

BOOK REVIEWS

Leases and Tenancies in New South Wales, by ANDREW G. LANG, LL.M. (HON.); Lecturer in Land Dealings, University of Sydney, Solicitor of the Supreme Court of New South Wales. (The Law Book Company Limited, Sydney, 1976), pp. i-xxvi, 1-466. Cloth recommended retail price \$24.50. (ISBN: 0 455 19450 5).

One of the side effects of the comprehensive system of control over rents and tenancies introduced in this country under the National Security Acts during the Second World War was that the courts had occasion to look more frequently and more closely at the basic common law principles relating to the law of landlord and tenant. A series of decisions particularly in New South Wales and Victoria, during and shortly after the War, went a considerable way to clarifying and expounding the principles relating to such matters as the nature of a periodical tenancy, the effect of an agreement for lease, the rights of different classes of tenants to sub-let, the circumstances in which a tenancy at will arose and its effect, and a whole host of similar matters. As a consequence of this, the basic English text books on the subject became less relevant and less adequate to Australian needs and created a demand for Australian works in which the local legislation and decisions could be fully and adequately discussed and applied to Australian conditions.

This book, although not the first, is I believe a very important and useful contribution to this field. Those familiar with Mr Lang's previous work, *Crown Land in New South Wales*,¹ will appreciate his facility for bringing order out of chaos, particularly when it comes to understanding the more obtuse and apparently contradictory legislation that one finds from time to time, not only in the field of Crown Lands, but also in the field of landlord and tenant. The book is not a treatise, and a person who seeks an encyclopaedia of the law of landlord and tenant, with a discussion of the relevant principles, their origin, their application and their correctness, or a discussion of doubtful points for the possible future development of the subject, will need to look elsewhere: this is not that kind of book. But the busy practitioner who seeks a reasonably brief statement of the common law principles, with a citation of the main relevant authorities, and references to the applicable statute law with an indication of how the principles and the statute law operate and can be applied in everyday practice, will find most of the answers here.

The work covers a wide field including the creation of the relationship of landlord and tenant and agreements for lease, the nature of different types of tenancies, the distinction between a lease and a licence, proof of the relationship, covenants, rent, liability for repair or damage, options, the enforcement of positive or negative covenants and assignments. Then follows a discussion of the manner in which the

¹ (1973).

relationship can be terminated including a special chapter on notices to quit and proceedings for recovery of possession both generally and in respect of "prescribed premises". The book then deals in some detail with the Landlord and Tenant (Amendment) Act 1948 (N.S.W.) with special reference to the exclusion of such premises under section 5A and the fixing of rents. The final chapter deals with tenancies of rural holdings and sharefarming agreements and the effect of the Agricultural Holdings Act 1941 (N.S.W.). Each chapter contains an introduction setting out the scope of the matters dealt with in the chapter and the area to be covered, and indicating where collateral matters might be found. The whole book is divided into numbered paragraphs and the cross references as well as the general index and the index of cases are by reference to the paragraph numbers.

Although the book is quite clearly intended to be a practical book (and in such a book one should not expect to find a reference to all the cases on the subject) it is unfortunate that some cases which appear to this reviewer to be of particular importance are not mentioned. For example, in paragraph (504) dealing with the question of a servant occupying the premises of his master as tenant or as licensee, no reference is made to *Glasgow Corporation v. Johnstone*² or to *Commissioner of Valuation for Northern Ireland v. Fermanagh Protestant Board of Education*,³ both decisions of the House of Lords which have recently been applied by the New South Wales Court of Appeal in *Skelton v. Department of Education*.⁴ Similarly, at paragraph (905), in discussing whether or not a variation in the rent repayable under a lease will amount to a surrender of a lease and the grant of a fresh one, no reference is made to *Jenkin R. Lewis & Son Ltd v. Kerman*,⁵ and at paragraph (1409) in discussing section 129(1) of the Conveyancing Act 1919 (N.S.W.) and *Holden v. Blaiklock*,⁶ there is no mention of *Plymouth Corporation v. Harvey*.⁷ The author suggests that the effect of *Holden v. Blaiklock* can be avoided by a provision whereby the lease term is reduced to a shorter term and not terminated and substituted by a fresh tenancy for a lesser term, at least if the notice to determine the reduced tenancy is not given simultaneously with the exercise of the option. I disagree, as it seems to me that any right to vary or reduce the term of the lease is a right to forfeit the original term and if the event which gives rise to that right is a breach by the lessee of any covenant or condition of the lease, section 129(1) by its express terms applies. In view of the fact that the Real Estate Institute of New South Wales has recently published a new form of lease for residential purposes which, in the event of certain breaches, gives the landlord the right to re-enter "or to continue the lease as a periodic lease from week to week" it may not be too long before the matter is further considered by the courts.

² [1965] A.C. 609.

³ [1969] 1 W.L.R. 1704.

⁴ [1974] 1 N.S.W.L.R. 127.

⁵ [1971] Ch. 477.

⁶ [1974] 2 N.S.W.L.R. 262.

⁷ [1971] 1 W.L.R. 549.

I disagree with the statement at paragraph (1422), which appears to be contradicted at paragraph (1610), that a lessee who has been guilty of a breach of covenant cannot, notwithstanding the Supreme Court Act 1970 (N.S.W.), raise a claim for relief against forfeiture as a cross-claim to proceedings for recovery of possession, but must institute separate proceedings in the Equity Division. The cross-claim procedure is frequently availed of in practice and, so far as I am aware, the propriety of such procedure has not been questioned.

Unfortunately there are also some errors: at paragraph (607) it is said that section 2A of the Landlord and Tenant Act 1899 (N.S.W.) applies where there is no rent payable although this is contrary to the express terms of the section; at paragraph (1601) it is said that the District Court of New South Wales has limited jurisdiction in proceedings for possession and a reference is given to sections 16 to 21 of the 1899 Act, although these sections were repealed by the District Court Act 1973 (N.S.W.) Second Schedule; at paragraph (1606) it is said that mesne profits can only be obtained pursuant to section 12(1) of the 1899 Act up to the date of judgment for possession and that in respect of the period after judgment separate proceedings must be commenced, although section 12 was amended by the Second Schedule to the Supreme Court Act 1970 so as to provide that unless the proceedings are tried with a jury (and very few such proceedings are nowadays tried with a jury), judgment for mesne profits may be recovered up to the time of delivery for possession.

There is a typographical error at paragraph (1621) where the author quotes the headnote in *Tate v. Johnson*⁸ as describing the circumstances in which a defendant may submit "no case to answer" at the close of the lessor's case in a Court of Petty Sessions. Unfortunately, about four lines from the bottom of the quotation, a complete line has been omitted which makes the second part of the quotation quite meaningless.

My only other criticisms are the failure to include an index of statutes, the reference to old editions of textbooks and the citation of authorities. An index showing where in the text the various provisions of the Landlord and Tenant Acts, the Supreme Court Act, the Conveyancing Act and other legislation is discussed would facilitate reference and be a significant improvement. Wherever *Halsbury's Laws of England* are referred to, for example, paragraphs (602), (704), (1126) and (1432), the reference is to the second edition although publication of the third edition was completed in 1962 and we are already well into the fourth edition. At paragraph (1013) the third edition of *Fleming on Torts* is referred to, notwithstanding that the fourth edition was published in 1971. In the citation of cases, the author has frequently failed to give the reference to the authorised reports be they Australian or English; for example, the reference to *N.L.S. Pty Limited v. Hughes* at paragraph (420) and (913) is given as 40 A.L.J.R. 292, notwithstanding that the case is now reported in 120

⁸ (1953) 53 S.R. (N.S.W.) 492.

C.L.R. 583, and there are many other examples throughout the book where New South Wales Weekly Notes references are given instead of State Reports and Weekly Law Reports and All England Law Reports are given instead of the authorised Law Reports. The other matter I found annoying was the frequent use of Roman numerals in references to law reports and in some cases the references are not in the correct order: for example *Williams v. Earle* (1868) III L.R. Q.B. 739 (paragraph (1211)); *Clegg v. Hands* (1890) XLIV Ch.D. 503 (*ibid.*); *Plomley v. T.K. Steanes Ltd* (1898) XIX L.R. (N.S.W.) 215 (paragraph (305)).

Notwithstanding these matters, the busy barrister or solicitor will have much use for this book provided that he uses it to help solve the day to day problems and doesn't assume that it contains all the relevant information on the more doubtful or debatable elements of the law of landlord and tenant. It also seems to provide the type of information which would give to students a good understanding of this branch of the law. Although the statutory references are to those of New South Wales, the principles and cases are generally of Australia-wide application and most States and Territories have legislation which is similar, in varying degrees, to that which applies in this State. Therefore, although the book will have much greater appeal in New South Wales, it will, I believe, be of considerable use and benefit to practitioners in other States.

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Law and Poverty in Australia, Australian Government Commission of Inquiry into Poverty, Second Main Report, by PROFESSOR RONALD SACKVILLE, Commissioner: Law and Poverty. (A.G.P.S., Canberra, 1975), pp. i-xxvi, 1-333. Recommended retail price \$8.10. (ISBN 0 642 01868 5).

The Report of the Poverty Commission into Law and Poverty in Australia sheds a completely new light upon the law and its administration in this country. It is the first substantially complete examination of the operation of the Australian legal system in a social context, based on the best available empirical evidence. It reveals defects in the administration of justice, both civil and criminal, which few Australian lawyers could previously have appreciated. Perhaps a few practitioners and probably fewer academic lawyers might, as a result of their work, have suspected that the Australian legal system was not entirely successful in providing justice for all equally, regardless of status or wealth. But on the first page of the Report, the following statement appears:

Lawyers and laymen alike consider it unthinkable that the legal system should discriminate against a person simply because he is poor. Yet even on these uncontentious criteria the law has failed

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