[HIGH COURT OF AUSTRALIA.]

ANDERSON . . . . . APPELLANT;
DEFENDANT,

AND

BOWLES . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1951.

BRISBANE, *June* 25, 26; MELBOURNE, *Oct.* 22.

Dixon, McTiernan, Williams, Fullagar and Kitto JJ.

Landlord and Tenant—Sub-lease of portion of premises without consent—Proceedings for recovery of possession—Order—Warrant to issue—Sub-lessee holding over after date fixed for execution of warrant—Subsequent proceedings by tenant and sub-lessee for rescission of order unsuccessful—Warrant finally executed one year after date originally fixed for execution—Liability of tenant to landlord—Mesne profits—Rent—Costs incurred by landlord—The Landlord and Tenant Acts 1948 *to* 1949 (*Q.*) (12 *Geo. VI. No.* 31—13 *Geo. VI. No.* 31), *s.* 62—*National Security* (*Landlord and Tenant*) *Regulations* (*S.R.* 1945 *No.* 97—*S.R.* 1948 *No.* 108), *reg.* 75.

In proceedings by a landlord of premises to which the *National Security* (*Landlord and Tenant*) *Regulations* and subsequently *The Landlord and Tenant Acts* 1948 *to* 1949 (Q.) applied, an order was made for the recovery of possession of the premises. On 15th July, 1948, the date fixed for the execution of the warrant, the landlord entered into possession of portion of the premises, the remainder having been sublet without his knowledge or consent to a sub-tenant who had obtained an interim injunction restraining the landlord from entering into possession. Later the sub-tenant and the tenant applied for rescission of the order for possession, but those proceedings were unsuccessful. The warrant was executed on 15th July, 1949, and the landlord entered into possession of the whole of the premises.

The landlord brought an action for damages against his former tenant alleging that he had suffered damage by the loss of "mesne profits and/or rental" for the period of one year from 15th July, 1948, and also claiming the expenses incurred by way of costs of legal proceedings for the purpose of recovering possession of the premises. The tenant demurred.

Held (1) That as the tenant was not alleged to have authorized the sub-tenant to remain in possession or to have received any rents or profits in respect of his doing so, *semble*, he was not liable for mesne profits, but, by *Dixon*, *Williams*, *Fullagar* and *Kitto* JJ., that he was liable in damages for his failure to perform his obligation to deliver up the whole of the demised premises. Those damages might or might not, according to the circumstances, be of an amount equal to the rental value of the demised premises as a whole. By *McTiernan* J., that a count for use and occupation lay and on that count the landlord was entitled to recover rent from the tenant.

(2) That, by reason of reg. 75 of the *National Security* (*Landlord and Tenant*) *Regulations* (s. 62 of *The Landlord and Tenant Acts* 1948 *to* 1949 (*Q.*)), which provides that no costs shall be recoverable in any proceedings to which the Part applies not being proceedings in respect of an offence, the landlord could not recover from the tenant the costs of the proceedings which ended in the ejectment of the sub-lessee.

Nowell v. *Roake*, (1827) 7 B. & C. 404 [108 E.R. 774]; 1 Man. & Ry. 170; 6 L.J. K.B. O.S. 26, distinguished.

Decision of the Supreme Court of Queensland (Full Court): *Bowles* v. *Anderson*, (1951) Q.S.R. 257, varied.

APPEAL from the Supreme Court of Queensland.

In June 1946 Margaret Julia Bowles let certain premises, No. 159 Stanley Street, South Brisbane, known as the Atlas Hotel, to William Taylor Anderson on a weekly tenancy. The premises were part of the hotel building and consisted of a basement, ground floor and first floor. In January 1948 Anderson sublet portion of the premises to the Factor Trading Co. and in February 1948 he sublet the first floor to Frederick James without the knowledge or approval of Miss Bowles. As landlord Miss Bowles gave Anderson notice to quit and took proceedings under the *National Security* (*Landlord and Tenant*) *Regulations* and obtained an order that a warrant of possession be issued to put her in possession of the premises, the warrant to be executed on 15th July 1948. On that day the tenant and the Factor Trading Co. vacated the premises, but James remained in possession, having obtained an interim injunction restraining the landlord from entering into possession until 21st July 1948. James subsequently discontinued his action and made application for the rescission of the order for possession, so far as it related to the portion of the premises occupied by him. Anderson then made a similar application which was granted, James' application having been refused. An appeal by the landlord against the decision of the magistrate in Anderson's case was allowed: *Bowles* v. *Anderson* (1). Both

(1) (1949) Q.S.R. 36.

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James and Anderson gave notice of appeal to the High Court, but the appeal was abandoned and formally dismissed. Finally the magistrate, in dealing with an application by the landlord for the extension of the warrant, ordered that the warrant be executed within fourteen clear days from 4th July 1949. In the result the warrant was executed and Miss Bowles, on 15th July 1949, went into possession of the whole of the premises. She commenced an action in the Supreme Court of Queensland against Anderson claiming damages suffered by the loss of "mesne profits and/or rental" of the premises in respect of the period of one year from 15th July 1948 to 15th July 1949, and by the expense incurred by way of costs of the legal proceedings in the course of efforts to recover possession of the premises.

The defendant demurred to so much of the statement of claim as alleged that the defendant was liable to the plaintiff for the loss of mesne profits of the premises and for the expense incurred by the plaintiff by way of costs of the legal proceedings referred to in the statement of claim. The demurrer was heard by the Full Court (*Philp*, *Stanley* and *Mack* JJ.), which held that the statement of claim disclosed a cause of action for damages for trespass and a cause of action for the recovery of costs incurred by the plaintiff: *Bowles* v. *Anderson* (1).

From this decision the defendant appealed to the High Court.

W. B. Campbell, for the appellant. The question is whether the defendant was a trespasser after 15th July 1948. In order that he might succeed the plaintiff would have to prove that the defendant was unlawfully in possession or was a trespasser from that date. The effect of reg. 64 of the *National Security* (*Landlord and Tenant*) *Regulations* was to leave the premises intact. There is a statutory right to occupy, the tenancy being terminated only in a limited way: *Krupa* v. *Zacabag Pty. Ltd.* (2). After notice to quit is given the tenant has a personal right to occupy the premises which is unassignable. Otherwise the obligations of the tenancy, so far as they apply, have to be observed: *Dikstein* v. *Kanevsky* (3); *Richardson* v. *Landecker* (4). Costs are only recoverable in the court which awards costs: *Nowell* v. *Roake* (5). There was no power in a court of error to award costs: *Mayne* on *Damages*, 11th ed. (1946), at pp. 119, 120; *Cole*

(1) (1951) Q.S.R. 257.
(2) (1950) 50 S.R. (N.S.W.) 304; 67 W.N. 221.
(3) (1947) V.L.R. 216.
(4) (1950) 50 S.R. (N.S.W.) 250; 67 W.N. 149.
(5) (1827) 7 B. & C. 404 [108 E.R. 774].

on *Ejectment*, p. 131. *Henderson* v. *Squire* (1) is distinguishable. In this case the court has no power to award costs, therefore they cannot be recovered as mesne profits. [He referred to *Malden* v. *Fyson* (2); *Collen* v. *Wright* (3); *Loton* v. *Devereux* (4); *Pritchet* v. *Boevey* (5).]

M. V. Fogarty, for the respondent. The question is whether the sub-tenant James had any right to be in occupation of the premises. He was a trespasser and always remained a trespasser. The right of a sub-tenant is not recognized at all unless he is there with the consent of the landlord: *Booton* v. *Clayton* (6). Therefore James was a mere trespasser from 15th July 1948 and the defendant has adopted the acts of James and taken the responsibility of those acts and recognized possession through James. It is the duty of the tenant not to walk out leaving a sub-tenant in possession but to deliver up the premises to the landlord. On the expiration of the time allowed in the notice to quit the tenant has only such rights as given him by the *National Security* (*Landlord and Tenant*) *Regulations*. Once the warrant becomes effective the tenant has no rights. The whole conception of a statutory tenancy as in England is different from the position in Australia. See Article in 20 A.L.J., at p. 470, *National Security* (*Landlord and Tenant*) *Regulations*. Do they create a statutory tenancy? The defendant was in possession as a trespasser through his agent James: *Krupa* v. *Zacabag Pty. Ltd.* (7). The position of the defendant was that he became a protected occupier: *Dikstein* v. *Kanevsky* (8); *Richardson* v. *Landecker* (9); *Churchward* v. *Ford* (10). When his protection ceased he became a trespasser. From the time the warrant was ordered to issue the tenant became a trespasser. [He referred to *Remon* v. *City of London Real Property Co. Ltd.* (11); *Jones* v. *Foley* (12); *Clifton Securities Ltd.* v. *Huntley* (13); *Henderson* v. *Van Cooten* (14); *American Economic Laundry Ltd.* v. *Little* (15); *Regional Properties Ltd.* v. *Frankenschwerth* (16); *Keats* v. *Thompson* (17); *Guthrie* v. *McCrindle* (18).] The acceptance of

(1) (1869) L.R. 4 Q.B. 170.
(2) (1847) 11 Q.B. 292 [116 E.R. 486].
(3) (1857) 8 El. & Bl. 647 [120 E.R. 241].
(4) (1832) 3 B. & Ad. 343 [110 E.R. 129].
(5) (1833) 1 C. & M. 775 [149 E.R. 612].
(6) (1948) 48 S.R. (N.S.W.) 336; 65 W.N. 164.
(7) (1950) 50 S.R. (N.S.W.) 304; 67 W.N. 221.
(8) (1947) V.L.R. 216.
(9) (1950) 50 S.R. (N.S.W.) 250; 67 W.N. 149.
(10) (1857) 26 L.J. Exch. 354.
(11) (1921) 1 K.B. 49.
(12) (1891) 1 Q.B. 730.
(13) (1948) 2 All E.R. 283.
(14) (1922) W.N. (Eng.) 340.
(15) (1951) 1 K.B. 400.
(16) (1951) 1 K.B. 631.
(17) (1939) N.Z.L.R. 30.
(18) (1949) 65 T.L.R. 192.

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rent does not prejudice the plaintiff. Costs are recoverable as damages. [He referred to *Finnegan* v. *Elton* (1); *See To Soo Hing* v. *Patty* (2).] The plaintiff is not asking for costs but seeks to recover damages for the expenses to which he has been put in recovering possession of the premises. That is part of the loss the plaintiff has suffered. In the cases cited in the argument for the appellant a court in one jurisdiction would not interfere with the decision of another court in granting or refusing costs, the matter being *res judicata*. [He referred to *Elliott* v. *Boynton* (3); *Southport Tramways* v. *Gandy* (4); *Ocean Accident and Guarantee Corporation Ltd.* v. *Ilford Gas Co.* (5).] The claim as to mesne profits has been stated with sufficient particularity.

W. B. Campbell, in reply. *Finnegan* v. *Elton* (1) is irrelevant, as there the court decided that the proceedings were not under the *Judiciary Act* 1903-1947 (Cth.). The other cases cited are not applicable where the head tenant remains in possession and is protected. If James as sub-tenant is unlawfully in possession of the premises, then James and not the appellant is liable: *Reynolds* v. *Bannerman* (6). There is no evidence of any agency, which would render the appellant liable for the acts of James. However, James as a sub-tenant was entitled to exercise his statutory rights. The respondent's case depends upon *Henderson* v. *Squire* (7) and stands or falls on that case. Whether the appellant was or was not a statutory tenant is not important, since he had a right to remain in possession and was therefore not a trespasser. [He referred to *Cruise* v. *Terrell* (8); *Skinner* v. *Geary* (9).]

Cur. adv. vult.

Oct. 22.

The following written judgments were delivered:—

DIXON, WILLIAMS, FULLAGAR and KITTO JJ. The appellant in this case, being the defendant in an action in the Supreme Court of Queensland, appeals against so much of an order of the Full Court of the Supreme Court as overruled a demurrer to a portion of the plaintiff's statement of claim in the action. The statement of claim, so far as relevant, sought damages against the defendant as the former lessee of certain premises of the plaintiff. It alleged that the plaintiff had suffered damage by the loss of "mesne

(1) (1948) 1 A.L.R. 120.
(2) (1950) 81 C.L.R. 132.
(3) (1924) 1 Ch. 236.
(4) (1897) 2 Q.B. 66.
(5) (1905) 2 K.B. 493.
(6) (1922) 1 K.B. 719.
(7) (1869) L.R. 4 Q.B. 170.
(8) (1922) 1 K.B. 664.
(9) (1931) 2 K.B. 546.

profits and/or rental " of the premises, and by the expense incurred by way of costs of certain legal proceedings in the course of efforts to recover possession of the premises. The period in respect of which the loss of mesne profits or rental was alleged to have occurred was a period after the defendant had left the premises, the allegation being that during that period a former under-lessee of the defendant had remained in occupation of a portion of the premises. The relevant grounds of demurrer were that the facts alleged did not disclose unlawful possession of the premises by the defendant or his under-lessee, and that by virtue of reg. 75 of the *National Security* (*Landlord and Tenant*) *Regulations*, no costs are allowed in respect of the legal proceedings referred to.

The facts alleged in the statement of claim as giving the plaintiff the right to relief which the demurrer denied may be stated as follows. In June 1946 the plaintiff let the premises to the defendant on a weekly tenancy. The demised premises formed a portion, known as No. 159 Stanley Street, Brisbane, of the Atlas Hotel Building, that portion comprising the basement, ground floor and first floor of the building and a yard appurtenant thereto. The defendant went into possession of the demised premises, and in January 1948 he sublet portion of them to the Factor Trading Company. In February 1948 the defendant, without the knowledge or approval of the plaintiff, sublet the first floor of the premises to one James. On 13th April 1948 the plaintiff gave the defendant a notice to quit in respect of the whole of the premises in accordance with the *National Security* (*Landlord and Tenant*) *Regulations* upon two grounds, namely the commission of waste and the subletting to James: reg. 58 (5) (*c*) and (*n*). The defendant did not notify the plaintiff of the names and addresses of his sub-lessees as he was required to do by reg. 73 (2) (*a*). On 25th May 1948 the plaintiff commenced proceedings against the defendant to recover possession of the premises, under the provisions of the *Summary Ejectment Act of* 1867 (Q.), and on 17th June 1948 an order was made that a warrant of possession be issued to put the plaintiff in possession of the premises and that the warrant be executed on 15th July 1948. On that day a constable of police, at the premises, produced the warrant to the defendant and the defendant and the Factor Trading Company vacated the basement and ground floor of the building and the yard, but James continued in occupation of the first floor. The warrant was not executed against James because James had obtained an ex parte injunction restraining the plaintiff from entering into possession until 21st July 1948. On 19th July 1948 James gave notice of

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discontinuance of the action in which the injunction had been granted, and made an application under reg. 64 (*b*) for rescission of the order made on 17th June so far as it related to the portion of the premises occupied by him. Before this application was dealt with, the defendant filed an application under reg. 64 (*b*) for rescission of the order. On 13th August 1948 James' application was heard and refused. The plaintiff then applied orally for an extension of the time for the execution of the warrant and on 23rd August 1948 made the like application in writing. But on 27th August 1948 the defendant's application to rescind the order and warrant for possession was granted, a direction was given that notices be given to the Factor Trading Company and James under reg. 73 (2) and the proceedings were adjourned to 9th September 1948. On 1st September 1948 the *National Security* (*Landlord and Tenant*) *Regulations* ceased to have effect in Queensland pursuant to an order under reg. 7AA, subject of course to sub-reg. (3) of that regulation: Commonwealth *Gazette* No. 123 of 1948. On the same day *The Landlord and Tenant Act of* 1948 (No. 31 of 1948) (Q.) came into force. The plaintiff appealed from the order rescinding the order and warrant for possession and on 22nd November 1948 the Supreme Court allowed the appeal and remitted the matter to the Court of Petty Sessions to be dealt with: *Bowles* v. *Anderson* (1). The defendant and James then gave notice of appeal to this Court but not until 4th March 1949. The appeal was abandoned, however, and on 15th June 1949 it was formally dismissed by this Court. On 4th July 1949 the application made by the plaintiff on 23rd August 1948, i.e., for the extension of the warrant, was heard by the magistrate, and an order was made that the warrant be executed within fourteen clear days from 4th July 1949. It was in fact executed on 15th July 1949, and the plaintiff then entered into possession of the whole of the premises. The plaintiff incurred legal expenses in connection with James' application to rescind the order, the defendant's application for the same purpose, the appeal to the Full Court, and the plaintiff's own application for extension of the time for execution of the warrant. The plaintiff also lost mesne profits or rental for the period of one year, i.e., from 15th July 1948 to 15th July 1949.

The demurrer was not put on the ground that the statement of claim disclosed no cause of action. It was limited to "so much of the statement of claim as alleges that the defendant is liable to the plaintiff for the loss of mesne profits of the said premises

(1) (1949) Q.S.R. 36.

and for the expense incurred by the plaintiff by way of costs of the legal proceedings referred to in the statement of claim ". Thus it was a demurrer on the ground that the plaintiff had no " distinct and severable claim for damages " under the two specific heads to which it refers. Such a demurrer is permitted by Order XXIX., r. 1 of the *Rules of the Supreme Court* (Q.). The learned Judges below recognized the limited character of the demurrer, and they confined their attention to three questions, first whether the statement of claim disclosed a cause of action for damages for trespass, and secondly whether it disclosed a cause of action for the recovery of the costs incurred by the plaintiff. Both these questions they answered in the affirmative. The third question, though mentioned in a ground of the demurrer, does not appear strictly to arise on the demurrer itself. It was whether a breach of reg. 73 (2) gave the lessor a private right of action. This question the Supreme Court answered in the negative and it was not argued upon the appeal to this Court.

The decision of the Full Court that the plaintiff had a cause of action for trespass proceeded upon the view which their Honours took of the operation and effect of certain provisions contained in the *National Security* (*Landlord and Tenant*) *Regulations* which were treated as governing the case. If the Regulations and not the State Act govern the rights of the parties in respect of the period after 1st September 1948 it must be by virtue of sub-reg. (3) of reg. 7AA. Sub-regulations (1) and (2) provide in effect that when the Minister makes an order declaring that the recovery of possession shall cease to be controlled by the regulations in a State, then, subject to certain exceptions, the regulations shall from the date specified in the order cease to have effect in that State. Sub-regulation (3) then provides that the operation of the preceding sub-regulation shall not affect any right, privilege, obligation or liability acquired accrued or incurred under the regulations before the date specified in the order or any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation or liability and any such investigation, legal proceeding or remedy may be instituted continued or enforced as if the preceding sub-regulation had not been made. The rights referred to in this provision must be specific rights acquired under particular provisions. The provision cannot relate to the general protection enjoyed by all lessees of prescribed premises enabling them to remain in possession until a notice to quit is given conforming with the regulations and a proceeding is taken before a magistrate resulting in an order for possession in favour of the lessor and

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the issue of a warrant. Otherwise it would only be new tenancies that would fall under the operation of the State Acts. Accordingly if there had been no appeal from the order of the magistrate of 27th August 1948 the regulations would have had no relevance to the period after 1st September 1948. It may be, however, that the right of appeal from that order given by reg. 65A (2) was preserved by reg. 7AA (3). But s. 6 (6) of *The Landlord and Tenant Act of* 1948 (Q.) is expressed in language apt to authorize the continuance of the appeal as a proceeding under that Act and, since the Federal reg. 7AA and the provisions of State law of the description of s. 6 (6) were obviously framed so as to be complementary, it may be open to doubt whether the Federal sub-regulation should not be construed as meaning that the cessation of the regulation is not to prejudice any right &c. in case State law did not provide for its continuance. But the matter is of small practical importance because the State Act contains in s. 53 (2) the same provisions as reg. 65A (2) concerning appeals and in nearly all other respects closely follows the Federal regulations.

The view which their Honours took was that the notice to quit given on 13th April 1948 was effectual to determine the defendant's weekly tenancy; that the regulations did not have the effect of creating a statutory tenancy thereafter; that their effect was merely to postpone the plaintiff's right to recover possession and in that sense to give the defendant "a negative right to occupancy" until a competent court should make an order for recovery of possession; and that after 15th July 1948, the date fixed by a competent court for recovery of possession by the plaintiff, all the defendant's rights of occupancy were gone and he became a trespasser.

In the first step which their Honours took we agree. It is alleged that the notice to quit was given in accordance with the regulations, and reg. 62 provides that a notice so given shall operate so as to terminate the tenancy of the premises at the expiration of the period specified in the notice. The regulation goes on to provide that nothing in it shall operate so as to determine any tenancy before the date on which it would have terminated if the regulation had not been made; and it has been held by this Court that a notice will not terminate a periodical tenancy unless it is valid under the law apart from the regulations: *Amad* v. *Grant* (1). In this case the statement of claim must be taken to allege the efficacy of the notice to quit to determine the defendant's tenancy, because it contains an allegation of a decision of a com-

(1) (1947) 74 C.L.R. 327.

petent court in favour of the plaintiff in proceedings in which her right to succeed depended upon proof of the due determination of the tenancy.

The date of expiration of the notice to quit is not alleged, but the tenancy must have terminated at some date prior to 25th May 1948, when the plaintiff commenced her proceedings to recover possession. After the termination of the tenancy, the position apart from the regulations would have been that the defendant, while he remained in possession without either the assent or the dissent of the plaintiff, was a tenant at sufferance : *Foa* on *Landlord and Tenant* (7th ed.), p. 2. The plaintiff could recover from him under a claim for use and occupation, in respect of the period during which he occupied the premises as tenant at sufferance : *Bayley* v. *Bradley* (1). The plaintiff could elect to treat him as a trespasser and sue for possession, and upon recovering possession she could also recover mesne profits : *Cole* on *Ejectment*, pp. 635, 636. Further, there is implied in the relation of landlord and tenant an obligation on the part of the tenant to deliver possession of the demised premises to his landlord at the termination of the tenancy should the landlord require it and for breach of that obligation he is liable in damages the measure of which is little if at all different from mesne profits : *Henderson* v. *Squire* (2). In the present case damages are not claimed from the expiration of the notice to quit until the plaintiff was put into possession of every part of the demised premises on 15th July 1949. They are claimed only for one year, namely, from 15th July 1948 to that date. The allegation is that from 15th July 1948 no payment in respect of the rental of the premises was made to the plaintiff. That was the date fixed for the execution of the warrant. It was then that in obedience to the warrant the defendant and the Factor Trading Company gave up so much of the demised premises as they occupied. James was left in occupation of the remainder of the premises, that is to say, the first floor, because he was protected by the interim injunction. Having chosen in this way to treat any further denial to her of possession as wrongful the plaintiff, apart from the regulations, could not claim rent in respect of the premises thus partially occupied, even if the rent were apportionable in respect of so much of the demised premises as were withheld from her. As the defendant is not alleged to have authorized James to remain in possession of the first floor or to have received any rents or profits in respect of his doing so, the defendant would seem not to be liable for mesne profits in

(1) (1848) 5 C.B. 396 [136 E.R. 932]. (2) (1869) L.R. 4 Q.B. 170.

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respect of James' denial of possession to the plaintiff of the first floor: cf. *Doe* v. *Harlow* (1), and *Powell* v. *Aiken* (2). But that would be of no importance in as much as the defendant would be liable in damages for his failure to perform his obligation *ex contractu* to deliver up that part of the demised premises. Those damages might or might not, according to circumstances as they might appear to the court or jury assessing them, be of an amount equal to the rental value for the period of the demised premises as a whole.

The first question for determination is whether the statutory provisions contained in the *National Security* (*Landlord and Tenant*) *Regulations* or *The Landlord and Tenant Acts* 1948 *to* 1949 (Q.) operate to prevent such a liability in the defendant arising or modify it or impose any other liability upon him.

A body of judicial decision exists for the view that, after a valid notice to quit has been given in accordance with reg. 58 (which corresponds with s. 41 of the Act) and expires, a tenancy is brought to an end by virtue of reg. 62 (s. 46), but nevertheless the lessee remains protected against dispossession by the lessor whether by peaceable re-entry or otherwise unless and until an order for possession is made by a court of competent jurisdiction under the statutory provisions and the time for the execution of the order expires, the tenant being liable to pay the rent and observe the other obligations of the tenancy, so far as applicable, in the meantime: see *Fry* v. *Metzelaar* (3), per *Martin* J.; *Dikstein* v. *Kanevsky* (4), per *O'Bryan* J.; *Gargaro* v. *Moore* (5), per *Herring* C.J.; *Taylor* v. *Smallwood* (6), per *Stanley* J.; *Richardson* v. *Landecker* (7), per *Street* C.J.; *Finney Isles & Co. Ltd.* v. *Pelling*; *Ex parte Pelling* (8); and see *Simms* v. *Lee* (9); *Wood* v. *Eisen* (10); *Batson* v. *de Carvalho* (11); and a paper by Mr. Bellhouse, 20 A.L.J. 470: cf. *Guest* v. *Ravesi* (12) and *Campbell* v. *Loader* (13). But, conceding this view to be well founded, it does not apply to the period of time with which this case is concerned, viz., a period after the date fixed for the execution of the warrant for

(1) (1838) 12 Ad. & E. 40, at p. 42 [113 E.R. 724, at p. 727].
(2) (1867) 4 K. & J. 343, at pp. 348, 349 [70 E.R. 144, at p. 146].
(3) (1945) V.L.R. 65.
(4) (1947) V.L.R. 216, at p. 223.
(5) (1948) V.L.R. 365, at pp. 365, 366.
(6) (1949) Q.S.R. 80.
(7) (1950) 50 S.R. (N.S.W.) 250, at p. 256; 67 W.N. 149, at pp. 151, 152.
(8) (1950) Q.S.R. 128.
(9) (1945) 45 S.R. (N.S.W.) 352, at pp. 357, 358; 62 W.N. 182, at p. 185.
(10) (1947) 48 S.R. (N.S.W.) 5; 64 W.N. 195.
(11) (1948) 48 S.R. (N.S.W.) 417; 65 W.N. 254.
(12) (1927) 27 S.R. (N.S.W.) 449; 44 W.N. 172.
(13) (1865) 3 H. & C. 520, at pp. 526, 527 [159 E.R. 634, at p. 637].

possession during which proceedings by the sub-tenants and the defendant to set aside the order and warrant were on foot.

Now at the beginning of the period with which the case is concerned it seems clear that the defendant was in actual breach of the implied stipulation that he should deliver possession of the entire demised premises to his lessor the plaintiff. A cause of action had accrued and the defendant was liable in such damages as might properly be estimated as a loss actual and prospective which the plaintiff had incurred by reason of the failure of the defendant to deliver up possession completely. The next step was the application four days later, namely, on 19th July, to rescind the order for possession. The application was refused on 13th August 1948. The statutory provisions contained in reg. 64A or s. 51 of the Act deal with the effect of certain applications to vary, discharge or rescind orders. The orders with which they deal are those referred to in reg. 64 or s. 50 of the Act. James' application was not for rescission of an order made under those provisions, but it was an application for the rescission of an order referred to in those provisions. His application was made under reg. 64 (*b*), corresponding with s. 50 (*b*), for rescission of an order made under reg. 63 (1), corresponding with s. 49 (1). These clauses refer to orders made under reg. 63 (1) or s. 49 (1). Next followed the filing of the defendant's application to rescind the order for possession. Then came the oral application of the plaintiff to extend the time for the execution of the warrant, followed by her written application on 23rd August 1948.

During the pendency of these three applications the execution of the warrant must be taken to have been stayed. The question arises whether, in the assessment of the damages flowing from the defendant's failure to deliver up possession, the defendant should be considered as lawfully in possession during the period of the stay, and if so whether the consequence is that for that period the plaintiff can recover as damages nothing in the nature of mesne profits of the land. The important fact to remember is that in the end the defendant and James failed in these applications. The decision of the Supreme Court of Queensland on appeal meant that there was no foundation for the defendant's application to rescind the order for possession. It is one thing to construe the Act as enabling a person in possession to remain in possession while he makes an application to rescind. But it is another thing, when the application is defeated, to treat the applicant although his application is defeated as discharged *pro tanto* from a cause of action, which had already accrued, for withholding possession

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of the demised premises. There is no implication in the regulations or statute that, when it is finally held that the lessee or a sub-lessee has been wrongfully in possession, the pendency of an application under the provisions contained in reg. 64A or s. 51 should operate to free him from a liability to mesne profits or damages which otherwise would ensue.

There appears to have been some irregularity in the proceedings after the remission of the matter to the magistrate by the Supreme Court. The magistrate apparently took up the application of the plaintiff made on 13th August 1948 to extend the warrant instead of acting solely under the order of the Supreme Court remitting the matter to him. But, be that as it may, the application of the plaintiff to extend the warrant cannot be considered *ex post facto* as a justification for James retaining possession so as to disentitle the plaintiff to damages in respect of the period against the defendant.

A question then arises as to the measure of the damages. In an action to recover mesne profits, and presumably in an action for breach of the implied condition that a lessee shall deliver up the demised premises at the termination of his tenancy, the lessor is entitled to include in the damages the costs, charges and expenses which are incurred in recovering possession. In the days when the power of the courts to award costs did not cover all proceedings the expenses of necessary proceedings in which such costs could not be awarded might be included in the assessment of the damages. At common law a court of error had no power to award costs upon any writ of error. By 8 & 9 Wm. 3, c. 11, s. 2, a partial alteration in the law was made, by which if the writ of error failed the defendant in error might recover his costs against the plaintiff in error. No provision, however, was made for costs where a judgment was reversed on error: see *Wyvil* v. *Stapleton* (1), where the court remarked that the statute extended only to the case of affirmance of a judgment and that very reasonably; for why should any man in the case of reversal pay costs for the error in the court below? see further *Bell* v. *Potts* (2). In *Nowell* v. *Roake* (3) it was decided that the landlord who had incurred the costs of the reversal in error of a judgment against him below, in the course of securing the ejectment of the tenant, could include the costs of the writ of error in the damages claimed. "These costs", said Lord *Tenterden* C.J., "are the consequence of keeping

(1) (1724) 1 Strange 615 [93 E.R. 735].
(2) (1804) 5 East 49 [102 E.R. 987].
(3) (1827) 7 B. & C. 404 [108 E.R. 774]; s.c. 1 Man. & Ry. 170; 6 L.J. K.B. O.S. 26.

the plaintiff wrongfully out of possession. I see no objection to the plaintiff's recovering them as between attorney and client ".

In the present case the plaintiff seeks to apply the foregoing rule to the costs of the proceedings under the Landlord and Tenant Regulations which ended in the ejectment of James. Regulation 75, corresponding with s. 62 of the Act, provides, however, that no costs shall be allowed in any proceedings in relation to which the Part applies not being proceedings in respect of an offence. This is a legislative declaration that the parties to proceedings for the recovery of possession or proceedings arising thereout shall not be liable to one another for the costs of those proceedings. In the face of this legislative declaration can costs be properly included in the damages or mesne profits? It is a general rule that where it is sought to include costs incurred in other proceedings in the damages arising upon a cause of action, costs shall not be included, if as a matter of judicial determination or by a positive rule of law they are treated as costs which should be borne by the party suing. Accordingly it is not possible to recover as part of such damages the difference between party and party costs awarded to the plaintiff in the original litigation and the costs as between solicitor and client which he has incurred: *Barnett* v. *Eccles Corporation* (1). Further, if costs are expressly withheld by the court in the original proceeding none can be recovered in the action for damages brought by the plaintiff from whom they were so withheld: *Loton* v. *Devereux* (2), where Lord *Tenterden* C.J. said: "In such a case the Court have jurisdiction to say definitely whether there shall or shall not be costs". In *Malden* v. *Fyson* (3) Lord *Denman* C.J. said: "And this principle was admitted, in general, to apply; so that, if any costs were awarded, nothing beyond the sum taxed according to the rules of the Court could be recovered as damages; or, if costs were expressly withheld by an adjudication in the particular case, none would be recoverable by suit in any other Courts." See, further, *Pritchet* v. *Boevey* (4).

The legislature having determined that costs shall not be recoverable in proceedings of the character now in question, it would be contrary to the principles which these cases exemplify if they were included in the damages and thus were made recoverable by a side wind. The case is not like *Nowell* v. *Roake* (5)

(1) (1900) 2 Q.B. 423, at p. 428.
(2) (1832) 3 B. & Ad. 343 [110 E.R. 129].
(3) (1847) 11 Q.B. 292, at p. 301 [116 E.R. 486, at p. 489].
(4) (1833) 1 C. & M. 775 [149 E.R. 612].
(5) (1827) 7 B. & C. 404 [108 E.R. 774].

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depending upon a rule of the common law which simply ignored costs of legal proceedings of the character in question. It is one where the legislature, having considered whether in such proceedings costs should or should not be awarded, has expressed its conclusion in a definite provision. This should stand on the same footing as a judicial pronouncement upon the same question and as the rule that the difference between party and party costs judicially awarded and costs as between solicitor and client are not recoverable. For these reasons the costs of the proceedings should be excluded from the calculation of the damages.

In par. 33 of the statement of claim the damage claimed is alleged to arise from the loss of mesne profits and or rental of the premises and the particulars include the loss of rental for a year at £2 10s. 0d. a week—£130 0s. 0d. The particulars also include costs of the various proceedings. The former is a head of damages which the plaintiff is entitled to claim; the latter is not. It follows that the appeal should be allowed and the demurrer should be allowed in respect of the plaintiff's claim for the costs of the proceedings mentioned in the particulars to par. 33 of the statement of claim and should be overruled in respect of the cause of action for loss of mesne profits stated in the particulars to be for one year. The order of the Supreme Court, which it will be necessary to discharge, contains a reference to the plaintiff's claim for damages for breach of statutory duty under reg. 73 (2), which the order treats as covered by the demurrer. The correctness of the decision which led to the inclusion of this cause of action in so much of the order as allowed the demurrer is not now contested but, as has already been said, although mentioned in a ground of the demurrer, it is not actually covered by the demurrer. It will, therefore not be included in the order of this Court. The question of costs causes some difficulty. Although the defendant appellant by his counsel said that he did not contest his liability in some form or other to an amount representing the rent of the land for the period in question, the appeal was actually from the overruling of the demurrer in respect of the cause of action for loss of mesne profits, as well as in respect of the claims for damages in relation to costs. The appeal has therefore failed in part and so has the demurrer. In all the circumstances it seems best to make no order as to costs in this Court or in the Supreme Court.

McTIERNAN J. The appellant was a weekly tenant of the respondent upon the terms of an oral contract of tenancy. They were lessee and lessor respectively within the meaning of the

National Security (*Landlord and Tenant*) *Regulations* and the demised premises were within the purview of these regulations. The respondent gave notice to the appellant to quit the premises. The notice was given and proceedings for the recovery of the possession were instituted and determined, in accordance with the regulations. In consequence of these proceedings the appellant was evicted from the demised premises on 15th July 1948. A sub-tenant to whom the appellant sublet part of the premises held over. The respondent did not consent to or approve of this sub-lease. The respondent did not succeed in obtaining entry into the premises until 15th July 1949. The respondent brought an action to recover damages from the appellant for loss occasioned by the holding over of the sub-tenant. In the action the respondent claims damages for " loss of mesne profits and/or rental " in respect of the period during which the sub-tenant held over. The only questions which were argued were whether this claim and a claim for costs are bad in substance. Mesne profits are compensation for a wrong to possession. The action for mesne profits is a species of the action for trespass and it lies to recover damages for loss suffered in consequence of being kept out of possession. The respondent's right to bring the action arose when, at last, she re-entered. By a fiction of law she is deemed to have been in possession from the time she was entitled to possession and her right to mesne profits accrued as from that time. The appellant is not liable to be sued for mesne profits unless he is responsible for her being kept out of possession. The sub-tenant was in possession during the whole of the period for which mesne profits are claimed. It is not alleged that the sub-tenant stood in a relation to the appellant or the appellant did anything which would make the appellant liable for the wrong done by the sub-tenant to the respondent's possession if the sub-tenant is guilty of such a wrong. The count for mesne profits does not lie.

The next question is whether an action for the rent of the premises lies against the appellant for the period during which the sub-tenant held over after the respondent was entitled to enter. In *Harding* v. *Crethorn* (1) Lord *Kenyon* said : " When a lease is expired, the tenant's responsibility is not at an end ; for if the premises are in possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable ; for the lessor is entitled to receive the absolute possession at the end of the term." Accordingly, where a tenant has vacated the premises after the determination of the tenancy, but his sub-

(1) (1793) 1 Esp. 57, at pp. 57, 58 [170 E.R. 278, at p. 279].

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tenant holds over and the landlord does not accept his occupation, the tenant is liable for the rent to the landlord in an action for use and occupation, and for the costs incurred by him in ejecting the sub-tenant: *Ibbs* v. *Richardson* (1); *Henderson* v. *Squires* (2). It is necessary to superimpose the regulations upon the contract of tenancy in order to decide whether this liability, which arises from the contract, is extinguished or affected. *Acton* J. said in *Reynolds* v. *Bannerman* (3) that the above-mentioned cases establish what the liability of the tenant is when a statute has not taken away his right to get rid of the sub-tenant; and the principle does not apply when the sub-tenant remains in possession by operation of a statutory enactment and independently of any right derived from the tenant. The liability of the appellant therefore depends upon the question whether the regulations prevented the appellant from getting possession of the premises, upon the determination of the tenancy, for his own landlord. The appellant sublet the premises without the consent of the respondent. One of the grounds upon which the regulations say that a lessor may give a notice to quit to the lessee is that the lessee has sublet the premises or some part thereof by a sub-lease which has not been consented to or approved by the lessor: reg. 58 (5) (*n*). The notice to quit operates to determine the tenancy of the premises at expiration of the period specified in it: reg. 62. An order may then be made in accordance with the regulations for the recovery of the possession of the premises. In this event, the regulations give no right to the sub-tenant to remain in possession. Regulation 73, on the other hand, specially deals with the case where the lessor has consented to or approved of a sub-lease, and the lessee ceases to be in possession of the premises following upon the making of an order for the recovery of possession or the surrender of his leave by the lessee. This regulation provides, in effect, that in that case the lessee shall drop out and the sub-lessee take his place. There is nothing in the regulations which would have prevented the appellant, if so minded, to take steps to terminate the occupation of his sub-tenant. A count for use and occupation lies and upon that count the respondent is entitled to recover rent from the appellant.

The remaining question is whether the respondent is entitled to recover by way of damages certain costs he incurred in recovering the possession of the premises. The appellant is liable to recoup

(1) (1839) 9 A. & E. 849 [112 E.R. 1436].

(2) (1869) L.R. 4 Q.B. 170.

(3) (1922) 1 K.B. 719, at p. 726.

the respondent under the rule in *Henderson* v. *Squires* (1), unless reg. 75 bars the respondent's claim in respect of such costs. Regulation 75 provides that no costs shall be allowed in any proceedings in relation to which Part III. of the regulations applies, other than criminal proceedings. In my opinion it would be contrary to the policy of Commonwealth law expressed in this regulation for a court to enforce the respondent's claim to be recouped the costs of any proceedings to which the regulation applies. This count, therefore, is bad in substance.

In my opinion the judgment of the Supreme Court should be varied by allowing the demurrer in respect of the cause of action for mesne profits and costs and overruling the demurrer as to the claim for the rent of the demised premises. I should allow the appeal but without costs.

Appeal allowed. Order of the Supreme Court discharged. In lieu thereof order that the demurrer be allowed in respect of the plaintiff's claim for costs of the proceedings mentioned in the particulars to par. 33 of the statement of claim and be overruled in respect of the cause of action for the loss of mesne profits described in such particulars as the loss of mesne profits or rental for one year. The parties to abide their costs respectively of the demurrer in the Supreme Court and of the appeal to this Court.

Solicitors for the appellant: *Delaney & Delaney.*
Solicitors for the respondent: *J. F. Fitzgerald & Co.*

B. J. J.

(1) (1869) L.R. 4 Q.B. 170.