[HIGH COURT OF AUSTRALIA.]

LANDALE . . . . . APPELLANT;
PLAINTIFF,

AND

MENZIES AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *July* 26, 27, 28, 29; *August* 12.

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

Landlord and Tenant—Tenancy at will, how created and determined—Agreement not to determine without reasonable notice—"Give and take" fence along common boundary—Implied agreement for exclusive occupation—Reasonable notice of intention to determine—Breach of agreement by lessor, effect of—Remedy of tenant—Injunction—Damages.

A tenancy at will may be subject to a stipulation that it shall not be determined without reasonable notice, and in such a case a notice by the lessor of his intention to determine the will does not determine the tenancy until the expiration of the period of reasonable notice.

So held *per Griffith* C.J., *Barton* and *O'Connor* JJ.; *Isaacs* J. dissenting.

Holders of two large pastoral properties separated by a watercourse along which a "give and take" fence had been erected in such a way as to secure a more convenient position for the fence both in respect of erection and maintenance, and to give each side a fair share of the water, maintained and improved the fence by contribution for a number of years, until the owner of the land on one side of the boundary, after giving a few days' notice of his intention, but without the consent of the other owner, cut the fence at a point where it was on his side of the watercourse, and extended it so as to take in a strip of land and portion of a waterhole which had been wholly on the other side of the fence, and thereby interfered with the use of the water by the other owner, and caused damage to his stock. There was no record of the agreement made when the fence was originally erected, and, except for an

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agreement in 1895 between the holders for the time being to adopt the fence as a working boundary and make it rabbit-proof, the arrangement depended wholly on implication from the conduct of the parties and the nature of the subject matter.

In a suit by the other owner for a declaration that he was entitled to the exclusive occupation of the land on his side of the fence, either during the life of the fence or under a tenancy from year to year terminable in the ordinary way by six months' notice expiring at the end of a year, and for an injunction and damages :

Held, on the evidence, *per totam curiam*, that there was an implied agreement that each party should have exclusive occupation of the land and water lying on his side of the fence, so long as the parties or their successors should be in occupation of the land, under whatever title, unless the agreement should be sooner terminated by reasonable notice ; and that the occupation by each party of land belonging to the other under such an agreement constituted a tenancy at will.

Held further, *per Griffith* C.J., *Barton* and *O'Connor* JJ. (*Isaacs* J. dissenting), that the tenancy, although a tenancy at will, could not be determined by either party except in accordance with the agreement, *i.e.*, by reasonable notice ; that the action of removing the fence under the circumstances was not intended to be and could not be regarded as a notice of intention to determine the agreement ; that, even if it could be so regarded, it was not a reasonable notice ; and that consequently the agreement and the tenancy were still subsisting and the plaintiff was entitled to an injunction and an inquiry as to damages as for trespass.

Per Isaacs J.—The tenancy, being at will, was necessarily terminable instanter at the will of either party ; the effect of the implied agreement not to terminate it without giving reasonable notice was not to preserve the tenancy after the determination of the will, but to render the party who determined it without such notice liable for damages for a breach of the agreement. The act of the lessor, whatever his intention may have been, was one for which he would otherwise have been liable for trespass at the suit of the tenant, and, therefore, *ipso facto* determined the tenancy. In any view the defendants by their pleadings showed their intention to determine the arrangement as to the particular piece of land and water in question. There was, therefore, no ground for an injunction but only for an inquiry as to damages for breach of agreement.

Per Griffith C.J.—Even if there was no tenancy known to the law, there was an agreement for a valuable continuing consideration in the nature of rent, of which a Court of Equity would grant specific performance.

Semble, *per Griffith* C.J.—A stipulation that a tenancy may be determined by either party at any time by reasonable notice is not inconsistent with a tenancy from year to year, the rule that such a tenancy is only terminable by a half-year's notice terminating at the end of a year being not a rule of law but only a rebuttable presumption.

Observations on the nature of tenancies at will and tenancies from year to year, the circumstances in which they may be implied, and the mode of determining them.

Decision of *Cohen* J., reversed.

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APPEAL from a decision of *Cohen* J. of the Supreme Court of New South Wales, in its equitable jurisdiction.

This was a suit by the appellant Robert Hunter Landale, owner of a property called Mundiwa, against the respondents, owners of an adjoining property called Cornalla, in the Riverina district of New South Wales.

The properties were separated from one another by a water-course, along which what is called a "give and take" fence had been erected as a common boundary many years before by the predecessors in title of the present parties. The facts are fully stated in the judgments hereunder.

The appellant in his suit claimed a declaration that he was entitled to the exclusive occupation of all land and water belonging to the respondents on the appellant's side of the fence either during the life of the fence or under a tenancy from year to year, and an injunction to restrain the respondents from interfering with that occupation in the future, and for damages for past acts of interference. *Cohen* J., before whom the suit was heard, held that the appellant had merely a revocable licence to occupy, and that sufficient notice of revocation had been given, and dismissed the suit.

From that decision the present appeal was brought.

Cullen K.C. (*Canaway* and *Pike* with him), for the appellant. The terms of the arrangement must be gathered from the conduct of the parties and the surrounding circumstances. Whatever agreement is to be implied was adopted by the present parties or their predecessors in title in 1895, when the existing fence was made rabbit proof, and an agreement was made to maintain it in that condition, the burden being divided between the parties. Changes in the nature of the title of the respective holders are immaterial. The liabilities and rights depended on occupation. There has been no break in the occupation, except that part of

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the respondents' holding is now in other hands. The original agreement applies to the length of fence that is now a common boundary. The parties have always acted on that basis. Any alterations that have been made in the meanwhile are slight, and have not affected the substance of the arrangement. By the agreement each party surrendered his rights over a portion of land for corresponding benefit conceded by the other. He cannot terminate that arrangement at his pleasure, though it may be that he can do so by giving notice. There was a mutual grant of quasi-easements.

[GRIFFITH C.J.—You must rest your claim on some sort of tenancy, by which you are entitled to possession as against the person who has the title.]

The agreement to erect and maintain the fence, having been executed by both parties, constituted a mutual grant of the right to exclusive occupation of the land and water on one side of the fence. The natural inference is that the arrangement should continue during the lifetime of the fence, *i.e.*, as long as it can be maintained by repair. [He referred to the *Dividing Fences Act*, No. 63 of 1902, consolidating 9 Geo. IV., No. 12.] One of the most important features of the arrangement, in that climate, was the distribution of the water in the creek. Could it be contended, once that division is made, that either party, having consumed the water on his own side of the fence, part of which would under natural conditions have belonged to the other, could at any time, without notice, then use the water that had been granted to the other? The nature of the subject matter implies permanence in the arrangement. The expenditure of money in fitting the fence with rabbit-proof netting is quite inconsistent with the notion that it was only temporary. Even if the arrangement was revocable, it was not revocable at will, so that the appellant was entitled to some relief in the suit. The lowest form of tenancy that should be implied is a yearly tenancy, terminable at the end of a year by six months notice. Such a tenancy should be presumed where there has been a general or indefinite letting as in this case: *Doe d. Martin* v. *Watts* (1); *Lowe* v. *Adams* (2). Although there was no rent, there was a continuing

(1) 7 T.R., 83.

(2) (1901) 2 Ch., 598.

consideration for the right to occupy. The tenancy should be taken to begin from the date of the agreement in 1895, when the holders for the time being adopted whatever tenancy existed under the old agreement.

[He referred to *Hervey* v. *Smith* (1), *McManus* v. *Cooke* (2).]

[BARTON J. referred to *Allen* v. *Seckham* (3).

ISAACS J. referred to *Laws of England*, vol. VII., p. 308.]

Even if there is not a tenancy from year to year, the tenure is not so low as a mere tenancy at will. There must at least be reasonable notice before it can be terminated. Under the circumstances 12 months would be reasonable. Under the *Dividing Fences Act*, sec. 3, six months notice is considered reasonable where there is an intention to fence. Sufficient notice should be given to enable the parties to make new arrangements. [He referred to *Vickery* v. *Jenner* (4), *York* v. *Vincent* (5).

[ISAACS J.—A general letting is presumed to be at will only unless there is some indication by payment of rent for a year or an aliquot part of a year that the tenancy is from year to year, *Richardson* v. *Langridge* (6), *Doe d. Hull* v. *Wood* (7).]

But here there is an implied agreement not to determine except upon notice which, putting it at the lowest, must be a reasonable notice.

[ISAACS J.—Then determining it without notice is a breach of the agreement, and you are only entitled to damages. He referred to *Kerrison* v. *Smith* (8), *Cornish* v. *Stubbs* (9).]

No; the effect of the agreement is to incorporate as a term of the tenancy a stipulation that neither party may determine it without reasonable notice. The tenancy is still subsisting. The act of the respondents was not intended to determine it, and cannot operate as a notice for that purpose. The respondents should be treated as trespassers until a proper notice has been given and the period of notice has expired. Damage has been proved sufficiently for the purpose of an inquiry. The appellant therefore is entitled to a declaration of right, an injunction

(1) 22 Beav., 299.
(2) 35 Ch. D., 681.
(3) 11 Ch. D., 790.
(4) 17 N.S.W. L.R., 438.
(5) 17 N.Z. L.R., 292.
(6) 4 Taunt., 128.
(7) 14 M. & W., 682, at p. 687.
(8) (1897) 2 Q.B., 445.
(9) L.R. 5 C.P., 334.

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against further breaches and to an inquiry as to damages. Apart altogether from the question of a tenancy, there was an agreement for valuable consideration which the appellant is entitled to have specifically enforced, and he is entitled to an injunction and damages on that ground. [He referred to *Equity Act* (N.S.W.), No. 24 of 1901.]

Langer Owen K.C. and *Harvey* (*Lamb* with them), for the respondents. For the purposes of this suit the agreement is that which is to be inferred from making an existing fence rabbit-proof in 1895. It is, therefore, important to consider the nature of the tenure of the respondents and their predecessors in reference to the question what was intended to be the duration of the arrangement. In 1895 a large portion was held under a precarious tenure under the Crown Lands Acts, liable to be defeated at any time by the Crown disposing of the land to others under more permanent tenures. Such a tenure rebuts any presumption that there was to be a permanent liability to repair.

[GRIFFITH C.J.—The Court considers the claim for the life of the fence quite untenable.]

The facts are inconsistent with any agreement to give notice because the holders were liable to be turned out at any moment. There was no permanent tenure of the holding up to almost the middle point of the common boundary, and that portion has now gone into other hands by force of circumstances over which the respondents, as the appellant knew, had no control. Moreover, since 1895 each party has from time to time altered the position of the fence to a material extent, without consulting the other, showing that they were not acting on the basis of a binding agreement to keep the fence in the position in which it stood in 1895. The parties acted as if they were entitled to move the fence as they pleased on their own land up to the legal boundary. The proper inference under all the circumstances is that the fence was merely a convenient working boundary, but that either party was at liberty to move it at his own expense up to the true boundary. The agreement to share the maintenance of the fence might equally have been made if the fence had been on the true boundary. Since 1904 the part which the appellant was

to maintain is no longer portion of the common boundary and is, therefore, of no benefit to the respondents. A great part of the original consideration to the respondents is gone. No interest in land passed under the arrangement. The only claim that the appellant can have is an action for damages for revoking the licence without reasonable notice, if an agreement to give such notice can be implied. [They referred to *Kerrison* v. *Smith* (1); *Woodfall, Landlord and Tenant*, 18th ed., p. 394.] If any tenancy was created it was a tenancy at will, terminable instanter by either party. There was a mere indefinite letting or agreement to let. Such a tenancy is terminable by any act on the part of the lessor on the land let inconsistent with the right of the tenant to exclusive occupation. The agreement would be merely personal and would not affect the nature of the tenancy. A tenancy at will has certain legal incidents, one of which is terminability at will In addition to that the parties may make any agreement they please, for the breach of which they have a legal remedy in damages. Before the law will infer a lease for a term of years there must be something in the circumstances fixing a term, and there must be payment of rent or some consideration of an annual nature. The rent must be referable to a year or an aliquot part of a year. [They referred to *Doe d. Nicholl* v. *McKaeg* (2); *The Queen* v. *Norwich Corporation* (3); *Braythwayte* v. *Hitchcock* (4); *Doe d. Hull* v. *Wood* (5).

[GRIFFITH C.J. referred to *Parker d. Walker* v. *Constable* (6); *Doe d. Edney* v. *Benham* (7).

ISAACS J. referred to *Foa, Landlord and Tenant*, 4th ed., pp. 3, 106, 596; *Right d. Flower* v. *Darby* (8).]

The agreement being personal does not bind the respondents, who are trustees, unless they adopted it. It will not be presumed that they made an agreement which they had no power to make. They had no power to do more than give a licence to occupy the greater portion of the Cornalla land that was on the appellant's side of the fence. [They referred to *Thwaites* v. *Brahe* (9).] The

(1) (1897) 2 Q.B., 445.
(2) 10 B. & C., 721.
(3) 30 L.T., 704.
(4) 16 M. & W., 494.
(5) 14 M. & W., 682, at p. 687.
(6) 3 Wils., 25.
(7) 7 Q.B., 976.
(8) 1 T.R., 159.
(9) 21 V.L.R., 192; 17 A.L.T., 1.

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acts of the respondents were inconsistent with the continuance of the tenancy and therefore determined it: *Woodfall, Landlord and Tenant*, 18th ed., p. 260.

[ISAACS J. referred to *Doe d. Bennett* v. *Turner* (1).]

There is no evidence of damage caused by the failure to give reasonable notice. In order to have an inquiry it is not sufficient to show technical damage. The Court will not grant an injunction unless there is a fear of irreparable damage.

[ISAACS J. referred to *Lavery* v. *Pursell* (2).]

The appellant is not entitled to a mandatory injunction compelling the respondents to restore the fence, and give another notice. The remedy in damages is sufficient. [They referred to *Equity Act* (N.S.W.), No. 24 of 1901, sec. 9.] The appellant waited 9 months before bringing his suit, which is longer than the period of notice which might be considered reasonable. He then put his case too high and forced the respondents into Court. He should not be allowed his costs of suit. Or the question of costs should be reserved until the inquiry, in case the appellant should fail to show substantial damage on the alternative claim.

Cullen K.C., in reply. The appellant was entitled to come into equity for a declaration of right, and should have his costs of establishing that. He referred on the main point to *Sweeney* v. *Sweeney* (3); *Doe d. Edney* v. *Benham* (4); *Ex parte McAndrew* (5); *Ex parte Foster* (6); *Ex parte Duggan* (7); *Jones* v. *Mills* (8), and, on the nature of the respondents' tenure, to the *Crown Lands Act* 1884, 48 Vict. No. 18, sec. 98, sub-sec. (1).

Cur. adv. vult.

August 12th.

The following judgments were read:—

GRIFFITH C.J. The appellant (plaintiff) and respondents (defendants) are respectively the owners of two contiguous pastoral properties in the Riverina district of New South Wales, called Mundiwa (on the north) and Cornalla (on the south), separated

(1) 7 M. & W., 226; 9 M. & W., 643.
(2) 39 Ch. D., 508.
(3) Ir. R. 10 C.L., 375.
(4) 7 Q.B., 976.
(5) 21 N.S.W. W.N., 20.
(6) (1903) 3 S.R. (N.S.W.), 645.
(7) 19 N.S.W. W.N., 260.
(8) 31 L.J.C.P., 66; 10 C.B.N.S., 788.

from one another by a creek called Tuppal Creek, which runs westward to the Edwards River. For many years before and up to 1895 the common boundary extended for a distance of over thirty miles along the course of the creek, the distance from point to point being about eleven or twelve miles.

To persons acquainted with the conditions of that part of New South Wales it is apparent that such a creek, the greater part of which is liable to become dry for long periods, but which contains occasional waterholes, would be an impracticable boundary. It is not, therefore, surprising that long before 1895 a fence had been erected by mutual consent, which did not follow the middle of the bed of the creek, but was what is commonly called a "give and take fence," which is described by the plaintiff in his evidence as "a fence which is thought most fair to both parties so that they may get their fair share of the water."

In 1895 it was agreed by the then owners of the two properties that the fence as it then existed should be made rabbit-proof by wire netting, and should be maintained as a working boundary between them. This was accordingly done.

About midway in the length of the boundary the creek was crossed by a bridge. From a point a short distance to the west of the bridge and thence westwards the fence was on the northern side of the creek, *i.e.*, on Mundiwa. At that point it crossed the creek, and thence eastward to its termination it was on the southern side, *i.e.*, on Cornalla, except at a place (spoken of as portion 38) about half-way between the bridge and the eastern end, where it crossed the creek to the north and took in an area of about four acres of Mundiwa together with a permanent waterhole in the bed of the creek, the use of which thus fell to Cornalla. Just west of the bridge, and between it and the point where the fence crossed the creek was another permanent waterhole in the bed, spoken of as the Bridge waterhole.

This waterhole being to the north of the fence, fell to Mundiwa. By the agreement of 1895 each party was to maintain so much of the fence as was on his own land, that is to say, Mundiwa was to maintain the western half and Cornalla the eastern half.

At this time there was in force a Statute, the *Rabbit Act* 1890, which imposed duties upon owners with respect to keeping down

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rabbits, and under which either of the owners could have required his neighbour to share the expense of erecting and maintaining a rabbit-proof fence upon the boundary between them.

One result of the agreement was that Mundiwa, as already shown, obtained the sole use of the Bridge waterhole, part of which belonged to Cornalla, and reciprocally Cornalla obtained the sole use of the waterhole at portion 38, part of which belonged to Mundiwa. After 1895 some changes occurred in the tenure by which the Cornalla land to the south of the creek was held, and in 1902 the defendants' predecessor ceased to be the owner of any land westward of a point a short distance to the west of the bridge. There were also some devolutions of title on both sides, but the obligations imposed by the agreement of 1895 as to maintaining the fence continued to be observed by the owners of Mundiwa and Cornalla respectively up to 1908. In 1907 the defendants claimed and obtained a reduction of the assessment payable under the *Pastures Protection Act* 1902, to which they were only entitled if Cornalla was enclosed with a rabbit-proof fence (sec. 18), and they showed the inspector, as part of their fence, that part which took in four acres of Mundiwa, at portion 38.

In April 1908 water was scarce in the district, and the defendants, giving two or three days notice of their intention, cut the fence at the Bridge waterhole and constructed a fenced lane by which their flocks obtained access to the water, which they proceeded to use.

Owing to the natural configuration of the ground at the waterhole, the plaintiff's flocks could not get safe access to the water from the northern side of the creek, and as the lane prevented their access to the southern side, they were practically debarred from using it at all. The plaintiff claims to have suffered substantial loss from the deprivation. He accordingly brought this suit, claiming a declaration of right, an injunction to restrain the defendants from destroying the fence, and damages.

The main question raised in the suit is as to the respective rights of the parties under the agreement of 1895. The defendants contend that it was determinable at will in the sense of being determinable instanter—at a moment's notice. The plaintiff con-

tends that the agreement lasted for the probable life or duration of the fence, or, alternatively, that it was not terminable without reasonable notice.

The first alternative appears to have been most pressed before the learned Judge of first instance, who rejected it, and I think rightly. But he held that the effect of the agreement was to give a mere revocable licence to occupy up to the actual line of the fence for the time being, and that sufficient notice of revocation had been given.

If one has regard to the natural features and conditions of Australia it is obvious that the secure possession of permanent water is an essential condition to the profitable occupation of land for grazing purposes, especially where the flocks are large, and the enclosures in which they run are of great extent. It may be mentioned incidentally that one of the paddocks dependent on the Bridge waterhole for water contained an area of about three square miles.

The practice of adopting a "give and take fence" between two properties separated by a watercourse is well known. Even without the express testimony of the plaintiff I should take it to be notorious that the object of such an arrangement is two-fold, (1) to obtain a more convenient location for a dividing fence, and (2) to divide the permanent water in the watercourse between the parties.

It is manifest that the intention of the parties in entering into such an agreement cannot be carried out unless the agreement has such a degree of permanency as not to be terminable by either party without reasonable notice to the other. What is reasonable notice must, as in all cases where the question of reasonableness arises, depend upon the circumstances of the particular case. What might be a sufficient notice in the case of an area of land divided by a watercourse containing permanent water at frequent intervals might be wholly insufficient in the case of a large area bounded by a channel containing a scanty supply of water at long intervals of distance.

In my opinion, therefore, it is an implied term of such an agreement that it cannot be terminated without reasonable notice. This conclusion is strongly supported by a consideration of the

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permanency of the mutual obligations of adjoining owners under the Fencing Acts and Rabbit Acts.

Another incident of such an agreement is that each party has the exclusive use of the land and water lying on his own side of the fence. This result necessarily follows so long as the fence actually divides the land occupied. The parties may, of course, stipulate that it shall be a term of the agreement that they shall have common access to the water, but in the absence of such a stipulation I think that the right to exclusive occupation should be inferred.

It appeared from the evidence that between the first erection of the fence and 1908 some small changes had been made in its position, but the defendants' manager, Kilpatrick, said that these changes did not affect the distribution of the water. So far as appears, the changes consisted in the removal of the line of fence to positions somewhat nearer the bank of the creek. Kilpatrick gave one instance in which he moved the fence on the Cornalla side to the middle of a waterhole so as to take in part of it. This occurred in 1897. It appeared, however, that the plaintiff had access to this same waterhole from his land, and that his paddock fronting the waterhole was not dependent on it for the supply of water. No objection seems to have been made to this action, and I do not think that any inference can be drawn from it.

In my opinion, therefore, the plaintiff has established an agreement, made in 1885, to the effect that the respective owners of Mundiwa and Cornalla should have exclusive occupation of the land and water lying on their respective sides of the fence as then existing, with permission to each party to remove the fence to a line nearer the bank of the creek on his own land, and that the agreement should continue in force until terminated by reasonable notice on either side, so long as the parties to the agreement or their successors should be in occupation of the land, under whatever title. This last term follows from the varying nature of the tenures under which land is held from the Crown in New South Wales.

What, then, are the legal consequences of such an agreement followed by possession ? A contract for the exclusive occupation of land for a determinate period, however short, constitutes a

lease : *R.* v. *Morrish* (1). A period determinable at the will of either party is such a period. In such a case the lease is called a lease at will. And, in one sense, and perhaps in strictness, every lease which is not for a term certain is a lease at will, although of late years the phrase is ordinarily used to describe a tenure under which the lessor may determine the lease instanter. But this was not the original idea of a lease at will. Thus, a tenant under the tenancy now called tenancy from year to year was originally spoken of as a tenant at will whose tenancy could not be determined by either party without due notice to quit : *Woodfall* : citing *Parker d. Walker* v. *Constable* (2). But " the Judges, seeing the inconvenience of so uncertain a holding, and that the tenant was usually entitled to emblements, very early adopted the inference that it was intended that the tenancy should be a tenancy to be put an end to by either party expressing such to be his will, but only at the end of the year; and they superadded to that, what is expressed in the *Year Book*, 13 H. 8, fo. 13 b., viz., that it must be a half-year's notice. Thus we have the general rule of law that no notice was necessary; and then we have the exception established for the sake of convenience, that, in the case of a tenancy from year to year, the notice to determine it shall be a six months' notice." (*Per Willis* J. in *Jones* v. *Mills* (3). The reason for adopting this rule was that six months was considered a reasonable length of notice : *Doe d. Martin* v. *Watts* (4).

In 19 Car. II. it was agreed by the Court of King's Bench that if land be leased at will and the rent is received half-yearly or quarterly the lessee cannot determine his will two or three days before the rent day, because that would be a fraudulent determination : *Kighly* v. *Bulkly* (5).

In *Jones* v. *Mills* (6) the learned Judges treated what is commonly called a weekly tenancy as a form of tenancy at will which could not be determined without some notice, *i.e.* reasonable notice, but did not decide what length of notice was necessary. The same considerations apply to any other tenancy the

(1) 32 L.J.M.C., 245.
(2) 3 Wils., 25.
(3) 10 C.B.N.S., 788, at p. 799 ; 31 L.J.C.P., 66.
(4) 7 T.R., 85.
(5) 1 Sid., 338.
(6) 10 C.B.N.S., 788.

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termination of which is not definitely fixed. In my opinion there is no authority for saying that there cannot be a lease at will terminable upon reasonable notice. In some cases such a tenancy may also be described as a tenancy from year to year terminable upon reasonable notice. The rule that a tenancy from year to year is only terminable by a half-year's notice terminating at the end of the year is not a rule of law, but only a rebuttable presumption. Such a tenancy may be made terminable on the happening of any event which the parties think fit: *R.* v. *Herstmonceaux* (1).

A lease until either party shall give six months' notice to the other does not constitute a tenancy from year to year, but it is a good lease: *Doe d. King* v. *Grafton* (2). I suppose it is technically a lease at will, and it was so described by counsel *arguendo* in *Lewis* v. *Baker* (3). *Farwell* L.J., however, described it as a term certain (4). *Jones* v. *Mills* (5) shows that a reasonable notice may be stipulated for as well as a fixed notice.

The principles of the common law of England introduced into Australia on its first settlement are rules of common sense founded on general convenience, and are not in their application limited to cases of which an exact analogue can be found in some law book. That law allows parties to enter into any agreement they choose, provided that it is not forbidden by Statute or contrary to the public welfare, and endeavours to give effect to such agreements. If it is necessary to classify every contract for occupation of land as belonging to some recognized genus or species (which I do not admit) there is, as I have shown, no difficulty in classifying the contract now in question.

If regard is had to the annual obligations of owners of land under the *Pasture Protection Act* and *Fencing Acts*, there is some ground for saying that the respective tenancies were from year to year. But it is not necessary to decide the point.

For the reasons I have given I am of opinion that the plaintiff was, in point of law, lessee (whether at will or from year to year) of the land upon which the Bridge waterhole lay, the lease being

(1) 7 B. & C., 551.
(2) 18 Q.B., 496; 21 L.J.Q.B., 276.
(3) (1906) 2 K.B., 599.
(4) (1906) 2 K.B., 599, at p. 603.
(5) 10 C.B.N.S., 788.

terminable upon reasonable notice, and that the action of the defendants in cutting the fence and taking the water and excluding the plaintiff from the use of it was unlawful and actionable unless they had first determined the tenancy.

Even in the view (which I think is without support in principle or authority) that a tenancy at will is at law necessarily determinable instanter at the will of either party, notwithstanding that, as in this case, there is a valuable continuing consideration, which is in the nature of rent (see *Doe d. Edney* v. *Benham* (1)), a Court of Equity would, in my opinion, enforce specific performance of an agreement to give exclusive occupation of land for purposes requiring permanency of tenure and containing a stipulation that the occupation should not be determined without reasonable notice.

If it were necessary that a formal instrument of demise should be executed, it might be in the form of a demise for one day certain, and thereafter until the expiration of a reasonable notice given by either party to the other. It is not disputed that in the present case the right of exclusive occupation was to endure for one day at least. It cannot be doubted that such a demise, although in form unusual, would be perfectly valid, and would not be an attempt to create a new kind of tenure unknown to the law. And, if effect could not be given to the intention of the parties without such a deed, a Court of Equity would compel its execution.

In either view, therefore, whether the case is regarded as a trespass by a lessor upon his lessee under claim of right, or as a breach of agreement for valuable consideration relating to permanent occupation of land, the plaintiff is entitled to relief, unless the notice given by the defendants of their intended action was reasonable. Having regard to the facts already stated, I think it impossible to take the view that it was reasonable. Under Australian pastoral conditions water cannot be provided for a flock of hundreds of sheep in dry country at a few days' notice.

With respect to the nature of the relief to be granted, however, another question arises, namely, whether the notice given by the defendants was in fact a notice to determine the tenancy

(1) 7 Q.B., 976.

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(or, from another point of view, to terminate the agreement). It is almost inconceivable that any sane man would under the circumstances give such a notice without previous negotiations, unless actuated by a desire to injure his neighbour. But it is plain that nothing was further from the minds of the defendants than to terminate the agreement. So far from claiming to do so, they gave a friendly notice of their intention to do an act which they claimed a right to do under the agreement. Possibly the plaintiff might have been entitled to elect to take advantage of the act as an excuse for terminating the agreement (if it was a mere executory agreement) at once, but the Court will not impute to parties an intention which it knows was not present to their minds unless compelled to do so by some rule of law.

In my opinion, then, the agreement has not been terminated but is still subsisting, and is a lawful and valid agreement.

I think that there should be a declaration that the plaintiff is entitled under the agreement of 1895 to the exclusive occupation of the land and natural water lying to the north of the fence as it stood on 9th April 1908 until the agreement shall have been terminated by a reasonable notice given by one party to the other, and to an injunction to restrain the defendants until such termination from interfering with such occupation or with the fence as it then stood. He is also entitled to an inquiry as to damages, which should be assessed as in an action for trespass.

BARTON J. The cardinal fact in this case is a fence between two sheep stations. It runs roughly east and west, the station on the north being Mundiwa and that on the south being Cornalla; the former occupied for thirty years or longer by the plaintiff and his predecessors, the latter for the like period by the defendants and those who preceded them. The original common boundary was the Tuppal Creek, which joins the Edwards River to the west, near the town of Deniliquin. Tuppal Creek, when it runs, has a tortuous course, in parts nearly doubling upon itself; the country is part of the Riverina, which is flat. The channel seems to be well defined, though in that country such a creek is often, and in fact always except after heavy rain, not a running stream, but a much broken chain of waterholes. Of

these the majority, sometimes nearly the whole, dry up when rains are withheld for any long period, a misfortune not uncommon. Such a channel cannot of course be maintained as an effective boundary in a country where shepherding is a thing of the distant past. The creek bed, often dry for most of its length, and nearly always dry for part of it, offers no obstacle to the trespasses, or the boxing or mingling of the sheep of the respective runholders. Fencing becomes as necessary there as on boundaries where there is no watercourse at all. But if a fence follows the windings of the creek bed it is unduly expensive, because it is unnecessarily long. Along the original boundary between these two holdings such a fence would extend a length of over thirty miles. If placed in the creek bed, *ad medium filum aquae*, the first flood would sweep most of it away. These are the conditions which in all similar cases give rise to the erection by adjoining holders of what is called a "give and take fence." The very name imports the thing that happens, namely, an adjustment of the direction of the fence by way of compromise. Each holder gives some country and some water, and takes—that is receives—some of each from his neighbour. Thus a less tortuous line is achieved, to the great benefit of both parties in the saving of first cost and upkeep. The occupation of each must necessarily be restricted by the fence; otherwise it would not serve its office of preventing trespass and boxing, and it would be without a *raison d'être*. Under the reciprocal giving and taking each must therefore have exclusive possession of the segments of his neighbour's land cut off from that neighbour by the fence. But it is the part of each to see to it that the "give and take" process amounts to what is called a fair deal—and that in respect not only of the land but of the water and the chances of water. Thus the plaintiff in his evidence says that a "give and take fence is a fence which is thought to be most fair to both parties, so that they may get their fair share of the water." Where there is water, the obtaining a fair share of it is of course a more important consideration than the gain of the occupation of a few acres for each of which the yearly rental is but a few pence. For in dry seasons, which are many, the sheep must have some water or die, and so in such seasons dry grass without water does not count for much.

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Any one with a knowledge of the pastoral conditions of New South Wales and of this part of it in particular, viewing this fence and its direction, together with the sinuous creek bed, and observing a sheep run reaching to the fence on each side, would know it for what it is, a "give and take fence." The evidence is that the fence was first erected in the year 1874 on approximately the line which it takes to this day, except for the alteration of which the plaintiff complains, and possibly one other. Casual alterations there have been, but being trivial they have not been the subject of complaint by either of the neighbours.

Robert and Alexander Landale were the owners of Mundiwa and Henry Ricketson the owner of Cornalla when the fence was erected. There is no evidence of the terms of their agreement, save so far as the facts of the erection of the fence, its maintenance, its direction, and the distribution of the available water between occupants on each side of it, afford such evidence. Since its erection there has not been any attempt to revise its general direction or to substitute any other boundary. While it altered in a slight degree the occupation of each party, it approximately maintained the areas. The division which it made was up to last year treated as a fair distribution of the waterholes in the creek bed. It reduced the length of the boundary line from over thirty miles of creek bed to about eleven miles of fencing.

Robert and Alexander Landale remained the owners of Mundiwi until 1891, when Robert Landale became the sole owner, Henry Ricketson being still the owner of Cornalla. In 1895 the owners found it necessary to put the fence in thorough order and to make it rabbit-proof. Its original course had no doubt been the subject of arrangement between the respective owners, for if either of them had resorted to the provisions of the *Dividing Fences Act* 1829 (now by consolidation the Act of 1902), then in the absence of agreement the owner claiming co-operation or contribution would have had first to show a completion of his own half of the fence of the existing boundary, and would then have been entitled to erect the remaining half at the expense of his neighbour, but only on the same boundary line. In that case the fence would have followed the course of the creek—indeed the bed of it—and not a "give and take" line.

In 1895 legislation for the purpose of coping with the rabbit pest had been in force for some years. The *Rabbit Act* 1890, by sec. 20, provided that the owner of a holding might enforce from an adjoining owner a contribution of one-half the cost incurred in making common boundary fences rabbit-proof; and previous payment of contributions under the *Dividing Fences Act* 1829 was not to prejudice any claim under the *Rabbit Act* where a fence not originally rabbit-proof had been made so. The owners of Mundiwa and Cornalla substituted for the processes of this Act in 1895 an arrangement by which Landale was to make and keep rabbit-proof that part of the fence running westward of a certain bridge over the creek near the middle of the existing boundary line, and Ricketson was to secure similarly that part of the fence east of the bridge. This arrangement was carried into operation, its effect being that instead of one owner making the whole line secure and exacting half the cost from the other, each of them made his own half efficient at his own cost. The convenience of this modification arose from the fact that the whole of the fencing west of the bridge ran on the northern side of the creek, except the portion which had thrown the bridge waterhole into the Mundiwa occupation, while eastward of the bridge the whole line was on the Cornalla side. This agreement could not of course have been made without the acceptance by both parties of the "give and take fence" as the boundary by which the future occupation was to be limited, not for a day, nor for any such transient time as would have rendered their expenditure a futility or a mere extravagance. Only one alteration of the fence line was made at that time. It was unimportant. About half a mile from the bridge and north of it Landale, apparently without any complaint from anyone, removed a short section of the fence further into his own land on higher ground, so as to minimise danger to the fence itself in the event of flood. In 1908 he found that some work done by the Government elsewhere in the district had lessened the risk of flood, and therefore in February of that year he restored that part of the fence to its original position nearer the creek. In this restoration the manager of Cornalla, whom the plaintiff informed of it, acquiesced. After the agreement of 1895, the

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occupation of each owner up to the fence on each side continued to be defined by the "give and take" line, the fence making the occupation effective. The agreement was kept, and the fence maintained by each party in execution of it. Ricketson died in 1901, and the defendants are the executors of his will and the trustees of his estate. Robert Landale died in 1903, and was succeeded in the ownership of Mundiwa by the plaintiff, one of his sons, who had then managed the station since 1891, and who continued to manage it after his father's death as owner. Each station has continued to keep the fence in good repair and rabbit-proof according to the agreement of 1895, and the occupation on each side has remained the same in character; but the country towards the junction of the creek with the Edwards River, lying west of portion 47, as shown on the plan, passed out of the occupation of Cornalla some time in 1905, and to that extent Mundiwa has since had new neighbours to deal with on that part of its southern boundary. The fence there however remains as it was. Two principal waterholes are the subject of evidence: one of them a little below or west of the Tuppal bridge and called the bridge waterhole; the other up the creek, a little more than half way from the bridge to the eastern boundary of the two runs. The line of the "give and take fence" allots the first named of these to Mundiwa and the other to Cornalla, no doubt on the principle described by the plaintiff, namely, that each party might get his fair share of the water. Opposite the bridge waterhole the fence line had run on the southern side of the creek, leaving that waterhole within the Mundiwa occupation. At the other waterhole the fence, running up to that point on the southern side, crosses and recrosses the creek at an elbow so as to cut the waterhole out of Mundiwa and and throw it into the Cornalla occupation. Only one other waterhole is mentioned in the evidence. It is on portion 21. At ordinary times Cornalla had all the water there, and Mundiwa did not participate unless there was a fresh in the creek. There is no further material evidence as to the distribution of the creek waters; but from what I have stated the inference is plain that each side secured what it deemed a fair share: the principal waterhole being allotted to Mundiwa, the other two to Cornalla.

Mr. Kilpatrick, who has managed Cornalla ever since 1887, and was overseer for about a year in 1883, testifies that apart from his own actions in April 1908, complained of in this suit, any changes that he made in the fence did not affect the distribution of the water between the two stations. The same thing, but without the exception, may be said of the plaintiff's dealings. In April 1908 the weather was extremely dry, and the water had failed in most of the Cornalla paddocks. On the 8th of that month the defendants' manager wrote to the plaintiff stating these facts, and intimating that owing to their existence he was "shifting the fence below the bridge on Tuppal, so as to get a share of the water in the hole there." On the 9th he received a letter of protest from the plaintiff, who pointed out that the boundary fence was a "give and take" one and had been erected for years. Mr. Kilpatrick did not reply to this protest. On the 10th the plaintiff saw him and verbally renewed it, but Mr. Kilpatrick asserted a right to take the water. On the 11th, three days after his letter, he cut a passage through the fence south of the creek, opposite the bridge waterhole. At each side of this gap he ran a fence to the creek, making a "lane," and joined the northern ends of these two new fences by another along the middle of the water hole from west to east, about a chain in length. At this hole he watered large numbers of Cornalla sheep—as many as 3,000 to 4,000 at a time. The sheep came to this water regularly. Not only did the plaintiff lose the use of half the waterhole, a very precious possession at such a time, but his own sheep were practically prevented from watering there. Before the fence was cut they were able to cross in the dry part of the creek bed and drink on the southern bank, which was safe. After the alterations made by Kilpatrick, they could not water save on the north bank, which was steep, clayey, and boggy, and therefore dangerous. Thus the plaintiff says he was compelled to remove a flock of breeding ewes to a paddock on the river where he had to feed them by hand. The percentage of their lambing was about fifteen, had they been left in the paddock, and had the water not been interfered with, the percentage would have been 50. It is not necessary to deal with any other head of damage claimed. There is here *primâ facie*

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evidence of some substantial damage sufficient as a basis for inquiry if the plaintiff is entitled to relief. On that question, I have in the first place no doubt that the facts prove an agreement acted on for many years between the owners of the two stations as the necessary result of the establishment of the "give and take" line of fencing, that each was to have the exclusive enjoyment of the land and water on his own side of the fence, which was erected and maintained, even before the rabbit-proofing, for the purpose of the mutual exclusion of the flocks depasturing north and south of it respectively. There is no fact on which to found an inference, for which the defendants contend, that the fence was established and kept in repair subject to a right to each party to depasture and water his stock on both sides of it, and therefore among the flocks of his neighbour.

In face of such a right, what would be the use of a dividing fence? Such an arrangement, if anyone could be so silly as to make it, could only be carried out by continuous shepherding to prevent otherwise inevitable confusion of flocks, and shepherding has been driven out by fencing, and will never be resorted to again as a system in this State. The agreement of 1895, so far as it was expressed, was strong in its confirmation of the then existing relations between the adjoining owners; and the implication from it is strong that the grant to each by each of a right to exclusive possession of the inconsiderable area of his neighbour's land cut off by the fence, was inseparable from the arrangement even without writing or spoken word.

The difficulty is as to the duration of this reciprocal right to be implied from the circumstances. I do not see that it can be fixed either as a definite term of years or as a yearly tenancy. It is clear, however, on the facts proved that it was never within the contemplation of the parties that the careful adjustment of their respective holdings and the equitable distribution, so far as they could make one, of the water, together with the expense of eleven miles of wire fencing (not to speak of the subsequent netting against rabbits) were to be worth no more than a moment's purchase. The resultant peace and security could never have been made subject to a right on the part of either of them, on the first or any subsequent day after the completion of

the fence, to turn upon his neighbour and say, "I put an end to our agreement; withdraw your sheep to-day. I will have no boundary but the creek bed, and therefore no fencing to outlast the flood that may destroy it in a night." Adjoining holdings could not possibly be managed on such terms. And especially where the distribution of water is the essence of a fencing agreement, no man in his senses would undertake its burden unless with fairly ample assurance against any such caprice of his neighbour. In any season it takes some time to make new arrangements to graze and water thousands of sheep. In dry seasons, which recur so often, such removals spell ruin unless the best available country be secured, and that generally takes considerable time. The circumstances of pastoral occupation in this country forbid the notion that holders of conterminous runs abutting on watercourses would enter into "give and take" fencing agreements on any such terms. The implication must be no wider than is necessary; but the minimum that is necessary in such cases is a notice sufficing to give its recipient reasonable time to look about him and make arrangements for the protection of his stock.

Woodfall (17th ed., p. 141) defines a lease as "a contract for the exclusive possession of land or tenements for some certain number of years or other determinate period"; and adds that "a licence to inhabit or enjoy, if it give an exclusive right to occupy, may have the same effect": *R.* v. *Morrish* (1). Where the right is made reciprocal, the one exclusive right being the consideration for the other, it cannot be doubted that some tenancy is created on each side. But for what term or period? In *Doe d. Martin* v. *Watts* (2) Lord *Kenyon* C.J. says:—"So long ago as the time of the Year Books it was held that a general occupation was an occupation from year to year, and that the tenant could not be turned out of possession without reasonable notice to quit." In *Braythwayte* v. *Hitchcock* (3) *Parke* B. says:—"Although the law is clearly settled, that where there has been an agreement for a lease, and an occupation without payment of rent, the occupier is a mere tenant at will; yet it has been held that if

(1) 32 L.J.M.C., 245.
(2) 7 T.R., 83, at p. 85.
(3) 10 M. & W., 494, at p. 497.

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he subsequently pays rent under that agreement, he thereby becomes tenant from year to year. *Payment of rent, indeed, must be understood to mean a payment with reference to a yearly holding*; for in *Richardson* v. *Langridge* (1), a party who had paid rent under an agreement of this description, but had not paid it with reference to a year, or any aliquot part of a year, was held nevertheless to be a tenant at will only." I am of the opinion which I find expressed in the notes to *Clayton* v. *Blakey* (2), that wherever a person is in possession of land in which he has no freehold estate, nor tenancy for any certain term, but which he nevertheless holds by consent of the true owner, that person is tenant at will. If his occupation is beneficial he is liable to pay for it. In the present case a continuing compensation has been made on each side. If, then, it is conceded that the consideration moving from each party, though equal to a reserved rent, was not referable to a yearly holding, it must also be conceded that it is not referable to a quarterly or monthly tenancy. But it is not sound reason to conclude from that concession that there is no tenancy at all, or that if there is one, the occupancy of either party, with his right to the water, is necessarily liable to be ended instanter by the other. Even in the case of a mere letting of sporting rights a reasonable notice is necessary: *Lowe* v. *Adams* (3). It may be that an authoritative decision cannot be found to meet the exact case; but that is because in England a case presenting the same circumstances has not occurred, nor is one likely to occur. Where an inference from facts is the only legitimate one they will reasonably bear, and is justified by the ordinary principles of law, I do not fear to say that it may be adopted, together with the legal consequences that follow from its adoption. The choice is between doing that and calling by the name of an inference something that we know to be contradicted by the proved facts. In my opinion, although the rights reciprocally granted to exclusive possession amount only to tenancies at will as to the land cut off on each side by the fence, of course with the water on it, such tenancies are determinable only at the expiration of a notice on

(1) 4 Taunt., 128.

(2) 2 Sm. L.C., at p. 136.

(3) (1901) 2 Ch., 598.

either side of intention to determine the will, such notice to be of reasonable length, having regard to all the circumstances. I believe such a tenancy to be one for a determinate period in the sense of *Woodfall's* definition, having regard to what he adds about the effect of a licence which gives an exclusive right of occupation. I should be reluctant indeed to come to any other conclusion, and by so doing to throw into disastrous confusion the dealings and relations of adjoining pastoralists in the numberless cases which embody the same essentials as the present.

To the question whether a three days' notice is sufficient in reason to determine the will in such a case as this, I have no hesitation in replying in the negative, if there has been any notice at all. Such a notice would be inadequate to the point of outrage. But I am of opinion that there has not been any. Neither the action of the defendants' manager nor his verbal assertion of right made to the plaintiff had any such effect. There is nothing to show that Mr. Kilpatrick (whose authority has not been questioned or denied) ever sought or intended to put an end to the whole contract between the parties. His verbal assertion amounts to no more than a claim that he had a right to the use of the bridge waterhole under and within that contract. To interpret his action or his words as intended to relegate the two stations to their former positions, and to set them at arms length all along the creek, would be a strange and unreasonable construction. He acted merely with reference to one spot to which, certainly without warrant, he imagined that the agreement gave him a right of access with stock in time of drought. Therefore I conclude that what he did, though under a mistaken claim of right, was not inconsistent with the continuance of the tenancy, but was a breach of the agreement for exclusive occupation of the land and exclusive use of the water lying on it.

Mr. Kilpatrick, in his evidence, speaks of other occasions in previous years on which he took his sheep to the waterhole; and this was relied on as proof of some right on the part of Cornalla to use it. It may be taken that he is correct in saying that no objection was ever raised to this proceeding. But he does not assert that he gave notice of it, and the plaintiff swears that so

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far as he knew his sheep were never interfered with in the use of this waterhole until Kilpatrick cut the fence in April 1908. The proof therefore seems to amount to no more than this, that there had been antecedent violations of the plaintiff's rights on the part of the defendants, without protest, because the breaches were not known. Probably in each instance the real impelling cause was that the seasons were droughty, and that Kilpatrick found he could not do without the water for his sheep. And without that impelling cause he probably would not have invaded the plaintiff's rights last year.

For the above reasons I am of opinion that the appeal must succeed, and I agree in the proposed declaration, injunction and inquiry, and in the principle on which damages should be assessed.

O'CONNOR J. I take it as established beyond serious controversy that the parties to this action have by adoption and otherwise become bound by the agreement entered into in 1895 between R. Landale, then owner of Mundiwa, and Henry Ricketson, then owner of Cornalla. Unfortunately there is no written record of the agreement, and the Court is driven to ascertain its terms by circumstantial evidence, that is, by inference from the nature of the subject matter, the actings of the parties, and the relevant facts and circumstances existing at the time when the contract was made. Tuppal Creek, if one follows its windings, is for over thirty miles the natural boundary between the properties, and is apparently a most important source of water supply on those portions of both of them which front the stream. The legal boundary line is the middle thread of the creek. To maintain even a sheep-proof fence along that line was plainly enough in that part of the country impracticable. But when it became necessary for the purpose of preserving the grass in both holdings and of fulfilling the obligations of the *Rabbit Act* 1890 that the boundary fence should be made and maintained rabbit-proof, the impracticability became if possible more emphasized. It was therefore a necessity of the position in which the parties found themselves in 1895 that they should adopt the "give and take fence" then in existence as the common working boundary of

the properties, and that they should add to the agreement under which it had up to then been maintained such stipulations as had become necessary for making the fence effectively rabbit-proof and maintaining it so in accordance with the Rabbit Acts. As to the terms of the agreement made under these circumstances in 1895 we are, as I have pointed out, without any means of ascertaining them, except by inferences drawn from the facts in evidence in the light of that acquaintance with the ordinary working conditions of station properties in Australia, which must be taken to be common knowledge in this community, and of which Judges cannot be assumed to be ignorant. There is no dispute as to the greater part of the agreement. I shall refer therefore to those facts only which have a bearing on that part which is in dispute. It is, I think, clear that the fence made a fairly equitable distribution of the thirty miles of creek water, and that it did so not by dividing the stream along its course, but by crossing it where necessary, thus giving to each party exclusive access to all water on his side of the fence. One necessary result of the adoption of such a boundary was that certain portions of Cornalla lands became enclosed on the Mundiwa side of the fence, and certain portions of the Mundiwa lands became enclosed on the Cornalla side. It is to my mind conclusively proved that each party in fact exercised exactly the same rights of exclusive occupation over the portions so enclosed within his boundaries as he did over his own land. In the course of repair and maintenance it appears that the position of the fence with regard to the creek was necessarily altered on many occasions and in many portions by the party charged with the care of those portions, and that the alterations were so made without the consent of the other party. But I am satisfied on the evidence that those alterations had not, up to the time of the occurrence which is the subject of the present suit, affected the distribution of water, and that, however they might have altered the occupation by the parties of small portions of the creek frontage in different places, they were only such changes as were necessary for the safe maintenance of the fence as a rabbit-proof boundary. Turning now to the conditions and mutual obligations on the parties which the

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appellant claims must be inferred from these facts, two questions have been raised. First, was either party entitled as the respondents contend to determine the contract at a moment's notice, to pull down that portion of the fence which was on his own land, and erect it on his legal boundary in the bed of the creek? Or must a term be implied as the appellant contends that the agreement with the rights and obligations arising under it cannot be put an end to by one party without due notice to the other? What amounts to due notice under such an agreement I shall consider later on. The respondents in support of their contention relied upon the facts to which I have already referred, taking the actual alterations of the line of fence made without objection by one party without the consent of the other as indicating a course of action inconsistent with any obligation of notice by the party who wished to bring the agreement to an end. In my opinion the evidence does not support that position. The alterations were all of such a nature, and made, as far as one can learn from the evidence, under such circumstances as to be entirely consistent with the obligation to give that due notice which the appellant contends must be inferred from the nature of the agreement itself, and the whole object and purpose of its existence. The principle on which the Court should determine whether terms not expressed should be implied in a contract is well stated by Lord *Esher* M.R., in *Hamlyn & Co.* v. *Wood & Co.* (1), in a passage referred to in Mr. Justice *Cohen's* judgment in the Court below:—"I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned."

Later on, in support of that statement of the law, he adopts the following passage from the judgment of *Bowen* L.J. in *The Moorcock* (2):—"An implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or

(1) (1891) 2 Q.B., 488, at p. 491. (2) 14 P.D., 64, at p. 68.

express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction, and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have." Whether the agreement is written or oral or to be inferred from circumstances the principle as to the implication of its terms must be the same. The two main objects of the agreement were the erection and maintenance of a practicable working rabbit-proof boundary between the properties, and the securing of a fair distribution of the waters of the creek necessarily distributed by the line which the fence was bound to take. Unless each party was entitled to treat the boundary fence and the distribution of the water thus brought about as part of the settled conditions of his property with reference to which he might arrange the classification and grazing of his sheep and the general working of his station, the agreement would substantially fail in its purpose.

It was essential to the object at which they were both aiming that the arrangement should have a certain permanency. Under these circumstances it is impossible to avoid the conclusion that a term must be implied in the agreement that it could not be put an end to by one party without due notice to the other. In deciding what would under the circumstances amount to due notice another phase of the matter in controversy must be taken into consideration. It was contended by Dr. *Cullen* on behalf of the appellant that each party had a tenure of the land of the other enclosed within his boundaries which gave him a right of exclusive occupation indeterminable except after due notice. To that position I entirely assent. But then the question arises, what would amount to due notice to determine the tenure?

In my opinion the occupation of the land was merely ancillary

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to the fixing and maintenance of the fence on the line arranged. There could be no necessity for a tenure which would extend beyond the duration of the agreement to maintain the fence. A tenancy, however, not a mere licence to occupy during that period, must be implied. The right of exclusive occupation, which distinguishes a tenancy from a mere licence to occupy, must necessarily be inferred if the agreement is to be really effective. But no longer tenancy will be implied than would be essential for the purpose of an effective agreement. There could be no reason for the occupation by either party of the other's land, after the arrangement for the "give and take fence" had come to an end. The longest term therefore that can be necessarily implied is one to continue during the existence of the agreement for the maintenance of the fence and to be ended by the determination of that agreement. Taking that view, the only reference which I think it necessary to make to Dr. *Cullen's* alternative contentions as to the duration of the implied tenancy, is this:—There is no evidence on which it would be possible to base an inference that the tenure was to endure during the life of the fence. Secondly, implication of a tenancy from year to year goes far beyond the necessities of the position, inasmuch as the notice necessary to terminate the agreement for maintenance of the boundary fence might very reasonably fall short of the period necessary to determine a tenancy from year to year. What stipulation then must necessarily be implied as to the duration of the fencing agreement? Having regard to the tenure under which portions of the land were held, it must, I think, be inferred that it was not intended that either party should continue liable in respect of any portion of land which he ceased to occupy. But on the other hand, the necessity of a permanency in the arrangement would fairly justify the inference that the agreement was intended to remain in force so long as the parties occupied their respective holdings, unless it was sooner determined by reasonable notice on either side. There was thus created a definite term of the tenancy of each others lands, and the resumption of possession by either party of his own lands before the expiration of due notice would be a trespass for which the party injured would in the circum-

stances of this case have his remedy in a Court of Equity. Assuming, however, that the duration of the agreement for the definite period I have mentioned cannot be implied, there must, for the reasons to which I have before adverted, necessarily be inferred in the agreement a stipulation that it shall continue until after the expiration of a reasonable notice given by either party to the other. That amount of permanency at least must have been intended by the parties, and in that case each party was as to the lands of the other a tenant at will subject to an undertaking that the will to terminate should not be exercised until after the expiration of a reasonable notice of the ending of the fencing agreement. That undertaking, which in my opinion must be taken to be implied in the agreement, is plainly one to which a Court of Equity would give effective operation by enjoining the respondents against such violation of the agreement as would amount to an interference with appellant's equitable right to exclusive possession during the existence of the agreement. It is, I think, abundantly clear that at the time when the respondents pulled down the fence, removed it to the legal boundary in the creek, resumed possession of their land and deprived the appellant of the exclusive use of that portion of the creek which the boundary fence as arranged had given him, the agreement was still in full force. The respondents' letter of 8th April 1908 which was relied on as a notice to terminate cannot in my opinion have such an effect given to it. It is evident from its terms that it was never intended to have any such effect, nor indeed does it amount to more than an assertion on the part of the respondents of a right to dispossess the appellant of the exclusive use of that particular portion of the creek and to revert at once in that portion of the fence to the legal boundary. The agreement must continue or be discontinued as a whole. It cannot be treated as a series of separate agreements concerning each panel of fencing. And it is difficult to imagine that, under the circumstances then existing as proved by evidence, any sane person charged with the care of the respondents' property could have intended to put an end there and then to the whole arrangement for the "give and take fence" and all the advantages it involved and revert to the boundary *in medio filo.*

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But assuming that the letter in question could be taken as notice to terminate the agreement. The acts complained of were committed within three days afterwards. Three or four days notice of the determination of such an agreement would not only be in my opinion entirely unreasonable, but would not, under all the circumstances, amount to evidence on which a jury could legally find that reasonable notice had been given. The question thus arises, the appellant's rights having been invaded during the existence of the agreement, what relief can he obtain in a Court of Equity ? He is entitled, in the first place, to have it declared that he has a right to the exclusive occupation and use of all the land and water on his side of the boundary fence, as it was when the respondents' manager committed the acts complained of, and that his right is to continue in such occupation until after the expiration of a reasonable notice for determination of the boundary fence agreement. The Court is not called upon at present to define what would in this case be a reasonable notice. On that point I shall say no more than this, that in determining that question regard must be had to the time required for making reasonably sufficient arrangements for the working of appellant's property in respect of a rabbit-proof boundary along the creek and for the water supply of his lands abutting thereon, in substitution for the provision in these matters secured by the agreement. The appellant would also be entitled to an injunction to prevent similar invasions of his right until the agreement was determined by reasonable notice, and under sec. 9 of the *Equity Act* to damages for the injury actually sustained. If the appellant's allegations as to damages are on inquiry established, he would be entitled to substantial damages for the loss occasioned by the removal of his breeding ewes to another paddock, the cost of feeding them there, and the loss which he suffered by reduction of the percentage of lambs which followed. The evidence furnishes, I think, quite sufficient ground for ordering an inquiry as to damages. It follows that, in my opinion, the appeal must be allowed and the order of Mr. Justice *Cohen* set aside, and that this Court should now grant the relief which the Court below ought to have granted, and should in the appellant's

favour make the declaration and grant the injunctions above stated together with an inquiry as to damages.

ISAACS J. The plaintiff's case is based on the view that he is entitled to possession of all Cornalla lands and creeks north of conventional boundary fence either during the lifetime of the fence or until the determination of his right by notice, which learned counsel for the plaintiff contended was a six months notice expiring, as I understand, at the end of some year from the beginning of the arrangement.

His claim is to have a declaration of title to occupy the land and to use and enjoy it fully, that is exclusively, until the first, or alternatively the second event occurs, that defendants may be ordered to reinstate and repair the fence where broken down by them, and an injunction restraining the defendants from further interference with the fence.

He also claims damages, and a declaration as to the manner in which the damages should be assessed, a highly important feature of the case, and then some general and usual claims are added.

The real basis of the appellant's case, as appears from his claims for relief, is title, legal or equitable, to possession of the lands and waters north of the fence—either for the lifetime of the fence or as a yearly tenant. He may be entitled to something less; but that is the claim he has put forward and endeavoured to maintain.

The material facts upon which the case depends may be stated very shortly. In 1895 Robert Landale was the owner in fee of Mundiwa and Henry Ricketson the owner in fee of Cornalla, except lot 47 which he held under pastoral lease, then having about five years to run, the exact date is not stated. Between the two stations ran Tuppal Creek the true boundary, but the meandering course of the creek extended to about thirty miles, and presented natural difficulties, though of course not impossibilities, in the way of making and maintaining a rabbit-proof fence.

For many years the respective owners had, upon some terms absolutely unknown, made and maintained a "give and take fence," which adopted a comparatively straight line that was only about eleven miles long, and occupied a more accessible and stable position. Its convenience and economy were undoubted, and it

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needed only the mutual sense of advantage and accommodation to continue the arrangement so long as the still greater question —water—offered no opposing considerations.

Until 1895 the fence was simply an acting boundary fence of five wires. It was admitted in argument by learned counsel for the appellant—and in view of the frame of the suit, and the evidence, he properly and necessarily admitted—that the fence was not erected or even regarded as a permanent delimitation of the boundaries. The respective owners do not appear even to have had any doubt as to their actual boundaries, or to have agreed to alter them permanently. The location of the fence was at all times a temporary expedient only. A signal proof of this exists in the fact that the plaintiff (fol. 71) says the Tuppal Creek forms the boundary between Mundiwa and Cornalla, and (fol. 78) that even from 1891, when Robert Landale became sole owner of Mundiwa, to 1895, he kept in repair all the fence on his side of the creek, and Cornalla kept in repair all on that side of the creek, and each at his own cost.

In 1895 the necessity for making the boundary fence rabbit-proof arose, and an express verbal agreement was entered into between Robert Landale and Henry Ricketson that the fence should be made rabbit-proof with wire netting. It stood to reason that it would be very awkward to wire net the fence in patches—constantly cutting the coils and piecing them together would have made a poor job, and the subsequent repair would be very troublesome—and therefore it was made part of the arrangement that each should attend to the work of netting and repairing on one side of the Tuppal Bridge, Ricketson taking the east side and Landale the west. This again was a matter of practical convenience and not of permanence, as indeed is shown, *inter alia*, by the alterations of position of the fence by each party, according to his own ideas of advantage or convenience. This agreement was carried out by Ricketson until his death in 1901, and by Landale until his death in 1903, and apparently no disturbance of the working arrangement was complained of until 1908, when the acts the subject matter of this suit occurred.

It is necessary to consider the real character of the contract between Landale and Ricketson as the law regards it. This

depends on considerations both of fact and law. I am sorry that I am unable to view the position as my learned brothers have stated it.

Starting with the undoubted fact that the agreement though indefinite was not perpetual but revocable or determinable, the question is when and how it might be determined by either party. Though the only terms expressly stated were as to the netting and repair on the respective sides of the bridge, it could not be that either party was understood to be at liberty to abandon the line of fence at any moment and in any circumstances without warning. That would have been wholly unreasonable, and the law imports into a contract every reasonable condition not inconsistent with its language or some rule of law. (See *Jones* v. *Gibbons*) (1).

The position of the parties must therefore be regarded to ascertain what (if any) implied stipulation was reasonable. I attach no importance to any incidental or accidental benefits accruing to either party from the contract when made as assisting to construe the bargain. The advantages as to rates, or freedom from departmental requirements were not considerations moving from the parties themselves, and besides, as advantages, were mutual. But the alteration of the parties' own respective positions in relation to each other, the disadvantages they severally incurred for the sake of entering into the arrangement are proper matters for consideration in arriving at what each permitted the other to believe would be the duration of his consent to the existence of the fence as so agreed upon or the circumstances of its withdrawal. The facts are simple. Each was a station holder, who would or might at any moment during the continuance of the arrangement have stock upon his run, occupying any portion of it, and dependent upon all the grass and water on his side of the acting boundary fence. It would be altogether unfair and unreasonable to be at liberty, without regard to the then present circumstances, and without warning, to throw down the fence, or take away the netting, or alter the disposition of the water as in fact existing in consequence of the actual alignment of the fence. So much is clear; the problem

(1) 8 Ex., 920, at p. 922.

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being what notice or warning it is reasonable to infer or proper to hold, in view of legal principles, the parties implicitly incorporated into their bargain. The appellant contends that a tenancy from year to year was created, the argument being that when the parties agreed to the position of the fence they necessarily implied not only permission to each to use the land on his side of the fence though not in his title, but also the exclusive right to do so—that this in law constituted a lease. Further, that the lease being general was in law a tenancy from year to year, and at all events, there being mutual consideration that was equivalent to actual payment of rent, that any rent paid converted any tenancy at will into a tenancy from year to year, and consequently this was such a tenancy and a six months' notice terminating at the end of the same current year was necessary to determine the legal right of the plaintiff to the land and water of the defendants on the plaintiff's side of the fence. That was the first position taken up, and really the main position contended for. Then, it was said, that in any case the parties must have contemplated the continuance of the agreement during the life of the fence. I agree, as I have already said, that the agreement though terminable was not in all circumstances to be terminated instanter, and I agree that while the fence should stand it was to act the part of a dividing fence, and each was necessarily to have the exclusive use and occupation of the land and water on his side; and that in law this exclusive use and occupation while it lasted constituted a letting: *Cory* v. *Bristow* (1); *Taylor* v. *Pendleton Overseers* (2); *Glenwood Lumber Co.* v. *Phillips* (3); *Edwards* v. *Barrington* (4).

I agree also with the argument of learned counsel for the appellant that the letting was general and indefinite in its terms. It was not for the life of either party, and if it were, both of them are dead, and no later agreement is proved or relied upon. It could not be for the duration of their respective interests in their own land, because that would either be limited by their lives, which have ceased, or be coincident with their tenure, which would be equivalent as to most of their land, and wholly as to that of one

(1) 2 App. Cas., 262.
(2) 19 Q.B.D., 288.
(3) (1904) A.C., 405.
(4) 85 L.T., 650.

of them, to fee simple or perpetuity, and to this there are insuperable objections both of fact and law. First, it is a primary fact, as already shown, that the arrangement was to be temporary, and next, the common law knows nothing of leases in perpetuity: *Sevenoaks Railway Co.* v. *London, Chatham & Dover Railway Co.* (1), and *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* (2). Besides, the plaintiff does not allege that the arrangement was to be coincident with the tenure of the lands. Paragraphs 7 and 11 of the amended statement of claim are wholly opposed to any such understanding on the part of the plaintiff. There is yet a further element of fact which stands in the plaintiff's way as to such a term being considered part of the agreement.

Since the agreement of 1895 was made, lot 47 has twice altered in point of interest, namely, in July 1900 from pastoral lease to occupation licence, and in November 1904 from occupation licence to grant in fee. That would of itself destroy the whole condition. And beyond that, since 1902 or 1905, according as one or other portion of the evidence is accurate, Cornalla has ceased to have any holding at all or even occupation west of portion 47, which adds a further reason for terminating the agreement if the suggested duration coincident with tenure were accepted.

Regarding the question as one of legal interest or, in other words, lease, any attempt to create such a term would be ineffectual. It would not be definite so as to mark the duration of a lease. The following passage from *Sheppard's Touchstone*, 275, indicates the futility of attempting to create such a term.

"If A. make a lease to B. for so many years as A. and B. or either of them shall live, not naming any certain number of years; this cannot be a good lease for years. So if the parson of Dale make a lease of his glebe for so many years as he shall be parson there; this is not certain, neither can it be made so by any means."

And that being so, I see no reason for implying such a condition, but rather one for refusing to imply it.

The contention that the Court ought to infer that the consent was to endure while the fence lasted is in my opinion altogether

(1) 11 Ch. D., 635. (2) (1901) A.C., 426.

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untenable. How long did the parties think the fence would last? The amended statement of claim (par. 11) fixes the probable lifetime of the fence at 15 or 20 years after 1904, that is 1919 to 1924: the plaintiff's own evidence (fol. 179) is that it would probably last 40 years after 1895, that is 1935. Add to that uncertainty the further uncertainty caused by repairs, replacements, bushfires, floods, the wearing away unevenly in different places, and it becomes obviously a proposition impossible of acceptance. It is of course also open to the legal objection, already adverted to, that being uncertain, it cannot mark the term of a lease or legal interest in land. No other period was suggested for the lease. I shall presently refer to the argument that in law this was in the circumstances a tenancy from year to year.

I think it convenient at this point to state affirmatively what I consider the true agreement of 1895 should be held to be. In my opinion, if extended, it may be accurately stated as follows:—

(I.) The then existing five-wire fence should be wire netted, so as to be rabbit-proof, and so netted should continue to serve as a boundary fence so long as both parties consented to let it remain.

(II.) One party to repair west, and the other east of the bridge.

(III.) Either party might at any time withdraw his consent and at once terminate the arrangement, subject to this, that before withdrawing his consent or substantially altering the alignment of the fence, he should, if the then existing circumstances so required, give such notice or warning (if any) as in fairness was necessary to prevent prejudice to the other party.

(IV.) While the fence subsisted, it being physically inconsistent with use and occupation according to title, all land and water to whomsoever belonging should be used and occupied exclusively by the party on that side of the fence.

The first two clauses and the fourth are common ground. The third is a centre of dispute, and a great deal turns in this case on whether the contract is to be deemed to continue and the right to possession to continue until the expiration of a reasonable notice, or whether a notice reasonable or unreasonable terminates the arrangement, subject to liability for damages for an un-

reasonably short notice, or an injunction restraining the respondents from turning out the appellant until the expiration of a reasonable time after the notice.

There are several considerations which lead me to prefer the latter alternative, that is clause III., as above stated. First of all, the appellant's contention is altogether unreasonable, and leads to results which seem to me oppressive. In the present case, he says that, assuming there was a notice of revocation unreasonably short, and therefore bad and utterly void of any divestitive effect whatever, consequently after protracted litigation—it might be after repeated appeals lasting for years—he is still rightfully in and entitled to remain, and the respondents must begin *de novo*. If then his new notice is again held to be too short by reason of new circumstances, the cycle may be repeated, and so *ad infinitum*. I cannot think this is possible.

The next consideration is that the duration is entirely uncertain. A notice given in January would probably differ greatly from one given in June; and in one particular year, from the number of sheep on the station, or the condition of the station itself, or the known intentions of the owner, a notice reasonable in other years might then be most unreasonable, and *vice versâ*. A notice reasonable if given to one might be very unreasonable if given to the other. Indeed, the circumstances might be such as, for instance, abandonment of stock holding altogether for a time, as not to render it improper or unfair to alter the alignment to the extent effected in the present case without any notice whatever, because no prejudice could possibly ensue.

I therefore hold the view that the third clause, as I have framed it, is substantially right, and is a collateral personal obligation (see *Mellor* v. *Watkins* (1), and *Kerrison* v. *Smith* (2),) which, if violated, may be vindicated either by damages or injunction, so as to secure to the opposite party all the benefit which he reasonably can claim, and without enabling him to obtain more than he could fairly expect to have.

I now proceed to examine the further proposition of law advanced by the appellant as to whether the tenancy existing during the time the fence subsists is from year to year.

(1) L.R. 9 Q.B., 400, at p. 405. (2) (1897) 2 Q.B., 445.

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Reverting to the initial fact that no permanent alteration or demarcation of boundary was contemplated, we have to recollect that each party was entitled to the creek bed *ad medium filum*, and it is an obvious inference that, when locating the fence for temporary purposes, the parties endeavoured to preserve during the period of its existence the true proportions of water access. This was in all probability carefully regulated when fixing the position of the fence, but the apportionment of grass land and of water access was not the primary object of the parties. They did not at first make that apportionment, agree to a lease and then erect a fence to mark it off, but they first directed their minds to building a convenient and economical fence, taking care incidentally that so far as possible the true proportions of water should remain; mutual compensations being made here and there for necessary departure from the actual boundary.

I entirely agree with *Cohen* J. when he says:—"The main and essential purpose of the various arrangements between the successive owners was a boundary and a boundary rabbit-proof fence."

This is the fair and, as I think, the irresistible conclusion from the only facts presented. The fact that the onus of proof rests on the plaintiff of establishing anything more favourable to himself makes his case the more difficult to sustain.

In *York* v. *Vincent* (1), *Prendergast* C.J. thus described the legal effect of a similar agreement:—"I think it a purely personal agreement, not in any way affecting the land, though no doubt affecting the occupation as long as both occupiers allow it to continue in force."

When this was done and the occupation proceeded accordingly, was there in law as the appellant contended strenuously a tenancy from year to year? No commencing date has been suggested; but passing that by, I see no sound foundation for the argument. Whatever lease exists arises purely upon implication from the indefinite use and occupation of the land. There was no agreement for a lease in the ordinary sense, none for a period, no holding over. It seems to me the law is not open to doubt, and that the course of decisions for more than 100 years is unbroken.

(1) 17 N.Z.L.R., 292, at p. 300.

In 1778 *De Grey* C.J. in *Roe d. Bree* v. *Lees* (1), says :—"All leases for uncertain terms are *primâ facie* leases at will ; it is the reservation of an *annual rent* that turns them into leases from year to year."

In 1786 in *Right d. Flower* v. *Darby* (2), *Buller* J. said :—"The reason of it (that is the rule of law which construes what was formerly a tenancy at will of lands into a tenancy from year to year) is, that the agreement is a letting for a year at an *annual rent*, then if the parties consent to go on after that time, it is a letting from year to year."

In 1811 in *Richardson* v. *Langridge* (3), *Chambre* J. says :—"Surely the distinction has been a thousand times taken : a mere general letting is a letting at will : if the lessor accepts *yearly* rent, or rent measured by any aliquot part of a year, the Courts have said, that is evidence of a taking for a year." In 1842, in *Braythwayte* v. *Hitchcock* (4), *Parke* B. said with relation to this point :—"Payment of rent, indeed, must be understood to mean a payment with reference to a yearly holding ; for in *Richardson* v. *Langridge* (5), a party *who had paid rent* under an agreement of this description, but had not paid it with reference to *a year*, or any aliquot part of a year, was held nevertheless to be a tenant at will only."

In 1845 the same learned Judge in *Doe d. Hull* v. *Wood* (6), again says that *Richardson* v. *Langridge* (5) correctly lays down the law on the subject, viz. :—"That a simple permission to occupy creates a tenancy at will, unless there are circumstances which show an intention to create a tenancy from year to year ; as, for instance, an agreement to pay rent by the quarter, or some other aliquot part of a year."

The words "as, for instance" are not intended to weaken the rule he has just affirmed, as laid down in *Richardson* v. *Langridge* (5), that so far as rent is concerned, payments under an indefinite letting in order to create a tenancy from year to year, must be referable to a year or an aliquot part of it. No case exists that has been cited, or that I am aware of, which runs

(1) 2 W. Bl., 1171, at p. 1172.
(2) 1 T.R., 159, at p. 163.
(3) 4 Taunt., 127, at p. 132.
(4) 10 M. & W., 494, at p. 497.
(5) 4 Taunt., 127.
(6) 14 M. & W., 682, at p. 687.

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contrary to this. Every text writer takes the same view. Thus, J. W. Smith, the learned editor of the *Leading Cases*, in his first lecture (see *Smith's Law of Landlord and Tenant*, 3rd ed., p. 30), says :—" The payment of rent must, however, in order to have the effect of enlarging the tenancy at will into a tenancy from year to year, be made *with reference to a yearly holding.* Similarly in *Tudor's Leading Cases*, 4th ed., p. 23 ; *Foa*, 4th ed. (1907), p. 395 ; and other text books.

I therefore feel no hesitation in expressing my opinion that there was no tenancy from year to year.

Well, if it be not a tenancy from year to year, it must in the circumstances be a tenancy at will. Then it was argued that even a tenancy of this nature may yet be impliedly non-determinable except at the expiration of a reasonable notice to quit. This appears to me to involve a contradiction. Merely because the lessor under an implied tenancy at will is bound contractually by a further implication to give reasonable notice so as not to prejudice the lessee, the contention is that, therefore, the tenancy itself must continue, that is the lessee's legal title to and tenure in the land itself continues, until the expiration of a reasonable notice to quit. This proposition likewise suffers from a dearth of supporting authority, and, if true, would afford a defence in ejectment in a Court of law, and render equitable interposition unnecessary. That argument was addressed to a Court once, and I think only once before, in 1830, in the case of *Doe d. Nicholl* v. *M'Kaeg* (1). It was urged that the tenant at will was entitled to some notice, that he was occupying the house as part of his reward for doing the duties of minister to a chapel, and could not at a moment's warning be called upon to go out with his family and furniture into the street at the peril of being dealt with as a trespasser. In all cases of continuing contract, it was urged, some reasonable notice must be given of putting an end to it. Now that is precisely what is urged here. But Lord *Tenterden* C.J., who spoke for himself and the whole Court of King's Bench, said what appears to me to equally answer the plaintiff's contention in this case. His words were :— " It was contended, that a demand of possession was not sufficient

(1) 10 B. & C., 721, at p. 723.

in this case to determine the tenancy, but that a reasonable time ought to have been allowed the defendant for the purpose of removing his goods. We can find no authority in the law for such a position. The general rule is, that where an estate is held at the will of another, a demand by that other determines the will. If, in this case, we were to hold otherwise, we should introduce a new rule, not to be found in the books, which might be productive of great inconvenience; for then, in every case of tenancy at will, it might be made a question, what is a reasonable time for removing goods. If the tenant, after the determination of his tenancy in this case, by a demand of possession, had entered on the premises for the sole purpose of removing his goods, and continued there no longer than was necessary for that purpose, and did not exclude the landlord, perhaps he might not have been a trespasser; but, however that may be, we are of opinion, that he being a tenant at will, his estate was determined by a demand of possession, and, consequently, that the lessors of the plaintiff were entitled to recover."

What Lord *Tenterden* and his fellow Judges refused to do, appears to me not distinguishable from what this Court is now asked to do. Nor is it a valid answer that equity would take a different view from the standpoint of implied agreement. In *Spurgin* v. *White* (1), Vice-Chancellor *Stuart* followed *Doe* v. *M'Kaeg* (2), in circumstances which strongly emphasize the view that I have expressed. White was engaged as manager of an association of which plaintiffs were trustees, upon the terms of receiving a certain salary, and while manager, of occupying part of the house, the legal estate of which was in the trustees, and also of using another part of the house, during his occupation as manager, for the purpose of carrying on his own trade as bookseller. It was part of the agreement that six months notice of separation should be given on either side.

The Committee terminated his engagement instanter, and the question arose what was the nature of his holding. The Vice-Chancellor said:—"It seems to me that the true view of Mr. White's rights of occupation and use of the shop for the purposes of trade or any other use is this, that it is the same precarious

(1) 7 Jur. N.S., 15, at p. 18. (2) 10 B. & C., 721.

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right which has been dealt with in many cases, but in particular such as was dealt with by the Court of Queen's Bench in the two cases of *Doe d. Jones* v. *Jones* (1), and *Doe* v. *M'Kaeg* (2).

The learned Vice-Chancellor after quoting Lord *Tenterden* said that in the case before him, however, there was a right to six months notice, but he was clearly of opinion that the only liability of the plaintiff at law for not giving that notice was in damages; and he left the question of equitable interposition of the Court on grounds of *personal obligation* to be determined upon the facts as they should appear at the hearing of the cause. So far therefore as the plaintiff's case rests upon any tenure in the land beyond that of a strict tenancy at will it fails.

I do not agree with the view that because a tenancy from year to year can be created, with any period of termination: see *In re Threlfall* (3), that the same can be done in the case of a tenancy at will. In the first case there is a term—a definite duration *primâ facie* agreed upon—and that may be made defeasible upon any condition the parties choose. But you cannot defeat a term that does not exist, and when a letting is entirely indefinite as to its duration you cannot convert it into a definite term by a condition as to notice which is equally indefinite. Once concede it is a tenancy at will, there can be no condition inconsistent with it. See *per Cozens-Hardy*, M.R., in *Morgan* v. *William Harrison, Ltd.* (4)—If A. lets his land to B. for an indefinite period, subject to a provision that A. shall not determine the tenancy until after reasonable notice, it is plain that it is a tenancy strictly at will, otherwise B. could not determine it at his will, which would be absurd. And so if the tenant alone was bound to give the notice. If both parties are bound to give reasonable notice, that does not make a term certain. If it is certain, what is the certain term? Is it the time when the landlord's or the tenant's notice given in January, or is it the notice which either would be bound to give in 1895 or 1905 under totally different circumstances? *Doe d. King* v. *Grafton* (5) was, as pointed out both by Sir *Gorell Barnes*, President, and *Farwell* L.J., in *Lewis* v. *Baker* (6), to be a lease for a certain

(1) 10 B. & C., 718.
(2) 10 B. & C., 721.
(3) 16 Ch. D., 274.
(4) (1907) 2 Ch., 137, at p. 143.
(5) 18 Q.B., 496.
(6) (1906) 2 K.B., 599, at p. 603.

term, that is, six months, which at once distinguishes it from an indefinite letting.

I cannot see the certainty. For instance, what could be assigned? There is, of course, a great difference in the meaning of the word "term" as indicating a term of an agreement and the term of a lease, and I think some confusion may arise by overlooking this distinction. So far, I have stated what I understand to have been the mutual relations of the parties before the acts that are complained of. I now come to consider the effect of these acts, and to deal first with the case from the aspect of legal title.

The plaintiff contends that, even if the defendants could at their will determine the tenancy, they have not done so; and that what they have done amounts merely to a trespass, because the defendants had not evinced the intention to put an end to the entire arrangement. Here again, I am unable to agree to the view so presented. As I understand the law, the landlord of a tenant at will can never trespass on the property let. If the act complained of is with the consent of the tenant, or in pursuance of the agreement of tenancy, it is of course not a trespass, because lawful: see *Lynes* v. *Snaith* (1). If it is opposed to or without the tenant's consent it is regarded by the law as *ipso facto* a determination of the tenancy, and equally free from liability to trespass. *Doe d. Bennett* v. *Turner* (2) is precisely in point. There the plaintiff in 1817 let lands to the defendant as tenant at will. In 1827 the plaintiff entered and took some stone from a quarry in the land. He did not intimate to the defendant that he terminated the agreement, and in fact did not communicate with him at all on the subject. The single fact existed that some stone was taken without defendant's consent. The defendant was allowed to remain otherwise undisturbed for twelve years longer, that is 1839, and an ejectment then brought; the defendant set up a statutory bar because he said he had been tenant at will for over twenty years and the entry in 1827 was no termination of the tenancy.

Only two facts were left by *Parke* B. to the jury, (1) whether the defendant was tenant at will, and (2) whether the act of 1827

(1) (1899) 1 Q.B., 486.

(2) 7 M. & W., 226.

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was with or without the defendant's consent. The jury found that the defendant was a tenant at will, and that the act was done without his consent. In Banco the Court was asked to say that it should have been left to the jury to say whether the entry was made with an intention to determine the tenancy at will.

The Court held that any act of ownership on the land which is not excused at the time is a determination of the will; that the tenancy was necessarily determined by the act of ownership in 1827 whatever the actual intention might have been; and therefore there was not a continuous tenancy at will from 1817 to 1839. A new trial was directed on another point, and the case came before the Court of Exchequer Chamber (1). Lord *Denman* C.J., delivering the opinion of himself, *Tindal* C.J. and five other Judges, said :—"The intent of an entry is undoubtedly in many cases important, but in the case of a tenancy at will, *whatever be the intent of a landlord*, if he do any act upon the land, for which he would otherwise be liable to an action of trespass at the suit of the tenant, such act is a determination of the will, for so only can it be lawful, and not a wrongful act."

The act complained of in the case at bar was, on the authorities I have referred to, a clear determination of whatever tenancy at will existed and, as shown by *Spurgin* v. *White* (2), equity would so regard it as well as law. Looking at the plaintiff's case therefore from the standpoint of actual title to or interest legal or equitable in the defendants' land, I am of opinion it cannot be sustained.

The plaintiff then relies on the implied personal obligation, which Ricketson undertook in 1895, and which it is said has been inherited by his trustees, the present defendants.

Under the *Equity Act* 1901 damages may be given if the suit when instituted was one in which specific performance or injunction could properly have been granted. The whole matter then refines itself down to the question whether either of those remedies was applicable, and if so to what extent?

If specific performance is asked—what decree should be made? As to specific performance, there was no agreement for a lease, *Browne* v. *Warner* (3), and no document which is void at law as

(1) 9 M. & W., 643, at p. 646. (2) 7 Jur. N.S., 15.
(3) 14 Ves., 156, 409.

a lease, but considered good in equity as an agreement for a lease, *Parker* v. *Taswell* (1), therefore there can be no decree to grant a lease, or any injunction on the footing of the appellant having an interest in the land: *Zimbler* v. *Abrahams* (2). But there was, in my view, a legal right to use and occupy exclusively unless and until the consent was withdrawn, and the arrangement thereby terminated, and further there was a legal right to have such notice or warning of intention to terminate as the circumstances then existing rendered reasonable. The withdrawal of consent at will, and the personal agreement not to exercise the power of withdrawal until after due notice, are separate and compatible rights (see *Mellor* v. *Watkins* (3) and *Kerrison* v. *Smith*, (4)). Now the appellant contends in the first place that there never was any termination of the arrangement, or in other words withdrawal of consent that it should continue. He advances what appears to me an inconsistent doctrine, that the respondents were at the same moment both willing and unwilling that the arrangement should continue; that while they refused to allow the alignment of the fence to remain as it was they were still perfectly agreeable to hold to the arrangement to leave it undisturbed. I must confess my mind cannot grasp this affirmative-negative argument, an argument which so far as a tenancy at will is concerned—and that is after all only a form of contract—has been rejected by a most powerful Court.

It is one of the unquestioned positions in the case that the water question was of transcendent importance. Highly advantageous as the convention regarding the fence might be, it would not have been entertained for a moment had it meant the abandonment of a proportionate share of the water. And the vital importance of this consideration in determining whether the act of Kilpatrick was a revocation of consent will be at once perceived. To shift back the fence so as to assume exclusive control of a permanent waterhole in a time of drought was a step which went to the very heart of the transaction. Apart from express announcement to the contrary, it must, as I conceive, be taken

(1) 2 DeG. & J., 559; 27 L.J. Ch., 812.
(2) (1903) 1 K.B., 577.
(3) L.R. 9 Q.B., 400.
(4) (1897) 2 Q.B., 445.

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as a refusal any longer to stand by the arrangement so long acquiesced in.

The facts as stated in evidence are not disputed, and it is really a matter of law as to their effect.

Reading the letters of 8th and 9th April, the plaintiff's own evidence at folio 126 and following folios, and Kilpatrick's evidence at folio 470 and following folios, it appears to me the testimony on both sides leads to one conclusion only, that Kilpatrick claims to do and did what is complained of *on the footing of a proprietary right—and by virtue of the respondents' ownership—not by virtue of any contractual right.* He may have considered that the understanding as to the fence in no way precluded the assent of the proprietary rights in the case of need. But having asserted his right to resume the benefits of the land and water the respondents owned, and having asserted it on the ground of ownership, notwithstanding the appellant's claim to object because of the long continued existence of the fence, I cannot understand why his action should not be held to be a total repudiation henceforth of the bargain whatsoever it was.

In an ordinary contract not open to rescission by one party only, the refusal of one to perform an obligation which he is bound by the contract to perform and which goes to the essence of the bargain, is a repudiation of the contract even although he misconstrues it, and persists in asserting that no such obligation exists. The true question in such a case is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. See *per* Lord *Collins* in *General Billposting Co. Ltd.* v. *Atkinson* (1). The other party may accept the repudiation and terminate the contract. In the present case, either party may himself rescind, and by parity of reasoning I apprehend that what would amount to a repudiation of the contract—that is a refusal to perform it, or a refusal to perform some term of it, going to the root of the bargain—is an effectual announcement of an intention no longer to be bound by it, and that whether in addition to the breach its terms are disputed or not. If it is not, then the removal back by Kilpatrick of the whole of the fence on Cornalla, on the ground of proprietary

(1) (1909) A.C., 118, at p. 122.

right, if only it were accompanied by an assertion that the contract entitled him to do so, would not be renunciation either.

In truth Kilpatrick's displacement of the fence, blocking access to the waterhole, went to the very root and essence of the arrangement. It was simply incompatible with the maintenance of the old convention. If the matter were regarded either as a tenancy at will or a licence the revocation would be complete on the authorities quoted. *Quoad* the area resumed, there can only be one answer to the question "whether the acts and conduct of the party evince an intention no longer to be bound by the contract."

It is immaterial, in my view, that the rest of the fence was not removed. That was unnecessary and would have been churlish, but the most that can be made of that fact, in my opinion, is that, although the old arrangement was gone, the respondents were willing to stand by a new one consisting of the altered alignment. I therefore hold the act of the defendants terminated the arrangement. If *Doe d. Bennett* v. *Turner* (1) is right the respondents could not be trespassers on their own land, held by the appellant on the mere tenancy at will, and if not trespassers, what right can the appellant possibly have beyond the personal obligation of the respondents not to re-enter without due warning.

Besides, in their statement of defence the respondents unequivocally take up the position that they are entitled by virtue of ownership, whatever the contract might have been, to have access to the water (fol. 230). No clearer or more formal intimation of intention not to continue the arrangement, whatever it was, so as to preclude access to the waterhole can be imagined, and I conceive it is contrary to all practice of the Court of Equity to make a decree on the basis of a continuing assent, which is decisively negatived on the pleadings. In *Clough* v. *London and North Western Railway Co.* (2), it was held, on the analogy of the law as to landlord and tenant, that a defendant having the right to rescind a contract on the ground of fraud, may do so in his plea, and that no prior declaration of intention was necessary, and that it was not a valid argument on the part

(1) 9 M. & W., 643.

(2) L.R. 7 Ex., 26.

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of the plaintiff that at the time of action brought there was a good vested right of action.

Therefore, upon the pleadings and the evidence I am of opinion the Court cannot treat the respondents' will as still continuing, and proceed to grant an injunction which is really specific performance, and the assumption that a tenancy at will or, what is tantamount to it, the agreement which gives rise to it, as still subsisting. That however does not end the matter. The circumstances may however have required a larger notice. Damage may have ensued by reason of an unreasonably short warning. There is really no proper evidence of damage before the Court. None accrued by reason of an invasion of rabbits, and that head of damage was abandoned (fol. 408). There was some evidence reserved for inquiry which might or might not establish damage, according to further testimony. But at present the Court is not, I think, able to say judicially whether or not the time allowed—though extremely short—was productive of damage which would have been avoidable had a more extended warning been given.

In my opinion the appellant has failed to establish any right to remain on the land beyond a reasonable time after the notification to resume the waterhole (whatever that may be and as to which there is absolutely no evidence at present before the Court). But it is safe to say that the reasonable time, though possibly unexpired on 14th May 1908, when the bill was filed, had ended before 16th December 1908, when the judgment was given by *Cohen* J. And in any event the onus lay on the appellant of showing that even at the date of the bill that reasonable time had not elapsed. He did not do so, and mainly because it was not treated by him as part of his case. He could not, therefore, in any view be entitled to an injunction at the time of decree, and, *a fortiori*, he is not entitled to an injunction now. From the dearth of evidence as to reasonable time and as to damage resulting from any breach of the implied undertaking to give reasonable notice, I should be disposed to hold that the appellant had entirely failed to establish any claim to relief, and that the appeal should be dismissed if it were not for the fact that at the trial certain evidence of damage was reserved for inquiry. It is not merely the evidence that was actually reserved,

but the fact of that reservation may have induced the appellant to refrain from adducing further evidence of damage, and on the whole I think there should be an inquiry as to what (if any) damages were sustained by reason of any unreasonably short notice. That is the fullest extent of relief to which the appellant is, in my opinion, entitled, and even that is some indulgence having regard to his case as framed.

Appeal allowed. Judgment and decree appealed from discharged. Substitute declaration that the plaintiff is entitled under the agreement of 1895 *to exclusive occupation of the land and water north of the fence as it stood on 9th April* 1908 *until the agreement shall have been terminated by a reasonable notice by either party. Injunction to restrain defendants until such termination from interfering with such occupation, or destroying or interfering with the fence as it then stood, except for the purposes of maintenance or repair. Inquiry as to damages. Defendants to pay costs of suit up to hearing. Respondents to pay costs of appeal. Further consideration reserved. Case remitted to Supreme Court.*

Solicitors, for appellant, *W. A. Windeyer* for *Windeyer & Alexander.*

Solicitor, for respondents, *Wilkinson & Osborne,* for *H. L. Wilkinson,* Deniliquin.

C. A. W.