[HIGH COURT OF AUSTRALIA.]

BURNHAM . . . . . APPELLANT;
PLAINTIFF,

AND

CARROLL MUSGROVE THEATRES LIMITED AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1928.

SYDNEY, *Aug.* 1, 2, 3, 7, 8.

MELBOURNE, *Oct.* 16.

Knox C.J. Isaacs, Higgins, Gavan Duffy and Powers JJ.

Landlord and Tenant—Estoppel—Action of ejectment—Issue—Effect of judgment—Res judicata—Weekly tenancy—Tenant holding over after expiration of term—Acceptance of weekly rent—Terms implied by law—Fair rents—Restriction on landlord's right to recover possession—Shop reasonably required for purpose of reconstruction to substantial extent—Greater hardship caused by refusing than by granting order—Conveyancing Act 1919 (*N.S.W.*) (*No.* 6 *of* 1919), *sec.* 127*—*Fair Rents Act* 1915 (*N.S.W.*) (*No.* 66 *of* 1915), *sec.* 21A (1) (*f*)—*Fair Rents (Amendment) Act* 1926 (*No.* 2 *of* 1926), *sec.* 11.*

The judgment in an action of ejectment is only an estoppel between the parties on the statutory issue as to whether or not the claimant was entitled to possession on the day named in the writ, and not as to any facts decided by the jury in such action.

* The *Conveyancing Act* 1919 (N.S.W.), sec. 127, provides:—"(1) No tenancy from year to year shall, after the commencement of this Act, be implied by payment of rent; if there is a tenancy, and no agreement as to its duration, then such tenancy shall be deemed to be a tenancy determinable at the will of either of the parties by one month's notice in writing expiring at any time. (2) This section shall not apply where there is a tenancy from year to year which has arisen by implication before the commencement of this Act: Provided that in the case of any such tenancy in respect of which the date of its creation is unknown to the lessor or the lessee, as the case may be, who is seeking to determine the same, such tenancy shall, subject to any express agreement to the contrary, be determinable by six months' notice in writing" &c.

The *Fair Rents Act* 1915 (N.S.W.), sec. 21A, inserted by sec. 11 of the *Fair Rents (Amendment) Act* 1926 (N.S.W.),

A weekly tenant who, after the termination of his tenancy, holds over, with the consent of his landlord, without any agreement other than that implied by law from the continuance in possession and acceptance of a weekly rent, continues to hold as a weekly tenant, and is not entitled to one month's notice under the provisions of sec. 127 of the *Conveyancing Act* 1919 (N.S.W.) for the determination of such tenancy: that section has no application to cases where before the Act no implication of a tenancy from year to year would have arisen.

A landlord required possession of a shop in order that he might effect some external alterations and also remove a partition from between the shop and an adjoining shop, which had been empty for a long time, and from the resultant combined shop he would receive a weekly rent of a sum considerably greater than the sum of the rents of the two shops if let separately.

Held, by *Knox* C.J., *Higgins*, *Gavan Duffy* and *Powers* JJ. (*Isaacs* J. dissenting), that the shop was reasonably required for the purpose of reconstruction to a substantial extent, and that greater hardship would be caused by refusing to grant an order for possession than by granting it.

Decision of the Supreme Court of New South Wales (Full Court): *Burnham* v. *Carroll Musgrove Theatres Ltd. and Victoria Arcade Ltd.*, (1928) 28 S.R. (N.S.W.) 169, affirmed.

APPEAL from the Supreme Court of New South Wales.

In December 1920 the appellant, Arthur Burnham, became tenant to the respondent, Carroll Musgrove Theatres Ltd., of a shop in Elizabeth Street, Sydney, at a rental of £5 per week, and he continued in occupation until after an order made by *Isaacs* J., on 7th September 1926, referred to later. At an early stage of the tenancy a dispute arose between the parties as to its terms—the Company contending that the appellant was a weekly tenant and the appellant claiming that he had an agreement with the agents of the respondents for a lease for three years, with a right under certain circumstances to a further period of three years. The Company, which had prepared a scheme for a reconstruction of the Victoria Arcade, of which the shop in question formed part,

provides: "(1) No order or judgment for the recovery of possession of any dwelling-house or shop, or for the ejectment of a lessee therefrom, shall be made or given unless—(*a*) some rent lawfully due from the lessee has not been paid, or some other obligation of the tenancy (whether under the lease or under this Act), so far as the same is consistent with this Act, has been broken or not performed; or . . . (*f*) the dwelling-house or shop is reasonably required by the lessor for the purpose of demolition or of reconstruction to a substantial extent and the Court is satisfied that greater hardship would be caused by refusing to grant an order or judgment for possession than by granting it."

H. C. OF A. 1928.

BURNHAM v. CARROLL MUSGROVE THEATRES LTD.

made more than one unsuccessful attempt to recover possession of the shop by legal proceedings. In September 1925 the other respondent, Victoria Arcade Ltd., became the owner of the property subject to the appellant's interest. On 24th September 1925 the appellant instituted a suit against both companies for specific performance of the agreement for a lease. The respondent Victoria Arcade Ltd. on 22nd October 1925 filed a counterclaim for recovery of the premises, having in the meantime served the appellant with a week's notice to quit. The suit and counterclaim came on for hearing in June 1926 before *Davidson* J., who dismissed the suit on the ground that there was no proof of the alleged agreement, upheld the counterclaim and made an order for the delivery up of possession by the appellant within fourteen days. After the conclusion of the evidence, and after the suit had been dismissed, but before argument on the counterclaim, the appellant (who appeared in person) said: "Can't I mention with regard to the new Act of the Fair Rents?" This, apparently, was the only reference made at the hearing to the *Fair Rents (Amendment) Act* 1926 (N.S.W.), which had become law on 8th February 1926. The appellant appealed to the Full Court of the Supreme Court of New South Wales from the judgment of *Davidson* J. Upon the hearing his counsel abandoned the appeal except with regard to the counterclaim. That appeal was dismissed on 17th August 1926, and the appellant was ordered to deliver up possession within fourteen days, the enforcement of the decree made by *Davidson* J. having in the meantime been suspended. He appealed to the High Court, and continued in possession, having paid no rent since the filing of the counterclaim in October 1925. On 7th September 1926 the respondents obtained an order from *Isaacs* J. for leave to prosecute the judgment appealed from upon giving security to abide by any order the High Court might make upon the appeal. The appellant thereupon gave up possession to the respondent Victoria Arcade Ltd., which completed the old reconstruction scheme by converting the shop in question and an adjoining shop into one, and by making other alterations, and continued in occupation by its tenants. On 18th November 1926 the appeal came on for

hearing before the High Court (1). The Court allowed the appeal so far as the counterclaim was concerned, and remitted the matter of the counterclaim back to the Supreme Court to be reheard, with liberty to all parties to apply for leave to amend the pleadings relating to the counterclaim. The appellant amended his defence to the counterclaim by pleading that the premises were a shop within the provisions of the *Fair Rents Acts*; the respondent Victoria Arcade Ltd. replied that the shop was reasonably required for the purpose of reconstruction to a substantial extent, and that greater hardship would be caused by refusing possession than by granting it. The matter came on for rehearing before *Davidson* J. on 12th September 1927. At the hearing the appellant obtained leave to make a further amendment, setting up that the respondents were estopped from alleging that he was a weekly tenant, because of the judgment in an ejectment action between the appellant and the respondent Carroll Musgrove Theatres Ltd. in 1923, and the respondent obtained leave to add a further claim to possession based upon the non-payment of rent by the appellant. *Davidson* J. found upon the evidence that the appellant went into possession of the premises originally as a weekly tenant, that this tenancy was determined in 1922 by one of several notices to quit that were in evidence, that the appellant afterwards continued in possession, paying the same rent as before, but that, as the parties were not in agreement as to the nature of the tenancy, they agreed that the rent should be paid and accepted without prejudice to the actual legal position. His Honor drew the conclusion that as the parties were not *ad idem* no terms could be inferred by way of agreement for the duration of the tenancy, and that therefore it must be taken to be a tenancy at will, without any period fixed for its duration. He held that sec. 127 of the *Conveyancing Act* 1919 (N.S.W.) applied to the case, and that the tenancy was accordingly determinable by one month's notice. As this notice had not been given, *Davidson* J. held that the tenancy was still undetermined, and the counterclaim failed. In the course of the hearing of the remitted counterclaim the issue, the *postea*, the judgment for the defendant (appellant) in ejectment and the summing-up to the jury by the

(1) (1926) 39 C.L.R. 600.

H. C. OF A. 1928. BURNHAM v. CARROLL MUSGROVE THEATRES LTD.

presiding Judge in an action of ejectment brought by the respondent Carroll Musgrove Theatres Ltd. against the appellant were tendered in evidence on behalf of the appellant, but were rejected by *Davidson* J. These ejectment proceedings were not so tendered on the original hearing of the suit in which his Honor, in dismissing the suit, held that the appellant had failed to establish the alleged agreement for a lease for three years (*Burnham* v. *Carroll Musgrave Theatres Ltd.* (1)). On the issue raised by the amended pleadings to the counterclaim under the provisions of sec. 21A of the *Fair Rents Act* 1915 (N.S.W.) as amended by sec. 11 of the *Fair Rents (Amendment) Act* 1926, *Davidson* J. held that the respondent would not be entitled, even if the tenancy had been properly determined, to have claimed under the provisions of that Act that it was entitled to proceed for an order for ejectment. The respondent Victoria Arcade Ltd. appealed to the Full Court of the Supreme Court of New South Wales, which allowed the appeal: *Burnham* v. *Carroll Musgrove Theatres Ltd. and Victoria Arcade Ltd.* (2).

From the decision of the Full Court Burnham now appealed to the High Court.

Other material facts are stated in the judgments hereunder.

H. V. Evatt and *Gallagher*, for the appellant. If there is an issue raised between landlord and tenant as to the duration of the tenancy and that issue is determined by the Court, then that judgment is conclusive as to the position as at the date of the writ. Here it was established in ejectment proceedings before a magistrate in 1922, and also in the Supreme Court in 1923, that at the date of the commencement of the respective actions the tenancy was more than a weekly tenancy, therefcre the respondent is estopped from denying that fact. The trial Judge was in error in rejecting the tender of evidence of the proceedings in ejectment in the Court of Petty Sessions, the notice under the seal of the respondent Carroll Musgrove Theatres Ltd. handed to the appellant and demanding rent from him, the ejectment proceedings in the Supreme Court, and the entry in the minutes of the Carroll Musgrove Theatres Ltd. as to the proceedings in the Court of Petty Sessions. Quite

(1) (1926) 26 S.R. (N.S.W.) 372. (2) (1927) 28 S.R. (N.S.W.) 169.

independently of estoppel the appellant is entitled to show that there never was a weekly tenancy between the parties.

[KNOX C.J. referred to *Stephenson* v. *Garnett* (1).

[*Teece* K.C. referred to *Gandy* v. *Gandy* (2); *Poulton* v. *Adjustable Cover and Boiler Block Co.* (3).

[ISAACS J. referred to *Badar Bee* v. *Habib Merican Noordin* (4).]

Even if a weekly tenancy did exist originally, it was determined by the notice to quit given in 1922; and thereafter a tenancy existed under sec. 127 of the *Conveyancing Act* 1919. The contents of the information in the ejectment proceedings indicate the view then held by the respondents as to the nature of the tenancy (*Flitters* v. *Allfrey* (5)). The proceedings before the magistrate are admissible as evidence (*Harris* v. *Mulkern* (6)).

[ISAACS J. referred to *Doe d. Strode* v. *Seaton* (7); *Peareth* v. *Marriott* (8); *Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (9); *Hook* v. *Administrator-General of Bengal* (10); *Ramachandra Rao* v. *Ramachandra Rao* (11).]

Assuming that in the action before the Supreme Court the Judge decided that the weekly tenancy was determined, it was then competent for his Honor to find what was the true relation between the parties in 1925, and that was the reason why the counterclaim was remitted to the Supreme Court (*Davies* v. *Bristowe* (12)). The agreement between the parties that the appellant should stay on and pay £5 per week without any limit of time, was an agreement within sec. 127 of the *Conveyancing Act* 1919.

[KNOX C.J. referred to *Ex parte Murphy* (13).]

The notice to quit given at the commencement of the suit was insufficient. If there are two conflicting judgments in a matter constituting estoppel, then the matter is again at large. The suit and counterclaim are separate matters.

[KNOX C.J. referred to *Shannon* v. *Smith* (14).]

Reference to a weekly tenancy first appeared in the counterclaim. The shop was not reasonably required within the meaning of sec.

(1) (1898) 1 Q.B. 677 (C.A.).
(2) (1885) 30 Ch. D. 57 (C.A.).
(3) (1908) 2 Ch. 430 (C.A.).
(4) (1909) A.C. 615.
(5) (1874) L.R. 10 C.P. 29.
(6) (1875) 1 Ex. D. 31.
(7) (1835) 2 C. M. & R. 728.
(8) (1882) 22 Ch. D. 182.
(9) (1883) L.R. 11 Ind. App. 37.
(10) (1921) L.R. 48 Ind. App. 187.
(11) (1922) L.R. 49 Ind. App. 129.
(12) (1920) 3 K.B. 428, at p. 438.
(13) (1856) 2 Legge 976.
(14) (1914) 14 S.R. (N.S.W.) 253.

H. C. OF A. 1928.

BURNHAM v. CARROLL MUSGROVE THEATRES LTD.

21A (1) (*f*) of the *Fair Rents Act*, as the making of two shops into one cannot be regarded as a substantial reconstruction. In any event there is no evidence to show that it was necessary for the appellant to vacate the shop in order to permit of the work being done (*Guest* v. *Ravesi* (1); *Cruise* v. *Terrell* (2); *Remon* v. *City of London Real Property Co.* (3); *Epsom Grand Stand Association Ltd.* v. *Clarke* (4)). The time when the reasonableness of the requirement had to be looked at was at the time of the counterclaim, that is to say, when possession was asked for (*Brewer* v. *Jacobs* (5)). The onus is on the landlord to prove that by a refusal to grant an order for possession he would suffer greater hardship than the tenant. The Full Court's view, that hardship should be measured in terms of money only and that the tenant suffers no hardship if he is required to leave when his tenancy or lease came to an end, is wrong. With the exception of clause (*f*), sec. 21A of the *Fair Rents Act* was obviously copied from the *Increase of Rent and Mortgage Interest (Restrictions) Act* 1920 (10 & 11 Geo. V. c. 17) (*Redman's Landlord and Tenant*, 8th ed., p. 945; *Nevile* v. *Hardy* (6); *Salter* v. *Lask* (7)). Rent was paid up to September 1925; after that date, although tendered, it had always been refused.

Teece K.C. (with him *Weston*), for the respondents. Evidence as to an alleged agreement for lease between the appellant and the respondents was properly rejected by *Davidson* J. as being *res judicata* (*Peareth* v. *Marriott* (8); *Pritchard* v. *Draper* (9)). There is no evidence that the notices to quit were served in sufficient time to determine the tenancy. The dictum of *Gordon* J. in *Ex parte Smith* (10) is not supported by *Doe d. Gorst* v. *Timothy* (11), on which it was said to be based. The notice must be to determine the tenancy at the proper date (*Queen's Club Gardens Estates Ltd.* v. *Bignell* (12)). The appellant was still a weekly tenant when he was served with the notice to quit on which the counterclaim was founded.

(1) (1927) 27 S.R. (N.S.W.) 449.
(2) (1922) 1 K.B. 664.
(3) (1921) 1 K.B. 49.
(4) (1919) 35 T.L.R. 525.
(5) (1923) 1 K.B. 528.
(6) (1921) 1 Ch. 404.
(7) (1924) 1 K.B. 754.
(8) (1882) 22 Ch. D. 182.
(9) (1831) 1 Russ. & M. 191.
(10) (1924) 24 S.R. (N.S.W.) 470.
(11) (1847) 2 Car. & K. 351.
(12) (1924) 1 K.B. 117.

[HIGGINS J. referred to *Beddall* v. *Maitland* (1).]

The position at common law is that when the Court finds that parties stay on after the termination of a weekly tenancy in cases where there has always been a dispute as to the nature of the tenancy, and the dispute continues during the holding over, the Court will imply an agreement between the parties to hold over on the terms that were obtaining before the determination of the tenancy (*In re Perrett & Bennett-Stanford's Arbitration* (2)). There cannot be a tenancy from year to year, as to establish such there must be a reference to a rental for some aliquot part of a year. Even if the weekly tenancy had been determined by the earlier notices to quit, the correspondence between the parties shows that the appellant remained in occupation as a weekly tenant. The proceedings in ejectment before the magistrate are not evidence to anything relevant to the matter before this Court: the decision amounts to a nonsuit (*Clisdell* v. *Gibney* (3); *Landlord and Tenant Act of* 1899 (N.S.W.), sec. 23 (2), (4)). *Davidson* J. was correct in refusing to admit evidence as to proceedings in the Supreme Court. His Honor permitted amendments to be made for the purpose of allowing the question to be argued (*Cohen* v. *Lapin* (4); *Lennon* v. *Meegan* (5)). There was some rent lawfully due from the appellant at the time of the filing of the counterclaim and it is still unpaid (*Brewer* v. *Jacobs* (6)). The scheme of reconstruction was a reasonable one, and for the carrying out of the scheme the premises were reasonably required by the respondent. Any order which would have the effect of putting the appellant back into possession would necessitate the undoing of the reconstruction work. The only form of hardship that could be suffered by the appellant if put out of possession would be loss of goodwill. Where the status of a house originally within the provisions of the *Fair Rents Act* 1915 to 1926 is changed and becomes a different sort of dwelling to which the Act does not apply, then no order can be made (*Prout* v. *Hunter* (7); *Phillips* v. *Barnett* (8)). This Court

(1) (1881) 17 Ch. D. 174.
(2) (1922) 2 K.B. 592.
(3) (1904) 4 S.R. (N.S.W.) 670.
(4) (1924) 35 C.L.R. 247.
(5) (1905) 2 I.R. 189.
(6) (1923) 1 K.B. 528.
(7) (1924) 2 K.B. 736.
(8) (1922) 1 K.B. 222.

H. C. OF A. 1928.

BURNHAM v. CARROLL MUSGROVE THEATRES LTD.

is entitled to exercise the power of discretion, conferred by the *Fair Rents Act* in connection with applications under that Act.

H. V. Evatt, in reply. The admissions as to tenancy made by the respondents in the proceedings before the magistrate are admissions they cannot now deny (*Hoystead* v. *Commissioner of Taxation* (1)). When dealing with an application for possession by a landlord under the *Fair Rents Act* 1915 to 1926, sec. 21A (1) (*f*), the Court must satisfy itself that at the time of the making of the order the premises are reasonably required (*Redman's Landlord and Tenant*, 8th ed., p. 945). Possession was the only relief asked for by the respondents, and they are not entitled to any other form of relief.

Cur. adv. vult.

Oct. 16.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND POWERS JJ. In this case we think that the judgment appealed against is right. We base our opinion primarily on the fact that the learned Judge of first instance, who heard the evidence, disbelieved the plaintiff ; and for the rest we substantially adopt the views expressed by *Ferguson* J. in delivering the judgment of the Court (2).

ISAACS J. This is a somewhat complicated case, and I am greatly indebted to learned counsel on both sides for their assistance. There emerge, as I view the matter, only four questions of substance for consideration. They are (1) whether the dismissal of the appellant's claim in the suit makes the question of the alleged agreement of 18th December 1920 a *res judicata* ; (2) whether on 2nd December 1925 the appellant was a weekly tenant of the respondent Victoria Arcade Ltd. ; (3) whether, if his tenancy was not weekly it fell within sec. 127 cf the *Conveyancing Act* 1919, and (4) whether in any case the respondent has satisfied the conditions of sec. 21A of the *Fair Rents* (*Amendment*) *Act* 1926.

1. *Res Judicata.*—I entertain no doubt that the decree in the appellant's claim for specific performance, the appeal against which

(1) (1926) A.C. 155 ; 37 C.L.R. 290.
(2) (1927) 28 S.R. (N.S.W.), at pp. 176 *et seqq.*

was abandoned before the second trial, operates to make the issue as to the existence of the agreement of 18th December 1920 *res judicata*. The point is entirely covered in principle by *Badar Bee* v. *Habib Merican Noordin* (1). There Lord *Macnaghten* said (2): "There is . . . a decree *inter partes* on the very same subject." It matters not when that prior decree was given, or whether in the same or another suit, provided its existence is proved during the course of the litigation. The words of the *Digest* quoted by Lord *Macnaghten* are all-embracing. The doctrine is not founded on any technicality, but on broad principles of justice and public policy. *Badar Bee's Case* was the case of a later suit. *Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (3) was the case of a prior decision in the same suit. Its binding force, said Sir *Barnes Peacock* for the Judicial Committee, depended "upon general principles of law," adding, "if it were not binding there would be no end to litigation." In *Raja of Ramnad* v. *Velusami Tevar* (4) Lord *Moulton*, speaking for a Board including Lord *Dunedin*, held a prior decision in the same suit conclusive in later proceedings. In *Hook* v. *Administrator-General of Bengal* (5) a Board including Lord *Buckmaster* and Lord *Bullinore* affirmed the observations quoted from *Ram Kirpal's Case*. In *Ramachandra Rao* v. *Ramachandra Rao* (6) a Board including Lord *Buckmaster*, Lord *Atkinson* and Lord *Carson* followed *Hook's Case*, Lord *Buckmaster* saying (*inter alia*) that whether the decision was in a former suit or not makes no difference. As every such decision must *ex necessitate* have been given either in a former suit or in the same suit, there appears to me no escape from the settled rule as to its binding nature.

Therefore the present appellant is bound by whatever was decided respecting his alleged agreement. The decision was that it did not exist. True, that was on the ground that no proof of it was forthcoming. But as it behoved the appellant to sustain the issue raised, it must thereafter be taken as between him and the respondent that no such agreement as the agreement to give a lease for years was ever made. But the estoppel goes no further: it does not, for

(1) (1909) A.C. 615.
(2) (1909) A.C., at p. 622.
(3) (1883) L.R. 11 Ind. App. 37.
(4) (1920) L.R. 48 Ind. App. 45.
(5) (1921) L.R. 48 Ind. App. 187.
(6) (1922) L.R. 49 Ind. App. 129.

H. C. OF A. 1928.

BURNHAM v. CARROLL MUSGROVE THEATRES LTD.

Isaacs J.

instance, touch the question of a tenancy from year to year, nor does it touch the question of a tenancy from week to week, except so far as that would be inconsistent with the agreement for years.

2. *Weekly Tenancy.*—It is a basic truth that, setting aside the so-called fictional tenancy by sufferance, the relation of landlord and tenant is created only by agreement. The agreement is subject to the ordinary law of contract, part of which is that no implication of intention can be made contrary to an expressed intention. Simple and elementary as this is, there is apparently danger of being drawn aside and overlooking it amid the complicated circumstances of the case. The allegation in the counterclaim is that "*on and prior* to 15th September 1925" the appellant was a weekly tenant. The tenancy alleged there is that which existed in fact and in law on 15th September 1925, when the present respondent Victoria Arcade Ltd. became proprietor. The concrete question raised by the pleadings and fought is: Was there on 2nd October 1925 *an existing agreement*, express or implied, between the parties that the appellant should occupy the premises as the respondent's tenant from week to week? The mere payment of a weekly rent *without more appearing* would lead to the necessary inference that the parties intended to create a weekly tenancy (*Adams* v. *Cairns* (1)). But, as that case shows, the intention may be shown by evidence to be different as by fixing a term. It matters not how the intention not to create a weekly tenancy is shown, so long as it is shown. *Davidson* J. found—and I think his conclusion cannot in the circumstances be disturbed—that originally there was a weekly tenancy. But how long did that tenancy continue? First of all, did it continue after the moment when the present respondent became registered proprietor on 15th September 1925? To establish that it did, some agreement between the new proprietor and the appellant must be shown (*Real Property Act* 1900 (N.S.W.), secs. 42, 43; *Waimiha Sawmilling Co.* v. *Waione Timber Co.* (2)). The effect of the sections quoted is (even apart from *res judicata*) to dispose at a stroke of the alleged agreement for a lease relied on by the appellant, and also, since no weekly tenancy was registrable or registered, of so much of the respondent's argument as rests on anything in the nature of tenancy prior to its becoming

(1) (1901) 85 L.T. 10; 17 T.L.R. 662. (2) (1926) A.C. 101.

registered proprietor. Admittedly no agreement was arrived at after 15th September constituting a tenancy from week to week. What has been held on that point by every Judge of the Supreme Court is clearly correct. That in itself is sufficient to conclude the second question against the respondent. But even apart from that, and dealing with the matter as if the same proprietorship existed throughout, the result is the same. Where, after the termination of any tenancy, the tenant holds over, and as *Atkin* L.J. said in *Cole* v. *Kelly* (1) "the facts do not exclude an implied agreement to hold upon the terms of the old lease," then impliedly the old terms remain. Those quoted words are all-important and, with deep respect to the Full Court of New South Wales, seem to have had no effect given to them. The learned primary Judge, *Davidson* J., said in his judgment that, starting with the position that there was a weekly tenancy at the outset, the three notices to quit of 1922 put an end to it; that the subsequent holding on by the appellant at £5 a week created a new tenancy, but that as the parties were in open dispute as to the terms of holding, no inference of agreement, either as to a tenancy for years or a weekly tenancy, was possible, and therefore the tenancy was, at common law, a mere tenancy at will. He held further that, being a tenancy at will, it came within sec. 127 of the *Conveyancing Act*; but that is a separate question.

As to the first point, namely, that the parties being in open conflict as to the terms, and the inference of mutual agreement on a weekly tenancy, the reasoning appears to me impregnable. It is the simple affirmation of the very first principle in the law of contract. It appears from the judgment of *Davidson* J. that the present respondent did not at the trial deny that the notices to quit referred to terminated the then existing tenancy, but claimed that the new tenancy must be taken to have been "a new tenancy on the terms that both parties agreed to let matters remain *in statu quo*." It was to this contention that the learned Judge applied the reasoning mentioned. As to this reasoning I can find no reference whatever in the judgment of the Full Court. It seems to have entirely escaped attention. Before this Court it was argued,

(1) (1920) 2 K.B. 106, at p. 132.

H. C. OF A. 1928.

BURNHAM v. CARROLL MUSGROVE THEATRES LTD.

Isaacs J.

however, that the notices of 1922 were invalid as notices to put an end to a weekly tenancy. The landlord's authority to its agent to give the notices to quit was abundantly proved in the evidence of the respondent's solicitor and of its chairman, and as to one of the notices, by the record of the Police Court proceedings which were for this purpose undoubtedly relevant, and relevancy was the only ground on which their admission was challenged. The actual delivery of the notices was proved and they were produced and are in evidence. It is sufficient to take the last of the three, namely, the notice dated 18th September 1922, and requiring delivery up of the premises on Monday 25th September 1922, which was also the one upon which the Police Court proceedings were taken on 5th October 1922. The information was laid by Louis Murcombe, who served the notice. The reason of the inefficacy of the notice to quit was said to be that a notice given on 18th September to quit on 25th September was not correct, inasmuch as it was not a week's notice. I must confess I do not understand the objection, unless it is founded on the notion that there must be seven clear days' notice to terminate a weekly tenancy. But that is an error (*Newman* v. *Slade* (1)—the case there cited). There was, at any rate, no agreement here that the *landlord* should give seven clear days' notice. But even if seven clear days, exclusive of both the 18th and the 25th, were required, the notice would be sufficient, and for this reason. The tenant would on that hypothesis be entitled to remain until the end of the 25th, and be bound to go out the first moment of the 26th. And on accepted principles the notice should be so construed. As *Lindley* L.J., for Lord *Halsbury* and himself, said in *Sidebotham* v. *Holland* (2) :—" The validity of a notice to quit ought not to turn on the splitting of a straw. Moreover, if hypercriticisms are to be indulged in, a notice to quit at the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before. But such subtleties ought to be and are disregarded as out of place." Conversely, a notice to quit at the last moment of the 25th and one at the first moment of the 26th are identical in effect. The law as to the construction of notices to quit is reasonable, and where possible a notice to quit is construed

(1) (1926) 2 K.B. 328.

(2) (1895) 1 Q.B. 378, at p. 383.

so as to give it efficacy. In *Harihar Banerji* v. *Ramsashi Roy* (1) Lord *Atkinson*, for a Board including also Lord *Phillimore*, said with reference to the English cases on the subject (2): "They establish that notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law; that the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances; and, further, that they are to be construed, not with a desire to find faults in them which would render them defective, but to be construed *ut res magis valeat quam pereat.*" Consequently, according as to the parties the "25th" September meant the first or the last moment of the day, or (what is the same thing as the last moment) the first moment of the 26th, so the Court would construe the notice.

The notice was, in my opinion, good, and the tenancy from week to week was thereby terminated. It must be remembered that in this respect we are not concerned with whether the tenant admitted or contested its validity or relevancy: it is the intention of the landlord, and, as the landlord intended the notice to be effective, then if the tenant understands what is meant, it is enough (3). The Police Court proceedings by the landlord, and subsequently a Supreme Court action instituted by the landlord and ending in September 1923, resulted in still leaving the appellant in possession of the premises. But by their letter of 22nd December 1923 the solicitors of the then proprietor not merely recognized but insisted that the weekly tenancy had terminated. The letter says: "We have to give you notice on behalf of Carroll Musgrove Theatres Ltd. that your right to occupy the premises you now occupy, namely, 57 Elizabeth Street, Sydney, *has terminated.*" So that there was an admitted end of the old weekly tenancy, if it ever existed; and, as the appellant always denied its existence at any time, the two parties were *ad idem* to this extent—that on 22nd December 1923, and long before, there was *no weekly tenancy in existence.* The

(1) (1918) L.R. 45 Ind. App. 222.
(2) (1918) L.R. 45 Ind. App., at p. 225.
(3) (1918) L.R. 45 Ind. App., at pp. 225-226.

H. C. OF A. 1928.

BURNHAM v. CARROLL MUSGROVE THEATRES LTD.

Isaacs J.

letter, however, went on to say that to save the Christmas business the Company would allow the appellant to remain for six weeks, but that rent would be accepted only as on a weekly tenancy " under the above concession." This was not accepted. The appellant on 27th December 1923 tendered to the landlord's agent £5 rent on the footing of the alleged agreement of 1920. This was repeated several times in the early months of 1924. Consequently, no agreement for a weekly tenancy subsequent to the termination of the first can possibly be inferred. Apparently, however, the landlord thought that, by his remaining in after the stipulation of the letter of 22nd December 1923, the appellant had willynilly become a weekly tenant. No rent was being received, and yet occupation continued. In these circumstances, and after an interview, a letter was written on 24th July 1924 which most unexpectedly has received an unsought-for and unmerited prominence. During the discussion in the Court it was suggested that, whatever the real truth might be in fact and in law, this letter bound the appellant, once his agreement for years was negatived, to submit to the landlord's claim of a weekly tenancy. That would be a delightfully easy solution of the matter. All that would be necessary for the determination of this case—except the *Fair Rents Acts*—would be the judgment on the claim, plus the letter of 24th July 1924. But I am not able to take the primrose path. Some very serious obstacles stand in my way ; and I shall mention some of them. Seeing that it is in effect suggested as an agreement to disregard all law and facts, except the elimination of one contention or the other, it is notable that it is never mentioned in the pleadings. On the contrary, the pleadings raise the true issue of weekly tenancy or no weekly tenancy. That letter was only one step in the arrangement by which rent was accepted, and it was not accepted simpliciter. It has to be read, for instance, with the letter of 28th January 1924. *Davidson* J. said " the real effect of this agreement, having regard to all the circumstances, was that the rent was accepted on the footing that the legal position of the parties, *whatever it was*, was not to be prejudiced." On this footing his Honor held that there was not at the date of the letter a weekly tenancy. The Full Court, in the judgment of *Ferguson* J., necessarily accepted the same view as to the letter of 24th July

1924. His Honor, after assuming that the weekly tenancy was terminated in 1922, said (1) that "the plaintiff admittedly continued to be a tenant after that time," and then asked: "What was the nature of the new tenancy?" Then:—"The answer to that question must be looked for in some agreement between the parties, either express or implied. *Now the one thing clear in this case is that there was no express agreement.*" And later: "*The correspondence certainly does not disclose any intention of the parties to put the tenancy on a new footing as to which they were both agreed.*" That necessarily means on any footing other than that which actually existed after the assumed termination of 1922. The Full Court then proceeds entirely on the general implication for "the continuance of a tenant in possession and the acceptance from him of a weekly rent, *after the expiration of a weekly tenancy.*" Nothing could be more remote from the judgment of the Full Court than the suggestion referred to as the agreement to be deduced from the letter of 24th July 1924. There are three potent reasons for rejecting the suggestion. They are: (1) the agreement was not between the present parties and does not run with the land; (2) the present respondent repudiated it and refused to act on it by its letter of 29th September 1925 and ever since; (3) the suggested interpretation simply inverts the meaning of the letter. As both *Davidson* J. and the Full Court have recognized, it protected both parties from any admissions whatever, and left to be decided—if ever necessary—the nature of the tenancy under which the tenant "occupies," that is, in July 1924, whatever that might be in fact and law. To imply more is counter to the law as laid down by this Court in *Peters American Delicacy Co.* v. *Champion* (2).

The result, so far, is that on 2nd October 1925 there was no weekly tenancy, but a tenancy at will, without any agreement as to duration.

3. *Section* 127.—I am not sure that I understand the dispute as to this section, nor do I know its relevancy. If the tenancy here is held to be a weekly tenancy—it is what in the *Queen's Club Case* (3) is called a "periodic tenancy," that is, one the period or duration

(1) (1927) 28 S.R. (N.S.W.), at p. 179. (2) (1928) 41 C.L.R. 316.
(3) (1924) 1 K.B., at pp. 124, 134.

H. C. OF A. 1928.

BURNHAM v. CARROLL MUSGROVE THEATRES LTD.

Isaacs J.

of which is agreed upon. In that case, of course, it is outside the section. On the other hand, supposing the tenancy to have been, as I think it was, on the determination of the weekly tenancy, a tenancy at will without any agreement as to its duration, then, either it comes under the section, or, being accompanied as it was by payment of rent, it is, notwithstanding the section, a yearly tenancy at common law, and the notice to quit of 2nd October 1925 is bad in either case.

A considerable amount of argument was bestowed on the section, but in the circumstances the only thing I have to say at this moment is that I am of opinion its words must be adhered to as they stand, and that the historical evolution of yearly tenancies from tenancies at will supports that view.

4. *Fair Rents Act* 1915.—The Full Court determined the application of the *Fair Rents Act* on one ground only, and as the Court, in my opinion, as will later appear, adopted the wrong test as to the onus of proof and rested on that, its conclusion cannot stand. It is, therefore, absolutely necessary for this Court to investigate the matter for itself.

Two preliminary positions material to this case seem to me, on the very plain meaning of the words of the section, to be quite clear. They are (1) the burden of proof is on the lessor and (2) the time at which the conditioning facts must exist is the time when the order is made. I am not directing my attention to proceedings instituted by virtue of sub-sec. 11. The prohibition is directed to tribunals. It is *pro tanto* a limitation of their jurisdiction otherwise existing. Consequently, before any Court can make an order or give a judgment of the nature indicated, it is bound to inquire as to the matters prescribed by Parliament as conditions of its jurisdiction. Naturally, therefore, the burden and the time, not of the origination but of the *existence* of the several conditions, are as I have stated, at all events in all cases not dependent on sub-sec. 11, as to which I say nothing. As to the burden of proof, the relevant English provision is practically identical, and there are three cases directly in point. They are *Nevile* v. *Hardy* (1) (a decision of *Peterson* J.), *Epsom Grand Stand Association Ltd.* v. *Clarke* (2) (by the Court of Appeal)

(1) (1921) 1 Ch. 404. (2) (1919) 35 T.L.R. 525.

and *Thompson* v. *Rolls* (1)). With regard to the relevant time, there is a mass of authority. In *Stovin* v. *Farebrass* (2), where the Court of Appeal, not having the necessary material to decide the facts, sent the case back to the County Court, *Atkin* L.J. said (3) : —" If we could have ascertained the facts, I think that we should have had to consider *the facts as on the date upon which we made the order* . . . . I think it follows that, as we decide that the final determination is to be by the County Court Judge, *he must consider the facts as on the date when he is asked to make the order.*" That accorded with the opinion of *Bankes* L.J. (4) and of *Scrutton* L.J. (5). That case is specially apposite, because it applied the rule to a case of " further hearing " (*Bankes* L.J.). The following are to the same effect : *Harcourt* v. *Lowe* (6) ; *Artizans, Labourers and General Dwellings Co.* v. *Whitaker* (7) ; *Kimpson* v. *Markham* (8) ; *Nevile* v. *Hardy* (9).

The first concrete question, then, is : Has the respondent Victoria Arcade Ltd. satisfied the burden of establishing that, at the date when the Full Court pronounced its judgment granting an order for possession, condition (*a*) or condition (*f*) existed ?

As to condition (*a*), the non-payment of rent, the question did not arise before *Davidson* J. because the learned Judge had not proceeded so far, and the Full Court did not deal with it as it decided in favour of the respondent upon condition (*f*). The first material fact as to the rent is that the present respondent became lessor on 15th September 1925, from which date its right to rent begins. At that time, as has been seen, the *modus vivendi* was being faithfully observed as between the previous lessor and the appellant, by which payment and acceptance of rent took place without compromising either, or compelling either to surrender his claim. It is clear from the respondent's evidence, the letters of 23rd, 24th, 28th (two) and 29th September, that the appellant tendered his rent on the same basis. Receipt of the rent on that footing would have enabled the lessor

(1) (1926) 2 K.B. 426, at p. 432.
(2) (1919) 35 T.L.R. 659.
(3) (1919) 35 T.L.R., at p. 666.
(4) (1919) 35 T.L.R., at p. 662.
(5) (1919) 35 T.L.R., at p. 664.
(6) (1919) 35 T.L.R. 255, at p. 256 (*Lush* J.).
(7) (1919) 2 K.B. 301, at p. 304 (*Astbury* J.).
(8) (1921) 2 K.B. 157, at pp 165-166 (*Avory* and *Salter* JJ.).
(9) (1921) 1 Ch., at p. 407 (*Peterson* J.).

H. C. OF A. 1928.

BURNHAM v. CARROLL MUSGROVE THEATRES LTD.

Isaacs J.

to obtain payment without making any admission. It was refused in terms that made any further effort futile, unless the appellant surrendered his claim entirely. What is the legal result ? It is, of course, quite clear that a refusal in terms that make a further tender futile dispenses with any further tender until the refusal is withdrawn. (See, e.g., *Hunter* v. *Daniel* (1) and *The Norway* (2).) The tender in the present case was first made by the appellant personally and orally, and was refused absolutely. Then by letter it was made through his solicitors substantially as a tender with a protest and so as to protect the tenant, who at that time had filed a bill in equity to assert his claim. All he sought was that *he* himself should not be charged with an admission ; and he expressly, by his solicitors' letter of 23rd September, made it plain that *the tender was on the footing of the former arrangement.* In those circumstances the situation is covered, in my opinion, by the case of *Greenwood* v. *Sutcliffe* (3)). There it was held that a tender under protest reserving the right of the debtor to dispute the amount due is a good tender if it does not impose any conditions on the creditor. There the tender was made reserving the right to tax the mortgagees' costs and also to review their account. The Court of Appeal (*Lindley*, *Bowen* and *Kay* L.JJ.) reversed *Stirling* J., who held the tender conditional and therefore invalid. As *Lindley* L.J. said (4) :— " What is the object of a tender ? It is not necessarily to put an end to all controversy. It may have that effect, and very often has, but its main object is to throw the risk of further controversy upon the other party." There were controversies there, as here, and the tender there, as here, was made without, as *Lindley* L.J. said, " throwing any burden " on the payee, and here, as there, it was a good tender. *Bowen* L.J. said (5) : " A man has a right to tender money reserving all his rights, and such a tender is good, provided he does not seek to impose conditions." The respondent, in my opinion, fails as to condition (*a*).

Then, as to condition (*f*) :—The first obligation of the lessor was to prove that " the shop was reasonably required by the lessor for

(1) (1845) 4 Ha. 420.
(2) (1865) 3 Moo. P.C.C. (N.S.) 245, at p. 266.
(3) (1892) 1 Ch. 1.
(4) (1892) 1 Ch., at p. 10.
(5) (1892) 1 Ch., at p. 11.

the purpose of reconstruction." Now, one suggested difficulty should be at once cleared up. It was said on behalf of the respondent that, pending the former appeal to this Court, the respondent had under an order made by me obtained actual possession and had converted two shops, of which one was No. 57 (the appellant's) and the other No. 55, into one shop, and had since let the one combined shop to another tenant. Thus, it was said, a third person had acquired rights which could not be disturbed. That excuse will not bear examination. My order was, on the balance of convenience and justice, pending the hearing of the appeal to determine the very question of right to possession, including the provision in the *Fair Rents Act*, that the respondent should be allowed to execute the Supreme Court order. But that meant merely to have possession in fact of the premises as they were, pending the final determination as to the right to possession. Had there been the faintest indication of an intention to alter the premises, and thus attempt to embarrass the Court in determining rights, the application would have been instantly refused. A wrong use was made of my order, and the respondent cannot, in my opinion, be allowed to profit by the surreptitious attempt to obtain an advantage by creating a new position. As for the new tenant, he has no rights superior to the appellant unless he proves (which is in the highest degree unlikely) that he took the premises for a term, not yet expired, and bona fide without notice of the appellant's litigation. In my opinion, on the material before the Court, this matter must be adjudged precisely as if my order had not been made.

On that basis, how has the lessor discharged its initial obligation created by the words quoted ? " Reasonably required " there refers to a requirement of the lessor. It must have required possession of the premises to the exclusion of the tenant for the purpose of reconstructing them, either alone or with other property. And his requirement for that purpose must be reasonable. For this position the case of *Epsom Grand Stand Association Ltd.* v. *Clarke* (1) is a leading authority. *Bankes* L.J. (2) held as a somewhat similar condition that the lessor must affirmatively satisfy the Court that " the premises were reasonably required. It was not merely a

(1) (1919) 35 T.L.R. 525.

(2) (1919) 35 T.L.R., at p. 526.

H. C. OF A. 1928.

BURNHAM v. CARROLL MUSGROVE THEATRES LTD.

ISAACS J.

question of their acting bona fide. They must not only act bona fide, but they must act reasonably in requiring the possession of the premises." Other authorities are *Harcourt* v. *Lowe* (1), *Kentish* v. *Sneath* (2) and *Thompson* v. *Rolls* (3). Now, the only suggested operation for which this exclusive possession was required was the renewal of a wooden partition that separated No. 57 from No. 55. The amount proposed to be expended in all on Burnham's shop was between £200 and £300, out of a total of £14,000. The secretary of the respondent was asked : " Could not Burnham have stayed in the shop while these alterations were carried out ?—You are not in a position to deny that ? " Answer : " No ; and I am not in a position to say whether he could or could not." The architect stated that some of the tenants did stay in while the work was being done, and, after referring to all the work done with regard to the appellant's shop, said, in answer to the learned trial Judge : " That could have been effected without his going out of the place." That answer, of course, is fatal to the respondent so far as condition (*f*) is concerned. But in the circumstances there remains the question of " hardship," and on this it seems to me impossible to sustain the grounds of the Full Court's decision.

The Supreme Court weighed the financial possibilities. That financial considerations are legitimate must be patent when one considers that to a poor tenant sought to be ejected from his dwelling-house, 10s. or £1 a week extra would mean more than perhaps £20 a week to his landlord. However, what appears on the surface to be common sense has the advantage of authoritative support. In *Williamson* v. *Pallant* (4) it was held by *Swift* and *Acton* JJ. that financial hardship is not only legitimate, but that to ignore it makes the judgment appealable. The Full Court, after entering upon the question of financial hardship, said there was no such evidence " as would justify us in finding this issue in the plaintiff's favour " (5). And again : " It is quite consistent with the evidence . . . that instead of the plaintiff suffering any hardship by going out of possession of the premises, it has really been an advantage to him " (6). With

(1) (1919) 35 T.L.R. 255.
(2) (1921) 37 T.L.R. 586.
(3) (1926) 2 K.B. 426.
(4) (1924) 2 K.B. 173.
(5) (1927) 28 S.R. (N.S.W.), at p. 183.
(6) (1927) 28 S.R. (N.S.W.), at p. 184.

great deference, that is reversing the onus of proof. That is exactly similar to the finding of *Peterson* J. in *Epsom Grand Stand Association Ltd.* v. *Clarke* (1), and because that learned Judge mistook the onus the appeal was allowed. In this case the respondent has, in my opinion, utterly failed to adduce evidence to satisfy the Court on the question of comparative hardship. It is all left to conjecture, and it would be quite wrong merely to pit a small amount of money against a larger amount, or to justify turning out a tenant because his landlord could prove a considerable gain to himself by so doing.

In my opinion the appeal should be allowed, and the judgment of *Davidson* J. restored.

HIGGINS J. I cannot think that it would serve any useful purpose if I were to restate the complicated story of this long struggle, or to deal with all the numerous contentions to which I have had to apply my mind. The relevant facts on which we have to give our decision have been effectively and succinctly stated by *Ferguson* J. in his judgment on the appeal to the Full Supreme Court of New South Wales (2). In that judgment the learned Judge brushed aside many matters which are not essential to the decision of the particular case before us—the suit instituted by Mr. Burnham on 24th September 1925 for specific performance of an alleged agreement for lease, and the counterclaim of the Victoria Arcade Ltd., the successor of the Carroll Musgrove company as registered proprietor, for the recovery of possession of the premises from Burnham. Many of the arguments have been directed to litigious proceedings which had been taken and facts which had occurred before the institution of the suit; but most of these proceedings and facts become irrelevant once it is realized that the claim for specific performance had been dismissed and abandoned on and from 15th June 1926, when judgment was given by the primary Judge on the first trial; that there is no appeal from that dismissal; and that, by order of the High Court made on 18th November 1926, the only matter as to which the appeal was allowed was the matter of the counterclaim. The counterclaim, and nothing else, was remitted to the Supreme Court

(1) (1919) 35 T.L.R. 525.

(2) (1927) 28 S.R. (N.S.W.) 169.

H. C. OF A. 1928.

BURNHAM v. CARROLL MUSGROVE THEATRES LTD.

Higgins J.

to be reheard; and the question now is as to the decision of the Full Court on that rehearing.

As for this counterclaim for delivery of possession of the shop, it appears that the Victoria Arcade Ltd., having been registered as the proprietor in fee simple on 15th September 1925, gave to Burnham on 2nd or 3rd October notice to quit possession, the notice expiring on 12th October. This notice was ample, if Burnham was a weekly tenant at that time—unless sec. 127 of the *Conveyancing Act* 1919 requires a full month's notice for a weekly tenant (a contention which I examine hereinafter). The learned primary Judge found that Burnham was a weekly tenant; and I see no reason for thinking that that finding was wrong. It is enough for my purpose to say, without going into any long-winded history, that something had happened in 1924 which settled by agreement the nature of the tenancy. Burnham had claimed a right to a lease for three years at least; the Carroll Musgrove company had asserted that he was merely a weekly tenant, and there had been legal proceedings on the subject. But, by letter to Burnham's solicitor dated 24th July 1924, the solicitors for the company stated that they were prepared to accept the rent due in respect of the premises (£5 per week), "provided that such an acceptance is not to be taken as an admission that your client is entitled to the premises in question by virtue of any lease or agreement. Similarly the payment of rent by your client on this understanding is not to be taken as an admission by him that he is a weekly tenant." The solicitor for Burnham accepted this proposal, and rent was paid accordingly. Neither side in this correspondence, suggested any tenancy of any other nature than (a) under or in consequence of the alleged agreement for a lease, or (b) weekly tenancy. In other words, it was left to the future to find whether effect was to be given to the alleged agreement; and, if not, the tenancy was to be treated as from week to week. Now, after that proposal was accepted, it has been decided, and conclusively decided, that effect cannot be given to the alleged agreement for a lease—that the alleged agreement was not proved; and for this reason, even if there were no other reasons, I am of opinion that the finding of a weekly tenancy was perfectly justified. As *Ferguson* J. says:—"Only two alternatives were presented to the Court, one a

weekly tenancy, the other a tenancy under an agreement for a lease. It has been determined in this suit, and conclusively determined, that there never was such an agreement. The judgment stands " (as to the alleged agreement) " unreversed and unappealed from. The plaintiff, therefore, cannot now be heard to say that there was such an agreement, or any tenancy referable to such an agreement " (1). I concur unreservedly in this view.

The Full Court has held also that *Davidson* J. rightly rejected as evidence the proceedings in an ejectment action of 1923, brought by the Carroll Musgrove company—including the charge of *James* J. to the jury in that action. I see no room for doubt that at the stage at which the proceedings were tendered, at the retrial in 1927, they were not admissible as evidence in support of the alleged agreement for a lease. That alleged agreement had been negatived by the decree on the first trial of this action ; the claim of Burnham for specific performance had been finally dismissed and abandoned ; there was no longer any issue as to the agreement. It is urged, however, that the issue was still alive for the purposes of the counterclaim ; but, in my opinion, if the issue was settled for the purpose of the statement of claim, it was settled for the purpose of the counterclaim. The true view as to the relation of counterclaim to claim seems to be that stated by *Fry* J. in *Beddall* v. *Maitland* (2), that they are to be treated as wholly independent actions which for convenience of procedure are combined in one proceeding ; and, judgment having been given against the agreement on the claim, Burnham could not rely on it in the counterclaim. It is *res judicata*. Incidentally, I may add that that case shows that the defendant can support its counterclaim on a cause of action which arises after the writ (or, in New South Wales, the statement of claim), but before the counterclaim. This is of importance ; for the notice to quit was not given till after 24th September 1925, the date of filing the statement of claim.

But even if we had to treat the claim and the counterclaim as one action, not as two, I concur with the Full Court in its view that " there cannot be two conflicting judgments in the same suit." The Court cannot, in the same action, make a finding that an agreement

(1) (1927) 28 S.R. (N.S.W.), at p. 176. (2) (1881) 17 Ch. D. 174.

H. C. OF A. 1928.

BURNHAM v. CARROLL MUSGROVE THEATRES LTD.

Higgins J.

does exist and a finding that it does not exist. The principles of the well-known maxims apply with equal, if not greater, force to a single suit—*Interest reipublicæ ut sit finis litium*; *res judicata pro veritate accipitur* (and see *Peareth* v. *Marriott* (1); *Badar Bee* v. *Habib Merican Noordin* (2)).

It so happens that in this case the decision of the issue as to the agreement took place on the claim in the same proceedings and before the issue came up on the counterclaim; but there is no ground that one can imagine for refusing to apply the same principle. As stated by *A. L. Smith* L.J. in *Butler* v. *Butler* (3), "that judgments are conclusive *inter partes* respecting the point directly decided therein is beyond dispute, the ground being that it is for the interest of the State that a limit should be placed upon the continuance of litigation, and, consequently, the same cause of action or issue when once decided cannot be again brought up for adjudication between the same parties." (See also *Hoystead* v. *Commissioner of Taxation* (4).)

It appears that in this case *Davidson* J., at the retrial, gave leave to amend the pleadings by alleging that the defendant was estopped by the judgment of *James* J. in 1923, in the ejectment action brought by the Carroll Musgrove company against Burnham, in which judgment was given for the defendant. Leave was also given to amend the pleadings by alleging, as to the *Fair Rents Act*, that condition (*a*) of sec. 21A applied—that the rent had not been paid. Neither amendment was made, but the learned Judge dealt with the case as if the amendments were made; and the Full Court, and this Court, are treated as under a duty to deal with the case on the same assumption. We are told that this practice is not uncommon in the Supreme Court of New South Wales; but, for my part, I feel bound to protest against it. The pleadings should have been actually amended in pursuance of the order of the learned Judge; otherwise grave misapprehension may arise—in my own mind, did arise for some time—as to the allegations on which the learned Judge and the Full Court gave their judgments. I say this incidentally, lest I should mislead by appearing to treat the practice as proper in future cases. On the question of substance, whatever effect the judgment in the ejectment action might have had on the statement

(1) (1882) 22 Ch. D. 182.
(2) (1909) A.C. 615.
(3) (1894) P. 25, at p. 28.
(4) (1926) A.C. 155; 37 C.L.R. 290.

of claim in this case, it has no application as an estoppel when the statement of claim has been finally and irrevocably dismissed.

I have had, indeed, some doubt whether the proceedings in the action might not be *some* evidence as to the nature of Burnham's tenancy. But we have had the advantage of seeing for ourselves the proceedings which were tendered; and it is clear that they could in no way affect the finding of *Davidson* J. that the tenancy was weekly.

Now I shall address myself to two points on which the Full Court differed from *Davidson* J. and reversed his judgment:—

(1) *As to sec.* 127 *of the Conveyancing Act* 1919.—It is urged for Mr. Burnham that even if the tenancy was weekly and although a week's notice was given to Burnham before the counterclaim, the notice did not determine the tenancy, owing to the provisions of sec. 127 of the *Conveyancing Act*. The section states: "(1) No tenancy from year to year shall, after the commencement of this Act, be implied by payment of rent; if there is a tenancy, and no agreement as to its duration, then such tenancy shall be deemed to be a tenancy determinable at the will of either of the parties by one month's notice in writing expiring at any time." There is no doubt that this section is aimed at what many regarded as a grave anomaly in the law as to implication of tenancy from year to year; the question is, does the section relate to other tenancies, such as weekly or at will, &c.? As *Chambre* J. said in *Richardson* v. *Langridge* (1), "the Courts have a great inclination to make every tenancy a holding from year to year, if they can find any foundation for it." As *Atkin* L.J. understands the law, "a holding over with the consent of the landlord prima facie gives rise to a tenancy at will, which by subsequent payment of rent may be converted into a tenancy from year to year" (*Cole* v. *Kelly* (2)). The result was that if a landlord allowed a tenant whose term had expired to pay him any rent, he could not get rid of the tenant without full six months' notice expiring with some year of the implied tenancy from year to year. The section undoubtedly *reduces* the length of that notice from six months expiring as aforesaid to one month expiring at any time; but does the section by the same words increase

(1) (1811) 4 Taunt. 128, at p. 132. (2) (1920) 2 K.B., at p. 132.

H. C. OF A. 1928.

BURNHAM v. CARROLL MUSGROVE THEATRES LTD.

Higgins J.

the length of the notice where there is a weekly or other short tenancy, to one month ? If the words of the legislation clearly required the lengthening of the notice to quit in the case of a weekly tenancy, they must be obeyed ; but as the opening words of the section are pointed directly at a tenancy from year to year, the words which follow may fairly be read—to say the least—as referring to such a tenancy only. Indeed, one cannot see what object the Legislature had in requiring a month's notice for a weekly tenancy ; and for a tenancy at will no notice to quit has ever yet been necessary. It is our duty to presume that the Legislature did not intend such a violent change in the rights of property. Moreover, when we examine the remaining words of the section, sub-sec. 2, dealing with existing tenancies, we are confirmed in the view that the Legislature was dealing merely with tenancies from year to year : " (2) This section shall not apply where there is a *tenancy from year to year* which has arisen by implication before the commencement of this Act : Provided that " if the date of creation of the tenancy is unknown " such tenancy shall, subject to any express agreement to the contrary, be determinable by *six months' notice* in writing expiring " on 30th June 1921 or at any date thereafter. There is no analogous provision in sub-sec. 2 for the protection of rights existing before the Act as to weekly or other tenancies for less than a year. The Full Court of New South Wales treats the section as merely altering the implication from payment of rent to be made in favour of tenancies from year to year and not as increasing the length of the notice to quit in the case of weekly tenancies ; and, in my opinion, the Full Court is right.

(2) *As to the Fair Rents (Amendment) Act (No. 2 of* 1926).—One of the main objects of the High Court in its order remitting the counter-claim to the Supreme Court was to have the effect of that Act considered. That Act had been passed on 8th February 1926 ; but it had not been dealt with by *Davidson* J. in his judgment on the first trial (15th June 1926), or in the judgment of the Full Court (17th August 1926). The judgment of the Full Court (30th January 1928) differs from the judgment of *Davidson* J. in that it decides on the evidence that the shop was required by the landlord for the purpose of reconstruction to a substantial extent, and that greater

hardship would be caused by refusing an order for possession than by granting it (see *Fair Rents (Amendment) Act* of 1926, sec. 21A (1) (*f*)). That the shop was required by the landlord *at the time of the counterclaim* is clear; that the hardship resulting from refusing such an order was greater than the hardship resulting from granting it, is clear also. A landlord who is getting only £5 per week for a property that is worth £20 suffers distinct hardship; and that hardship is not counterbalanced by the failure of the tenant to retain possession of the property unjustly, at £5 per week or without rent.

But I am unable to take the same view as the Full Court as to the time at which the condition allowing an order for possession must exist. The Full Court thinks the condition must exist before the writ (or in this case the counterclaim), and then only; but the peculiar language used in sec. 21A has to be considered: "(1) No *order or judgment* for the recovery of possession of any . . . shop, or for the ejectment of a lessee therefrom, shall be made or given unless . . . (*f*) the . . . shop is reasonably required by the lessor for the purpose of . . . reconstruction," &c. The words are prohibitive of the *order or judgment*, not of the *action*, of ejectment. There is nothing to diminish the right of the landlord to bring his action, nothing to diminish or increase the burden on the landlord to prove his right of entry before the action is started; but it seems that when his right of entry has been proved, and everything is ripe for an ejectment order, the Court has to consider further the cause or the motive of the landlord wanting possession; and, if none of the conditions fit the case, the order or judgment for possession should not be made or given. This was the view taken by *Davidson* J. That the time of making the order or giving the judgment was before the minds of the Legislature, and not the time of the bringing of the action (or counterclaim), was actually decided under the analogous English section in the *Increase of Rent and Mortgage Interest (Restrictions) Act* 1920—*Nevile* v. *Hardy* (1). There *Peterson* J., in dealing with the condition that the dwelling-house must be reasonably required by the landlord for the purpose of his residence, said (2): "The dwelling-house must be reasonably required when the order for the recovery of possession is asked for—namely, *at the hearing*." This

(1) (1921) 1 Ch. 404.

(2) (1921) 1 Ch., at p. 407.

H. C. OF A. 1928.

BURNHAM v. CARROLL MUSGROVE THEATRES LTD.

Higgins J.

decision is strongly supported by the reasoning of *Bankes* L.J. in *Gill* v. *Luck* (1) and in *Barton* v. *Fincham* (2). But what ought the Full Court to have done when it found, in January 1928, that in October 1925, when the counterclaim was started, the tenant was in possession unlawfully, that the landlord then required to reconstruct the Arcade, but that since the counterclaim the tenant had in September 1926 been put out of possession, and the reconstruction had therefore been fully effected ? As matters stood when the counterclaim came before the Full Court, *Davidson* J. had refused the order for possession on what the Full Court regarded as insufficient grounds. Under the *Common Law Procedure Act* 1899 of New South Wales, if the claimant had title at the writ, but the title had expired before the time of trial, the claimant was, notwithstanding, entitled to a verdict according to the fact that he was so entitled at the time of bringing his action. In my opinion, the problem is solved by the due application of the *Equity Act* 1901, secs. 82 and 84 (4)—the Full Court had to rehear the matter on the appeal from *Davidson* J., and had power on the rehearing " to make any decree or order which ought to have been made, and *such further or other order as the case may require.*" What the Full Court has in fact done here is *not* to order delivery of possession (for possession had been delivered), but to " declare that *at the date of the filing of the counterclaim* the appellant defendant *was entitled* to an order for possession against the respondent plaintiff." Such an order seems to be quite within the competence of the Full Court under sec. 84 of the *Equity Act*, and would, in my opinion, accurately fit the position if after the words " at the date of the filing of the counterclaim " were inserted some such words as " and thenceforward until the plaintiff left possession." *Davidson* J. on the first trial actually ordered delivery of possession, 15th June 1926, but it was set aside by the order of the High Court granting a retrial.

In my opinion, with this variation the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant, *C. M. P. Horan.*

Solicitors for the respondents, *Barry, Norris & Wildes.*

J. B.

(1) (1924) 93 L.J. K.B. 60, at p. 62. (2) (1921) 2 K.B. 291, at p. 295.