

H. C. OF A.

1909.

MAIDEN

v.

MAIDEN.

think fit to make any order as to costs of suit or counterclaim, nor as to costs of appeal. Caveat to be removed absolutely.

Solicitor, for the appellant, *D. Cowan*, Taree, by *F. C. Petrie*.
Solicitor, for the respondent, *W. H. Drew*.

C. A. W.

[HIGH COURT OF AUSTRALIA.]

BAYNE APPELLANT;
DEFENDANT,

AND

LOVE RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

H. C. OF A. *Landlord and tenant—Evidence of tenancy—Payment of rent—Notice to quit—*
1909. *Monthly tenancy—Length of notice.*

MELBOURNE,

March 4.

Griffith C.J.,
Barton,
O'Connor and
Isaacs JJ.

A. had been in possession of land as a monthly tenant, but there was no evidence as to who was then the owner. Subsequently B. became the owner, and A. continued in possession, and, on rent being demanded from her, promised B. to pay it and asked for time.

Held, that there was evidence of a tenancy between A. and B.

One month before one of the monthly periods a notice in writing was given by B. to A. demanding payment of rent then alleged to be due, and, in default of payment, that A. should immediately quit, and stating that, in

the event of A. paying the sum demanded, the tenancy would be determined as from the end of the particular monthly period. A. paid no rent.

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Held, that the tenancy was properly determined.

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Judgment of the Supreme Court of Victoria (*Cussen J.*) affirmed.

APPEAL from the Supreme Court of Victoria.

A complaint was heard at the Court of Petty Sessions, St. Kilda, on 26th June 1908, whereby the complainant, John Jeremiah Love, sought to recover from the defendant, Grace Bayne, possession of certain premises.

The justices having ordered a warrant of possession to issue within 30 days, the defendant obtained an order *nisi* to review that order on the grounds:—(1) That there was no evidence of any tenancy between the complainant and the defendant. (2) That there was no evidence that the tenancy (if any) had ended or been duly determined by legal notice to quit, or otherwise. (3) That the justices were wrong in deciding that it was necessary to produce a written contract for the purchase of the land in order to give the defendant a title thereto.

In the affidavits used on the hearing of the order to review before *Cussen J.* the following matters were deposed to:—The defendant first went into possession of the premises as monthly sub-tenant of one A. R. Stevenson, and after the determination of his tenancy on 4th June 1907, she remained in possession, but paid no rent from that time onward. There was no distinct evidence as to who was the owner of the land until, on 31st January 1908, the defendant became registered proprietor. In April 1908 the defendant, after rent had been demanded from her, called on the complainant, promised to pay the rent then owing, and asked the complainant for time. Certain correspondence put in evidence showed that negotiations for the purchase of the property by the defendant were going on from April 1907 until March 1908. On the 4th May 1908 a notice addressed to the defendant and Lilian Bayne, and signed by the complainant, was served on the defendant, and, so far as is material, was as follows:—“ Please take notice that I, being the owner and registered proprietor of the house and premises at Esplanade and Pine Avenue, Elwood, occupied by you, or one of you, on a monthly

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tenancy, demand payment by you, or one of you, to the bearer hereof . . . of £18 4s., being four months' rent due and owing to the 4th inst., to me in respect of the said premises, and in default thereof that you immediately quit the said premises and give and yield possession thereof to the bearer on my behalf. In default of your complying herewith, proceedings will be at once taken to have you and each of you ejected therefrom. I regret if, seeing that you have paid no rent in respect of the premises, this latter course should become necessary, but I must have immediate possession, and in the event of your paying the above sum hereby demanded, I give you notice that I determine your tenancy as from 4th June next, and require you to quit and deliver up peaceable possession of the said premises on that date."

Another notice, dated 14th May 1908, which was sent to the defendant and was signed by the complainant's solicitors as his solicitors and agents, was in the following terms:—"We, on behalf of Mr. J. J. Love, the owner of the premises occupied by you at the above address, beg to confirm the notice already given you by or on behalf of him, determining your tenancy, and requiring possession to be given on or before the 4th prox., and to repeat to you in writing our Mr. Hewison's statement to you personally this morning that Mr. Love must have possession of the said premises on or before 4th June next, or on such day of that month as your monthly period of tenancy may expire. . . ."

The defendant not having delivered up possession, on 6th June the proceedings to recover possession were instituted. At the hearing of the complaint the solicitor for the defendant stated that his substantial defence was that the defendant was not a tenant but was a purchaser under a contract of sale, and also admitted that notice to quit was given and that there was no objection in regard to the notice.

Cussen J. held that there was no contract of sale but only negotiations for a sale, and therefore that the first objection failed; that there was evidence of a tenancy, and that, as the complainant did not before the Justices rely on the invalidity of the notice to quit, the other objections also failed. He therefore discharged the order *nisi*.

From this decision the defendant appealed to the High Court.

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Gregory, for the appellant. There is no evidence that the appellant was a tenant of the respondent. There was no agreement for a tenancy nor was there payment of any rent. As to the promise of the appellant to pay rent, the mere fact that the parties acted on a mistaken supposition that some prior agreement was binding upon them is not evidence of a new agreement: *In re Northumberland Avenue Hotel Co. Ltd.* (1). To determine a monthly tenancy a month's notice ending with a current month is necessary: *Harvey v. Copeland* (2).

[*Davis* referred to *Bowen v. Anderson* (3).]

There was a *bonâ fide* dispute as to the title to the premises, and the Court of Petty Sessions had no jurisdiction in the matter: *Justices Act* 1890, sec. 69. The notice dated 5th May is too short, and is also bad in that it demands immediate possession in the event of the rent demanded not being paid. The notice dated 14th May is too short.

Davis, for the respondent, was not called upon.

GRIFFITH C.J. There is nothing in any of the points which have been raised. Three points were formally taken, viz. (1) that the appellant was not a tenant of the respondent; (2) that no proper notice to quit had been given, and (3) that the appellant was really in the position of a purchaser in possession. The third point is abandoned by counsel for the appellant, and there is no evidence to support it. As to the first point *Cussen J.* thought the evidence was ample to support a finding that the relation of landlord and tenant existed between the respondent and the appellant. The appellant became tenant of the owners for the time being—it does not matter who they were. Subsequently the land was transferred to the respondent, and the appellant, on being asked for rent by the respondent, went to him and asked for certain favours which were granted to her. That is abundant evidence that the appellant became tenant to the respondent.

(1) 33 Ch. D., 16.
(2) 30 L.R. Ir., 412.

(3) (1894) 1 Q.B., 164.

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As to the notice to quit there are two answers. First, before the magistrates counsel for the appellant said that he did not raise any objection on that ground, and, secondly, upon the evidence, a full month's notice to quit was given. Whether in the case of a monthly tenancy a month's notice terminating at the end of a month of the tenancy is necessary or not it is not necessary to decide. The appeal fails on all grounds.

BARTON J. I concur.

O'CONNOR J. I concur.

ISAACS J. I concur.

Appeal dismissed with costs.

Solicitor, for the appellant, *W. E. Douglas.*

Solicitors, for the respondent, *Ellison & Hewison.*

B. L.

[HIGH COURT OF AUSTRALIA.]

BEDGGOOD & COMPANY APPELLANTS;
APPLICANTS,

AND

GRAHAM RESPONDENT.
OPPONENT,

ON APPEAL FROM THE REGISTRAR OF TRADE MARKS.

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1909.
—
MELBOURNE,
March 24, 25,
26.

Griffith C.J.,
O'Connor and
Isaacs JJ.

*Trade Mark—Registration—Similarity of marks—"Honest concurrent user"—
"Special circumstances"—Trade Marks Act 1905 (No. 20 of 1905), secs. 8, 9,
16, 25, 28.*

An application for registration of a trade mark having been opposed by the registered proprietor of a trade mark limited to New South Wales, was granted subject to a limitation to the States other than New South Wales. On appeal by the applicant to the High Court,