be such a covenant, and none of the prescribed grounds extend effectively to such a case.

Ref'd to: 76 (N.S.W.) W.N. 61

The complete discretion with respect to hardship which is given to a magistrate by s. 70 (1) (*a*) of the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W.), can only be reviewed on appeal under s. 74 when an error of law has been committed or the exercise of his discretion has so miscarried that his conclusion cannot be supported in point of law.

Dist: 1956 SR (NSW) 384.

At common law an assignment of a lease in breach of a condition against assignment, does not make the assignment nugatory, but merely exposes the lease to forfeiture.

Dist 1956 73 WN 546.

Decision of the Supreme Court of New South Wales (Full Court): *Blight* v. *Massart*, (1950) 67 W.N. (N.S.W.) 206, reversed.

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APPEAL from the Supreme Court of New South Wales.

On 15th February 1949, Gertrude Lillian Blight and her husband, Charles Alfred Blight, became the owners of a block of eight flats, known as "Rothesay" Flats, 58 Blair Street, Bondi, with the object of carrying on a business of letting the flats, as had been done in the past by two ladies, who had occupied one of the flats, under a lease, in the form of a weekly tenancy, dated 11th January 1944, in respect of the whole building, but which lease had expired in 1946. The two ladies, as lessees, held over after the expiry of the lease but nevertheless subject to its terms. The lease was stated to be made in pursuance of the *Conveyancing Act* 1919-1932, and contained a covenant by the lessees not to assign or sublet without leave in the expanded sense given to those words by Schedule IV. of that Act, and in that expanded form it was provided that consent was not to be refused in the case of a proposed respectable and responsible assign. In order to purchase the subject premises Mr. and Mrs. Blight sold their own residence at Croydon with vacant possession to be given in September 1949, but at the date of the hearing hereinafter mentioned, in November 1949, they were still in possession of that residence.

In June and July 1949, discussions took place between Mr. and Mrs. Blight and the two ladies with respect to an assignment by the lessees, of their interest in the premises. Mr. and Mrs. Blight refused to give their consent to the proposed assignment, and on 20th July 1949 the lessees, without any consent, assigned the premises and their interest therein to Alfred John Massart, who agreed to pay them the sum of £1,250 for the lease. An approval for that transaction had not been obtained from the Fair Rents Board. Massart went into possession of the block of flats and occupied one of the flats with his wife and child.

On 27th August 1949, Mr. and Mrs. Blight served a notice to quit on Massart, claiming to recover possession of the block of flats upon the grounds contained in pars. (b), (g), (m) and (n) of s. 62 (5) of the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W.), as follows:—(b) that the lessee had failed to perform or observe some other term or condition of the lease (that is, other than to pay rent) and the performance or observance of that other term or condition had not been waived or excused by the lessors; (g) that the premises were reasonably required by the lessors for occupation by themselves; (m) that the premises were reasonably required by the lessors for reconstruction or demolition; and (n) that the lessee had become the lessee of the premises being a dwelling house or series of dwelling houses by virtue of an

assignment or transfer which the lessees had not consented to or approved.

Massart did not give up possession of the premises pursuant to the notice to quit, and Mr. and Mrs. Blight caused an information for ejectment to be exhibited and a summons issued thereon.

The magistrate before whom the summons was heard adjudged that ground (b) had been proved but, in the exercise of his discretion under s. 70 of the Act, held that the greater hardship lay with the lessee, Massart, and refused to make an order for possession.

On the application of the lessors, the magistrate stated a case for the opinion of the Supreme Court of New South Wales.

The magistrate found the following facts, *inter alia*, to be established from the admissions made before him:—(i) that Massart held the premises of Mr. and Mrs. Blight as a weekly tenant; (ii) that ground (m) in the notice to quit, that the premises were reasonably required by the lessors, Mr. and Mrs. Blight, for reconstruction or demolition, was not proceeded with; and (iii) that ground (n), that the lessee, Massart, had become the lessee of the premises being a dwelling house or a series of dwelling houses by virtue of an assignment or transfer which the lessors had not consented to or approved, was not proceeded with.

The following facts were found by the magistrate to be established from the evidence:—

(i) that Massart had failed to obtain the consent of Mr. and Mrs. Blight to the assignment and therefore had failed to perform a term or condition of the lease.

(ii) Mr. and Mrs. Blight had sold their own residence to purchase the subject premises but were still in possession of that residence at the date of the hearing. Massart had (a) purchased a lease of the subject premises for the sum of £1,250, and (b) was occupying, with his wife and child, Flat No. 3 of the subject premises and had no other suitable accommodation available for his family.

Taking into consideration any hardship which would be caused to Mr. and Mrs. Blight or to Massart, in addition to all relevant matters, the magistrate found that the greater hardship would be caused to Massart and refused to make an order.

With regard to ground (g) that the premises were reasonably required by Mr. and Mrs. Blight for occupation by themselves, there was no evidence adduced to show that Mr. and Mrs. Blight had provided, at the date of the expiry of the notice to quit and had immediately available for the persons occupying the subject dwelling house, reasonably suitable alternative accommodation as provided by s. 70 (2) of the *Landlord and Tenant (Amendment)*

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Act 1948. The magistrate, therefore, held that there was no case to answer on that ground.

The ground upon which it was contended that the magistrate's determination in point of law was erroneous, was that he was in error in holding that there was no case to answer in respect of ground (g) that the premises were reasonably required by Mr. and Mrs. Blight for occupation by themselves.

The question for the determination of the Supreme Court was whether the magistrate's determination in holding that there was no case to answer in respect of ground (g) in the notice to quit was erroneous in point of law.

Upon the hearing of the matter before *Herron* J., his Honour regarded it as one of importance because a question which arose was whether, having regard to the amendment in s. 62 (7) (b) and the addition to s. 62 of sub-s. (10) made by s. 5 of Act No. 21 of 1949, a landlord could recover possession of premises under s. 62 (5) (b) or (n) from an assignee of a lease in possession when the lease contained a covenant against assigning. His Honour said a very curious problem arose. If a lessee had become the lessee of premises by virtue of an assignment which had not been consented to or approved, proceedings may be taken for eviction of such lessee provided the premises were a dwelling house, but curiously enough the rights so conferred by par. (n) could only be availed of where the lease contained no covenant, whether absolute or conditional, against assigning by the lessee. In other words, if there was in the lease, as there was in the subject lease, a covenant against assigning without leave, the rights otherwise conferred on a landlord by par. (n) disappeared, and none were substituted for such rights. His Honour referred the appeal by case stated to the Full Court of the Supreme Court.

Upon the appeal coming on for hearing before the Full Court the case stated was remitted to the magistrate to enable him to find additional facts.

The magistrate thereupon submitted the following further facts which he found to be proved :—

(i) The subject premises consisted of a block of eight self-contained flats.

(ii) Mr. and Mrs. Blight, on 15th February 1949, became owners thereof by purchase of the freehold.

(iii) The existing lease, which was a weekly tenancy, was held by the two ladies mentioned above, and it was a term thereof that the lessees would not assign or sublet without leave in the expanded

sense given those words by Schedule IV. (1) (b) of the *Conveyancing Act*.

(iv) On several occasions prior to 20th July 1949, the lessees were informed that Mr. and Mrs. Blight would not consent to any assignment.

(v) On or about 28th June 1949, Mrs. Blight, by telephone, invited the solicitors for the lessees to communicate with Messrs. K. O'Malley Jones & Co., Solicitors, in relation to a request for leave to assign.

(vi) On or about 4th July 1949, a letter was written on behalf of Mr. and Mrs. Blight to one of the lessees advising that the owners would not agree to any transfer of the tenancy.

(vii) On or about 12th July 1949, a letter was written by the lessees' solicitors to Messrs. K. O'Malley Jones & Co. requesting leave to assign to Massart, who was named therein, and stated to be a responsible and reputable person, but the evidence did not show that it came to the knowledge of Mr. and Mrs. Blight prior to the assignment.

(viii) Such consent was not given.

(ix) On 20th July 1949, one of the lessees informed Mrs. Blight by telephone that she had a buyer for the business, who was not named, and was informed by Mrs. Blight that the latter would not allow her to assign and the lessee informed Mrs. Blight that she thought it was then too late.

(x) On 20th July 1949, the lessees did assign to Massart by deed.

(xi) Massart was at all relevant times a responsible and respectable person.

(xii) The only notice given by Mr. and Mrs. Blight to Massart in respect of the assignment was the notice to quit.

(xiii) Mr. and Mrs. Blight had sold their own residence, with vacant possession being given on or about 16th September 1949, to purchase the subject premises, but were still in possession of that residence at the date of the hearing.

(xiv) Massart purchased the lease of the subject premises for the sum of £1,250 without obtaining permission from the Fair Rents Board.

(xv) Massart was occupying Flat No. 3 of the subject premises, with his wife and child, and had no other suitable accommodation available for his family.

Having found that Mr. and Mrs. Blight had established ground (b), the magistrate took into consideration the relative hardships which would be caused to Mr. and Mrs. Blight and to Massart

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by the refusal or the making of an order, and refused to make an order.

The grounds upon which it was contended that the magistrate's determination, in point of law, was erroneous, were :—

(1) by Mr. and Mrs. Blight, on the ground that there was no evidence of hardship which would be caused to Massart by the making of an order ;

(2) by Massart, on the grounds (a) that s. 62 (5) (b) of the *Landlord and Tenant (Amendment) Act* did not provide any ground for an order for possession in the case of an assignment of lease in breach of an express covenant ; (b) that on the facts found there was no breach of the covenant by Massart or his predecessor in title, not to assign or sublet without leave ; and (c) that Mr. and Mrs. Blight had not complied with the requirements of s. 129 of the *Conveyancing Act*.

The Full Court of the Supreme Court (*Street* C.J., *Maxwell* and *Herron* JJ. held that the magistrate's determination in refusing to make the order sought by Mr. and Mrs. Blight was erroneous in point of law, allowed the appeal and ordered that the case be remitted to the magistrate with the Court's expression of opinion (*Blight* v. *Massart* (1)).

From that decision Massart appealed, by special leave, to the High Court.

The relevant statutory provisions are sufficiently set forth in the judgment hereunder.

G. E. Barwick K.C. (with him *L. G. Tanner*), for the appellant. The magistrate correctly refused to make an order. " Lessee ", in pars. (b), (n) and (o) of s. 62 (5) of the *Landlord and Tenant (Amendment) Act* 1948-1949, means lessee in possession. An assignee does not, by accepting an assignment in breach, commit a breach of the lease under s. 62 (5) (b). That provision does not afford a ground for an order for possession against the assignee of a lease by reason of the assignment of the lease in breach of an express covenant or condition in the lease. The fact that an assignee has accepted the assignment knowingly in breach does not disentitle him to any consideration on the question of relative hardship. The facts found by the magistrate were not sufficient to ground a finding that there was a breach, either by the appellant or by his predecessors in title, of the covenant or condition of the lease not to assign or sublet without leave. There was not here any breach. The consent of the respondents to an assignment to the

(1) (1950) 67 W.N. (N.S.W.) 206.

appellant, a respectable and responsible person, was asked for but was not given. The consent was unreasonably withheld (*Moat* v. *Martin* (1); *Treloar* v. *Bigge* (2)). In such circumstances the withholding of consent operated as a complete release (*Bates* v. *Donaldson* (3)). This was not a case of "forgetfulness" as in *Barrow* v. *Isaacs & Son* (4): see also *Eastern Telegraph Co. Ltd.* v. *Dent* (5). In *Fuller's Theatres and Vaudeville Co. Ltd.* v. *Rofe* (6) there were special reasons for asking for consent. Section 62 (5) (b) does not apply. Section 62 (7) relates also to par. (o) as well as par. (n) of s. 62 (5). An assignment in breach of covenant is not within par. (b) of s. 62 (5). No wrong was done by the lessee. The appellant was not the lessee. The breach, if any, was committed by the then lessees. Any failure was antecedent to the assignee becoming lessee. Section 62 (10) is only intended to protect landlords in cases of subletting. There was evidence of hardship which would be caused to the appellant by the making of an order for possession in favour of the respondents. Hardship relates to the appellant's wife and child also. Financial loss and lack of accommodation are hardships (*Hawke* v. *Edwards* (7)). Hardship is a matter of fact. Relevant matters for consideration are shown in *Scott* v. *English* (8). The appellant should not and cannot be regarded as a trespasser (*Fink* v. *McIntosh* (9); *Moore* v. *Greenacre* (10); *Richardson* v. *Landecker* (11)). *Holden* v. *Nuttall* (12) does not lay down any general rule as to hardship (*Irvine* v. *Begelhole* (13), and cf. *Jeffery* v. *Burmeister* (14)).

A. H. S. Conlon, for the respondents. A lessor is without a remedy under the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W.) if s. 62 (5) (b) is not available to him on breach of a covenant by the lessee against assignment. Before the enactment of s. 62 (7) (b) by the *Landlord and Tenant (Amendment) Act* 1949, a lessor, upon such a breach, had par. (n) as well as par. (b) available to him. He could have proceeded under either or both of those grounds. The 1949 Act was not intended to and did not destroy a lessor's right to apply for and, in certain circumstances, obtain an order for the recovery of possession. In the amendments

(1) (1950) 1 K.B. 175, at pp. 178, 179.
(2) (1874) L.R. 9 Ex. 151.
(3) (1896) 2 Q.B. 241, at pp. 246, 247.
(4) (1891) 1 Q.B. 417.
(5) (1899) 1 Q.B. 835.
(6) (1923) A.C. 435, at p. 440; 23 S.R. (N.S.W.) 221, at p. 226.
(7) (1947) 48 S.R. (N.S.W.) 21; 64 W.N. 211.
(8) (1947) V.L.R. 445.
(9) (1946) V.L.R. 290.
(10) (1946) 63 W.N. (N.S.W.) 265.
(11) (1949) 66 W.N. (N.S.W.) 236; (1950) 50 S.R. (N.S.W.) 250; 67 W.N. 149.
(12) (1945) V.L.R. 171.
(13) (1947) V.L.R. 504, at p. 507.
(14) (1946) V.L.R. 363, at p. 369.

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to sub-ss. (5) (7) and (8) and the addition of sub-ss. (9) and (10), effected by the 1949 Act, the legislature, in determining the applicability and scope of each ground was obviously directing its attention as to whether there was or was not a covenant in the lease touching each given matter. The objects of the 1949 Act, so far as presently relevant, were twofold:—(i) by the enactment of s. 62 (7) (b) to remove overlapping between pars. (b) and (n) in s. 62 (5), then recently adverted to in *Batson* v. *De Carvalho* (1), and (ii) by the enactment of s. 62 (10) to give a procedural direction to a lessor to avail himself, and expressly reserving his right to avail himself, of par. (b), where there was a breach of express covenant. The assignor, having divested himself of possession, is not the proper defendant in proceedings for recovery of possession for which Part III. of the 1948-1949 Act provides (*Dalby* v. *Gazzard* (2)). The standard form of information alleges that the premises are "actually occupied by the defendant". Suit should therefore be taken, as here, against the assignee in possession or occupation, he being the tenant from whom recovery of possession is sought. "Lessee" admittedly has a constant meaning throughout s. 62—that is, the content of its meaning does not alter. It does not necessarily refer to the same *person* throughout. The expression "the lessee" should not be read as "*that* lessee". It denotes a *class* of persons. The definition of "lessee" in s. 8 (1) indicates the class a group comprised. Further, s. 62 (6) expressly provides that in s. 62 (5) "'lessee' includes, where there is more than one lessee any one or more of the lessees". The appellant need not be the person who committed the breach. It is sufficient if there is a breach by any person within the class defined. If that is not so then s. 62 (6) is either meaningless or unnecessary. In s. 62 "lessee" can refer to, but does not solely mean, the lessee in possession. That, for instance, cannot be its meaning in s. 62 (5) (b), which by its terms is available where the lessee is not in possession. The heading to Part III. of the Act, and the use in s. 62 (1) and (2) of the undefined expression "the tenancy" together indicate that, for the purposes of that Part, the word "lessee" should be given a meaning extended beyond the limits of the definitions in s. 8 (1) and (2) to include a person with tenancy rights against whom an order is sought for the recovery of possession. Primarily, but not solely, in Part III. "lessee" means the lessee or tenant in possession, he being the proper defendant. Ground (b) is available where that person, or any other within

(1) (1948) 48 S.R. (N.S.W.) 417, at p. 422; 65 W.N. 254.

(2) (1949) 78 C.L.R. 375, at pp. 386, 387.

the class, as defined or as extended, has committed a breach of covenant. Breach by an assignor will suffice to found action against an assignee. At common law an assignee is liable in ejectment for an act of forfeiture committed prior to the assignment to him: *Woodfall* on *Landlord and Tenant*, 24th ed. (1939), p. 846; *Goldstein* v. *Sanders* (1). In *Strong* v. *Bell* (2) an eviction order was made against an assignee to whom notice to quit had been given on the ground of assignment in breach of covenant. That the breach was prior to the assignee's acquisition of title is immaterial in ejectment proceedings, as distinct from actions on the covenant: *Woodfall* on *Landlord and Tenant*, 24th ed. (1939), p. 846. An assignee was similarly exposed to distress for rent left unpaid by his assignor; *Foa's General Law of Landlord and Tenant*, 7th ed. (1947), p. 484, note (f). The legislature is presumed not to intend any alteration of the common law except when it expressly so provides: *Maxwell* on *Statutes*, 9th ed. (1946), pp. 85 et seq. The statute now under consideration does not expressly or at all so provide. A lessor's procedural steps are canalized—that is, he must, as here, give notice to quit to the assignee, move on an information in a court of petty sessions, and there prove the relevant breach. His substantive right of access to a court, if not to actual forfeiture where the lease so provides, is not denied by the 1948-1949 Act. Whether or not there was a breach of covenant, the question asked of the Supreme Court was a question of fact. The jurisdiction of that Court being limited on appeal to questions of law, it did not and could not deal with that. For the first time, in the present appeal, the question having been reframed as a question of law, it is now for the appellant contended that the facts before the magistrate were insufficient to ground a finding of breach. This Court has no jurisdiction to entertain an appeal on a ground or matter which was never before the Supreme Court. An application must, in any event, be made for the lessor's consent to the lessee or his agent, even where he has no power to withhold or refuse it (*Barrow* v. *Isaacs & Son* (3)). The person to whom application was here made was not then the lessors' agent, his authority having been countermanded to the knowledge of the applicant. There is not any evidence that the lessors knew of that application until after the assignment had been made. Reasonable time must be allowed the lessor to give his consideration to the matter, even where that consent is a pure formality (*Lewis & Allenby* (1909) *Ltd.* v. *Pegge* (4)). Reasonableness of

(1) (1915) 1 Ch. 549.
(2) (1950) G.L.R. 145.
(3) (1891) 1 Q.B., at p. 419.
(4) (1914) 1 Ch. 782.

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time is a question of fact. The magistrate's finding of breach can be supported on the ground that the seven days between the application for consent and the assignment was, in all the circumstances, insufficient. That finding should not, therefore, be disturbed. Hardship on the lessee is here dependent on only two matters, namely, financial loss because of (i) the payment of money for the purchase of the lease, and (ii) the question of accommodation. Neither of those matters, in the circumstances of this case, is relevant on that issue. Hardship springing from a civil wrong to which a person is a party and by virtue of which he acquires title is not hardship within the meaning of the Act or, if it is, is not caused by the making of an order within the meaning of the Act. Before the 1949 Act, where a lessor in breach of an express covenant by the lessee against assignment proceeded on ground (n), which with ground (b) was equally available to him, hardship of any kind in the lessee was immaterial (*Childs* v. *Kelly* (1)). That is still so where the lease is silent as to assignment and ground (n) is used. The lessor, therefore, had, before the 1949 Act, provided he adopted the appropriate procedure, and still has where there is an assignment of a dwelling house not in breach of covenant, an unassailable right to eviction, in the absence of " special circumstances ". Hardship, however arising, is not a special circumstance (*Childs* v. *Kelly* (1)). It would be anomalous and absurd if the lessors' rights in this regard were any the weaker since the 1949 Act, where the assignment, as here, is in breach of express covenant. In the construction of the 1948-1949 Act the following presumptions are applicable :—(i) that no absurdity was intended : *Maxwell* on *Statutes*, 9th ed. (1946), pp. 207, 212. Any anomaly superficially resultant from the 1949 Act should be disregarded ; (ii) that a statute does not intend any alteration of the existing law, except where it expressly so declares : *Maxwell* on *Statutes*, 9th ed. (1946), pp. 85 et seq. At common law, where, on breach of express covenant against assignment, as here, a right of re-entry was reserved, although title passed the lessor could put an end to the lease and thereby destroy the interest of an assignee (*Wilson* v. *Jolly* (2) ; *Wood* v. *Eisen* (3)). That position had not been completely destroyed by the 1948 Act ; (iii) against permitting a person to take advantage of, or even to plead, his own wrong : *Maxwell* on *Statutes*, 9th ed. (1946), p. 215. The assignment here by its terms acknowledges receipt of the

(1) (1948) 65 W.N. 141.
(2) (1948) 48 S.R. (N.S.W.) 460, at p. 464 ; 65 W.N. 205.
(3) (1947) 48 S.R. (N.S.W.) 5, at p. 9 ; 64 W.N. 195.

price paid for purchase of the lease and was made "subject to . . . the performance of the stipulations respectively reserved and contained in the lease." At the moment of assignment, if not prior to then, the assignee was affected with notice of the existence and content of those covenants. The payment of purchase money, recited virtually as the consideration for the assignment, clearly had the effect of procuring, and must have been made with the intention of inducing, the assignment. The assignee is, therefore, a party to the civil wrong of procuring or inducing the assignor to commit a breach of her contract, namely the lease, with the lessors—*jus ex injuria non oritur : Broom's Legal Maxims*, 10th ed. (1939), p. 405. *Jasperson* v. *Dominion Tobacco Co.* (1). A person who without justification knowingly interferes with a contract between other persons commits an actionable wrong. That principle was applied in *Camden Nominees Ltd.* v. *Forcey* (2) to restrain a third party from disturbing the contractual relationship between a landlord and his tenant. Both the price paid for the purchase of the assignment and the entry into possession, from which the need for accommodation now basically arises, have their genesis in a civil wrong to which the assignee is a party. Neither of those matters was, therefore, relevant on hardship. There being nothing to weigh against the hardship found to be caused to the lessors, the balance is all in their favour : cf. *Holden* v. *Nuttall* (3). The magistrate's finding was rightly reversed by the Court below.

G. E. Barwick K.C., in reply.

Cur. adv. vult.

May 10.

The following written judgment was delivered :—

DIXON, MCTIERNAN, WILLIAMS, WEBB and FULLAGAR JJ. This is an appeal from an order of the Supreme Court of New South Wales declaring that a magistrate's determination refusing to make an order under the *Landlord and Tenant (Amendment) Act* 1948-1949 for the recovery of possession of premises was erroneous in point of law and ordering that the case be remitted to the magistrate with the Court's expression of opinion. The proceedings before the magistrate were brought by the landlords who are the respondents upon this appeal against an assignee of the lease who is the appellant. The landlords were themselves assignees of the reversion, but that is not material.

The premises consist of some flats, apparently eight in number, in Blair Street, Bondi. The lease made between the predecessor

(1) (1923) A.C. 709, at pp. 712, 713.
(2) (1940) 1 Ch. 352, at p. 355.
(3) (1945) V.L.R. at p. 175.

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Dixon J. McTiernan J. Williams J. Webb J. Fullagar J.

in title of the landlords (the now respondents) and the predecessor in title of the present tenant (the now appellant) is dated 11th January 1944 and was for a fixed term of two years and four months commencing from that date. It contained, however, a condition that if the lessor should permit the lessee to continue in occupation of the premises after the expiration of the term, which, in the event, happened, the tenancy should continue as a weekly tenancy only at the fixed rental, to be determined by a month's notice in writing from either party thereto. The lease contained a short form of covenant that the lessee would not assign or sublet without leave, no fine to be taken. This form of covenant operates under par. 16 of Part II. of the fourth schedule to the *Conveyancing Act* 1919-1943 to introduce into the lease the long form of covenant stated in the second column of that schedule. The long form includes a covenant that the lessee will not assign, transfer or part with the possession of the demised premises unto any person or persons without the consent in writing of the lessor, but that such consent shall not be refused in the case of a proposed respectable and responsible assign, tenant or occupier. The appellant acquired title to the tenancy by an assignment dated 20th July 1949 and went into possession of the premises by entering into actual occupation of one of the flats and into the receipt of the rents of the others, which were held by sub-tenants. Notwithstanding s. 36 of the *Landlord and Tenant (Amendment) Act* 1948-1949, he paid £1,250 to the assignor for the assignment. On 27th August 1949 the respondents gave to the appellant notice to quit and deliver up the premises on 3rd October 1949. Four grounds were stated in the notice to quit, but two of these were negatived on the facts at the hearing of the complaint for the recovery of possession. Of the other two, one was that prescribed by s. 62 (5) (b) of the Act, namely, " that the lessee has failed to perform or observe some other term or condition of the lease (i.e., other than to pay rent) and the performance or observance of that other term or condition has not been waived or excused by the lessor." An information or complaint against the appellant was made by the respondents for the recovery of possession of the premises but it was dismissed by the magistrate who formed the " court of competent jurisdiction ".

The magistrate decided that there was no evidence that the premises were reasonably required by the lessors for occupation by themselves. He also decided that the defendant was occupying one of the eight flats with his wife and child and had no other suitable accommodation available to his family. He found,

further, that the landlords had established that the lessee had failed to perform or observe a term of the lease and that the performance or observance of that term or condition had not been waived or excused by the lessors. That is to say, he found in favour of the respondent as to the ground prescribed by s. 62 (5) (b) of the *Landlord and Tenant (Amendment) Act* 1948-1949. The term or condition which the magistrate found had not been performed or observed was the condition against assignment without consent. Having found the issue raised by that ground in favour of the respondents, the magistrate, as his stated case says, took into consideration the relative hardships which would be caused to the complainants and the defendant by the refusal or making of an order and, acting under s. 70 (1), refused to make an order for the recovery of possession of the premises by the landlords from the tenant. Section 70 (1) provides that :—

"On the hearing of any proceedings by a lessor for an order for the recovery of possession of any prescribed premises, the court shall take into consideration, in addition to all other relevant matters—

(a) any hardship which would b caused to the lessee or any other person by the making of the order ;

. . . and may, in its discretion, make the order or may, on such conditions (if any) as it thinks fit, refuse to make the order notwithstanding that one or more of the prescribed grounds has been established."

The landlords appealed to the Supreme Court pursuant to s. 74, adopting proceedings by way of case stated for the purpose. Section 74 (1) provides that, except as provided in the section, there should be no appeal in proceedings under that part of the *Landlord and Tenant (Amendment) Act* 1948-1949 from an order of a court of competent jurisdiction. Sub-section (2) provides, however, that there shall be an appeal, as to questions of law only, to the Supreme Court from any order of the court in proceedings under the Part. The jurisdiction of the Supreme Court was therefore confined to deciding questions of law. The case stated came, in the first instance, before *Herron* J. His Honour regarded the matter as one of importance because a question which arose was whether, having regard to the amendment in s. 62 (7) (b) and the addition to s. 62 of sub-s. (10) made by Act No. 21 of 1949, s. 5, a landlord could recover possession of premises under s. 62 (5) (b) or (n) from an assignee of a lease in possession when the lease contained a covenant against assigning. His Honour gave an explanation of the problem raised by these provisions and referred the appeal by case stated to the Full Court.

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On the hearing of the appeal some difficulty arose concerning the case stated and it was remitted in order to enable the magistrate to find additional facts and this was done. The Full Court upheld the appeal upon the ground that there was no evidence of hardship which enabled the magistrate to act under s. 70 (1) and refuse to make an order for possession. Their Honours took the view that the tenant (the now appellant) had obtained an assignment in breach of covenant and had entered into occupation of the premises under a title which was only derived from such breach. In fact no consent had been given to the assignment by the landlords. Circumstances were relied upon by the tenant (the now appellant) as showing that the assignment was not a breach of covenant. The circumstances set up were that an application for consent to the assignment had been made by the assignor to the landlords (the now respondents) and that they had failed to grant consent although the assignee was a respectable and responsible person. As the long form of covenant, which makes no reference to an unreasonable withholding of consent, requires the landlord to give consent in the case of a respectable and responsible person and, as it was not disputed that the assignee (the appellant) fell within that description, it was said that it was no breach to assign. The authority of *Barrow* v. *Isaacs & Son* (1), and of *Lewis & Allenby*, (1909) *Ltd.* v. *Pegge* (2) was relied upon. The Supreme Court however, negatived this view, chiefly upon the facts. The court then overruled the magistrate on the question of hardship. Their Honours accepted the submission made for the present respondents (the landlords) that hardship springing from a wrong to which the tenant as assignee was a party could not be hardship justifying the magistrate's refusal under s. 70 (1) to make an order for the recovery of possession. *Street* C.J., who delivered the judgment of the court, said :—" It is clear in the present case that the respondent (i.e., the tenant the now appellant) obtained possession of these premises by paying money to his assignors in order to procure them to commit a breach of their agreement with the appellants (i.e., the landlords the now respondents), and, in order to establish his claim to retain possession of the premises he had to rely upon what the magistrate has found to be a breach of the term of the original lease under which he claims to hold. Under those circumstances, it is not open to the respondent to suggest that the hardship which will be occasioned to him arises from the making of the order requiring him to vacate the premises. In one sense it results from the making of that order, but it really arises from his own

(1) (1891) 1 Q.B. 417. (2) (1914) 1 Ch. 782.

self-created necessity based upon his being a party to procuring his assignors to commit a breach of their agreement." (1).

Adopting this view, it became necessary for the Supreme Court, in order to determine the rights of the parties, to decide whether the ground stated in s. 62 (5) (b) was available against the tenant (now appellant) as an assignee of the lease. Their Honours decided that the ground was available and accordingly allowed the landlords' appeal. The contention made to the contrary was that under s. 62 (1) a notice to terminate the tenancy could not lawfully be given and the right to take proceedings to recover possession of the premises from the lessee did not exist, when the prescribed ground was that stated in sub-s. (5) (b) and an assignee was in possession, unless the assignee so in possession had committed a breach of covenant and that from the nature of the case it was the assignor and not the assignee who committed the breach of a covenant against assignment; the tenor of such a covenant made it impossible for anybody except the assignor to break the covenant. The appeal to this Court is supported on grounds which include the contention that the magistrate's decision as to hardship ought not to have been overruled and the contention that in consequence of the amendments in s. 62 (7) (b) and the addition of sub-s. (10) of s. 62—amendments made by Act No. 21 of 1949, s. 5—the respondents cannot recover possession on the ground that the assignment was made without their consent, there being a covenant against assignment. In our opinion the contention of the appellant is right, both upon the question of hardship under s. 70 (1) (a) and also in respect of the inapplicability of the ground contained in s. 62 (5) (b). It would be enough for the purpose of determining the present appeal to confine ourselves to the question of hardship, but, in view of the observations made by *Herron* J. and of the general importance of the question, we think it right to state our opinion also upon the application of s. 62 (5) (b) to the circumstances of such a case as this.

Dealing first with the question of hardship, the cardinal consideration appears to us to be that the magistrate as a tribunal of fact has found that in all the circumstances there is no other suitable accommodation for the tenant and his wife and child and, having taken into consideration the relative hardships which would be caused to the landlords and the tenant by the refusal or the making of an order, has, in his discretion, refused to make an order. We are prepared to assume, although there is not sufficient

(1) (1950) 67 W.N. (N.S.W.), at p. 207.

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evidence to establish it, that when the appellant (the tenant) took the assignment he knew that his assignors had failed to obtain the consent of the landlords (the respondents) to the assignment and that he knew the terms of the covenant. Consistently with that knowledge he may have believed that the assignment was not in breach of the covenant. But that is not an important consideration. It is true that he gave a sum of money for the assignment and that to do so involved an infringement of s. 36 of the Act, but that does not invalidate the transaction: see s. 91. It is not found that he counselled and persuaded the assignor to break his contract and it may well be that he did not. But, be that as it may, the doctrine that a man may not set up his own wrong as a title to rights has no direct application to the matter. The appellant in his character of assignee obtained a valid title to the lease and is in possession under the lease. That is the title which he is setting up. In stating that the circumstances are those of hardship, he is relying on a set of considerations arising from his occupation of the demised premises, his inability to obtain another dwelling place and the general circumstances surrounding his occupation. Doubtless the manner in which he came into occupation should be taken into consideration by the magistrate, but there is no reason to suppose that it was not taken into consideration. It is no more than a circumstance to be weighed with all the other circumstances of the case. There is nothing in the case stated to show that the magistrate misunderstood the position or proceeded upon any erroneous legal principle and the complete discretion which is given to him by s. 70 (1) can only be reviewed on appeal under s. 74 when an error of law has been committed or the exercise of his discretion has so miscarried that his conclusion cannot be supported in point of law. We do not think there is any ground upon which his discretion can be set aside in the present case. It follows that he properly refused to make an order. His refusal to make an order is therefore to be supported independently of the question whether, in other respects, the landlords made out a case for an order for the recovery of possession.

But we do not think that under par. (b) of sub-s. (5) of s. 62 the landlords could make out a case for the recovery of possession. Before the amendment of s. 62 by s. 5 of Act No. 21 of 1949, s. 62 (7) was in the following form :—

"Notice to quit on a ground specified in paragraph (n) or paragraph (o) of subsection five of this section—

. . . (b) may be given whether or not the assignment, transfer or sub-lease was in breach of any covenant or condition."

Par. (n) of sub-s. (5) was as follows :—

" The prescribed grounds shall be—

. . . (n) that the lessee has become the lessee of the premises being a dwelling house by virtue of an assignment or transfer which the lessor has not consented to or approved."

It will be seen that as the law then stood a landlord, where his tenant had assigned the lease to an assignee, could take proceedings against the assignee in possession on the ground stated in par. (n) of s. 62 (5). Paragraph (n), by its very terms, acknowledged that the lessee (that is to say the assignee of the lease, who is in possession) had obtained that character in virtue of an assignment or transfer. The assignee is a lessee within the meaning of s. 62 by virtue of the definition of " lessee " contained in s. 8 (1). By that definition " the lessee ", besides including other persons, means the parties to a lease or their respective successors in title.

But, by Act No. 21 of 1949, s. 5 sub-s. (7) (b) was transformed. A new paragraph was substituted for the words which have been quoted, with the result that sub-s. (7) (b) enacted that notice to quit on a ground specified in par. (n) or par. (o) of sub-s. (5) of s. 62 may be given only where the lease contains no covenant, whether absolute or conditional, against assigning transferring or subletting by the lessee. The consequence of this amendment is that par. (n) of sub-s. (5) cannot apply where the lease does contain a covenant against assigning and, accordingly, as the lease in the present case contains such a covenant, it is outside par. (n).

But Act No. 21 of 1949, s. 5, added a new sub-section to s. 62—sub-s. (10). Sub-section (10) provides that " nothing in sub-section seven, eight or nine of this section shall prejudice the right of a lessor to give notice to quit on the ground specified in paragraph (b) sub-section five of this section ". Par. (b), to which reference has already been made, includes as a prescribed ground that the lessee has failed to perform or observe some other term or condition of the lease, there being no waiver. This paragraph was obviously intended to be of general application, but it would appear from the terms of the new sub-s. (10) that the draftsman was of opinion that its operation would include a breach of a covenant not to assign and it is likely that he thought that a case such as the present would be best dealt with by the application to it of ground (b). Unfortunately the draftsman appears to have overlooked the fact that the lessee referred to in par. (b) is the same lessee as is referred to in s. 62 (1). The definition in s. 8 (1) of " lessee " gives a very wide application to that term and persons holding the premises or title to the premises in various capacities

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may come within that definition. But sub-s. (1) of s. 62 is directed to the person who answers the defined description of "lessee" to whom a notice to quit is given and against whom proceedings to recover possession of the premises are taken. In the case of a lessee who sub-leases, a notice to quit may, according to circumstances, be given to the lessee so sub-leasing, notwithstanding that the sub-lessee is the person in actual possession. But, in the case of an assignor who has gone out of possession, it is the assignee in possession against whom the proceedings are taken, as was done in the present case. He is the person against whom a ground for giving the notice to quit must be made out. When sub-s. (5) enumerates the prescribed grounds and comes to par. (b) it appears reasonably obvious that the lessee who has failed to perform and observe some term or condition is that person against whom the proceedings are taken or the person to whom notice to quit is to be given. In the present case it was the assignor who failed to perform or observe the term or condition when he made the assignment. No doubt at that time he filled the description of lessee, but he is not the lessee against whom the proceedings are taken. An attempt was made to answer this position on the ground that under par. (b) it was enough that any person who at the moment of breach of covenant or condition filled the description of lessee had failed to perform or observe the term or condition. That, we do not think, is the true meaning of the provision. Like many other of the prescribed grounds, it was directed against the occupation or possession of leased premises by lessees who failed in the performance of their obligations. The terms in which par. (n) is expressed show clearly enough that when it was desired to provide a ground depending on a breach by a predecessor in title it was seen that a different form of expression was essential. The very terms in which par. (n) is expressed are enough to confirm the construction which we have placed on par. (b). A probable explanation of sub-s. (10) is that the draftsman believed that if an assignment was made in breach of condition the assignment was void and the assignee took nothing, but that is an error. The breach of condition does not make the assignment nugatory. It merely exposes the lease to forfeiture, a forfeiture which of course would at common law, considered independently of the *Landlord and Tenant (Amendment) Act* 1948-1949, deprive the assignee of his estate or interest. If we are right in thinking that this is the explanation of sub-s. (10), it affords an explanation of the legislation, but it does not enable us to give a new meaning to sub-par. (b). The result is a very curious one, and one that it may be confidently

assumed the legislature did not intend to bring about. For, as the law stands, an assignment of a lease which has not been consented to or approved by the lessor is a ground for giving a notice to quit under s. 62 if there is no covenant against assigning contained in the lease, but is not a ground if there be such a covenant and none of the prescribed grounds extend effectively to such a case. The question is one which may merit the attention of the legislature, but it is not a position which can be rectified by any construction to which, in our opinion, the legislation is reasonably open.

The appeal should be allowed with costs, the order of the Supreme Court discharged and the order of the magistrate restored.

Appeal allowed with costs. Order of the Supreme Court discharged. Order of magistrate restored.

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Solicitors for the respondents, *Parish, Patience & McIntyre.*

J. B.