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.

by the surveyor in certain requested particulars and in so doing contravened Uniform Building Regulation 571 (Victoria). When the house was completed, the parties submitted a dispute regarding the balance of moneys owing under the contract to arbitrators, who made an award in favour of the plaintiff conditional upon issue of the supervising architect's certificate. In the course of their investigation the arbitrators took evidence in the absence of the defendant and without giving her notice. The plaintiff now sought to enforce the award summarily,[2] but leave to do so was withheld, and on the defendant's motion the award was set aside.

Although it was brought to their notice by the defendant's husband the question of illegality was not referred to the arbitrators for decision nor was it dealt with by them. Consequently the portion of the sum awarded in respect of the unapproved, illegal work could not be ascertained. Herring C.J. found this a sufficient reason for refusing leave to enforce the award in a summary way though he did not feel bound to set it aside on this ground. He might well have done so had the illegality complained of been of a different kind, which His Honour distinguished,[3] patent illegality, of which a court will take notice of its own motion. In the instant case, since the plaintiff did not have to disclose it to establish his cause of action, the illegality was of the lesser kind which the defendant would have had to plead to rely upon.

It follows that if the award had been found good in other respects a remedy in the form of a common law action based on it would have remained to the plaintiff, and in such an action the defendant could have pleaded illegality. But since Herring C.J. upheld the defendant's two further objections with the result that the award was set aside, the ultimate effect of illegality in the facts of the case was never determined. The suggested possibilities of severance and of a dispensing power under the regulations were never explored. But the case does throw some light on the circumstances in which leave by the court to grant summary execution of an award will be withheld. There is authority to the effect that if the objections are substantial, if there is a *prima facie* case against the award, it ought to be tested by action rather than summarily enforced.[4] Evidence of illegality which cannot be severed is a sufficiently substantial objection.

The first of the grounds on which Herring C.J. found the award bad was 'that it made liability depend on the action of third parties whose actions the parties cannot control and who indeed would

[2] S. 13 Arbitration Act 1928 (Victoria) provides that 'An award on a submission may, by leave of the Court or a Judge, be enforced in the same manner as a judgment or order to the same effect.'

[3] Following *Gozzard v. McKell* (1931) 33 S.R. (N.S.W.) 39.

[4] *In re Boks & Co. and Peters Rushton & Co. Ltd.* [1919] 1 K.B. 491, 496 per Swinfen Eady M.R.

seem no longer able to grant a valid certificate.'[5] While the correctness of the decision cannot be doubted it may be that this statement, particularly in the shorter form in which it appears in the headnote to the case, requires qualification. Herring C.J. did not cite authority for the principle, but there are certainly cases of the greatest antiquity which establish it. For example Yelverton J. says in a Year Book case: 'Every award must be complete and certain, and this one is not, for leaving part of the matter to S and F.'[6] In short, an arbitrator could not delegate his power or substitute the decision of another for his own. So in a dispute as to the merchantable quality of sleepers, where an arbitrator found a certain quantity unmerchantable but required the loss to be certified by a selling broker, the award was held bad.[7]

Yet it is possible to suggest circumstances in which lack of finality will not necessarily vitiate an award. In a number of cases awards have been upheld where arbitrators have deferred to the possible adjudication of a court of law. In the Victorian case of *Melbourne Harbour Trust Commissioners v. Hancock*[8] an arbitrator awarded a certain sum, and, in the event of the Supreme Court of Victoria finding that certain views he had expressed were wrong, a certain larger sum; if not liability itself then certainly the extent of liability was made to depend on third persons whom the parties could not control, yet the award was held good. If an award is conditional, but there is an alternative in case the condition is not fulfilled, it appears that the award may be good.

In *Varley v. Spatt* four questions were submitted to the arbitrators and the answers to two of them were found bad. The first question and the offending answer were as follows:

> Is any and what sum properly payable by the owner to the contractor for work and labour done and materials provided by the contractor pursuant to the said agreement?
>
> Yes. £3,671 16s. 4d. provided and when a certificate is issued by the architects.
>
> On the principle stated above, that if an award is conditional it must contain an alternative, this answer is clearly bad.

The second question and its answer were as follows:

> Was the owner on the 26th day of December 1952 indebted to the contractor in any and what sum for work and labour done and materials provided by the contractor pursuant to the said agreement?

[5] The architect had in fact left the job.

[6] *Anon.* (1468) Y.B. 8 Edw. 4. fo. 11, pl. 9.

[7] *Dresser v. Finnis* (1855) 25 L.T.O.S. 81.

[8] [1927] V.L.R. 418. See also *Chrysolite Hill Co. v. Sandhurst Chrysolite Co.* (1879) 5 V.L.R. 242; *Re Wright & Cromford Canal Co.* (1841) 1 Q.B. 98; 4 P. & D. 530.

Yes. £3,671 16s. 4d. This amount also governed by the architect's certificate.

It may be agreed that this answer was rightly held bad, not because it made liability depend on third parties nor because it was conditional, but because as a matter of construction it was self-contradictory. Either the owner was indebted in a particular sum at a particular time or she was not. The arbitrators simply failed to provide a rational answer, conditional or otherwise.

As to the arbitrators' misconduct in taking evidence in the absence of the defendant, Herring C.J. found that this amounted to the violation of a fundamental principle of justice. Two aspects of this matter dealt with in the case deserve mention, the first and narrower one a matter of construction. Clause 6 of the written submission on which the arbitrators acted empowered them to be 'informed in any way thought fit by them or him whether according to the rules of evidence or not'. Did this justify their action? Herring C.J. considered that clause 6 should be read with the whole of the document, clause 4 of which made express provision for *ex parte* reference but on condition that notice was duly given. He then distinguished rules of evidence, which the arbitrators could ignore, from principles of justice, which they could not.

The wider aspect of the matter is that of natural justice, on which His Honour did not dilate as such but which it is clearly inferred laymen must observe when called upon to act in a judicial capacity. How are they to conduct themselves? If left without express guidance as to procedure they must 'act honestly and by honest means'.[9] It was not suggested in *Varley v. Spatt* that 'misconduct' was to be understood in anything but a technical sense, yet it cannot be said that the decision merely reflects the thesis that 'lawyer-like methods may find especial favour from lawyers'.[10] There is ample authority that giving a party the opportunity of challenging what is alleged against him is an axiomatic principle of justice, binding upon laymen as upon lawyers. It is enough to say that Herring C.J. took a sufficiently serious view of the error to set the award aside completely rather than remit it to the arbitrators.

HOWARD FOX

[9] *Local Government Board v. Arlidge* [1915] A.C. 120, 138 per Lord Shaw of Dumfermline.
[10] *Ibid.*