the mortgagee to apply to the Registrar under s. 79. Otherwise, the plaintiff should be granted an order for sale. In making the order, the Supreme Court should not grant it free from the restrictions which would affect it were it sought by a legal mortgagee. This is consistent with treating as done that which ought to be done. Section 77 of the Transfer of Land Act, which regulates the right of sale, does not, by its terms, apply to equitable mortgages, but s. 103 of the Property Law Act, which would apply, appears to be just as restrictive. In order to achieve the result required, a vesting order under s. 90 of the Property Law Act would presumably be granted in addition to an order for sale. If this course were followed, it is submitted that the remedies of an equitable mortgagee would correspond with those of legal mortgagees and not be in excess of them.[16]

J. D. MERRALLS

[16] Dean J., at 100: 'I think the obligation on the mortgagor is to do all that is necessary to vest the legal title in the mortgagee in case of default, and to give the mortgagee all the rights he would have if the mortgage were legal . . . The remedy of the mortgagee should correspond as nearly as possible with those of legal mortgagees.'

LANDLORD AND TENANT – DESERTED WIFE REMAINING IN MATRIMONIAL HOME – AFTER LICENCE TO REMAIN TERMINATED – LANDLORD AND TENANT ACT 1948, s. 2 (2)

Adamson v. Busch[1]

This case before the Supreme Court raised the question of the effect of the deserted wife's remaining in possession of the matrimonial home, in relation to the creation of a statutory tenancy. The premises in question were let by the owners Mr and Mrs A to Mr B, the husband of the defendant. Mr B deserted his wife on 5 October, leaving her with enough furniture 'to enable her to carry on', and, on 21 October, he gave the owners notice to quit on the 31st, when he handed Mr A the key. Mrs B, however, continued to occupy the premises and refused the owners' demand for possession; whereupon the latter sought an order for recovery of possession against her. The motion for an interlocutory injunction restraining the defendant from remaining in possession came before Herring C.J. who gave judgment for the plaintiffs.

The plaintiffs claimed possession by virtue of Mr B's termination of the tenancy on 31 October. His Honour agreed that since Part III of the 1948 Landlord and Tenant Act did not affect the *lessee's* right to give notice to quit, therefore unquestionably the lease had been validly determined on 31 October.

So far the case is straightforward; but, because the contractual tenancy had been determined, Mrs B contended that by virtue of

[1] [1956] A.L.R. 259. Supreme Court of Victoria; Herring C.J.

her possession, a statutory tenancy had arisen between the plaintiffs and her husband under s. 2(2) of the 1948 Landlord and Tenant Act, which enlarges the definition of 'lessee' to include 'a person who remains in possession of premises after the termination of his lease of the premises'.

By holding that this section was wide enough to cover termination of a lease by a tenant giving notice to quit, His Honour posed the problem of the effect to be given to the deserted wife's possession, for if her possession were sufficient to constitute her husband a 'lessee' within the section, the landlords were bound to comply with Part III of the Act and therefore could not recover possession through action in the Supreme Court.

Whether Mr B was still in possession is a question of fact,[2] but the effect of his wife's possession is a question of law which has been the subject of much opinion in the Court of Appeal when the court has had before it the provisions of the Rent Restrictions Act which provide that a statutory tenant can be deprived of the protection of the Act only by giving up possession or by having a court order for recovery of possession made against him.[3]

It has been in deciding whether there has been a sufficient surrender of possession to satisfy that provision, that the problem of a deserted wife's possession has come before the Court of Appeal. In *Old Gates Estates Ltd. v. Alexander*[4] Lord Justice Denning based the husband's possession on his wife's possession, declaring that the wife, although not a licensee of her husband, was in a special position with a permission to remain that her husband could not revoke; and that *her* possession was her husband's so that the premises remained within the provisions of the Rent Restrictions Act. The other Lords Justices hearing the appeal chose to base their conclusions on other grounds.

Soon afterwards, in *Middleton v. Baldock*,[5] Evershed M.R. in *obiter dicta* expressed his concurrence in Denning L.J.'s opinion, which the latter repeated in *Middleton's* case. On the other hand, in *Taylor v. McHale*[6] the Court of Appeal had held that the wife was a trespasser. In *Bendall v. McWhirter*,[7] Denning L.J. shifted his position somewhat, holding that the wife had an equitable interest which though personal was good against successors in title to the licensor. Romer and Somervell L.JJ. preferred a previous expression of opinion by Denning L.J. in *Errington v. Errington*:[8] the wife is not a tenant nor a bare licensee, but is in a special position, a licensee with a special right under which her husband cannot turn her out except by a court order; but she has no legal or equitable interest.

[2] *Brown v. Brash* [1948] 2 K.B. 247, 254 per Asquith L.J.
[3] *Brown v. Draper* [1944] K.B. 309, 312-13 per Lord Greene M.R.
[4] [1950] 1 K.B. 311.
[5] [1950] 1 K.B. 657, 667.
[6] [1948] Estates Gazette Digest 299.
[7] [1952] 2 Q.B. 466.
[8] [1952] 1 K.B. 290, 298.

Lord Justice Jenkins, in *Bradley-Hole v. Cusen*[9] agreed that the husband was under a personal obligation not to turn his wife out of the matrimonial home, and the idea of the wife being a special licensee was supported by Lord Goddard C.J. in *R. v. Twickenham Rent Tribunal.*[10] Denning L.J., however, in *Jess B. Woodcock & Sons Ltd. v. Hobbs*[11] dismissed Jenkins L.J.'s remarks in the *Bradley-Hole* case as *obiter,* and restated that the wife had an equitable right. Parker L.J. said he was not yet satisfied that the wife's right would bind a *bona fide* purchaser with constructive notice of the wife's possession,[12] i.e. he doubted that that right was equitable.

But in the Victorian case of *Brennan v. Thomas,*[13] Mr Justice Sholl took the view that a deserted wife acquired no legal *or* equitable interest in the home at all, a view taken by Roxburgh J. in *Thompson v. Earthy*[14] and for which there is considerable support from the authorities.

Chief Justice Herring in this case chose to follow these last two cases, rejecting the view expressed by some members of the Court of Appeal that the husband retains possession of the home through his deserted wife whether he likes it or not, so long as she chooses to remain there and the court allows it.

That there is considerable divergence of opinion among the members of the Court of Appeal is undeniable, and this alone, it is submitted, could have been reason enough to enable His Honour to prefer *Brennan v. Thomas*[15] to those English decisions. But His Honour chose also to distinguish the latter on the ground of the differences between both the general approach of the English Rent Restrictions Act and that of the Victorian Landlord and Tenant Act, and the specific provisions themselves. This may appear to be arguable when it seems that both the English and the Victorian sections in question provide in effect that the tenant who remains in possession when he has no contractual lease, shall not lose the protection of the Act. But, as was pointed out by Herring C.J., the Victorian provisions leave the lessee free to end the contractual tenancy whenever he wishes by serving notice to quit (unlike the English scheme). When the tenant takes advantage of this provision, all the subordinate interests must perish too, and among these is the deserted wife's interest.

The New South Wales Supreme Court decision of *Webb v. Diethe,*[16] which was relied on by the defendant, was rejected owing to the inconsistencies in the Court of Appeal decisions on which the judgment was based, and because of the differences of opinion between the two judges who delivered judgments, as to the ability of the husband to surrender the lease. Herring C.J. considered this

[9] [1953] 1 Q.B. 300.
[10] [1953] 2 Q.B. 425, 429-30.
[11] [1955] 1 W.L.R. 152, 156.
[12] *Ibid.* 159-60.
[13] [1953] V.L.R. 111.
[14] [1951] 2 K.B. 596.
[15] *Supra,* n. 13.

power in the husband to be undoubted. In the English decisions, the question was always whether the husband had given up possession, but this was only because it was only if he *had* surrendered possession, and only then, that the Acts were no longer relevant. But in Victoria (and presumably in New South Wales), the lessee can terminate the lease at any time he chooses, not only by going out of possession; and he thereby places himself outside the Landlord and Tenant Act. In England it followed that if a woman remained in possession for her husband the statutory tenancy *could* not have ended.

There is another reason to support Herring C.J.'s conclusion that the deserted wife gets no legal or equitable interest in the matrimonial home; if the position were otherwise, a husband might terminate the lease *vis à vis* the landlord, but the latter would not be able to take advantage of such termination if the deserted wife chose to remain in possession. This would give the wife a greater interest than the husband had to give her – and a remarkably durable interest at that.

Further, the New South Wales decision can be of little help in favouring the other view, since, if the husband's interest determined, his wife's did too; then her presence on the premises could have no relevance one way or the other, for the husband would have no interest to confer on her, unless he acquired a new interest by remaining in possession himself, under s. 8 (2) of the New South Wales Act – the equivalent of s. 2 (2) of the Victorian Act. This last question is a question of fact to be decided in accordance with the principles stated by Asquith L.J. in *Brown v. Brash.*[17] Since therefore the husband must have acquired some new interest before the wife's presence can be relevant, there is no warrant for holding, as Herron J. did, that the husband continued in 'possession'.

Accordingly, the defendant in this case could have no answer to the owner's claim. This case, together with *Brennan v. Thomas*[18] – it is hoped – has finally settled for Victoria at least, the difficult question of the possible effect of a deserted wife who chooses to ignore her husband's termination of the tenancy.

J. D. PHILLIPS

[16] (1953) 53 S.R. (N.S.W.) 190.
[17] [1948] 2 K.B. 247, 254-5.
[18] *Supra*, n. 13.

CONTRACT – SUBMISSION OF DISPUTE TO ARBITRATION – CERTAINTY OF AWARD – DENIAL OF NATURAL JUSTICE

Varley v. Spatt[1]

In the course of building a house for the defendant, a married woman, the plaintiff contractor departed from the plans as approved

[1] [1956] A.L.R. 71. Supreme Court of Victoria; Herring C.J.