[HIGH COURT OF AUSTRALIA.]

MOORE . . . . . APPELLANT;
PLAINTIFF,

AND

DIMOND . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *Oct.* 21, 22.

SYDNEY, *Dec.* 12.

Knox C.J., Isaacs, Rich, Starke and Dixon JJ.

Landlord and Tenant—Unenforceable contract for lease—Tenant in occupation under —Payment of rent—Yearly tenancy—Action for rent in Local Court—Court of limited jurisdiction—Inability to grant specific performance of agreement—Local Courts Act 1926 (*S.A.*) (*No.* 1782), *secs.* 57, 259 (v.).

The appellant sued the respondent in the Local Court of Adelaide to recover £16 10s. for the rent of a shop in Adelaide for the week ended 24th November 1928. The respondent had been the appellant's tenant at a weekly rent under a lease for a term which expired on 30th November 1927. In May 1927 they had made an agreement in writing for a renewal of the lease for five years at a rent of £16 10s. per week. The respondent remained in possession of the shop for some time after 30th November 1927 and paid the agreed weekly rent up to and including the week which ended on 17th November 1928. The parties failed to agree on the formal instrument for the new lease, and in November 1928 the respondent gave up possession of the shop. The appellant claimed the rent as under an agreement for a lease made in May 1927, and alternatively as upon a tenancy from year to year. The Full Court of the Supreme Court held that the rent could not be recovered under the agreement for a lease as it was not specifically enforceable in the Local Court, and that the tenancy was one from week to week and not from year to year. Against the latter part of the decision the appellant appealed to the High Court.

Held, that the respondent by continuing in possession under the agreement for a further term and paying rent became a tenant from year to year.

Decision of the Supreme Court of South Australia (Full Court) reversed.

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APPEAL from the Supreme Court of South Australia.

The appellant, Jane Cocks Moore, commenced an action in the Local Court of Adelaide against the respondent, Lewis Robert Dimond, to recover the sum of £16 10s. for rent of a shop in Rundle Street, Adelaide, for the week 17th to 24th November 1928. The plaintiff in the action claimed the rent under an agreement for a lease contained in correspondence which passed between the plaintiff and the defendant; and in the alternative she claimed the rent from the defendant as a tenant from year to year, alleging that the defendant had held over after the expiration of a registered lease from the plaintiff to the defendant. The defences substantially were that, if the defendant entered into the agreement referred to in the particulars of claim, it was upon the express condition that such lease should, with the exception of some variations agreed upon, be upon the same terms and conditions as the lease previously held by the tenant, which condition was repudiated by the plaintiff, and the defendant thereupon vacated the premises on 17th November 1928; and that, if the defendant was at any material times anterior to 17th November a tenant of the said premises, he was a tenant at will and determined the tenancy upon the said date. The respondent had held the premises in Rundle Street as tenant from the appellant under a registered lease for a term commencing 31st March 1922 and expiring on 30th November 1927 at a weekly rental of £10 10s. up to 13th November 1924 and after that at £12. In May 1927 an agreement in writing was entered into by correspondence between the parties for a further lease for five years on the basis of £16 10s. per week plus rates and taxes. From 1st December 1927 until 17th November 1928 the respondent remained in occupation of the premises, paying rent £16 10s. weekly in advance. The parties failed to agree on the formal instrument for the new lease, and in November 1928 the respondent did his best to put the appellant in possession of the premises, which, for his part, he abandoned. The Local Court of Adelaide is a Court of limited jurisdiction, and can only decree specific performance of any agreement for the lease of any property where the property does not exceed in value the sum of £2,000; which the premises in question admittedly

did. The Judge of the Local Court found that the appellant and the respondent had, by the correspondence passing between them, made an agreement for a new lease, and held that, as it was specifically enforceable at the suit of the appellant, it was a lease in equity and she was entitled to sue in the Local Court for rent accruing thereunder; and held that in any event there was a tenancy from year to year, and that in either view the appellant was entitled to recover. The Judge of the Local Court, however, agreed to state a special case for the opinion of the Full Court of the Supreme Court, which held that, having regard to the value of the property, the Local Court had no jurisdiction to decree specific performance of the agreement for a lease, and without a decree for specific performance rent could not be recovered in equity; and also held that the occupation and payment of a weekly rent were prima facie evidence of a weekly tenancy and that the claim for rent upon a yearly tenancy failed.

From this decision the plaintiff now appealed to the High Court.

Fullagar, for the appellant. Where a tenant holds over after the expiration of a lease and pays rent, prima facie a tenancy from year to year is created. Entry under a void lease plus payment of rent prima facie creates a tenancy from year to year and not a tenancy at will, and where there is a holding over and a payment of rent the same inference arises. Specific performance could not have been decreed by the Local Court and rent could not have been recovered in that Court under a void lease (*Foster* v. *Reeves* (1)). As soon as rent was paid a tenancy from year to year arose (*Dougal* v. *McCarthy* (2); *Braythwayte* v. *Hitchcock* (3); *Doe d. Hull* v. *Wood* (4); *Richardson* v. *Langridge* (5)).

[ISAACS J. referred to *Redman* on *Law of Landlord and Tenant*, 7th ed., at p. 15; *Coatsworth* v. *Johnson* (6).]

By 1780, when Lord *Kenyon* was Chief Justice, the common law Courts had, so far as they could, having regard to the *Statute of Frauds*, treated a tenancy at will as one from year to year (*Sm. L.C.*, 8th ed., vol. II., p. 109; *Doe d. Shore* v. *Porter* (7); *Bank of*

(1) (1892) 2 Q.B. 255.
(2) (1893) 1 Q.B. 736.
(3) (1842) 10 M. & W. 494, at p. 497; 152 E.R. 565, at p. 567.
(4) (1845) 14 M. & W. 682; 153 E.R. 649.
(5) (1811) 4 Taunt. 128, at p. 129; 128 E.R. 277.
(6) (1886) 55 L.J. Q.B. 220, at p. 222.
(7) (1789) 3 T.R. 13; 100 E.R. 429.

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Victoria v. *M'Hutchison* (1); *Box* v. *Attfield* (2); *Morison* v. *Edmiston* (3); *Beattie* v. *Fine* (4)).

[ISAACS J. referred to *Caulfield* v. *Farr* (5).]

There is no inconsistency created by reason of the rent being payable by reference to a week, and there is no other fact in this case which affects the implication of a tenancy from year to year.

[DIXON J. referred to *Ex parte Murphy* (6).]

The rule requiring six months' notice to determine a yearly tenancy is considered in *Landale* v. *Menzies* (7). [Counsel also referred to *Real Property Act* 1852 (S.A.) (No. 25 of 1852), sec. 2; *Real Property Act* 1886, sec. 116; *Local Courts Act* 1926 (S.A.) (No. 1782), sec. 57.]

Cleland K.C. (with him *Edmunds*), for the respondent. There is no evidence to raise a presumption that there was a tenancy from year to year, and the question here is, was there any evidence that justified the conclusion that the parties were not tenants from year to year? *Woodfall* on *Law of Landlord and Tenant*, 22nd ed., p. 269, shows that the presumption of a tenancy from year to year may be rebutted. If the new arrangement was a completed agreement, there was no room for the presumption of a tenancy from year to year; if the agreement were only provisional, that is inconsistent with a holding from year to year. The tenant did not hold over, but held under the new agreement. It depends on the circumstances of each case whether the person in exclusive occupation of land is or is not a tenant from year to year; if he remains in possession of the land in respect of which he has been paying rent, he does not become a tenant from year to year unless the payment is made with reference to a year or to an aliquot part of a year. Payment with reference to an annual rent is the determining factor (*Landale* v. *Menzies* (8)). If the tenant continued in occupation of the premises in expectation of an agreement being executed, he is liable only for use and occupation and not for rent. There was no

(1) (1881) 7 V.L.R. (L.) 452, at pp. 455, 456.
(2) (1886) 12 V.L.R. 574, at pp. 579, 580; 8 A.L.T. 45.
(3) (1907) V.L.R. 191; 28 A.L.T. 148.
(4) (1925) V.L.R. 363, at p. 374; 47 A.L.T. 19, at p. 24.
(5) (1873) 7 Ir. R. (C.L.) 469.
(6) (1856) 2 Legge (N.S.W.) 976.
(7) (1909) 9 C.L.R. 89, at p. 101.
(8) (1909) 9 C.L.R., at p. 129.

evidence which would justify a jury in finding that there was a tenancy from year to year. If there was a valid subsisting agreement, the intention of the parties was that the tenant was not to be a tenant from year to year but a tenant for five years. Secondly, even if it were only a negotiation for an agreement, that would negative any presumption that the respondent was a tenant from year to year. Thirdly, if there was a valid agreement, but the landlord repudiated it, in that case the respondent still cannot be held to be a yearly tenant, though he may be liable for use and occupation. It is a question of fact as to what the parties really agreed.

Fullagar, in reply, referred to *Lennon* v. *Scarlett & Co.* (1); *Foa's Law of Landlord and Tenant*, 6th ed., pp. 12, 13.

[DIXON J. referred to *Lee* v. *Smith* (2).]

Cur. adv. vult.

Dec. 12.

The following written judgments were delivered :—

KNOX C.J., RICH AND DIXON JJ. The appellant brought an action against the respondent in the Local Court of Adelaide to recover the sum of £16 10s. for rent of a shop in Rundle Street, Adelaide, for the week ended 24th November 1928. The respondent had been the appellant's tenant at a weekly rent under a lease for a term of five years and eight months which expired on 30th November 1927. In May 1927 they had made an arrangement for a renewal of the lease for a period of five years at a rent of £16 10s. per week. The respondent, accordingly, remained in possession of the shop for some time after 30th November 1927, and he paid the agreed weekly rent up to and including the week which ended on 17th November 1928. The parties failed to agree on the formal instrument for the new lease, and in November 1928 the respondent did his best to put the appellant in possession of the shop, which, for his part, he abandoned. In her particulars the appellant claimed the rent for the week ended 24th November 1928 as under an agreement for a lease made in May 1927, and alternatively as upon a tenancy from year to year.

(1) (1921) 29 C.L.R. 499.

(2) (1854) 9 Ex. 662; 156 E.R. 284.

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The Judge of the Local Court found that the appellant and the respondent had, by correspondence passing between them, made an agreement for a new lease, and held that it was specifically enforceable at the suit of the appellant notwithstanding attempts on her behalf to impose upon the respondent a lease more advantageous to her than was warranted by the agreement. He went on to hold that, in any event, there was a tenancy from year to year on the terms and conditions of the former lease as varied by the agreement, and, therefore, that in either case the appellant was entitled to recover. The learned Judge agreed, however, to state a special case for the opinion of the Supreme Court under sec. 57 of the *Local Courts Act* 1926.

Upon the hearing of the special case the Supreme Court considered that it was manifest—having regard to the value of the property—that the Local Court had no jurisdiction to decree specific performance of the agreement for a lease, and held that "the Local Court had no jurisdiction to entertain the action in so far as it presents any claim to the rent which may be payable as an equitable debt under the agreement for a lease, if any such agreement exists and is enforceable in a Court of competent jurisdiction." The Supreme Court proceeded to deal with the alternative claim made by the appellant's particulars for a week's rent under a tenancy from year to year, and said that one of the questions submitted to the Court, in substance though not in form, asked whether a tenant, who has agreed upon a new lease at a weekly rent and holds over after the expiry of a term of years at a weekly rent, and is then found in occupation—for less than a year—paying the new weekly rent, is a tenant by the year. The Supreme Court considered that occupation and payment of a weekly rent were prima facie evidence of a weekly tenancy, and that if the character of the rent were rejected, there was really nothing in the evidence which afforded any clear indication of the intention of the parties respecting the tenancy at law. The judgment concluded:—"For these reasons we think that the alternative claim, which alleges a yearly tenancy, fails. On the other hand it would seem that the defendant was at law a weekly tenant at a weekly rent payable in advance (*Lee*

v. *Smith* (1)), and it does not appear that the tenancy was terminated before the week ending 24th November 1927 had begun, and that the rent for that week had become payable. But as the particulars of claim stand, the plaintiff is not claiming on a weekly tenancy, and this question does not arise in the action notwithstanding the form of the final question in the case stated. The only answers which we can give to the case are that (1) the Local Court has no jurisdiction to entertain the claim to rent under the agreement alleged in the particulars; (2) the tenancy was not at law a yearly tenancy. The case will be remitted to the Local Court to do what is just in accordance with this opinion, and, in the circumstances, we think that the plaintiff should pay the defendant's costs of the special case."

The appellant now, by special leave, appeals against the second of these answers, but she has prosecuted no appeal against the first answer. We must therefore assume that the rights of the parties in these proceedings are to be determined at law and not by reference to their equitable position, as would be the case if the action were brought in a Court with complete jurisdiction in equity as well as at law. Moreover, in deciding what the character or duration of the respondent's tenancy was, we are not at liberty to draw any inferences of fact. The proceeding before the Supreme Court was a case stated, and there is no provision in the section under which it was stated enabling inferences to be drawn. The duty of the Court is, therefore, to collect from the special case and the documents which are annexed to it, what the learned Judge meant to state as the ultimate, as distinct from evidentiary, facts and to decide what is their legal result. "It cannot be too clearly understood that on a 'case stated' the facts stated are to be taken as the ultimate facts for whatever purpose the case is stated. The Court is not at liberty to draw inferences unless that power is, by express words or by necessary implication, specially conferred by some enactment" (per *Isaacs* J. in *Mack* v. *Commissioner of Stamp Duties (N.S.W.)* (2)). "Unless care is taken to distinguish between 'inference' and 'implication,' confusion is likely to occur. An implication is included in what is expressed: an implication of

(1) (1854) 9 Ex. 662; 156 E.R. 284. (2) (1920) 28 C.L.R. 373, at p. 381.

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fact in a case stated is something which the Court stating the case must, on a proper interpretation of the facts stated, be understood to have meant by what is actually said, though not so stated in express terms. But an inference is something additional to the statements. It may or may not reasonably follow from them: but even if no other conclusion is reasonable, the conclusion itself is an independent fact; it is the ultimate fact, the statements upon which it rests however weak or strong being the evidentiary or subsidiary facts" (per *Isaacs* J. in *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co.* [*No.* 1] (1)).

It is desirable to set out certain material facts that seem clearly enough to be stated or implied in the documents which together make up the special case. The conclusion is sufficiently expressed that the appellant and the respondent did, in May 1927, make a final agreement that the former should grant to the latter a further term of five years commencing on 30th November 1927 with the determination of the current lease, reserving a weekly rent of £16 10s. and subject to an immaterial exception containing the same terms and conditions as the current lease. This conclusion is stated subject to the opinion of the Court upon the sufficiency of the correspondence between the parties to support it. Another conclusion which sufficiently appears is that the respondent remained, and the appellant permitted him to remain, in occupation of the premises after 30th November 1927 in intended performance of the agreement and that the appellant, as lessor, accepted, and the respondent, as lessee, paid the weekly sum of £16 10s. from 1st December 1927 to 17th November 1928, as the rent stipulated for in the agreement. An examination of the correspondence shows that it does support the conclusion that a complete agreement was made. As the agreement for a lease was not a demise, but an executory contract to grant a lease, it could not operate to create an *interesse termini* and, immediately upon the effluxion of the prior term, the respondent became at law (although of course not in equity) a tenant at will only. Upon the first payment of rent he became entitled at law to a term, but the question is whether the term

(1) (1913) 16 C.L.R. 591, at p 624.

was from week to week or from year to year. In *Hamerton* v. *Stead* (1) *Littledale* J. said : " Where parties enter under a mere agreement for a future lease they are tenants at will ; and if rent is paid under the agreement, they become tenants from year to year, determinable on the execution of the lease contracted for, that being the primary contract." This statement was approved by *Hill* J. in *Anderson* v. *Midland Railway Co.* (2). It was well settled at law that the terms and conditions of the agreement, save in so far as they are inconsistent with a tenancy from year to year, apply to the tenancy. It was further settled that the tenancy from year to year continued only during the term contracted for, and expired at the end of that term by effluxion of time without notice to quit, being in the meantime liable to a sooner determination by notice to quit. In *Doe d. Davenish* v. *Moffatt* (3) Lord *Campbell* C.J. says :— " According to *Doe d. Bromfield* v. *Smith* (4), and other cases cited on the argument, this would be the effect of a holding under an agreement to grant a lease for a term certain. At the expiration of that term, no notice to quit is necessary ; and it would be strange if the tenant had a more extended interest under an agreement to grant a lease than he would have had under the lease had it actually been granted. In *Doe d. Tilt* v. *Stratton* (5) a reason is given for the judgment, which would not apply here, that the agreement for a term certain was a notice to quit at the end of the term. Here the lease, turned into an agreement, contemplated a probability of the tenancy continuing after the expiration of the three years. But, instead of considering the agreement a notice to quit, we think the better view of the subject is that possession under the agreement creates a tenancy from year to year, which may be determined by a notice to quit during the time specified in the agreement for the duration of the lease, but which expires at the end of that time without any notice to quit." (See *Doe d. Oldershaw* v. *Breach* (6).) These principles applied whenever the tenant held under an agreement for a lease whether the agreement was expressed as an

(1) (1824) 3 B. & C. 478, at p. 483 ; 107 E.R. 811, at p. 813.
(2) (1861) 3 E. & E. 614, at p. 622 ; 121 E.R. 573, at p. 576.
(3) (1850) 15 Q.B. 257, at p. 265 ; 117 E.R. 455, at p. 458.
(4) (1805) 6 East 530 ; 102 E.R. 1390.
(5) (1828) 4 Bing. 446 ; 130 E.R. 839.
(6) (1807) 6 Esp. 106 ; 170 E.R. 844.

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executory contract or consisted of an intended demise for more than three years void, because not under seal. In such cases the contractual intention of the parties is completely expressed in a binding manner, but is formally inefficacious to create a legal interest of the intended duration.

There is little resemblance between such a case and the very many instances in which a person has been let into, or has retained, possession of land without any express contract, and the question is whether he is a tenant, and if so, for a term of what duration. Such cases occur when a tenant overholds; when a tenant for life has granted a lease in excess of his power and dies before its determination, and the remainderman allows the lessee to retain possession; when a mortgagor has granted a lease without statutory or other power; and when the terms of entry are too vague or uncertain to be ascertainable. In such cases payment or acknowledgment of rent constitutes evidence of the establishment of a tenancy, and the fact that the rent is paid by reference to a year, or aliquot part of a year, affords evidence of a tenancy from year to year. The existence and duration of the tenancy in such a case were, however, questions of fact. On the other hand, in *Doe d. Thomson* v. *Amey* (1), in deciding that a proviso for re-entry formed a condition of a tenancy from year to year, implied from entry and payment of rent pursuant to an agreement for a lease containing such a condition, *Patteson* J. said (2): "The terms upon which the tenant holds are in truth a conclusion of law from the facts of the case, and the terms of the articles of agreement."

In the one case the question is what common intention should be attributed to the parties, in the other the question is what duration of tenancy replaces that upon which they have expressly agreed? In the latter case it is difficult to see why the period in respect of which rent is paid should afford a criterion of or determine the term. Nevertheless, in *Braythwayte* v. *Hitchcock* (3) *Parke* B. said:—"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

(1) (1840) 12 A. & E. 476; 113 E.R. 892.

(2) (1840) 12 A. & E., at p. 480; 113 E.R., at pp. 893-894.

(3) (1842) 10 M. & W., at p. 497; 152 E.R., at p. 567.

that if 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." In point of fact *Parke* B. was mistaken in his reference to *Richardson* v. *Langridge*, because there the land was let to the carrier "without any reference to time" (2), and *Mansfield* C.J. said (3):—"Here you speak, all along, of an indefinite agreement. If there were a general letting at a yearly rent; though payable half-yearly, or quarterly, and though nothing were said about the duration of the term, it is an implied letting from year to year. But if two parties agree that the one shall let, and the other shall hold, so long as both parties please, that is a holding at will." In the later case of *Lee* v. *Smith* (4) *Parke* B. relied upon payment of a quarterly rent as proof of a tenancy from year to year, and *Martin* B. said his impression was that the party would have succeeded without the receipts (*scil.*, for rent) and that he would have been entitled to refer to the instrument for the purpose of seeing what the terms of the tenancy were; whereupon *Parke* B. said (5): "I do not say that I dissent from that proposition, but here the proof of that fact appeared more strongly without it."

In the many cases at law in which it was decided that a tenant entering or holding under an agreement for a lease became on payment of rent a tenant from year to year, the rent or the render has been annual; and apparently no case has before come for decision in which the rent was not calculated by reference to a year or a part of a year. But, save for these observations of *Parke* B., no case of an agreement for a term of years has been found in which the character of the rent has been relied upon as determining the duration of the tenancy. At an early stage of the history of

(1) (1811) 4 Taunt. 128; 13 R.R. 570; 128 E.R. 277.
(2) (1811) 4 Taunt., at p. 129; 13 R.R., at p. 571; 128 E.R., at p. 277.
(3) (1811) 4 Taunt., at p. 131; 13 R.R., at p. 573; 128 E.R., at p. 278.
(4) (1854) 9 Ex. 662; 156 E.R. 284.
(5) (1854) 9 Ex., at p. 666; 156 E.R., at p. 285.

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tenancies from year to year a presumption arose in favour of that tenure. In his *History of English Law*, vol. VII., p. 245, Sir *W. S. Holdsworth* says that the ruling of *Holt* C.J. that the tenancy could only be terminated at the end of each year "shows that opinion was beginning to lean in favour of construing a tenancy, when no certain term was mentioned, as a tenancy from year to year. In the latter part of the eighteenth century this leaning became so pronounced that, on one occasion, Lord *Mansfield* even went so far as to say that, 'in the country, leases at will . . . being found extremely inconvenient exist only notionally; and were succeeded by another species of contract which was less inconvenient.' This, of course, was an exaggeration. Tenancies at will still exist; and the presumption of the existence of a tenancy from year to year, arising from the payment of rent, can always be rebutted. But the presumption had undoubtedly come to be very strong in the eighteenth century—so strong that it was held that, though the *Statute of Frauds* had enacted that a parol lease should operate only as a lease at will, such a parol lease will operate as a lease from year to year if rent has been paid thereunder." This presumption has continued and still prevails. In *Doe d. Martin and Jones* v. *Watts* (1) *Grose* J. said: "The plaintiff received rent of the defendant; and from that moment he admitted that the defendant was a tenant to him of some kind; and no other tenancy appearing here, the defendant must be considered as tenant from year to year." In *Roe* v. *Prideaux* (2) Lord *Ellenborough* says: "The receipt of rent is evidence to be left to a jury that a tenancy was subsisting during the period for which that rent was paid; and if no other tenancy appear, the presumption is that that tenancy was from year to year." In *Preston's* edition of *Watkins' Principles of Conveyancing* (1820) he says: "All leases made generally and not for any particular period, are, by construction of law, leases from year to year." This was recognized by *Cozens-Hardy* J. in *Low* v. *Adams* (3): "A general occupation of land was, as long ago as the Year-Books, held to be an occupation from year to year." In principle there

(1) (1797) 7 T.R. 83, at pp. 85, 86; 101 E.R. 866, at p. 868.
(2) (1808) 10 East 158, at p. 187; 103 E.R. 735, at p. 746.
(3) (1901) 2 Ch. 598, at p. 601.

appears to be no reason why the circumstance that the rent paid under an agreement for a term of five years is weekly should displace this presumption in favour of the yearly tenancy. The doctrine which justifies reference to the period of the rent in order to ascertain the term no doubt is that the rent is a compensation for the land, and the parties have so understood it. A quarterly payment thus implies a yearly tenancy because it is part of the compensation for a year's holding. When the parties agree for a five years' holding with weekly payments of the compensatory rent, their intention is not that each week's rent shall represent a distinct and therefore terminable holding of a week. The weekly rent is part of the compensation for the entire period. Where the intention of the parties is to hold for a greater duration than a yearly tenancy would give them, and this intention fails because of its want of appropriate expression or of formal demise, the presumption or assumption that a general holding is from year to year supplies the term.

It should, perhaps, be added that the conclusion which has been thus reached appears to be supported by the views adopted in four of the Australian States in relation to the implication of tenancies from year to year. (See *Ex parte Murphy* (1); *Bloomfield* v. *Bloomfield* (2); *Bank of Victoria* v. *M'Hutchison* (3); *Box* v. *Attfield* (4); *Morison* v. *Edmiston* (5); *Beattie* v. *Fine* (6); *Marshall* v. *Coupon Furnishing Co.* (7); *Styles & Co.* v. *Richardson* (8).)

It follows that at law, whatever may be the position in equity, the respondent would be considered a tenant from year to year.

The appeal is allowed with costs.

The second answer or statement of opinion of the Supreme Court is set aside, the opinion of this Court being that at common law the defendant was a tenant from year to year.

Order that the case be remitted to the Supreme Court to do what is right in accordance with this opinion. The order for costs in the Supreme Court is discharged, and, in lieu thereof, it is ordered

(1) (1856) 2 Legge (N.S.W.) 976.
(2) (1893) 9 N.S.W.W.N. 188.
(3) (1881) 7 V.L.R. (L.) 452.
(4) (1886) 12 V.L.R. 574; 8 A.L.T. 45.
(5) (1907) V.L.R. 191; 26 A.L.T. 148.
(6) (1925) V.L.R. 363; 47 A.L.T. 19.
(7) (1916) S.R. (Q.) 120, at p. 125.
(8) (1915) 17 W.A.L.R. 81.

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that the costs of the special case and order thereon be paid by the defendant.

ISAACS J. The material facts, so far as this appeal is concerned, are few. The respondent was tenant of the appellant of certain premises in Adelaide under registered lease, for a term commencing on 31st March 1922 and expiring on 30th November 1927, at the weekly rental of £10 10s. up to 13th November 1924, and, after that, £12. In May 1927 an agreement in writing was entered into for a further lease of five years on the basis of £16 10s. per week plus rates and taxes. From 1st December 1927 until 17th November 1928 the respondent remained in occupation of the premises, paying rent £16 10s. weekly in advance. In the meantime, disputes having occurred with reference to the new lease, the respondent went out of possession. This action was brought to recover £16 10s. as rent for the week from 17th November to 24th November 1928. It is plain that unless a tenancy at law existed during that week the claim must fail. The Supreme Court of South Australia thought that, having regard to the claim made, the appellant would fail unless a tenancy from year to year was established, and held there was no evidence to sustain any finding of such a tenancy. I agree that it was incumbent on the appellant at that stage to succeed, if at all, on the footing of a tenancy from year to year.

The reasoning of the Court leading to its conclusion may be thus epitomized: (1) Apart from the payment of rent, there was a mere tenancy at will; (2) the rent from payment of which the law draws the implication of a tenancy from year to year must be what is known as an "annual" rent, in whatsoever instalments it is payable; (3) the rent actually paid was a weekly rent; (4) there was nothing—apart from the rent—which afforded any clear indication of the intention of the parties respecting the tenancy at law. It was contended for the appellant that the second step was inaccurate, and that the true rule of law is that occupation plus payment of any rent whatever raises a prima facie legal implication, subject to rebuttal, that a tenancy from year to year exists. It was also contended for the appellant that the terms of the agreement for a lease were sufficient on which to base a conclusion of a tenancy

from year to year. Both propositions were contested. With the first proposition I certainly do not agree. In *Landale* v. *Menzies* (1) I cited cases and text-writers from 1778 to 1907—which I need not now repeat—establishing as a firmly-rooted doctrine that in order to raise the implication in question the rent paid must be what is called an "annual" rent, that is, a rent referable to a year or some aliquot part of it, so as to give it, so to speak, a yearly character. Later authorities confirming this will be mentioned presently. There are to be found some judicial observations referring to tenancies from year to year which employ the word "rent" without the adjective "annual" or its equivalent. But those are always, so far as I have seen, *alio intuitu*, and in cases where the rent was in fact of a yearly character and "annual" was *verbum inauditum*. No judicial decision or even dictum has been brought under notice contrary to those included in *Landale* v. *Menzies* (2). If we approach the matter from the standpoint of principle, the same conclusion is reached, and very naturally so. The implied tenancy from year to year does not rest on the actual intention of the parties to create such a tenancy. It is "a conclusion of law" (per *Patteson* J. in *Doe d. Thomson* v. *Amey* (3)). It rests on a presumption that the law makes from their acts, that they have contracted to create a tenancy from year to year. The presumption is the same for all persons, including corporations (*Doe d. Pennington* v. *Taniere* (4)).

In *Arden* v. *Sullivan* (5) *Patteson* J., for the Court, said: "The defendant, by entering under this agreement and paying rent for a year, must be presumed to have agreed to be tenant from year to year." In *Dougal* v. *McCarthy* (6) Lord *Esher* M.R. calls the presumption an implication of law, citing Lord *Mansfield* and *Butler* J. in *Right* v. *Darby* (7). In *Croft* v. *William F. Blay Ltd.* (8) *Astbury* J. calls the implication "a contract implied from conduct." I should prefer to say "imputed." In the Court of Appeal *Warrington* L.J. (9) says:—"On March 25, 1917, the

(1) (1909) 9 C.L.R., at pp. 129-130.
(2) (1909) 9 C.L.R. 89.
(3) (1840) 12 A. & E., at p. 480; 113 E.R., at p. 894.
(4) (1848) 12 Q.B. 998; 116 E.R. 1144.
(5) (1850) 14 Q.B. 832, at p. 839; 117 E.R. 320, at p. 323.
(6) (1893) 1 Q.B., at p. 740.
(7) (1786) 1 T.R. 159; 99 E.R. 1029.
(8) (1919) 1 Ch. 277, at p. 289.
(9) (1919) 2 Ch. 343, at p. 349.

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tenant paid and the landlord accepted a quarter's rent, that is to say, one-quarter of the yearly rent stipulated for in the agreement. *The result* of that was that *the tenant thereupon became* a tenant from year to year upon the same terms as expressed in the original agreement so far as such terms are applicable to a tenancy from year to year." In the quotation from the judgment of *Cozens-Hardy* M.R., which immediately follows, the words are: "Under those circumstances the tenant holding over is *deemed to hold* upon all the terms" &c. *Warrington* L.J. says (1):—"A man goes into possession at an odd time, he pays rent for the odd time up to the next quarter-day, and thereafter he pays and the landlord accepts rent at the regular quarter-days. The Court under those circumstances comes to the conclusion, *as it is bound to do*, that there is a tenancy from year to year." *Duke* L.J. (2) refers to the term arising by holding over as a term "which *arose by conduct* of the parties." He quotes *Preston* to the same effect. In *Mayo* v. *Joyce* (3) the Court had to consider the effect of a clause in a letting agreement which provided that the rent was £60 per annum payable on the usual quarter-days. Of that clause *Bailhache* J. said (4): "The provision for the payment of rent quarterly of itself creates a yearly tenancy"; and *Sankey* J. said (5): "That clause, taken by itself, creates a yearly tenancy." In *President and Governors of Magdalen Hospital* v. *Knotts* (6) Lord *Selborne* says: "If any rent had been reserved and received, however small, the legal relation of a tenancy from year to year would have been *created*." That was even though the actual lease was void, and the observation appears to be in line with the decision in *Doe d. Pennington* v. *Taniere* (7).

In my opinion, therefore, unless in view of all the circumstances the rent paid has a yearly character, the Court cannot presume a tenancy from year to year, for the payment of rent would be repugnant to such a tenancy. The evidentiary facts, that is, the facts constituting the conduct, must no doubt be ascertained by the tribunal of fact, whether Judge or jury as the case may be. The

(1) (1919) 2 Ch., at p. 357.
(2) (1919) 2 Ch., at p. 360.
(3) (1920) 1 K.B. 824.
(4) (1920) 1 K.B., at p. 826.
(5) (1920) 1 K.B., at p. 828.
(6) (1879) 4 App. Cas., 324, at p. 335.
(7) (1848) 12 Q.B. 998; 116 E.R. 1144.

intention of the parties in this domain is, of course, all-important. These facts, if disputed, may be whether the alleged tenant held over or retained possession as tenant at all (*Jones* v. *Shears* (1); and per *Willes* J. in *London and North-Western Railway Co.* v. *West* (2)); or if as tenant, on what intended terms (*Dougal* v. *McCarthy* (3), *Wedd* v. *Porter* (4) and *Cole* v. *Kelly* (5), per *Bankes* L.J. and per *Atkin* L.J.). But, those facts being ascertained, it is obvious it cannot be a question of fact whether the parties created a tenancy from year to year. The basis of the inquiry is that they did not. But at that point the ultimate question as to the existence of such a tenancy is one for the Court as a matter of law. It may be called a presumption or an implication of law, or it may be a legal imputation of an actual contract. But in effect, where the proper circumstances exist, the law deems the relation of landlord and tenant from year to year to exist. As *Patteson* J. said in *Doe d. Thomson* v. *Amey* (6), "the terms upon which the tenant holds are in truth a conclusion of law from the facts of the case, and the terms of the . . . agreement"; and as *Willes* J. said in *West's Case*, "a new tenancy in law from year to year" was "created." The circumstances must contain sufficient to raise the presumption and nothing repugnant to it. For instance, as *Erle* C.J. said in *Hunt* v. *Allgood* (7): "Ordinarily speaking, an occupation of premises for more than a year, and payment and acceptance of rent, creates a tenancy from year to year." The length of time for occupation and payment of rent there together raise a prima facie implication. But if the parties say expressly the tenancy is at the will of the tenant or the lessor, there would be a repugnancy and no tenancy from year to year (*Doe d. Warner* v. *Browne* (8); *Doe d. Bastow* v. *Cox* (9)). And see as to inconsistency, per *Parke* B. in *Doe d. Dixie* v. *Davies* (10), *Mayo* v. *Joyce* (11), and *Lowther* v. *Clifford* (12).

(1) (1836) 4 A. & E. 832, at p. 836; 111 E.R. 997, at p. 998.
(2) (1867) L.R. 2 C.P. 553, at p. 555.
(3) (1893) 1 Q.B., at p. 742.
(4) (1916) 2 K.B. 91, at p. 98.
(5) (1920) 2 K.B. 106, at pp. 126, 132.
(6) (1840) 12 A. & E., at p. 480; 113 E.R., at pp. 893-894.
(7) (1861) 10 C.B. (N.S.) 253, at p. 257; 142 E.R. 448, at p. 450.
(8) (1807) 8 East 165; 103 E.R. 305.
(9) (1847) 17 L.J. Q.B. 3; 11 Q.B. 122; 116 E.R. 421.
(10) (1851) 7 Ex. 89, at p. 91; 155 E.R. 868, at p. 869.
(11) (1920) 1 K.B. 824.
(12) (1927) 1 K.B. 130, at p. 136.

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It follows from what I have already said that, if nothing more appeared, the payment of a weekly rent would not be sufficient to raise the presumption of a tenancy from year to year. In *Adams* v. *Cairns* (1) *Williams* L.J. said: "If there were nothing more than the reservation of a weekly rent, the inference would be drawn that there was a weekly tenancy." But the matter does not end there. It is important to observe that the Court examines all the relevant circumstances which taken as a whole may overcome the prima facie effect of the payment taken alone. That is to say, the fact of a rent being a weekly rent or a yearly rent is not conclusive that the tenancy is weekly or from year to year. As to the weekly rent, the cases of *Bank of Victoria* v. *M'Hutchison* (2) and *Box* v. *Attfield* (3) are cases in point, and, in my opinion, are correct. As to a yearly rent, the observations of *Parke* B. in *Doe d. Dixie* v. *Davies* (4) are relevant. *Smith* v. *Widlake* (5) is an authority on the point. The rent of sixpence was paid as yearly rent, but, having regard to its disproportion in relation to the annual value of the property, the Court declined to regard it as sufficient to raise the presumption. *Bramwell* L.J. said (6): "the payment of rent is at most only evidence of a tenancy from year to year." Then on the facts he held that the money was not received as rent under such a tenancy, but under a mistaken notion of confirmation of a void lease.

Once the principle is granted that the Court makes the presumption or implication *in law* from all the relevant facts evidencing the conduct of the parties, and in so doing adheres inexorably to the essentiality of the rent having an annual character, for the plain reason that, unless it is so, it cannot be rent for a lease from year to year, the matter here seems to present no difficulty on the facts. First of all, it is undeniable that the respondent did not hold over; that is, his occupation after 30th November was not an unauthorized occupation which apart from payment of rent would have made him a tenant at sufferance and would have referred prima facie the payment of rent to the terms of the expired tenancy. He held as tenant at will, at least until payment of rent, because he held under the terms of the agreement for a new lease. The rent of

(1) (1901) 85 L.T. 10, at p. 11.
(2) (1881) 7 V.L.R. (L.) 452.
(3) (1886) 12 V.L.R. 574; 8 A.L.T. 45.
(4) (1851) 7 Ex. 89; 155 E.R. 868.
(5) (1877) 3 C.P.D. 10.
(6) (1877) 3 C.P.D., at p. 15.

itself, which was not paid for a full year, though very nearly so, would, as already stated, have effected no change, because without more the Court would have no evidence on which to base a legal conclusion from conduct that the rent was paid with reference to a yearly holding. But part of the relevant conduct may, in accordance with judicial authority already stated, include entry upon or retention of possession upon the faith of an agreement. (See *Doe d. Rigge* v. *Bell* (1) and per *Williams* J. in *Doe d. Thomson* v. *Amey* (2).) *Tress* v. *Savage* (3) is an authority for this, and has been followed in *Martin* v. *Smith* (4). So in *Bank of Victoria* v. *M'Hutchison* (5). The agreement for this purpose is regarded not as a binding contract, but as evidence of the mutual understanding and intention of the terms on which the premises were held and the rent was paid, that is, of the conduct of the parties. Looking at the agreement in this case for that purpose, and all the attendant circumstances, I entertain no doubt there was abundant evidence of circumstances without repugnance on which to found the necessary presumption of a tenancy from year to year. That conclusion being a matter of law, I am of opinion it should be drawn, and this the Court, in the words of *Warrington* L.J. (6), "is bound to do"; and the fourth question, namely, "Is the defendant liable for the rent claimed?" should be answered in the affirmative.

STARKE J. In this case we are dealing with technical aspects of the law rather than with the real rights of the parties. According to the case stated, the defendant for some time prior to 30th November 1927 held certain premises in Rundle Street, Adelaide, under lease from the plaintiff. Some six months before the lease expired, the plaintiff and the defendant agreed in writing upon a further lease for five years "on the basis of £16 10s. per week plus rates and taxes." This agreement was void at law as a lease, but, though void at law, it would in equity be held to operate as an agreement for a lease, and as such to create an equitable tenancy on the terms expressed, provided—and this is the essential condition

(1) (1793) 5 T.R. 471, at p. 472; 101 E.R. 265, at p. 266.
(2) (1840) 12 A. & E., at p. 480; 113 E.R., at p. 894.
(3) (1854) 4 E. & B. 36.
(4) (1874) L.R. 9 Ex. 50, at p. 52.
(5) (1881) 7 V.L.R. (L.) 452.
(6) (1919) 2 Ch., at p. 353.

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—that it be found to be an agreement of which a Court of equity would decree specific performance (*Gray* v. *Spyer* (1); *Walsh* v. *Lonsdale* (2); *Manchester Brewery Co.* v. *Coombs* (3)). Under the law of South Australia, in all matters in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity prevail (*Supreme Court Act* 1878, sec. 6 (XI.); *Local Courts Act* 1926, sec. 36). But the equitable doctrine that a person who has an agreement for a lease can be treated as if he had a lease can only be applied if the Court in which an action is brought upon the agreement had jurisdiction to decree specific performance (*Foster* v. *Reeves* (4)). In the present case, the plaintiff sued in the Local Court of Adelaide for the sum of £16 10s., being a week's rent of the premises in Rundle Street, and founded his claim on the agreement, or alternatively on a tenancy from year to year, to be inferred from the agreement, payment and acceptance of rent, and holding over of the premises by the defendant after the expiration of the lease already mentioned. The Local Court of Adelaide is a Court of limited jurisdiction, and can only decree specific performance of any agreement for the lease of any property where the property does not exceed in value the sum of £2,000. It was admitted that a decree was beyond its jurisdiction in this case, though we were informed at the Bar that the plaintiff is now seeking or is about to seek specific performance of the agreement in the Supreme Court. In the present proceedings he fell back on his claim for rent as upon a tenancy from year to year. Usually, the question, as we have seen, does not call for decision, for where specific performance can be had the tenant holds under the agreement as if the lease had been actually granted, and the implication of a yearly tenancy is unnecessary (cf. *Foa* on *Landlord and Tenant*, 6th ed., p. 396). But, owing to the limited jurisdiction of the Local Court of Adelaide and the form of the plaintiff's claim, the question in this case is whether the defendant is at law a tenant from year to year. It is not a question of fact, but rather an implication of law from the proved facts and circumstances of the case. It would be idle,

(1) (1922) 2 Ch. 22, at pp. 33, 34.
(2) (1882) 21 Ch. D. 9.
(3) (1901) 2 Ch. 608.
(4) (1892) 2 Q.B. 255.

after the exhaustive examination by the Chief Justice and my learned brethren of the authorities, to traverse them again. The learned Judges of the Supreme Court of South Australia held that the mode in which the rent was reserved—on the basis of £16 10s. per week—" affords a presumption that the tenancy is of a character corresponding to it " (*Foa* on *Landlord and Tenant*, 6th ed., p. 3). But that presumption is not conclusive, and " other parts of the instrument " may rebut it. An agreement to grant " a further five years' lease," coupled with the payment and acceptance of rent, effectively destroys, in my opinion, any implication that the intention of the parties was to create a weekly tenancy, and raises an implication in point of law that the parties, as they could not by agreement lawfully create a term of five years, must have intended to create a yearly tenancy. I therefore agree that the appeal should be allowed.

One other observation is perhaps desirable: the plaintiff and his advisers should consider whether they can enforce specific performance of the agreement for a five years' lease if they take a judgment in the present proceedings on the footing of a tenancy from year to year subsisting at law between the parties. An estoppel by judgment may arise, but I have formed no opinion upon the question, and I express none.

Appeal allowed.

Solicitors for the appellant, *Baker, McEwin, Ligertwood & Millhouse.*

Solicitors for the respondent, *Edmunds, Jessop & Ward.*

H. D. W.