[HIGH COURT OF AUSTRALIA.]

THOMPSON AND ANOTHER . . . . APPELLANTS ;
PLAINTIFFS,

AND

EASTERBROOK . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 6, 9 ; *June* 14.

Dixon, Williams, Webb, Fullagar and Kitto JJ.

*Landlord and Tenant*—" *Dwelling-house* "—*Shop and dwelling*—*User*—*Purposes*—*Residence*—*Business*—*Termination of tenancy*—*Notice to quit*—*Premises required by lessors for occupation in trade*—*Appeal from magistrate*—*Case stated*—*Landlord and Tenant* (*Amendment*) *Act* 1948-1949 (*N.S.W.*) (*No.* 25 *of* 1948—*No.* 21 *of* 1949), *ss.* 8 (1), 62 (5) (*g*) (i), (ii), 70 (2), 74 (1), (2), 84—*Justices Act* 1902-1947 (*N.S.W.*) (*No.* 27 *of* 1902—*No.* 3 *of* 1947), *s.* 101.

Section 8 (1) of the *Landlord and Tenant* (*Amendment*) *Act*, 1948-1949 (N.S.W.) provides (*inter alia*) that " . . . unless the contrary intention appears . . . ' dwelling-house ' means any prescribed premises (including shared accommodation) leased for the purposes of residence . . . "

*Held* that in respect of leased premises the purpose or combination of purposes to which the parties must be held to have contemplated that the premises would be put by the tenant, must be ascertained by considering the provisions of the contract as it stands at the date when the notice to quit is given, and any facts which at that date affect their mutual rights and duties in relation to the user of the premises ; and, if the inquiry is not thereby answered, then by considering the nature of the premises and all the circumstances existing at the date of the original lease. If the conclusion be that residence was either the sole purpose or one of several purposes which the parties should be held to have contemplated the premises must be held to be " leased for the purposes of residence " within the meaning of the Act ; but a conclusion that residence was a purpose of the letting is not open where the parties are considered to have had in view no residence except as part of the enjoyment of the entire premises for non-residential purposes.

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Section 74 (2) of the *Landlord and Tenant (Amendment) Act*, 1948-1949 which provides that there shall be an appeal, as to questions of law only, to the Supreme Court creates a new and substantive right of appeal and as no procedure for the exercise of that right is prescribed, the procedure by way of case stated under s. 101 of the *Justices Act* 1902-1947 (N.S.W.) is available.

Decision of the Supreme Court of New South Wales (*Herron* J.): *Easterbrook* v. *Thompson*, (1950) 67 W.N. (N.S.W.) 158, varied.

APPEAL from the Supreme Court of New South Wales.

In an information laid by Frederick Thompson on his own behalf, and on behalf of John Marshall, his partner, it was alleged, *inter alia*, that the defendant John Robert Easterbrook held from them by virtue of a tenancy from week to week the land and premises, being a dwelling house, shop and shed, known as Number 119 Victoria Road, Drummoyne; that that tenancy was determined by notice to quit on or about 23rd October 1949; that at the time of the information the land and premises were actually occupied by the defendant; and that the defendant had neglected to quit and deliver up possession of the land and premises, and the informants prayed that they might be put into possession of the said land and premises.

The grounds stated in the notice to quit (so far as relevant), were as follows:—"(1) That so much of the premises as are not a dwelling house are reasonably required by the lessors for occupation by them in their trade calling or occupation. (2) That the premises are reasonably required by the lessors for reconstruction or demolition".

After hearing the parties and evidence adduced by them, the magistrate before whom the information was heard, on 5th December 1949, adjudged that the informants were entitled to the possession of the land and premises and ordered a warrant to issue on 3rd January 1950 for putting the informants into such possession within fourteen days thereof.

Easterbrook was aggrieved by that determination and at his request the magistrate stated a case pursuant to s. 101 of the *Justices Act*, 1902-1947 (N.S.W.) for the opinion of the Supreme Court.

The stated case showed that the following facts were found by the magistrate to be established to his satisfaction, by the evidence before him:—

(a) the subject premises consisted of land at 119 Victoria Street, Drummoyne, upon which were buildings which consisted of:—

(i.) a room abutting upon Victoria Street, and used initially by the lessee as a fruit and vegetable shop, but latterly used by him as an occasional bedroom, following upon employment in night work; (ii.) living quarters, under the same roof, separated from the first-mentioned room by a fibrous partition and situate to the rear of such room, and used by him throughout his tenancy as living quarters for himself, his wife and his son; and (iii.) a shed, detached, and used to house a motor lorry originally used by him for purposes of his fruit and vegetable business, and for "carrying jobs", but latterly used for purposes of pleasure and for occasional carrying jobs; (b) the subject premises were contiguous to business premises owned otherwise than by the lessors, but occupied by them for an extended period for purposes of their business, as shop, office, workshops &c., some ten to sixteen employees having been engaged; (c) the subject premises were purchased by the lessors on or about 15th June 1948, a time when defendant was lessee thereof and in occupation, he so continuing as lessee of the informant lessors; (d) the informant lessors were business partners, and Frederick Thompson, who signed the form of information herein had due authority from his partner John Marshall so to do, and to take the subject proceedings; (e) the relationship of lessors and lessee is not in dispute between the parties; (f) the premises are situate within the area of the Petty Sessions District of Balmain; (g) on 21st September 1948 the lessee received from the lessors a notice to quit; (h) lessee was in occupation of the subject premises as at the date of the giving of the notice, and of the exhibition of the subject information and the hearing; (i) defendant disclaimed being a "protected person" within the meaning of the *Landlord and Tenant (War Service) Amendment Act*, 1949 (N.S.W.); (j) lessors offered no alternative accommodation to the lessee at the date of expiry of the notice to quit; (k) during the course of the hearing the lessors offered to enter into an agreement with the lessee to let to him, immediately upon possession of the whole of the premises being gained by them, that portion of the subject premises other than the front room, the shed at the rear, and some contiguous land; (l) congestion, through lack of space, exists in the premises occupied by the lessors, both in work-rooms and in the office, and also in the storerooms, resulting in restriction in the number of persons employed therein, and consequent loss of business and profits to the lessors; (m) such congestion has existed for some three years; (n) the subject premises were purchased with a view to extension of the business of the lessors; (o) the lessee leased the subject premises in 1934 "to start a

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business ", and to use portion as a fruit shop, portion for residence, and portion (the shed at the rear) for the housing of a motor lorry used for business and for pleasure; (p) during the currency of his lease, the lessee sub-let the front room to a dressmaker for a period of six months for the purposes of her business, and for the first three months of his lease, he used such front room as a fruit and vegetable shop, latterly using it for purposes of residence; (q) apart from the front room, now occasionally used as a bedroom, there are two bedrooms and a long kitchen which have been used throughout for residence by lessee; (r) there is access to these living quarters, otherwise than through the front room, and a partition between such front room and other rooms; (s) the front room has not been used as a shop since the subject premises were purchased by the lessors; (t) the contiguous premises are occupied by lessors and leased to them, and they also occupy premises elsewhere leased to them for storage of goods; (u) alternative accommodation, elsewhere than at the subject premises, is not available to the lessee.

The magistrate stated that the grounds upon which he made the order for possession were as follows:—

(1) He held that the subject premises were " prescribed premises " (as defined) and were within the Balmain Petty Sessions District, and that the Court of Petty Sessions at Balmain was the appropriate court for the hearing of the matter; that the relationship of lessors and lessee existed between the parties by virtue of a weekly tenancy of the premises; that such tenancy was determined on or about 23rd October 1949 by a form of notice to quit, sufficient for compliance with s. 62 of the *Landlord and Tenant (Amendment) Act*, 1948-1949 (N.S.W.); and that, subject to the following considerations, the lessors had, at the time of the hearing before him, legal right to the possession of these premises:—(A) establishment of a " ground " within one of the clauses in s. 62 (5) of the amending Act; (B) hardship to be expected to result to lessee or to lessors, according as to whether he made an order for possession, or refused to make one.

(2) As to hardship, he found that the expected hardship to the lessee was mitigated to such a degree by the offer by the lessors to re-let to him the portion actually used by him for residence at the time he conducted a shop, as to constitute the hardship to be expected to accrue to lessors, greater than that in the case of the lessee.

(3) The magistrate held that the requirement by the lessors of the subject premises was reasonable in fact and in law, in respect

to one ground upon which the notice to quit was based, namely, the requirement set out in cl. (g) (ii) of s. 62 (5) of the Act in relation to premises " not being a dwelling-house—are . . . required for occupation by the lessor ".

(4) He found against the lessors in respect to the other ground upon which the notice to quit was based.

(5) He held that, should the subject premises be not a " dwelling-house ", it would not be necessary for them to show the existence of that alternative accommodation required, in cases of " dwelling-houses ", by s. 70 (2).

(6) He held, further, that " residence " in the subject premises being established in fact, the remaining question for his consideration was :—

" Are the premises to be considered a ' dwelling-house ' within the meaning of that term, where occurring in cl. (g) (i) of s. 62 (5) of the amending Act of 1948-1949, or as ' not being a dwelling-house ' as appearing in cl. (g) (ii) of that section and sub-section ? "

If the latter, the magistrate stated he would be bound to hold that the remaining ground in the notice to quit was established, but, if the former, he would be bound to refuse an order, unless leave under s. 66 were granted, and the matter considered under cl. (g) (i).

(7) He further held that, as " dwelling-house " was the subject of definition by s. 8 (1) of the amending Act in question, such definition must be applied, and the following aspects considered :—(a) the definition of " dwelling-house " applies only to premises " leased for the purposes of residence ", and not to premises merely used for the purposes of residence ; (b) a part only of premises may be leased for the purpose of residence, and such part may constitute a " dwelling-house " as defined provided (vide part (b) of the definition) it be (1) leased separately, (2) for residence ; (c) in the definition of " dwelling-house " the legislature has made no provision for a leasing (in the one letting) for residence in association with some other purpose, and that a lease as a " shop-and-dwelling " or as a " shop-and-living-quarters " is different from a lease " for the purposes of residence " ; (d) where premises consist of a composite of shop and dwelling, it is pertinent to know whether the shop and the dwelling are physically susceptible of separate lettings and ; (e) if there be doubt as to the purpose or purposes of letting, regard might be had to the principal or dominant user contemplated by the parties thereto.

(9) The magistrate held that the premises were let to the defendant as a " shop-and-dwelling " and that, prima facie, a letting

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as such for business purposes, with residence thereat as a convenience to the shopkeeper but subservient to the main business or purposes of conducting a shop. He held that the subject premises were leased to the defendant at the commencement of his tenancy thereof, not as a " dwelling-house " as defined, but for business purposes, with residence incidental to the pursuit of business, and therefore premises within the ambit of cl. (g) (ii). In so holding, he considered that, on the evidence before him, " the principal or dominant use to which the premises were put " at the time of the letting was, prima facie, that of business premises, with living quarters attached as a convenience to the shopkeeper, and, in so holding, he had regard to *Mayer* v. *Smythe* (1).

(10) He further held that the features of the front room, considered as a building, were those of " business premises " possessing, as it does, immediate access to the street, partition between it and the living quarters proper, similarity to the contiguous premises of the lessors, and convenience for the carrying on of a fruiterer's or other business, and that such were " characteristics " ordinarily found in buildings used or " let " as business premises, and in so finding, he drew an analogy from *Bakes* v. *Huckle* (2).

(11) Guided by the evidence before him, including a plan, it appeared to the magistrate that the front room, initially used by the lessee as a shop, was capable of " occupation separately from the portion " (originally the only portion) occupied by him for residence, and which could have been the subject of a letting separately from the living quarters, should the parties to the letting have been so minded. He held that " where one portion of a building is, structurally, so separated from the rest of the building as to be capable of occupation by a separate household, it may constitute a separate dwelling " quoting *Lowe* J. in *Cobbold* v. *Abraham* (3). He therefore held that the front room and the living quarters might, from their construction, have been the subject of separate lettings, but had been let as a whole at a time when the purpose of the front room was business, and of the remainder, under that roof, of residence.

(12) Having held that the premises were leased for business purposes, or for business purposes in conjunction with purposes of residence, he held that the lessee could not alter the nature of the premises, merely by altering the nature of his user of them—that he could not convert the subject premises into a " dwelling-house " (as defined) merely by ceasing to use the front room as a shop,

(1) (1948) 66 W.N. (N.S.W.) 15.
(2) (1948) V.L.R. 159.
(3) (1933) V.L.R. 385.

and by using it instead as an occasional bedroom for himself. The magistrate considered *Wolfe* v. *Hogan* (1) and *Gidden* v. *Mills* (2), and particularly *March* v. *Neumann* (3), holding that a lessee was bound by the purposes of the letting until such time as a different user was approved by the lessor for the premises. Quoting *Wolfe* v. *Hogan* (1), he held that the lessee must discharge the onus of proof by establishing, by positive evidence, that "there was a consensus between himself and the landlord regarding the matter, either by an express consent, or by a consent implied by knowledge." The magistrate held that the evidence revealed that the lessors knew that the front room had not been used as a shop for a considerable time, but that there was no evidence before him to show that they knew it was used as an occasional bedroom, and not merely left vacant, and that it had not been shown to him that their consent to a change in the user, had been either sought or obtained. He held that, had the lessee proved the fact of such a consensus, a letting for the new purpose of residence only, might be presumed, but that the lessee had failed to prove assent to change in user, and thus to discharge the onus of proof resting on him.

In the absence of proof of agreement between the parties to the present matter, at or about the time of the purchase of the premises by the present lessors, the magistrate held that a lease between them must be presumed under s. 22A of the *Landlord and Tenant Act* 1899, and that a tenancy, so presumed, must be considered to relate to all the features of the pre-existing lease apart from the change in the person of the lessor, such features including the purpose of the letting. He held, therefore, that the defendant lessee held from the present lessors for purposes of shop-and-dwelling. Having held that the premises were within the ambits of cl. (g) (ii) of s. 62 (5) of the *Landlord and Tenant (Amendment) Act* 1948-1949, and that the requirement of them by the lessors was reasonable, he held that s. 70 (2) of the amending Act had no application in respect of alternative accommodation. Having previously held that the hardship likely to enure to the lessors was greater than that to be expected in the case of the lessee, he held that the matter of the information had been proved and that he should make an order.

The grounds upon which it is contended that the magistrate's determination making an order for possession of the subject premises and land was erroneous in point of law were :—1. That he

(1) (1949) 2 K.B. 194.
(2) (1925) 2 K.B. 713.
(3) (1945) S.A.S.R. 167.

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was in error in holding that these premises were not a "dwelling-house" within the meaning of the *Landlord and Tenant (Amendment) Act*, 1948-1949; 2. That, on the evidence, he was bound to hold that these premises were a dwelling house within the meaning of that Act; 3. That, on the evidence, he was bound to hold that any change of the original user of these premises had been consented to by the lessors, and 4. That there was not any evidence that the tenancy agreement contemplated any dominant user, or specified user.

The question for the determination of the Supreme Court was whether the magistrate's determination in making an order for the issue of a warrant of possession in respect of the subject premises was erroneous in point of law.

*Herron* J. said that in all the circumstances he felt driven to the conclusion that the magistrate did misdirect himself on a question of law: firstly as to his decision that the original lease contained an express provision as to the purpose of the letting, and secondly as to the weight to be attached to the user to which the premises were in fact put by the tenant, particularly during the relevant term between the parties to the action. The magistrate, in his insistence on going back to the original state of affairs as it was in 1934, omitted sufficiently to consider the position at the time when possession was sought to be obtained. That was the vital time to consider the question of whether the premises were a dwelling or not.

His Honour answered the question in the case stated in the affirmative and remitted the case to the magistrate with those expressions of opinion (*Easterbrook* v. *Thompson* (1)).

From that decision the informants appealed, by leave, to the High Court.

The relevant statutory provisions are sufficiently set forth in the judgment hereunder.

*H. E. E. Reimer*, for the appellants. An appeal by way of case stated to the Supreme Court under s. 101 of the *Justices Act*, 1902-1947 (N.S.W.) is not a competent method of appeal under s. 74 of the *Landlord and Tenant (Amendment) Act*, 1948-1949 (N.S.W.). An appeal under s. 101 of the *Justices Act* is not available to a tenant (*Ex parte Dwyer* (2); *Robertson* v. *Manders* (3); *Australian*

(1) (1950) 67 W.N. (N.S.W.) 158.
(2) (1908) 8 S.R. (N.S.W.) 329; 25 W.N. 101.
(3) (1947) 47 S.R. (N.S.W.) 437, at p. 440; 64 W.N. 127, at pp. 129, 130.

*Red Cross Society* v. *Beaver Trading Co. Pty. Ltd.* (1) ). Appeal by way of case stated was discussed in *Oates* v. *Sieveking* (2) and *Harle* v. *Christian* (3). The question of whether the subject premises are or are not a " dwelling-house " is one of fact (*Mayer* v. *Smythe* (4) ; *Bakes* v. *Huckle* (5) ; *London County Council* v. *Cannon Brewery Co. Ltd.* (6) ). The finding that the subject premises are a shop and dwelling is clearly in accordance with the evidence. The magistrate found as material facts that (i) the particular part of the subject premises was used initially by the respondent as a shop ; (ii) the living quarters were separated from the shop by a partition ; and (iii) the respondent had leased the premises in 1934 " to start in business ". It was not competent for the judge below to displace the magistrate's finding of fact by his own view. The judge below based his reasoning on the observations in *Gidden* v. *Mills* (7), but those observations were doubted or disapproved in *Wolfe* v. *Hogan* (8) : see also *Whitty* v. *Scott-Russell* (9). Those observations were dependant upon the proposition of the tenant being free to use the premises as he liked. That was not the position in this case, as found by the magistrate. The judge below also based his *ratio decidendi* on the proposition that the magistrate found the lease contained an express provision that the premises were to be used as a shop. That was not the finding of the magistrate, nor the basis of his finding. The judge below held that right throughout the relationship with the appellants the respondent, as tenant, was free to use the premises as he saw fit. That was a finding of fact and was a finding contrary to that of the magistrate, whose finding was warranted by the evidence. There was not any evidence of any new tenancy. It was merely the taking over of a reversion (subject to existing tenancies) and the relationship created by s. 22A (d) of the *Landlord and Tenant Act* 1899-1948 (N.S.W.). The test applied in *Bakes* v. *Huckle* (5) was whether at the material time the premises possessed the characteristics ordinarily found in buildings used or let for human habitation as homes. In *Ex parte Belling* ; *Re Woollahra Municipal Council* (10) the court held that the true test must be whether the premises retained characteristic description of buildings ordinarily used as homes. Regard must be had not only to the structure of the buildings, but also to the purpose for which they

(1) (1947) 75 C.L.R. 320, at p. 328.
(2) (1948) 48 S.R. (N.S.W.) 445, at pp. 447, 448 ; 65 W.N. 199, at pp. 199, 200.
(3) (1949) 66 W.N. (N.S.W.) 122.
(4) (1948) 66 W.N. (N.S.W.) 15.
(5) (1948) V.L.R. 159.
(6) (1911) 1 K.B. 235, at p. 242.
(7) (1925) 2 K.B. 713, at p. 722.
(8) (1949) 2 K.B., at pp. 201, 202.
(9) (1950) 2 K.B. 32.
(10) (1946) 47 S.R. (N.S.W.) 166 ; 63 W.N. 295 ; 16 L.G.R. 68, at p. 73.

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were to be used (*Cobbold* v. *Abraham* (1) ), and to the principal or dominant use to which they are put (*Mayer* v. *Smythe* (2) ). The question is concerned with the primary or principal purposes for which the premises were designed to be used or are in fact used (*Tucker* v. *Turner* (3) ). On the question of the right of a tenant to change the user of premises see *March* v. *Neumann* (4).

*E. G. Whitlam*, for the respondent. The judge below correctly held that the magistrate was erroneous in point of law in two respects in holding, firstly, that premises which are both a shop and dwelling-house are prima facie not a dwelling-house within the meaning of s. 62 (5) (g) (ii) of the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W.), and, secondly, that the lease of the subject premises was originally not for the purposes of residence. Whether premises are a dwelling-house or not depends on the primary or principal purpose for which they are designed or used (*Tucker* v. *Turner* (5) ), or the principal or dominant use to which they are put (*Mayer* v. *Smythe* (2) ). In neither of those cases did the judge refer to the definition of " dwelling-house " in reg. 8 (1) of the *National Security (Landlord and Tenant) Regulations*, which corresponds to s. 8 (1) of the *Landlord and Tenant (Amendment) Act*. Nevertheless the New South Wales legislature may be presumed to have known and approved of these decisions. In both cases the judge rejected the contention that it is necessary to hold that premises are not a dwelling-house unless they are solely used as a dwelling-house. If those cases are not thought to have been approved by the legislature, it is submitted that premises are " leased for the purposes of residence ", within the meaning of the definition of " dwelling-house " in s. 8, if residence is one of the purposes rather than if it is the sole purpose of the lease. Such a construction is apt in the light of the definition, just in the light of the requirements of alternative accommodation in s. 70 and more precise than the test in the cases referred to above. If the principle of *Tucker* v. *Turner* (5) and *Mayer* v. *Smythe* (2) is applied to the facts of the present case, one can consider only the use to which the premises were put; for no document was tendered prescribing the use to which they were to be put, there was not any evidence given of the user the original or the present lessors contemplated, and the lessee deposed that he intended to use the premises both as shop and residence. During the course of over

(1) (1933) V.L.R., at p. 391.
(2) (1948) 66 W.N. (N.S.W.) 15.
(3) (1947) V.L.R. 241, at p. 242.
(4) (1945) S.A.S.R. 167, at p. 169.
(5) (1947) V.L.R. 241.

fifteen years' tenure the lessee had used portion as a shop for a mere nine months. At all times which might be material—the commencement of the lease, the attornment to the appellants and the service of the notice to quit—the sole use to which the premises were put was that of residence. In these circumstances the magistrate was bound to hold that the premises were a dwelling-house (*Wolfe* v. *Hogan* (1); *Court* v. *Robinson* (2)). There was not any evidence on which he could hold otherwise. He must have misdirected himself on the law. Decisions under reg. 30A of the *National Security* (*War Service Moratorium*) *Regulations* and consequential State Acts are not of any assistance in construing the word "dwelling-house" under the *National Security* (*Landlord and Tenant*) *Regulations* and consequential State Acts. The word is defined in the latter and not in the former. Many premises would be a dwelling-house under the latter and not under the former. The purpose of the letting is the criterion under the latter; the character of the premises is the criterion under the former. The Full Court of the Supreme Court of New South Wales held that appeal by way of stated case was a competent method of appeal under the *National Security* (*Landlord and Tenant*) *Regulations* (*Robertson* v. *Manders* (3)). This Court referred without disapproval to that case in *Australian Red Cross Society* v. *Beaver Trading Co. Pty. Ltd.* (4). That method of appeal was adopted in eighteen reported cases under the regulations. An appeal by way of common law prohibition was made without comment in one reported case (*Ex parte Halliday*; *Re Grigsby* (5)). In *Harle* v. *Christian* (6), the judge below held that appeal by way of stated case was an appropriate method of appeal under the *Landlord and Tenant* (*Amendment*) *Act* 1948. That method has been adopted in nineteen reported cases under the Act. The New South Wales legislature must be presumed to have known and approved *Robertson* v. *Manders* (7) when it enacted the 1948 Act, and *Harle* v. *Christian* (6) when it amended the 1948 Act in 1949. The notice to quit was invalid in that it gave as one ground "that so much of the premises as are (*sic*) not a dwelling-house are (*sic*) reasonably required by the lessors for occupation by them in their trade, calling or occupation". The ground must apply to the whole of the premises. The other ground was "that the premises are reasonably required by the lessors for reconstruction or

(1) (1949) 2 K.B., at p. 203.
(2) (1951) 2 K.B. 60.
(3) (1947) 47 S.R. (N.S.W.) 437; 64 W.N. 127.
(4) (1947) 75 C.L.R. 320.
(5) (1947) 48 S.R. (N.S.W.) 26; 64 W.N. 221.
(6) (1949) 66 W.N. (N.S.W.) 122.
(7) (1947) 47 S.R. (N.S.W.) 437; 64 W.N. 127.

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demolition". That ground is not appropriate where the lessors intend themselves to occupy the reconstructed premises (*Burling* v. *Chas. Steele & Co. Pty. Ltd.* (1) (per *Williams* J.) ).

*H. E. E. Reimer*, in reply.

*Cur. adv. vult.*

June 14.

The Court delivered the following written judgment:—

This is an appeal by leave from an order of the Supreme Court of New South Wales made by *Herron* J. on 16th May 1950 upon a case stated by a stipendiary magistrate in an application by the appellants under the provisions of the *Landlord and Tenant (Amendment) Act*, 1948-1949 (N.S.W.), for the possession of certain land and premises comprising a shop, dwelling and shed situated at 119 Victoria Road, Drummoyne.

The form of the notice to quit on which the application for possession was founded was somewhat peculiar, because it attempted to divide the premises into two portions, a shop and a dwelling house, and as regards the shop it claimed that so much of the premises as were not a dwelling house were reasonably required by the lessors for occupation by them in their trade, calling or occupation. It also claimed that the premises were reasonably required by the lessors for reconstruction or demolition. Obviously premises comprised in one letting cannot be subdivided into two portions in the manner proposed in the first ground, but the hearing before the magistrate proceeded without objection being taken to the form of the notice to quit. If it had been taken, the magistrate might have given leave to the lessors to rely upon a ground not specified in the notice: s. 66. If the premises were a dwelling house as defined by s. 8 of the Act, the notice to quit was invalid because under s. 62 (5) (*g*) (i) of the Act it is necessary to allege that the premises are reasonably required by the purchaser for occupation by himself or by some person who ordinarily resides with and is wholly or partly dependent upon him. Moreover s. 70 (2) provides that an order for the recovery of possession shall not be made on this ground unless the court is satisfied that the lessor had provided at the date of expiry of the notice to quit, and has immediately available for the occupation of the persons occupying such dwelling house, reasonably suitable alternative accommodation.

The magistrate regarded the notice to quit as one which could be valid only if the premises were not a dwelling house within

(1) (1948) 76 C.L.R. 485, at p. 490.

the meaning of the Act, in which case an order could be made for possession under s. 62 (5) (g) (ii) if they were reasonably required for occupation by the lessors or by a person associated or connected with the lessors in their trade, profession, calling or occupation. The magistrate, after examining the facts, found that the premises were originally leased for business purposes or for business purposes in conjunction with purposes of residence, and that the lessee was bound by the purposes of the letting until such time as a different user was approved by the lessor for the premises. He found that the lessee held from the present lessors for the purposes of a shop and dwelling and that the principal or dominant use to which the premises were put at the time of the letting was, prima facie, that of business premises, with living quarters attached as a convenience to the shopkeeper. He said that in so finding he had regard to *Mayer* v. *Smythe* (1). He determined that the lessors were entitled to possession of the property, and ordered that a warrant should issue for putting them into possession thereof.

From such an order the Act gave a right of appeal to the Supreme Court as to questions of law only : s. 74 (2) ; and it provided that, with that exception, there should be no appeal : s. 74 (1). The lessee, being dissatisfied with the magistrate's determination as being erroneous in point of law, applied to him under s. 101 of the *Justices Act,* 1902-1947 (N.S.W.), to state a case for the opinion of the Supreme Court. The magistrate accordingly stated a case, by which he submitted to the Supreme Court the question whether his determination was erroneous in point of law and set out the grounds upon which it was contended by the lessee that this question should be answered in the affirmative.

It was contended on behalf of the lessors in this Court that the method of appeal by way of stated case for which s. 101 of the *Justices Act* provides is not available to a tenant. Reference was made to the cases of *Robertson* v. *Manders* (2) ; *Australian Red Cross Society* v. *Beaver Trading Co. Pty. Ltd.* (3) ; and *Oates* v. *Sieveking* (4), all of which were decided under the *National Security* (*Landlord and Tenant*) *Regulations,* and to *Harle* v. *Christian* (5), which was decided under the present Act. In our opinion s. 74 (2) creates a new and substantive right of appeal to the Supreme Court on questions of law only, and, as no procedure for the exercise of that right is prescribed, the procedure by way of case

(1) (1949) 66 W.N. (N.S.W.) 15.
(2) (1947) 47 S.R. (N.S.W.) 437 ; 64 W.N. 127.
(3) (1947) 75 C.L.R. 320.
(4) (1948) 48 S.R. (N.S.W.) 445 ; 65 W.N. 199.
(5) (1949) 66 W.N. (N.S.W.) 122.

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stated is available, according to well-settled principle, "because it is a suitable procedure and is in use in the like case" (*Australian Red Cross Society* v. *Beaver Trading Co. Pty. Ltd.* (1)).

The question of law upon which the appeal to the Supreme Court was brought was shown by the case stated to be whether on the evidence the magistrate was bound to hold that the subject premises fell within the definition of "dwelling-house" in s. 8 (1) of the Act. If he was so bound his determination was erroneous in point of law for two reasons: (1) because s. 62 of the Act, in its application to the present case would disentitle the appellants to an order for possession unless they established, as they had alleged in the notice to quit upon which they relied, that the premises were not a "dwelling-house" and were reasonably required for occupation by them in their trade: s. 62 (5) (g) (ii); and (2) because, it being admitted that the appellants had not provided for the respondent's occupation reasonably suitable alternative accommodation, s. 70 (2) of the Act would operate in the circumstances of this case to preclude the making of an order for possession.

When the case stated came before *Herron* J., he held, not that the magistrate was bound on the evidence to find that the premises were a "dwelling-house", but only that the magistrate had applied an erroneous test in making a contrary finding. His Honour therefore decided to remit the case to the magistrate with his expression of opinion. The formal order which his Honour made answered in the affirmative the question submitted by the case stated, namely, whether the magistrate's determination was erroneous in point of law, and it remitted the case stated to the magistrate with that opinion and ordered him to hear and determine the information in accordance with that opinion.

The appeal necessitates a consideration of the facts of the case in relation to the definition of "dwelling-house" in s. 8 (1) of the Act, which is in these terms:—

"'dwelling-house' means any prescribed premises (including shared accommodation) leased for the purposes of residence, and includes—(a) the premises of any lodging-house or boarding house; (b) any part of premises which is leased separately for the purposes of residence, but does not include premises licensed for the sale of spirituous or fermented liquors."

It is conceded that the premises in question are "prescribed premises" within the meaning of the Act. Paragraphs (a) and (b) of the definition of "dwelling-house" admittedly have no

(1) (1947) 75 C.L.R., at p. 329.

application. It is not suggested that the premises were licensed for the sale of spirituous liquors. The question, therefore, is whether it was open to the magistrate to conclude that the premises did not answer the description provided by the words " leased for the purposes of residence."

The construction of these words may be considered first. It is clear from the terms of s. 62 that the question whether premises fall within the description must be decided as at the date of the giving of the notice to quit which is relied upon in the proceedings to recover possession. Consequently it is necessary to consider in every case whether it was for the purposes of residence that the premises in question were in lease at that date. The word " leased " in the definition must be understood in the light of the definition of " lease " contained in s. 8 (1), by which that word (subject to exceptions not relevant to this case) is made to include every contract of letting of any prescribed premises, whether the contract is express or implied or is made orally, in writing or by deed, and to include, *inter alia*, any tenancy the existence of which is presumed by operation of s. 22A of the *Landlord and Tenant Act of* 1899 (N.S.W.) as amended by subsequent Acts.

The purposes for which premises are leased at the date of the notice to quit are the purposes which " may reasonably be held to have been contemplated by both parties, having due regard to the terms of the lease, the character of the subject let, and other similar circumstances " (cf. *Westropp* v. *Elligott* (1) ). In that case Lord *Watson* said, in relation to provisions of an Imperial Act relating to a " holding let to be used wholly or mainly for the purpose of pasture ", that " where the particular purpose for which the holding is to be used is not defined by contract, the legislature must have intended that the purpose should be ascertained by reference to the use or uses which the contracting parties must as intelligent and reasonable men be held to have had in their contemplation when they entered into the lease " (2). This proposition may be accepted as applicable to a case arising under the Act now in question, unless, after the granting of the lease, a change has occurred in the mutual rights and duties of the parties in relation to the user of the premises. It is in line with the view which the English courts have adopted in construing the words " let as a separate dwelling " in the *Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (Imp.) (10 & 11 Geo. 5 c. 17). They have held that what must be ascertained is the contemplation to be attributed to the parties at the date of the letting,

(1) (1884) 9 App. Cas. 815, at p. 831. (2) (1884) 9 App. Cas., at p. 832.

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according to the terms and circumstances of the letting (*Wolfe* v. *Hogan* (1), per *Evershed* L.J.). *Denning* L.J. said in that case (2), " If the lease contains an express provision as to the purpose of the letting, it is not necessary to look further. But, if there is no express provision, it is open to the court to look at the circumstances of the letting. If the house is constructed for use as a dwelling-house, it is reasonable to infer the purpose was to let it as a dwelling. But if, on the other hand, it is constructed for the purpose of being used as a lock-up shop, the reasonable inference is that it was let for business purposes. If the position were neutral, then it would be proper to look at the actual user. It is not a question of implied terms. It is a question of the purpose for which the premises were let ".

But, though the time of the letting is initially the time as at which the purposes must be ascertained, it is apparent that the parties may afterwards change the nature of the purposes. They may do this by a contract express or implied, or by conduct giving rise to an estoppel or a general waiver. Passages in the judgments in *Wolfe* v. *Hogan* (3) and *Court* v. *Robinson* (4) support the view that where premises are initially let for business purposes and the tenant converts them into a dwelling, then, even though the lease contained a prohibition against use as a dwelling, the premises should be held to be leased for the purposes of a dwelling if a contract varying the lease to permit of the new mode of user is to be inferred. But, though we think that the same conclusion should be reached if the conduct of the parties, while not justifying the inference of a contract, effects an estoppel or a waiver as to the use of the premises as a dwelling, we do not think that a change of the purposes for which the letting was originally made can be brought about by an alteration in the mode of actual user, if that alteration is unaccompanied by anything constituting a variation of the legal relations of the parties upon the subject of the purposes for which the premises are in lease. *Denning* L.J. in *Wolfe* v. *Hogan* (5) expressed the view that a house originally let for business purposes does not become let for dwelling purposes unless it can be inferred from the acceptance of rent that the landlord has affirmatively consented to the change of user. We would not adopt, as applying to the Act we have to consider, the qualification contained in this proposition. In our opinion even an affirmative consent by the landlord will not suffice unless it is given by a con-

(1) (1949) 2 K.B., at pp. 203, 204.
(2) (1949) 2 K.B., at pp. 204, 205.
(3) (1949) 2 K.B., at p. 203.
(4) (1951) 2 K.B. 60.
(5) (1949) 2 K.B., at p. 205.

tract between the parties, express or implied, or the circumstances lead to the conclusion that the landlord has waived any provisions of the lease inconsistent with the change of user or is estopped from objecting to the change.

The application of the definition of " dwelling-house " in s. 8 of the Act to a case where it is found, in accordance with the principles we have stated, that the premises are leased for more purposes than one raises a question of considerable importance. In *Mayer* v. *Smythe* (1) a case decided under the *National Security (Landlord and Tenant) Regulations* in which " dwelling-house " was defined as it is in the Act now in question, it was held that the definition should not be construed as if the word " wholly " preceded the words " for the purposes of residence " ; and to that extent the decision was plainly right. It was also held, however, that it is the principal or dominant use to which the premises are put that constitutes them a " dwelling-house ". Reference was made in the judgment to *Tucker* v. *Turner* (2), in which it was held under the same regulations that premises are a " dwelling-house " if the primary or principal purpose for which they are designed to be used, or are in fact used, is that of a dwelling-house, although they may also be used for other purposes. *Ex parte Belling* ; *Re Woollahra Municipal Council* (3) was also mentioned, but that case and the later case of *Bakes* v. *Huckle* (4) were decided under regulations in which the expression " dwelling-house " was used without definition. In *Mayer* v. *Smythe* (5) and *Tucker* v. *Turner* (6) no attention appears to have been devoted to the definition, which in truth does not advert either to the use to which premises are put or for which they are designed, or to the relative importance of several concurrent uses, or to the relative importance of the several purposes for which premises are leased in a case where they are leased for more purposes than one. In our opinion, the question of fact to be decided in such a case is not to be answered by endeavouring to assess the significance of each of the purposes of the letting and concentrating upon that which is considered the principal or dominant purpose to the exclusion of the purposes which, though also within the contemplation of the parties, are adjudged to be of less importance.

The course of decision in England, under the *Increase of Rent and Mortgage Interest (War Restrictions) Act*, 1915 (Imp.) (5 & 6

(1) (1949) 66 W.N. (N.S.W.) 15.
(2) (1947) V.L.R. 241.
(3) (1946) 47 S.R. (N.S.W.), at p. 177; 63 W.N. 295; 16 L.G.R. 68.
(4) (1948) V.L.R. 159.
(5) (1948) 66 W.N. (N.S.W.) 15.
(6) (1947) V.L.R. 241.

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Geo. 5 c. 97) and the Acts which have replaced it, is instructive. The Act of 1915 provided that it should apply to a house or part of a house "let as a separate dwelling": s. 2 (2). The Court of Appeal held, in *Epsom Grand Stand Association Ltd.* v. *Clarke* (1), that a house let for the purpose of its being dwelt in was let as a dwelling-house, and none the less so because it was also let for the purposes of a public-house. The *Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 repeated the provisions of s. 2 (2) of the 1915 Act, and added that the application of the Act should not be excluded "by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes": s. 12 (2) (ii); but it was held that this provision merely affirmed the construction adopted in the *Epsom Grand Stand Case* (1) (see *Vickery* v. *Martin* (2)). That construction necessarily involved the rejection of the view that where there was a plurality of purposes the dominant purpose was the test: indeed *McCardie* J. twice indicated a personal preference for that view but accepted the *Epsom Grand Stand Case* (1) as a binding decision to the contrary (*Waller & Son Ltd.* v. *Thomas* (3); *W. H. Brakspear & Sons Ltd.* v. *Barton* (4)).

In *Greig* v. *Francis and Campion Ltd.* (5) *Swift* J. said, in reference to premises which included a shop and living quarters, that it had to be determined as a question of a fact, what was the real, main and substantial purpose of the premises. He pointed out that it well might be that whoever had to determine that question of fact might come to the conclusion that the real, main and substantial purpose of the premises was twofold, namely, to provide a shop for the inhabitants of the building to work in during business hours, and a dwelling-house for them to rest, recuperate, and dwell in during the non-business hours. The distinction intended to be drawn by the words "real, main and substantial purpose" seems to have been between uses in the contemplation of the parties as purposes to be served for their own sake or as ends in themselves and uses incidental, or subservient, to the use of the premises for another purpose. In *Cohen* v. *Benjamin* (6) *Bray* J., in answer to a specific contention that the question to be determined was what was the dominant use to which premises were put, said that he did not think that he had to decide any such question, and that there was nothing in the statute about dominant use, nor was there any authority for the proposition so far as he was aware.

(1) (1919) 35 T.L.R. 525.
(2) (1944) 1 K.B. 679, at p. 682.
(3) (1921) 1 K.B. 541, at p. 554.
(4) (1924) 2 K.B. 88, at p. 92.
(5) (1922) 38 T.L.R. 519, at p. 520.
(6) (1922) 39 T.L.R. 10, at p. 11.

Finally, when the *Rent and Mortgage Interest Restrictions Act*, 1939 (Imp.) (2 & 3 Geo. 6 c. 71) re-enacted the relevant provisions of the 1920 Act, Lord *Greene* M.R., delivering the judgment of the Court of Appeal in *Vickery* v. *Martin* (1), said : " I decline, with the language of the sub-section before me, to embark on an inquiry what is the substantial use, or what, in the language of the county court judge, is the principal or ancillary use, of the premises." (Obviously the county court judge had used the word " ancillary " as meaning secondary or subordinate.) This case was referred to by *Evershed* M.R. in *Kitchen's Trustee* v. *Madders* (2) as having decided that the provision means what it says and that one is not concerned to see how substantial the part is that is used for business purposes.

The definition which has to be considered in the present case must likewise be taken to mean what it says. There is no justification for reading into it a qualification which would confine its application to cases where residence is considered of greater importance than other uses which also are within the actual or presumed contemplation of the parties. The purpose or combination of purposes to which the parties must be held to have contemplated that the premises would be put by the tenant must be ascertained by considering the provisions of the contract as it stands at the date when the notice to quit is given and any facts which at that date affect their mutual rights and duties in relation to the user of the premises ; and, if the inquiry is not thereby answered, then by considering the nature of the premises and all the circumstances existing at the date of the original lease. If the conclusion be that residence was either the sole purpose or one of several purposes which the parties should be held to have contemplated, the premises must be held to be " leased for the purposes of residence " ; but a conclusion that residence was a purpose of the letting is not open where the parties are considered to have had in view no residence except as part of the enjoyment of the entire premises for non-residential purposes. An illustration may be found in the case of a large city store which contains caretaker's quarters. Residence by a caretaker is one of the uses which the parties to a lease of such a building may well be found to have contemplated, yet the building could not on that account alone be held to be leased for the purposes of residence, for residence by a caretaker merely forms part of the use of the building for the purposes of a store.

On this construction of the definition, the facts of the present case admit of no other conclusion than that the premises were

(1) (1944) 1 K.B., at p. 684. (2) (1949) 2 All E.R. 1079, at p. 1081.

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leased for the purposes of residence. The respondent became the tenant of the premises in June 1934, the lessor being the appellants' predecessor in title. A tenancy agreement was executed, but its terms were not proved before the magistrate. The appellants purchased the premises subject to existing tenancies in June 1948, and thereafter the respondent, without any attornment or fresh agreement, continued to hold the premises as tenant, paying rent to the appellants' agents. The case is not one of a tenancy the existence of which is presumed under s. 22A of the *Landlord and Tenant Act of* 1899 as amended by subsequent Acts, for the notice to quit described the respondent as tenant from week to week, and the magistrate found that the relationship of lessors and lessee existed between the parties by virtue of a weekly tenancy of the premises. The contract of letting which was in force when the notice to quit was served was therefore the contract made in 1934 between the respondent and the appellants' predecessor in title. There was no proof of any variation of the lease by contract, or of any waiver or estoppel effecting the user of the premises. The contract of letting was silent, so far as appears, as to the contemplated user of the premises. The only clue to the contemplation of the parties was provided by the character of the premises themselves. They consisted of two buildings, one a shop and dwelling and the other a shed. The main building comprised a room on the street frontage having a shop window and being separated from the remainder of the building by a fibrous partition, and behind it two bedrooms, a kitchen, a bathroom and a boxroom. Thus the building was, to all appearances, adapted to serve the dual purpose of a shop and a dwelling. The shed was of a neutral character, for it might well subserve either aspect of the ostensible purpose of the main building.

The magistrate found that the lessee took the premises to start a business, and to use portion as a fruit shop, portion for residence, and portion (the shed) for the housing of a motor lorry for business or pleasure. This finding is irrelevant, as it was not shown that the intentions of the lessee were known to his lessor; but even if that had been shown, the effect would only have been to reinforce the conclusion to which the character of the buildings points.

There was also evidence, and the magistrate made certain findings, as to the uses to which the lessee actually put the premises during his tenancy. In brief, he used the shop portion as a shop for a period of three months only, namely, in 1936; he sub-let it to a dressmaker for six months in 1945; and from that time

onwards he used it as a bedroom, darkening the window on the street frontage. These facts cannot affect the issue. They show a user subsequent to the date of the letting and unaccompanied by any consent of the original lessor or the appellants, and therefore they do not bear upon the question of the purposes for which the premises were in lease. They could have no relevance unless the magistrate had to decide, as he erroneously thought he had, which of the uses to which the buildings were adapted was the principal or dominant use.

The only conclusion open to the magistrate was that the premises were leased to the respondent for the twofold purpose of business and residence. Each was obviously an end in itself; neither was merely accessory to the other. The premises were as surely leased for the purposes of residence as for the purposes of business.

The determination of the magistrate was therefore erroneous in point of law, and the order made by *Herron* J. was correct in so far as it answered in the affirmative the question submitted by the case stated. The order proceeded to remit the case stated to the magistrate. But it necessarily follows from these reasons that only one determination was in law open to the magistrate, and that he should have dismissed the information. There is no cross-appeal by the tenant from the order of *Herron* J., but his Honour could have made any order that flowed from a correct decision upon the question of law. Under s. 37 of the *Judiciary Act* 1903-1950 (Cth.), this Court on appeal may give such judgment as ought to have been given in the first instance, and we consider that the order of *Herron* J. should be varied by omitting that portion of it which remitted the case to the magistrate and directed him to hear and determine the information in accordance with the Supreme Court's opinion, and by inserting in lieu thereof an order allowing the appeal brought by the case stated, discharging the order of the magistrate and dismissing the information. Otherwise the appeal to this Court should be dismissed.

The appellants must pay the costs of the appeal to this Court, s. 84 of the Act having no application to this appeal (*O'Mara* v. *Harris* (1)).

*Order of Herron J. varied by omitting that portion thereof whereby it was ordered that the case stated be remitted to the stipendiary magistrate with the opinion of the Supreme Court and that he should hear and determine*

(1) (1948) 77 C.L.R. 490.

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*the information in accordance with such opinion, and by substituting therefor an order that the appeal brought by the case stated be allowed, that the order of the magistrate be discharged and that the information be dismissed. Otherwise appeal dismissed with costs.*

Solicitors for the appellants, *Vindin & Littlejohn.*
Solicitor for the respondent, *L. S. Allen.*

J. B.