she plainly told him so. That case was put to the jury and they disbelieved it." This view, that the Crown is not bound to negative a possible defence which the prisoner has not raised, is supported by the High Court decision in *Packett v. The King*.[16] It has the curious result that it arbitrarily prevents the jury from determining that they are not satisfied that an essential element in the crime is present. It is by no means certain that the decision of the jury in this case that there had been no consent, also carried with it a decision that they were satisfied that the accused knew there was no consent.

A. L. TURNER.

16. (1937) 58 C.L.R. 190

LANDLORD AND TENANT: SPECIAL CIRCUMSTANCES.

In these days of acute housing shortage a wide section of the general public takes an interest in the law, and in general conversation one may hear some remarkable enunciations of the law relating to landlord and tenant. It is a common thing to hear from laymen, and sometimes even from a person connected with the law, the statement: "Sub-letting is against the law now." This fallacious statement springs from an amendment, by Statutory Rule No. 31 of 1947, to the *National Security (Landlord and Tenant) Regulations*. By regulation 58, a lessor of "prescribed premises" may terminate the tenancy thereof only by a notice to quit given on one of the grounds set out in that regulation. And he may not take ejectment proceedings unless such a notice has previously been given. To the list of grounds for the giving of such a notice, Statutory Rule No. 31 added the following:

> "(*m*) that the lessee has become the lessee of the premises by virtue of an assignment or transfer which the lessor has not consented to or approved, or
>
> (*n*) 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."

It will be seen that all that Statutory Rule No. 31 has done, has been to create two further grounds for the giving of a notice to quit, and that an assignment or sub-lease, whether with or without the lessor's consent, may still legally be made. However, the practical value of a sub-lease or assignment is obviously diminished when it affords the lessor a ground for giving a notice to quit and taking ejectment proceedings. Even so, the effect of this amendment would not have been particularly drastic if it went no further than that. For, by regulation 63 (1), on the hearing of ejectment proceedings, the Court

> "shall take into consideration, in addition to all other relevant matters—
>
> (*a*) any hardship which would be caused to the lessee or any other person by the making of the order;
>
> (*b*) any hardship which would be caused to the lessor or any other person by the refusal of the court to make the order; and

(*c*) (certain other matters)

and may, in its discretion, make the order or may . . . refuse to make the order notwithstanding that one or more of the prescribed grounds has been established."

So that if nothing further appeared, a sub-lessee or assignee would have considerable protection in that, before he could be evicted, the Court would have to consider the relative hardships which would be caused by the making of, or the refusal to make the order. He would be in a better position, in all probability, than the original lessee upon whom a notice had been served on the ground, e.g., that the lessor reasonably required the premises for his own use. For the amount of hardship caused to a lessor by the mere fact that his consent had not been obtained to an assignment or sub-lease, would in most cases be of very little weight.

However, a further amendment to the regulations was made by Statutory Rule No. 31, and it is the effect of this amendment that has prompted the writing of this article.

The amendment adds to Regulation 63, the following :

" (2) Where the application is made on either of the grounds specified in paragraphs (*m*) and (*n*) of sub-regulation 5 of regulation 58 of these Regulations, the court shall not refuse, in the exercise of the discretion vested in it by the last preceding sub-regulation, to make the order unless the court is satisfied—

(*a*) that *special circumstances** exist by reason of which the order should not be made ; or

(*b*) without limiting the generality of the last preceding paragraph, in a case where the ground specified in paragraph (*n*) applies, that the sub-letting was in the course of a business of sub-letting carried on by the lessee.

(3) On the hearing of an application specified in the last preceding sub-regulation, any assignee, sub-lessee or person in occupation of the prescribed premises or any part thereof shall be entitled to be heard."

The effect of the above appears to be, that with two exceptions the discretion granted to the court, after considering all relevant matters and the relative hardships to the parties, to refuse to make the order, is taken away. That is, that no matter what hardships might be caused, to the lessee, assignee, or sub-lessee by making an order, the court shall not refuse to make the order. But by sub-paragraph (*a*), if special circumstances exist, it may refuse to make the order, and consider these hardships, presumably in the exercise of the discretion vested by sub-regulation (1). The regulations do not define the expression " special circumstances," and what sort of circumstances the legislature contemplates is a matter for conjecture.

So far there has been no judicial decision given as to what constitutes " special circumstances," in this sub-regulation.

Although the Australian Courts have not yet been called on to interpret the phrase as used in this regulation, there have been numerous

* My italics.

decisions as to what constitutes " special circumstances," in other enactments. Generally speaking, the Courts have refused to be bound by any rigid rule defining " special circumstances," and have decided each case on its own particular facts.

For example, in *In re Cheeseman*[1], the Court was dealing with an enactment to the effect that a mortgagor may apply to have a mortgagee's bill of costs taxed, " if the special circumstances of the case shall, in the opinion of a Court or Judge, appear to require the same." *Bowen L.J.*, at p. 293, after quoting the enactment, said, " This gives the judge a wide discretion. If there had been nothing here that could reasonably be considered a special circumstance, it would have been our duty to reverse this order." See also *Re Ward Bowie & Co.*[2]

All that can be done here, then, is to consider what a court might be expected to hold to be " special circumstances " in regulation 63 (2) (*a*), so that it may be free to exercise the discretion conferred by sub regulation (1).

Freeman and Shaw, in their recently published " *Landlord and Tenant Law and Practice*," at p. 57, suggest that sub-reg. (2) " merely gives the Court power to decide whether the lessor's refusal to consent to an assignment or sub-lease is unreasonable." The authors possibly had in mind section 144 (1) of the *Property Law Act* 1928, which provides, in effect, that a lease containing a covenant against assigning or subletting without consent, shall, unless it contains an express provision to the contrary, be deemed subject to a proviso that such consent shall not be unreasonably withheld, and that no fine or sum of money in the nature of a fine shall be payable in respect of such consent. It is certainly possible that the legislators envisaged something like this. For example, if it were proved to the court that the lessor, on application being made for his consent to an assignment, had said : " Pay me £500 and I will consent, otherwise I refuse," and gave no other reason for refusing, that might well constitute " special circumstances," for refusing an order in subsequent proceedings based on the ground that the lessee had assigned without consent. This might be a clear case, but it may often be difficult to decide what is an " unreasonable " refusal to consent. Suppose that a lessee applies to his lessor for consent to assign his tenancy to a person suffering great hardship because of lack of accommodation, and to whom the lessor has no particular objection as a tenant. The lessor, however, refuses his consent on the ground that he wishes to select his own tenants —scarcely an unreasonable attitude. But in the event of the lessee then proceeding to assign without the lessor's consent, would the great hardship of the assignee in itself constitute a " special circumstance " justifying a refusal to make the order ?

I do not think that the *only* test can be the reasonableness or otherwise of refusal to consent. Consider the following suppositious cases :

A lessor leaves the country without leaving any address at which he can be located, merely instructing the lessee to pay the rent into a bank account during his absence. If the lessee, having made every possible attempt to locate the lessor, fails to do so, and then, having himself good

1. (1891) 2 Ch. 289.
2. (1910) 102 L.T. 881.

reason for vacating the premises, sublets them, would these be " special circumstances " if the lessor subsequently returns and commences ejectment proceedings on the grounds in regulation 58 (5) (*n*) ?

Again, suppose a lessee holding a tenancy from month to month, and having decided to vacate the leased premises, assigns his tenancy to a person, falsely representing to the assignee that he has obtained the lessor's consent, and even presenting to the assignee a forged consent. The assignee takes possession, having spent a large sum on redecorating and re-furnishing the premises. At the expiration of the current month of the tenancy ejectment proceedings are commenced on the grounds in reg. 58 (5) (*m*). Could the assignee claim that there were special circumstances which would justify the refusal of an ejectment order ? In both the above examples it should be a matter for the discretion of the court as to whether or not there were such circumstances.

In the writer's view, no specific test of " special circumstances " can be applied and the Courts appear to have a wide discretion to decide, in each particular case, whether or not there are facts, of any kind, which would justify its refusal to make an order.

C. P. JACOBS.

PRACTICE : SUBMISSION OF NO CASE TO ANSWER : ELECTION NOT TO CALL EVIDENCE.

The manoeuvre of submitting, at the end of the case of the party having the onus of proof, that he has failed to make out a case, is so familiar that it is curious that the practice in relation thereto has remained uncertain for so long.

In *N.Z. Loan Co. v. Smith*[1], Madden C.J. held that Defendant cannot, at the close of Plaintiff's case, ask for a verdict, without stating that he intends to call no evidence. It appears from the report that Holroyd and Hood JJ. favoured a similar practice.

Thirty-five years later, in *Hannah v. Stott*[2], Lowe J. decided that, at any rate in cases where there is no jury, there is no such election involved.

The Court of Appeal in *Alexander v. Rayson*,[3] at 178, considered it " highly inconvenient " that a judge of fact should be asked to express any opinion on the evidence till it be completed, that nobody would so ask a jury, and that the responsibility for not calling rebutting evidence should rest entirely on the counsel making a submission.

That very year Branson J. in *Muller v. Ebbw Vale, etc., Co.*,[4] seizing upon the Court of Appeal's reference to convenience as the basis of their opinion, held that convenience was a matter which must be decided in each particular case, so that there was no inflexible rule. He ruled on a submission without putting defendant's counsel to an election.

1. (1893) 15 A.L.T. 92.
2. (1928) V.L.R. 168.
3. (1936) 1 K.B. 169.
4. (1936) 2 All E.R. at 1365.