

LANDLORD AND TENANT—PROTECTED PERSON CLAIMING UNDER THE LESSEE.

In view of the housing shortage, which shows no sign of abating, the recent decision of O'Bryan J. of the Victorian Supreme Court in *Towill v. Bailey*¹ is of great importance to persons living in premises who seek to remain there, after the tenant has gone out of occupation, as persons "claiming under the lessee and actually in possession of the premises." This case was decided before the validity of certain of the Commonwealth *National Security (War Service Moratorium) Regulations* had been challenged successfully in the High Court,² but because section 72 (6) of the newly proclaimed³ Part V. of the Victorian *Landlord and Tenant Act 1948* is very similar in wording to regulation 30 (6), adjudicated upon in *Towill v. Bailey*, it is submitted that similar considerations would apply in future litigation.

The proceedings took the form of a motion for an interlocutory injunction to restrain the defendant from continuing to exclude the plaintiff from premises which consisted of a dwelling house. It was agreed that the hearing of the motion should be treated as the trial of the action. The defendant had leased the premises to one Cornell. In due course, the tenant informed his landlord (the defendant) that he would be leaving the premises for an indefinite period and that, during his absence, the plaintiff, who had been living with him, would continue to look after the place for him and pay the rent on his behalf. It was not suggested that there had been any assignment of the lease or any sub-letting. Subsequently, Cornell wrote the defendant, stating, "I now vacate your house at" His Honour considered that the letter effected a surrender of the tenancy. The defendant removed the plaintiff's furniture and belongings out of the house, and the plaintiff, to avoid violence, departed peacefully, and then commenced proceedings. He relied on the admitted fact that he was a "protected person" within the meaning of the regulations, and based his right to possession on the provisions of regulation 30 (6) which are as follow :

"When a tenancy has been lawfully determined and a person claiming under the lessee and actually in possession . . . is a protected person, an order for the ejectment of persons from those premises or for the recovery of possession . . . shall not be enforced against the protected person unless the court which made the order is satisfied" (of some one of nine alternative matters) "and gives leave to enforce the order against the protected person."⁴

None of the nine matters could be established. The tenant had informed the plaintiff that he could remain on in possession.

A case involving similar facts had been decided previously by Herron J. of the New South Wales Supreme Court.⁵ O'Bryan J. was not con-

1. Not yet reported. Judgment delivered 3rd May, 1949.

2. See *Collins v. Hunter*, reported *cum* and *sub-nom.* *The King v. Foster*; *Ex parte Rural Bank of N.S.W.*, [1949] A.L.R. 493.

3. On 6th June, 1949.

4. Reg. 30 (6) had no application where the lessor was a "protected person" *vide* reg. 30 (10). Section 72 (8) of the Victorian *Landlord and Tenant Act 1948* also renders a similar provision (s. 72 (6)) nugatory where the lessor is "protected."

5. *Callaghan v. Norman*, (1949) 66 W.N. (N.S.W.) 1.

vinced by the reasoning in that decision, however. There, Herron J. had found as a fact that one Norman actually was in possession at the time the lease was determined. Was he "a person claiming under the lessee"? It was held that he was and that a person could be said to claim under a lessee although he did not claim title to any estate in the land, e.g. a sub-lease. Herron J. said,⁶ " . . . what he is claiming is possession and, provided he can shew that his possession is with the leave and licence of the former lessee, he then in effect becomes the tenant of the property. He gets as it were an estate conferred upon him by regulation 30."

O'Bryan J. disagreed. He pointed out that the regulation primarily was concerned with cases where an order for ejectment or possession had been made. The order could have been made much later than the date of the surrender of the tenancy or determination by notice to quit. "How," he asked, "can a person claim a right to possession of premises after a tenancy has been determined unless he claims under the lessee some estate in the land, such as a sub-tenancy?" His Honour opined that a sub-tenancy may be the only case in which protection is relevant in these circumstances. He said, "I can think of none other." The learned judge preferred the reasoning in the earlier case of *Simpson v. Mitchell*⁷ (a decision of Herron J.) which was cited with approval in *Fink v. McIntosh*.⁸ He pointed out that *Callaghan v. Norman* contained no reference to either of those cases.

His Honour found that the plaintiff was a mere trespasser once the tenancy had come to an end, and that he was not protected by the regulations. The motion for an interlocutory injunction was refused.

As, of course, the decision in *Towill v. Bailey* is binding on courts of petty sessions in Victoria, wherein cases involving similar facts, but where the lessor is out of possession, can be litigated (the lessor instituting proceedings in ejectment) pursuant to section 69 of the *Landlord and Tenant Act 1928* as amended in 1948⁹, it follows that, as the law now stands, like arrangements made between tenants and persons living with them (often their relatives) who endeavour to remain in the premises after the tenancy has been determined—such arrangements have not been uncommon since the decision in *Callaghan v. Norman*—must be ineffective to deprive the landlord of possession of his premises.

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6. at p. 3.

7. (1944) 61 W.N. (N.S.W.) 147.

8. [1946] V.L.R. 290.

9. By Act No. 5264, Part VI.

(Although proof of "like arrangements" referred to *supra* would not defeat a landlord's claim for possession, the Full Court in N.S.W. has held that, in certain circumstances, a head landlord who has not consented to a sub-leasing by his tenant can be restrained from ejecting the "protected" sub-lessee—*vide Mouton v. Abbott*, (1949) 66 W.N. (N.S.W.) 129. As this decision was given on the same day as the judgment in *Towill v. Bailey* was delivered, there is no reference to O'Bryan J.'s *dictum* referring to a sub-lease. *Callaghan v. Norman* is not referred to, but the F.C. said *obiter* that the phrase "a person claiming under the lessee and actually in possession" in reg. 30 (6) does not include a person who was merely in occupation with the lessee's permission but without any legal right of possession as against him. See also *Wilson v. Markham*, 66 W.N. (N.S.W.) 165—the phrase "claiming under the lessee" held not to include the assignee of the term in whom the term had become vested by assignment.—E. E. H.)