

within section 4), but if it is not penal, then and only then will the full amount be recoverable. Only in this last case can more than section 4 allows be recovered, a class of case which it is hard to imagine once a wider interpretation of section 4 is adopted.

Finally, His Honour criticized the method of calculating the value of the goods at the date of repossession in this case, (based as it was on wholesale values)—a method described by counsel as 'usual' in the trade—and pointed out the correct method (based on retail value) to be used in fairness to the hirer, and it is hoped that the finance companies will heed this warning from the bench.

J. D. PHILLIPS

WILSON v. KELLY¹

Transfer of Land Act 1928—Sale by Mortgagee—Lease Prior to Sale without consent of Mortgagee

S, the registered proprietor of land on which a service station was erected, defaulted in his payment of mortgage moneys, whereupon the unsatisfied mortgagees, in exercise of their right under the Transfer of Land Act 1928, s. 148,² sold the land to the plaintiff at public auction. Prior to the sale S had granted to the defendant a ten-year lease of the land, this lease being neither consented to by the mortgagees nor registered. The plaintiff brought an action to recover possession of the land, claiming an injunction to restrain the defendant from occupying it, and damages for his exclusion therefrom. He claimed that upon registration of the transfer to him following the sale he had, by virtue of the Transfer of Land Act 1928, s. 150,³ acquired a clear title to the land. The defendant claimed that a lessor-lessee relationship within the meaning of these terms in the Landlord and Tenant Act 1948, s. 2, existed between the plaintiff and himself, and that section 37 of the Act applied to the situation. In this case he could not be ejected from the land except by the procedure therein defined, *viz.* the service of a notice to quit on one of the prescribed grounds.⁴ Gavan Duffy J. gave judgment for the plaintiff, holding that his title was paramount to that of the defendant lessee.

Two principal lines of argument were advanced in the case. The plaintiff's case relied on the provisions of the Transfer of Land Act 1928 to establish the paramountcy of his claim. The effect of sections 131 and 150 of the Act, it was contended, was that the plaintiff acquired an estate and interest in the land freed from the lease

¹ [1957] V.R. 147. Supreme Court of Victoria; Gavan Duffy J.

² The corresponding provision in the Transfer of Land Act 1954 is s. 77 (1).

³ *Ibid.*, s. 77 (4).

⁴ Landlord and Tenant Act 1948, s. 37 (5).

granted by S to the defendant.⁵ Gavan Duffy J. elucidated the argument by demonstrating how, at common law, the mortgagor could not make a lease which would be good against the mortgagee without the concurrence of the latter.⁶ His Honour quoted the words of Lord Selborne L.C. in *Corbett v. Plowden*,⁷ stating that, in cases where there is no such concurrence:

The lessee has a precious title inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagee may be asserted against both of them.

His Honour pointed out that, although in a mortgage under the Transfer of Land Act the title remains throughout in the mortgagor, his right to make a lease binding on the mortgagee is also restricted.⁸ As there had been no consent by the mortgagee to the lease in question, a straightforward interpretation of the Act could hardly have produced a different conclusion.

At this juncture it is advisable to bear in mind the whole policy of the Transfer of Land Act 1928, which is to guarantee, with limited exceptions, the indefeasibility of the title of a purchaser taking a transfer from the registered proprietor and himself becoming registered. Special provisions were enacted to ensure that the title of the purchaser in a sale by a mortgagee should not be impeachable.⁹ Although he had not in fact dealt with the registered proprietor he was *to be deemed* to have done so for the purpose of Part III of the Act, and therefore he was eligible to receive the protection afforded by section 72 and 179. Thus it would appear that the recognition, as against such a purchaser, of rights in a lessee who acquired a lease after the mortgage and without the consent of the mortgagee, would violate the fundamental policy of the Act.

However counsel for the defendant advanced a counter-argument based on the provisions of the Landlord and Tenant Act 1948. He submitted that a lessor-lessee relationship existed between the parties, basing his contention upon the terms of section 2 of the Act, which defines that relationship as subsisting between 'parties to a lease or their respective successor in title.'¹⁰ If this submission were correct the plaintiff could recover possession only by satisfying the require-

⁵ The Transfer of Land Act, s. 131, provides that 'No lease subject to a mortgage shall be valid or binding against the mortgagee *unless he has consented in writing to such lease* prior to the same being registered.' S. 150 of the Act provides that on registration of a transfer following a sale under s. 148 'the estate and interest of the mortgagor . . . shall vest in the purchaser as proprietor by transfer, freed and discharged from all liability on account . . . of (any) encumbrance registered subsequent thereto *excepting a lease . . . to which the mortgagee has consented in writing.*'

⁶ [1957] V.R. 147, 148.

⁷ (1884) 25 Ch. D. 678, 681.

⁸ Transfer of Land Act 1928, ss. 131, 150. *Supra* n. 5. Cf. the position of land under the general law, Property Law Act 1928, s. 99. The provisions of these two Acts are not identical, especially concerning the necessity for consent.

⁹ Transfer of Land Act, s. 150.

¹⁰ [1957] V.R. 147, 149.

ments of section 37 of the Act.¹¹ Gavan Duffy J. rejected this argument. After studying the words 'successors in title' he concluded that the plaintiff and defendant were not within the definition and that section 37 was therefore inapplicable. The successor in title must be a successor to a person *who is a lessor*. Where a person takes a title which is anterior to the creation of a lease, he cannot be a successor in title to the lessor. This was the position of the plaintiff under the Transfer of Land Act 1928, s. 150: on registration of the transfer, the estate and interest of the mortgagor *at the time of registration of the mortgage* became vested in the purchaser. Since at that crucial time S had not yet granted any lease to the defendant, the plaintiff could not be his successor in title. The title of the plaintiff antedated the lease and was therefore paramount to it. His Honour also expressed the view that a mere definition clause in the subsequent Landlord and Tenant Act 1948 did not operate to repeal the express provisions of the earlier Transfer of Land Act 1928, ss. 131 and 150.¹²

It was also alleged by the defendant that the Vacuum Oil Company, for which the plaintiff was nominee and trustee, knew of the lease and still made an agreement with the defendant concerning the sale by him of the company's petrol. This allegation was unsupported by reliable evidence, but in the opinion of His Honour, it would not have debarred the plaintiff from his right to recover possession in any case. The defendant further submitted in evidence that the auctioneer at the sale had mentioned that the land was subject to a lease, naming the amount of rent, although not disclosing the identity of the lessee. It was held, however, that this also should not affect the right of the plaintiff, on learning the true position shortly afterwards, to evict the defendant.¹³

Wilson v. Kelly marks no great milestone or turning point in real property law. It is highly unlikely that it will prompt any legislative changes, either in the direction of enlarging the definitions contained in the Landlord and Tenant Act 1948 s. 2, or of altering the present situation as to the leasing of land under the Torrens System by mortgagors. The policy of establishing security of tenure which inspired the post-war landlord and tenant legislation is in this case required to give way before the right of the mortgagee to protect the value of his security against improvident arrangements by mortgagors. It appears that the principal lesson taught by the case is of the imperative need for the mortgagor of land under the operation of the Transfer of Land Act to obtain the consent of the mortgagee to any lease he may wish to make, if he and the lessee are to be protected in their agreement.

JAN E. BARNARD

¹¹ *Supra*, n. 4.

¹² [1957] V.R. 147, 149.

¹³ *Ibid.*, 151 ff.