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.

In *Parry v. Aluminium Corporation Ltd*,[5] Goddard L.J. stated that, in cases of negligence, it was very undesirable for the judge to rule on a submission in a case which might afterwards be upset by the Court of Appeal, and then for the defendant to be in a position to say: " I must have a new trial, because my evidence was never heard."

Goddard L.J's statement was expressly approved in *Laurie v. Raglan Building Co.*,[6] by Lord Greene M.R., with whom du Parq L.J. and Goddard L.J. himself concurred. Lord Greene M.R. added that there was " no particular magic " about a question by the judge, and that counsel could " make it perfectly clear, by the words which he uses and by the way in which he acts, that he does not intend to call any evidence, and, that being so, he must be taken to have given a negative answer to the question which the judge might otherwise have put to him."

Laurie's case, like *Parry Aluminium Corporation Ltd.*, happened to be a case of negligence, but *Alexander v. Rayson* and *Yuill v. Yuill*[7] were not. In view of the latter case, it would seem that the test in *Parry's case* is not to be confined to cases of negligence.

The implied election mentioned in *Laurie's case* rather imperils the comfort which counsel might otherwise derive from *Yuill v. Yuill*, where the Court of Appeal stated[8] the rule as follows: " The practice which has been laid down amounts to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election, and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound; but if for any reason, be it through oversight or (as here) a misapprehension as to the nature of counsel's argument, the Judge does not put counsel to his election, and no election in fact takes place, counsel is entitled to call his evidence just as if he had never made the submission."

In *Humphrey v. Collier*[9], the Full Court of Victoria considered that the practice was not yet settled. Gavan Duffy J. (with whom Herring C.J. concurred on this point), in laying down " a rule for Victorian Courts," stated[10]: " Mr. Barry asked us to take this opportunity of laying down a rule for the Victorian Courts corresponding with that approved by Goddard L.J. in *Parry v. Aluminium Corporation* and by Lord Greene M.R. in *Laurie v. Raglan Building Co.*, namely, that the trial Judge should refuse to rule on a submission made at the close of the plaintiff's evidence that there is no case to answer unless counsel for the defendant says he is going to call no evidence. That such should be the general practice is I think very desirable but I do not think the presiding Judge should be left without discretion in the matter. There might be occasions when a strict adherence to it would result in unnecessary loss of time and money."

" The cases on appeal that have found their way into the reports do not encourage counsel to take the risk of calling no evidence, even in what seems to him a clear case, and a wise counsel might be very unwilling to take such a risk. With a long and expensive continuance of the trial

5. (1940) W.N. 44 at p. 46.
6. (1942) 1 K.B. 152 at 155.
7. (1945) P. 15.
8. (1945) P. at p. 18.
9. (1946) V.L.R. 391.
10. (1946) V.L.R. at pp. 402-3.

in prospect, however, a ruling in favour of the defendant, even with the possibility of its reversal on appeal, might be the obviously better choice between two evils. Such cases would, indeed, be exceptional and as a general rule there is great and evident advantage in not deciding such a point until all the evidence has been given, and indeed, if there is a jury until the jury's verdict is taken, and I think nothing but good would result from such a practice being followed in all but exceptional cases. I would not, however, be in favour of laying down an inflexible rule that such a practice should always be followed, and I doubt whether Lord Justice Goddard and Lord Greene are to be taken as laying down a rule that is to be without exception."

Macfarlan J. said[11] : " I agree with Gavan Duffy J. that it is desirable that the practice of putting defendant to his election should be uniformly followed and should not be departed from unless the circumstances are altogether exceptional."

In view of the authority to be accorded decisions of the Court of Appeal (see *Waghorn v. Waghorn*[12]), some future Court may determine the question whether the test in *Humphrey v. Collier* does not give rather more discretion to the trial judge than do the tests in *Alexander v. Rayson*, *Laurie v. Raglan Building Co.* and *Yuill v. Yuill.*

One further aspect of this question is the rule to be adopted in Petty Sessions in Victoria. In England a Divisional Court (Lord Merriman P. and Hodson J. in *Goodwin v. Goodwin*[13]), referring to proceedings before Justices, cited *Alexander v. Rayson* and seemed to assume that counsel should be required to elect.

In Victoria there appears to be no established practice on this point. The complainant has the right to address the Court in opening his case (see *Justices Act* 1928, s. 88 (3)). There is no express statutory right in the defendant to open his case at all, though perhaps it is implied in *Justices Act* 1928 s. 88 (5). The long-established practice is however " to confine parties or their advocates to one address each, which may be delivered before calling witnesses."[14]

The defendant in his opening is not permitted to comment on the evidence of complainant's witnesses.

If the defendant makes a submission, at the end of complainant's case, that there is no case to answer, he can comment on the evidence so far as is necessary for his point of law (see *Stone, Justices' Manual*, 70th ed., p. 184).

If without being put to his election he makes a submission[15] which is upheld, but reversed on review, he can always demand a rehearing. If his submission fails, he can then open his case in the normal way. He thus obtains the advantage of commenting on the evidence for the complainant, though the complainant has no opportunity of commenting on the evidence for the defence. This seems unfair.

On the other hand, if defendants are put to their election, in many cases submissions which would succeed will not be made, an unfortunate

11. (1945) V.L.R. at p. 402.
12. 65 C.L.R. 289.
13. (1947) W.N. 28.
14. *Irvine, Justices of the Peace*, 2nd ed. (1899) p. 169.
15. c.f. Goddard L.J. in *Laurie's case* (supra).

result, wasting time and money, in the Court of Petty Sessions, which is " par excellence the poor man's court " (*Geo. Hudson Ltd. v. Australian Timber Worker's Union*[16].)

The matter seems to call for authoritative resolution one way or the other.

R. J. DAVERN WRIGHT.

NOTE.—Shortly after the writing of the above note, Lowe, J. in the case of *Sampson v. Butcher* (11th March, 1948), decided that he was not deprived of any discretion regarding procedure, and, having regard to the particular circumstances of the case, he refused to put the defendant to his election. This decision followed upon argument in which the English authorities were cited. In the words of His Honour Mr. Justice Lowe: " the question of putting a defendant to his election is one which arises for the protection of the Court and is not I think a right which is given by law to the opposing party."

In *Jones v. Peters* (February-April 1948) Herring C.J., after argument in which the English cases were cited approved of the general rule that counsel should be put to an election in other than exceptional cases, but did not in fact require counsel to elect, considering that the particular question raised fell under Order XXV. Rule 2 of the Rules of the Supreme Court.

[Ed.]

16. 32 C.L.R. at p. 427, per Isaacs, J

PROPERTY—REVOCABILITY OF LICENCES—HURST'S CASE AGAIN.

WINTER GARDEN THEATRE *v.* MILLENIUM PRODUCTIONS.

In a note in this journal in 1937, K.A. Aickin wrote: " The controversy about the case of *Wood v. Leadbitter*[1] and *Hurst v. Picture Theatres*[2] has now been settled so far as Australia is concerned."[3] He was able to do so because the High Court by a majority (Latham C.J., Starke, Dixon and McTiernan JJ., Evatt J. dissenting) had held in *Cowell v. Rosehill Racecourse Company*[4] that a mere licence not being a licence coupled with a grant of property could be revoked, whether or not the revocation involved the breach of contract, and in so holding had declared Hurst's case to be " manifestly wrong." This comfortable position of certainty has now again been unsettled by the dicta of certain members of the House of Lords in *Winter Garden Theatre v. Millenium.*[5] The facts in this case are very different from those in the earlier cases mentioned. The appellants had granted a licence of their theatre to the respondents for the purpose of producing stage plays or concerts. The licence was for six months from July 1942 at £80 a week with an option of continuing for a further period of six months and with a further option after that period of continuing the licence at a " rental " of £300 a week. These options were in fact exercised by the licensees. In September 1945 the licensors gave the licensees a month's notice to vacate the theatre, but stated that they were prepared to give notice for a later date if the licensees required further time to make other arrangements. The licensees thereupon brought an action claiming a declaration that the licence was not revoc-

1. 13 M. & W. p. 844.
2. (1915) 1 K.B. 1
3. *Res Judicatae* Vol. I, p. 240.
4. (1936-7) 56 C.L.R., p. 605.
5. (1947) 2 All E.R, p. 331.