[HIGH COURT OF AUSTRALIA.]

DIMOND . . . . . APPELLANT;
DEFENDANT,

AND

MOORE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *Feb.* 18, 19.

SYDNEY, *April* 13.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

Landlord and Tenant—Agreement for a lease—Rescission—Lease to be in same form as earlier lease with certain modifications—Landlord submitting and requiring lease in different form—Delay in submitting lease according to agreement—Rescission by tenant—Lease from year to year formerly held to subsist for purposes of former case—Lease from year to year falling with rescinded agreement.

The appellant had been a tenant of the respondent. By an agreement made about April 1927 the respondent agreed to grant to the appellant a further five years' lease with certain specified modifications. The appellant remained in possession and the respondent made various improvements. In December 1927 a draft lease was forwarded to the appellant for execution, but he refused to sign it as it was not in the terms of the agreement between the parties. In July 1928 the respondent's advisers wrote to the appellant enclosing a lease for execution by him, and stating that that was the lease the respondent required. This engrossment was also contrary to the terms of the agreement. The appellant retained the premises until 1st November 1928, when he stated that he accepted a request to vacate, which he erroneously ascribed to the respondent, and offered to return the keys of the premises on 30th November 1928 on the mistaken belief that the respondent required possession. On 2nd November 1928 the appellant wrote returning the lease, stating that it was not in accordance with the terms of the agreement. On 28th November the appellant returned the keys and said that the matter was finished. On 11th December the respondent admitted the terms of the agreement and required the appellant to carry out such agreement.

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Held, by *Duffy* C.J., *Starke* and *Evatt* JJ. (*Dixon* and *McTiernan* JJ. dissenting), that the appellant was entitled to treat the contract as at an end on 28th November 1928.

In *Moore* v. *Dimond*, (1929) 43 C.L.R. 105, it had been decided, for the purposes of that case, that the present appellant was tenant from year to year of the present respondent at common law.

Held, by *Duffy* C.J., *Starke* and *Evatt* JJ., that as the agreement from which the tenancy from year to year was implied was terminated on 28th November 1928, neither party could specifically enforce the agreement, and consequently in equity the appellant ought not, from such date, to be regarded as a tenant of the respondent, and that from such date the respondent could not assert that the appellant was a tenant of hers from year to year.

Decision of the Supreme Court of South Australia (*Richards* J.) reversed.

APPEAL from the Supreme Court of South Australia.

The plaintiff, Jane Cocks Moore, brought an action against the defendant, Lewis Robert Dimond. The statement of claim alleged that an agreement in writing was constituted by letters between the plaintiff and the defendant whereby the plaintiff agreed to grant to the defendant the lease of a shop and premises in Rundle Street, Adelaide, for five years from 1st December 1927 at a rental of £16 10s. a week payable in advance; that the defendant entered into possession of the premises under the agreement on 1st December 1927 and remained in possession until 19th November 1928 and paid rent up to 17th November 1928; that on 6th December 1928 the defendant refused to carry out or perform the agreement, and that the plaintiff was at all times ready to perform the agreement. The plaintiff claimed specific performance of the agreement; £775 10s. being rent under the agreement from 17th November 1928 to 14th October 1929, (alternatively) damages for the defendant's breach of the agreement; or (alternatively) the plaintiff claimed a declaration that the defendant was a tenant from year to year of the premises at a rental of £775 10s. In a previous case between the same parties (*Moore* v. *Dimond* (1)) the High Court had, for the purposes of that case, decided that at common law the present appellant was a tenant from year to year of the respondent.

The defendant by his defence (*inter alia*) denied the alleged agreement, and said that the letters relied on as constituting the

(1) (1929) 43 C.L.R. 105.

same were mere negotiations and did not constitute a concluded or binding contract. The defendant also denied that he entered into possession but said that, if he did so, he entered either as a weekly tenant or as a tenant on sufferance or in expectation of the said negotiations resulting in his obtaining from the plaintiff a lease registrable under the provisions of the *Real Property Act* 1886 (S.A.) upon terms approved by the defendant and embodying the terms and conditions stipulated in the said letters, and that the defendant paid the rent for the period of his occupation and until the plaintiff finally refused to grant such lease; that the plaintiff finally refused verbally by her solicitors on 1st November 1928, whereupon the defendant by notice in writing to the plaintiff determined his tenancy and vacated the premises on or before 30th November 1928. The defendant also denied that on 6th December 1927 he refused to carry out the said agreement, and said that if the correspondence referred to constituted an agreement the plaintiff, despite repeated application by the defendant for a draft lease in terms of the said correspondence for his approval, refused at all material times and, until after the defendant had vacated the said premises pursuant to the said notice, continued to refuse to carry out the said agreement by submitting such draft as aforesaid but insisted upon the acceptance and execution by the defendant of a lease in terms different from that referred to in the said correspondence. The defendant also alleged unreasonable delay on the part of the plaintiff, and that grave hardship would be caused to the defendant by an order for specific performance, and alleged that in consequence of the plaintiff's failure to carry out the agreement the defendant had been compelled to lease other premises at a higher rental of £22 10s. per week (exclusive of rates and taxes). The defendant also counterclaimed for damages alleged to be occasioned by the plaintiff's breach of the said agreement.

The material facts are set out in the judgments hereunder.

The action was heard by *Richards* J., who made a declaration that the letters referred to in the statement of claim constituted a binding agreement between the plaintiff and the defendant and that the said agreement ought to be specifically performed, and decreed

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specific performance and gave judgment for the plaintiff on the claim for rent for £775 10s. and on the counterclaim.

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

Cleland K.C. and *Edmunds*, for the appellant. There never was a concluded agreement, and, if there was, it was repudiated by the landlord at or after the time of performance. No adoption of or assent to that repudiation by the tenant was necessary to make it a final and complete breach and establish a cause of action for the breach. If any approval or assent to that position was necessary, the evidence establishes beyond question that the tenant adopted the conduct of the landlord as a breach of contract. There is no evidence in this case that the landlord was ever ready and willing to grant the lease stipulated for in the contract alleged. Moreover, on the whole of the facts of this case it would be unjust and inequitable to grant specific performance. If the agreement for the lease exists it is contained in the letters referred to in the statement of claim, and they are not couched in the terms of a completed contract. Everything was left in a state of negotiation and there never was a concluded contract. But assuming that there was a completed agreement, the agreement was that the new lease was to be on the same terms as the old lease except as to the insurance clause. A draft lease was prepared and sent to Dimond with a letter stating that it was in the terms agreed upon. The draft lease was definitely objected to by the tenant as not complying with the terms of the agreement. On 9th July 1928 the solicitors of the landlord wrote to the tenant enclosing a memorandum of lease for execution and stating:—"The lease has been greatly modified and is virtually in the same form as your previous lease. We are instructed to inform you that this is the form of lease which our clients require." This letter constitutes a definite repudiation of the agreement by the landlord. If there was a contract this letter was a breach, and if there was no contract it shows what the landlord required. After that letter the tenant could sue for specific performance of the agreement constituted by the letters pleaded or could sue on that letter for damages for breach. Directly there is a breach of a contract, the contract is converted into a cause of action which

cannot be got rid of except by some method known to the law, as by accord and satisfaction. The contract was that the new lease was to be in exactly the same form as the old, and not in any other form. There was a repudiation of that contract by the letter of 9th July, which was an ultimatum following attempts to get the parties to agree, and is to be regarded as a statement that the landlord is not going to comply with the contract (*Summers* v. *The Commonwealth* (1)). The tenant could then elect his remedy of specific performance or damages (*Halsbury*, vol. VII., pp. 441, 454 ; *Leake* on *Contracts*, 7th ed., p. 659). The breach of contract by the landlord gave a right of action to the tenant, but gave no right to the landlord. The contract was then at an end and converted into a cause of action in the tenant but not in the landlord. There is no evidence that till the issue of the writ the landlord was ever ready and willing to give the defendant the lease, and the onus of showing that she was so ready and willing was on the plaintiff (*Cohen & Co.* v. *Ockerby & Co. Ltd.* (2) ; *Hensley* v. *Reschke* (3)). If a breach occurs at or after the time for specific performance, there must be satisfaction as well as accord, and in this respect it differs from the case of an anticipatory breach (*Bellamy* v. *Debenham* (4)).

Ligertwood K.C. (with him *Wright*), for the respondent. If the tenant had told us exactly what he wanted, he would have got it. The landlord was at all times ready to perform the agreement, and there was no repudiation at any time by the landlord, who at no time said he would not give a lease in accordance with the agreement. The tenant went out of possession, not because the landlord repudiated the contract, but, as he says, because the landlord gave him notice to quit, and went not in repudiation of the contract but in affirmance of it. The landlord was always ready and willing to grant a lease in the terms of the agreement. Its form still required negotiation, and discussion of its terms took place. The tendering of a draft document not in entire accord with the agreement was not evidence of repudiation or of breach of contract, and there was

(1) (1918) 25 C.L.R. 144, at p. 152.
(2) (1917) 24 C.L.R. 288, at p. 298.
(3) (1914) 18 C.L.R. 452.
(4) (1891) 1 Ch. 412.

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no refusal of a lease such as was agreed upon (*Lennon* v. *Scarlett & Co.* (1)). The landlord stated that she would like a lease in another form, but she was not insisting upon it. Until the contract is terminated the plaintiff can sue for specific performance of it. Even if the plaintiff's conduct amounted to a repudiation going to the root of the contract, it was open to the defendant to waive that breach. The defendant should have given notice that unless the plaintiff performed the contract by a certain date, he was leaving the premises. As the defendant did not adopt the letter of 9th July as a repudiation, he cannot later so adopt it without giving proper notice and an opportunity to rectify the defect (*Panoutsos* v. *Raymond Hadley Corporation of New York* (2)). The defendant should have given the plaintiff reasonable notice that unless the lease in the form agreed on was signed he was going to treat the contract as at an end. Notice is necessary after the negotiations that had taken place (*Fry* on *Specific Performance*, 6th ed., pp. 510, 511, pars. 1092, 1094). After negotiations the parties cannot arbitrarily put an end to the contract without giving reasonable notice. The tenancy can be put an end to only in a proper legal way, and, even if there be a breach, that still leaves the tenancy subsisting until it is determined, and the tenancy from year to year subsists, if we are not entitled to specific performance of the agreement (*Moore* v. *Dimond* (3)). The tenancy from year to year which the Court held in that case subsisted can only be terminated by six months' notice, and will continue until properly terminated. As to damages, the defendant suffered no damage, because he had possession of the plaintiff's premises, and there is nothing to show that the plaintiff ever denied him possession. There was no need for the defendant to pay rent for the two premises. He could have got all he was entitled to under this lease. The plaintiff is entitled to rent after the keys were given up. Even if the agreement does not subsist, the relation of landlord and tenant still exists, and that can only be terminated by proper notice. The defendant may have possession and a right to specific performance but no right to terminate the tenancy from year to year. The plaintiff was ready and willing at all times to perform this lease.

(1) (1921) 29 C.L.R. 499.
(2) (1917) 2 K.B. 473, at p. 477.
(3) (1929) 43 C.L.R. 105.

Cleland K.C., in reply. Here the tenant entered in expectation of obtaining a five years' lease and, when that was refused, his possession was not converted into a claim at law (*Walsh* v. *Lonsdale* (1)). Here there was no tenancy from year to year, because the tenant held under the agreement. There is no evidence that the plaintiff was ready and willing to give a lease on the old terms. The plaintiff always insisted on a lease in a particular form and ultimately the defendant said he would not go on.

Cur. adv. vult.

April 13.

The following written judgments were delivered :—

GAVAN DUFFY C.J. AND STARKE J. This is an appeal from a judgment of *Richards* J., of the Supreme Court of South Australia, declaring that certain letters between the parties to the action written in April and May 1927 constituted a binding agreement for a lease and decreeing specific performance of that agreement. The case of *Moore* v. *Dimond* (2) must first be mentioned. The decision in that case does not hinder us from dealing with the rights of the parties on this appeal, because no final judgment was ever sought or obtained in that cause from the Local Court in South Australia or any other Court. The parties, not unnaturally, preferred to bring an action before *Richards* J. wherein their real rights could be ascertained and enforced, instead of proceeding in the Local Court at Adelaide where some technical aspects of the law might be expounded but the substantial rights of the parties left undetermined.

The judgment under appeal has been attacked upon several grounds. First, it was contended that the letters relied on by *Richards* J. did not constitute a binding agreement for a lease. The letters, however, support the conclusion of *Richards* J. that a complete agreement was made. The learned Judge examined the letters in detail, and we concur in the interpretation put upon them by him. Next, it was argued that the respondent (the party who had agreed to grant the lease) repudiated the agreement, refused and was never ready and willing to carry out and perform it, and

(1) (1882) 21 Ch. D. 9, at p. 14. (2) (1929) 43 C.L.R. 105.

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that the appellant elected to treat the agreement as ended and vacated the premises. Before examining the facts it is desirable to state the rule of law applicable to this branch of the case. A convenient statement of that rule may be found in the judgment of Lord *Alverstone* M.R. in the Court of Appeal in *Rhymney Railway* v. *Brecon and Myrthyr Tydfil Junction Railway* (1) :—"It will be well to consider . . . what conduct on the part of one party to a contract justifies the other party in treating it as at an end. If there is a distinct refusal by one party to be bound by the terms of a contract in the future, the other party may . . . treat the contract as at an end. . . . Short of such refusal . . . the true principle . . . is that you must ascertain whether the conduct of the party who has broken the contract is such that the other party is entitled to conclude that the party breaking the contract no longer intends to be bound by its provisions." See *General Bill Posting Co.* v. *Atkinson* (2). A refusal by one of the parties to an agreement "to recognize it as subsisting" may evince an intention no longer to be bound by it. Compare *Marsden* v. *Sambell* (3).

The material facts are :—Dimond, the appellant, had been a tenant of Mrs. Moore, the respondent. By the agreement already mentioned, made in April and May of 1927, Mrs. Moore had agreed to grant to Dimond a further five years' lease, containing all such clauses as were in the prior lease, excluding, however, the obligation of Dimond to pay insurance. Also a stipulation was made for a higher rent and that the lessee was to paint the store part of the premises twice during the currency of the lease. Dimond remained in possession of the premises, and Mrs. Moore made various improvements to them. In December 1927 a draft lease was forwarded to him for execution, but he refused to sign it. It was claimed to be "in terms agreed upon with you," but in fact it was contrary to the terms of his agreement, in various clauses, particularly those numbered 4, 5, 6, 7, 10 and 12. This departure from the agreement was due partly to the desire of Mrs. Moore to have a lease in the same form for all her tenants, and partly to the fact that the solicitors drawing

(1) (1900) 69 L.J. Ch. 813, at p. 818. (2) (1909) A.C. 118.
(3) (1880) 43 L.T. 120.

the lease did not know of the terms of the agreement. Some delay then took place, but in June of 1928 Mrs. Moore's advisers interviewed Dimond, who insisted that he was entitled to a lease in the same terms as his old lease, subject to an alteration in rental and in the insurance clause. He specially objected to clauses 5 and 12 of the draft lease submitted for his execution. On 9th July 1928, Mrs. Moore's advisers wrote to Dimond, enclosing a lease in triplicate for perusal and execution by him. They said they had been instructed by their clients to prepare it, that it was virtually in the form of Dimond's previous lease; and they added: "this is the form of lease which our clients require." This draft or engrossment of a lease was also contrary to the terms of the agreement, particularly those clauses numbered 4, 5, 6, and 9. Again Mrs. Moore's advisers do not appear to have known the real agreement between her and Dimond. And, like the draft of December 1927, the new lease was the result of an endeavour to have a lease as nearly in the same form for all Mrs. Moore's tenants as possible. Delay again took place, owing to the absence of Dimond in Western Australia, but on 1st November 1928 he wrote to Mrs. Moore's advisers that he accepted the notice given to vacate the premises, and would return the keys on 30th November or earlier if desired. In this he was under some misapprehension, for it is denied that any such notice was given, and the learned trial Judge acted upon this view. However, on 2nd November Dimond's advisers put the position on a clear and definite basis. They wrote to Mrs. Moore's advisers as follows (omitting immaterial passages):—"Our client instructs us that his offer was to take a further lease of these premises upon the distinct understanding that it was to be upon the same terms and conditions as the existing lease, subject only to the exclusion of the insurance clause and the consequential increase of rent. The lease tendered for his signature is . . . not in the same terms as the expired lease, and our client, quite properly, objected to accept it. . . . Our client has always been ready and willing to abide by his offer, but as the premises are now unoccupied he is quite willing to hand over possession and the keys immediately if you so desire. . . . We return the lease in triplicate tendered by you and would be obliged by an immediate reply." On 6th November Mrs. Moore's

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advisers replied :—" The lease as originally prepared by us was in accordance with our instructions. A fair copy was submitted to your client, and several times we attended at your client's shop and at last agreed on the form of the lease which we understood your client said he would sign. According to our instructions it was never agreed that the new lease should be upon the same basis and conditions as the former lease, subject only to the deletion of the insurance clause and the consequential increase of rent. However, we will refer the matter to our client and advise you immediately we have been able to obtain her further instructions herein." It is clear enough that Dimond never did agree to the form of lease submitted to him, and the other statements make it certain that the advisers either were wrongly instructed, or else (as seems probable) never knew the facts. The premises had at this time been vacated, and Dimond's advisers offered to return the keys " pending further developments," but Mrs. Moore's advisers covered themselves under the objection that they had no authority to receive them. So the matter dragged on during the whole of November without the slightest intimation from Mrs. Moore's advisers that she withdrew from the position that Dimond had agreed upon the form of lease submitted to him, and that no such agreement as he alleged was ever made. But a few days would have been sufficient to obtain the necessary instructions. At last, Dimond took decisive action. On 28th November he called at the office of Charles Moore and Company in Adelaide, who had acted for Mrs. Moore in connection with the letting of her properties in Adelaide to Dimond and others. He saw Allen the accountant, who had been concerned in and had to some extent handled the matter of the lease to Dimond. Dimond said he would not sign the lease or anything, and that any lease was finished. He put the keys on Allen's table and walked out. Allen's understanding of the position was that " the thing was finished with as far as we " (the firm) " were concerned. There was nothing left for us to do but to leave it to our solicitors." The advisers of Mrs. Moore promptly returned the keys to Dimond's advisers, and asserted that they had been endeavouring to arrange an appointment with them to " consider the terms of the proposed lease." Dimond's advisers, not unnaturally, replied that it was too late, that their

client was not prepared to continue negotiations and in substance had terminated the contract. And it was not until 11th December that Mrs. Moore's advisers admitted the contract contained in the correspondence already mentioned, and then they insisted upon Dimond "carrying out his obligations in this connection." The tergiversation on the part of Mrs. Moore and her advisers and the long delay before the admission of Dimond's right to a lease in the terms of the agreement would disentitle her, in any event, we think, to specific performance of the agreement (*Cornwall* v. *Henson* (1)). But we go further : we think that her conduct and that of her advisers justify the conclusion that she did not recognize the agreement with Dimond, and did not intend to be bound by its provisions. The facts show that what she or her advisers insisted upon was a lease in the form that other tenants were prepared to accept. Such a demand was quite inconsistent with the agreement with Dimond, and the conduct of herself and her advisers from July 1927 to November 1928 was wholly inconsistent with the terms of that agreement. Then, in November 1928, when her advisers were confronted with a precise statement of the agreement, they asserted that such an agreement was never made. But they promised to refer the matter to their client and advise Dimond's solicitors immediately. Dimond waited for three weeks longer, offering to return the keys in the meantime pending developments, but on 28th November 1928 he acted decisively as already mentioned. In our opinion Dimond, at this point, was entitled to conclude that Mrs. Moore did not intend to be bound by or carry out the agreement with him, and he was justified in electing and did elect to treat the agreement as at an end. Only when this election was made, and finally made, did Mrs. Moore and her advisers bestir themselves, and offer, on 3rd December 1928, "to consider the terms of the proposed agreement." But it was too late. And in an endeavour to retrieve the position, they, on 11th December, for the first time admitted the agreement that Dimond had all along relied upon.

The decree for specific performance cannot, in these circumstances, be supported.

(1) (1900) 2 Ch. 298, at p. 303, *Rigby* L.J.

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But Mrs. Moore has an alternative claim, for a declaration that Dimond is a tenant from year to year in respect of the premises and payment of rent payable under such tenancy. In *Moore* v. *Dimond* (1) this Court, on the case there stated, gave its opinion and decision that Dimond was at common law a tenant of Mrs. Moore from year to year; and that determination is authority for the same conclusion now. But the opinion was explicitly limited to the position of the parties at common law and excluded any decision upon their equitable rights or position. The rescission of the agreement does not extinguish or destroy the tenancy from year to year which subsisted at law between Mrs. Moore and Dimond: the tenancy arose as an implication of law from the agreement of the parties, possession pursuant to that agreement, and payment of rent. But, as we have seen, that agreement was terminated on 28th November 1928. The position of the parties in equity must therefore be considered.

Neither party can specifically enforce the agreement, and consequently in equity Dimond ought not, from the date mentioned, to be regarded as a tenant of Mrs. Moore. It is, we think, in accordance with the doctrine of *Walsh* v. *Lonsdale* (2) to say that Mrs. Moore cannot be permitted, since that date, to assert that Dimond is in law a tenant of hers from year to year, when equity regards the relationship under the agreement between them as terminated. In former times Mrs. Moore might have been restrained from proceeding at law against Dimond on the basis of such a tenancy, but since the *Judicature Act* it is sufficient to say that the Supreme Court of South Australia is entitled to, and must, give effect to the rule of equity. Consequently, this alternative claim for a declaration that Dimond is a tenant from year to year in respect of the premises also fails.

Judgment must be entered for Dimond on his counterclaim for damages for breach of contract. The evidence is very loose on the subject. Dimond, it appears, took other premises for his own convenience and not because of the refusal of Mrs. Moore to go on with the contract. We think a nominal verdict for one shilling is sufficient to cover his claim for damages on the counterclaim.

(1) (1929) 43 C.L.R. 105. (2) (1882) 21 Ch. D. 9.

The claims for rent remain for consideration. As we understand the facts, a week's rent was paid in advance on 17th November 1928; 24th November would have been the date for the next payment, but the agreement was terminated on 28th owing to its repudiation by Mrs. Moore. Dimond had in fact vacated the premises and the action of Mrs. Moore discharged him, in our opinion, from accruing rent.

DIXON J. In *Moore* v. *Dimond* (1) the lessor appealed successfully to this Court against an order of the Supreme Court of South Australia by which, in answer to the questions contained in a special case stated by the Local Court of Adelaide, the Supreme Court declared that the tenancy upon which the lessee held was not a tenancy from year to year. The Supreme Court considered that, having regard to the value of the demised premises, the Local Court had no jurisdiction to declare or enforce any equitable rights which might subsist between the parties, and that the case must be dealt with as at common law. This view was not impugned upon the appeal to this Court, which accordingly assumed that it was correct and that the matter must be determined by the application of rules of law without recourse to doctrines of equity. But the opinion of this Court was that, upon the facts stated in the special case, the lessee would be at common law a tenant from year to year, and not, as the Supreme Court thought, a tenant from week to week. The order of the Supreme Court declaring the tenancy was not from year to year was discharged, and the case stated was remitted to the Supreme Court to do what was right in accordance with the opinion of this Court that at common law the lessee was a tenant from year to year. The lessor, however, took no further step under that judgment either in the Supreme Court or in the Local Court. A week before the appeal in which it was given came on to be heard in this Court, she had commenced an action in the Supreme Court of South Australia against the lessee for specific performance of an agreement to take the demised premises for a term of five years from the expiration of a prior lease which ended on 30th November 1927. The action was heard by *Richards* J., who gave judgment

(1) (1929) 43 C.L.R. 105.

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against the defendant, the lessee, and made a decree for specific performance of an agreement for a lease for a term of five years from and including 1st December 1927. From this judgment the lessee now appeals to this Court.

The first ground which the lessee takes in support of his appeal is that the alleged agreement was not in fact made, and that the documents from which it has been inferred do not amount to or establish a concluded contract. In my opinion this ground fails. I think that in May 1927 the landlord and the tenant made a final agreement that the former should give and the latter take a lease for the term of five years, beginning on 1st December 1927, at a weekly rent of £16 10s. payable in advance, upon the terms and conditions of the then current lease, except that the covenant should be omitted requiring the lessee to insure, and a covenant should be added that the premises should be painted twice by the lessee during the term, the first occasion being within three years. The agreement required that the lease should be drawn by the landlord's solicitors at the tenant's expense.

The lessee next contends that the lessor discharged him from performance of this agreement by the lessor's own breach of its conditions, and that, whether this be so or not, the lessor was not ready and willing to perform the conditions by her to be performed. Finally the lessee contends that the lessor has disentitled herself to the equitable remedy of specific performance by her own conduct. These defences all arise upon the same facts, which need a somewhat full statement.

The lessee held a lease of one of a number of adjacent shops owned by the lessor, the leases of which fell in on 30th November 1927. Other tenants, as well as the present appellant, agreed to renew their leases. The lessor, through her son, who carried on a business in Adelaide, instructed her solicitors to draw up a lease for the lessee containing the same clauses as his current lease with the exception of the covenant to insure. Upon her solicitors suggesting that it was desirable to have a common form of lease for all the lessor's tenants, they were instructed to submit to the tenants leases "all on the same lines." A draft was prepared of a lease to the lessee and was sent to him on 5th December 1927. The

covenants in this draft lease were not expressed in the same form as those of the lessee's previous lease, and it contained two new provisions which were quite unwarranted. The first of these entitled the lessor, upon one month's notice, to enter for the purpose of altering or adding to the present buildings. The other forbade the lessee to place advertisements upon any external part of the premises. Upon receiving this draft the lessee consulted with another of the lessor's tenants, and with him went to see a solicitor whom the other tenant had instructed. This solicitor advised them not to agree to the form of the lease offered, and although, according to the lessee, he was not instructed to do so, he afterwards interviewed the lessor's solicitors on behalf of the lessee as well as of other tenants and said that they objected to the two new clauses which restricted advertising and allowed the lessor to enter for the purpose of building. Her solicitors appear to have sought and obtained instructions from the lessor to excise these provisions, but nothing was done, probably because the conveyancing clerk who was dealing with the matter went abroad. The lessee remained in possession and paid his rent but did not communicate with the lessor's solicitors. On 1st June 1928 the solicitor in their employ, who had taken the matter in hand, went to see him, taking a form of the draft lease. The tenant said that he expected a lease like the previous lease but with an increased rent and an alteration of the provision relating to insurance. The solicitor then read over to him the draft which he had brought, and asked to what he objected. He said that he objected to the clauses which had been introduced, namely, that relating to the landlord's right of entry to effect alterations and that prohibiting advertisements. He appears also to have said that it had been agreed between himself and the accountant in the employ of the lessor's son that the new lease should be in the terms of the former lease, and he gave the solicitor his copy of the old lease. The solicitor said that he could not agree to delete the two new clauses without his client's instructions, but that he would submit the matter for further instructions. He obtained further instructions authorizing him to omit the provisions which were objected to, and he prepared an engrossment with these provisions omitted. On 9th July 1928 he sent the lessee this engrossment together with the old lease which

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the lessee had handed to him at their interview of 1st June 1928. The phraseology of the covenants in the engrossment differed from that of the old lease and its effect varied from it in several particulars. The covenant to discharge rates taxes and the like added the word "outgoings" to impositions. It is doubtful, however, whether this really increased the liability of the tenant although, no doubt, it expressed it more clearly. The covenant to repair in the old lease excepted structural defects and decays but not damage by fire. The covenant in the new lease excepted damage by fire but not structural defects and decays. The new lease required the tenant to do nothing which would increase the fire insurance premium. No doubt this covenant was included because it was considered a fair consequence of omitting the lessee's covenant to pay the premium. The provision prohibiting assignment without the lessor's consent was not expressed in the old lease to include mortgages, but was so expressed in the new lease. It is clear, however, that the provision in the old lease would have covered assignments and sub-leases by way of mortgage. Finally a covenant was introduced into the new lease requiring the tenant to observe all the obligations imposed by the laws and regulations for the time being in force relating to health, factories, warehouses or shops, and to fulfil the requirements of notices or orders given under such laws whether to the lessor or to the lessee. In the letter which accompanied this engrossment the solicitor said :—"We now enclose same in triplicate for perusal and execution by you. The lease has been greatly modified and is virtually in the same form as your previous lease. We are instructed to inform you that this is the form of lease which our client requires. We shall therefore be glad if you will execute the document and return the three copies to us in order that we may obtain the lessor's signature and finalize this matter." Before this letter was written the lessee had left Adelaide to visit Western Australia. He appears to have left on 7th July 1928 and to have returned on 21st August 1928. He left his son, aged about 27 or 30 years, in charge of the business he conducted in Adelaide. The son was not a partner, but he was employed in the business and, according to his father, he managed it when his father was not there. He had authority to draw cheques and to dismiss some servants

but not others, and the correspondence in which the new lease was arranged for was in his handwriting. Before the father left for Western Australia he negotiated with the owners of a shop a few doors away for a lease. This shop had a somewhat wider frontage and a greater depth, but when he left it was not empty, and he was not sure whether he would obtain it because there were others besides himself seeking a lease. Accordingly he left it to his son to do the best he could. The son secured the shop upon some tenancy and placed the shop they were occupying, which is the subject of this appeal, in the hands of agents for subletting. Advertisements seeking tenants were inserted with the son's authority in the newspapers on 21st, 23rd, 25th, 27th July and from 6th to 23rd August 1928. On 11th August the business was moved into the new shop. On 27th July 1928 the son visited the place of business of the lessor's son and told the accountant that they were leaving the premises and taking a larger shop, but emphasized the fact that they had no desire to get out of the lease and wished the lessor to understand that the lease would be signed as soon as the father returned from Western Australia. He suggested that they should endeavour to find a suitable tenant, and, if the lessor approved of the tenant, the lease should be transferred to him. He further said that they were sorry to leave but their business was expanding, and as the new premises were suddenly offered to them they thought that they would be missing a golden opportunity if they allowed the chance to go by. When the father returned from Western Australia he read the letter from the solicitors dated 9th July 1928 and looked through the lease. But he swore that he did not observe that the two provisions to which he objected were omitted. He did not communicate at all with the solicitors, or the lessor's son, or with his accountant, but he continued to pay the rent. He put a weekly tenant into possession of the shop, who, however, carried on business there for a short time only. Twice between 9th July and 7th September 1928 the lessor's solicitors communicated with the lessee's shop, once by calling and once by telephone, but on each occasion the lessee was out. On 7th September the solicitor who had charge of the matter telephoned and spoke to the lessee's son, who said that the lease would be signed at once. One or two further telephone

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messages were sent without result, and on 1st November 1928 the solicitor spoke over the telephone again to the lessee's son, who on this occasion said the lease would not be signed as it was not in the agreed form. The solicitor replied that his clients insisted that the matter be completed, but the telephone was disconnected and the conversation interrupted. He said nothing to the effect that the premises must be vacated, but, nevertheless, the father wrote at once to the lessor's solicitors saying that he accepted the notice given to him by them to vacate the premises and would hand over the keys on 30th November 1928. He wrote a similar letter to the accountant employed by the lessor's son. He then consulted a firm of solicitors, who wrote on his behalf a letter dated 2nd November 1928 which adopted the wise course of treating as open the question whether their client was to deliver up or retain possession of the premises. After stating that the lessee's offer was to take a further lease upon a distinct understanding that it should be upon the same terms and conditions as the existing lease except the provision for insurance and the amount of rent, that the lease tendered for execution was not in the same terms and the lessee had properly objected to accept it, and that on the previous day the lessee had been requested by telephone to vacate, the letter proceeded:—"Our client has always been ready and willing to abide by his offer, but as the premises are now unoccupied he is quite willing to hand over possession and the keys immediately if you so desire. Our client cannot however afford to leave the matter in the present unsatisfactory condition. We understand our client handed you his old lease for the purpose of preparing the new lease in the same terms with the modifications mentioned and he is not prepared to accept any lease in any other form. We desire to know, however, and immediately, whether you desire our client to hand you the keys and vacate the premises, as intimated by you yesterday. We return the lease in triplicate tendered by you and would be obliged by an immediate reply."

In my opinion the lessee was not at this time discharged from further performance of his contract, but the lessor was entitled to enforce it upon tendering for execution a lease containing the provisions of the prior lease except that relating to insurance with

an additional provision requiring the lessee to paint twice during the term, and with the increased amount of rent. I do not think that, by tendering the first draft lease on 5th December 1927, the lessor's solicitors either committed an actual breach of contract or intimated an intention of refusing to perform the contract. In any case the lessee by his conduct and by his discussion on 1st June 1928 with the lessor's solicitors affirmed the contract which remained open. When the second form of lease was prepared I think the lessor's solicitors believed that the lessee was willing to accept it although it did not conform exactly to the former lease, as it should. I think they knew that the lessee considered himself entitled to insist upon a lease, the provisions of which conformed to those of the former lease, but they did not know of the written agreement which in fact gave him this right. His objection, however, to two provisions of the first draft and his failure to object to any of the other provisions, which were all gone through at the interview, led the solicitors to suppose that he would accept them. I do not think that by the sentence in their letter of 9th July 1928 "we are instructed to inform you that this is the form of lease which our clients require," the lessor's solicitors meant to intimate that their clients refused to grant him a lease which followed the provisions of the previous lease even although he should insist upon such a lease, and I do not think that he understood the statement so to intimate. But again, however this may be, I think he elected to affirm the contract and keep it open. It is true that he disowns statements made by his son and, I think, the more material of his son's actions, and it is true that the trial Judge considered that there was "no evidence to lead to the conclusion that the son had authority to deal with the matter of the lease." But when his long silence is considered with the fact that he had read the solicitor's letter of 9th July 1928 and the lease, that he knew his son had communicated with them, that he paid rent regularly, that he attempted to sublet, and, in fact, did for a time sublet the premises, no other inference is open save that he elected to keep the contract open and not to disaffirm it. But in any case I think the proper inference is that the son's authority did extend to communicating with the lessor and with her solicitors upon the subject of the lease during the

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father's absence and particularly in respect of the transfer of the business to the new premises. I further think that the son had authority to receive and answer messages at the father's place of business on his behalf, after the father returned from Western Australia.

With some appearance of inconsistency the father relies upon the unfinished conversation with his son on 1st November 1928 as a renunciation by the lessor's solicitors of the lessor's obligation to tender a proper lease. But perhaps it was open to him to treat his son as a messenger chosen by the lessor's solicitors, or to adopt the son's receipt of the message on his behalf, and thus avoid any real inconsistency. In my opinion, however, the conversation did not express any such renunciation. It amounted to no more than an insistent request for the completion of the transaction. Accordingly the lessee was not entitled to disaffirm the contract by returning the keys or otherwise, and his solicitors rightly treated the contract as still on foot, in their letter of 2nd November 1928. But the lessee relies upon what next took place as in itself enough to relieve him from the agreement. He contends that in their reply to this letter the lessor's solicitors took up a position inconsistent with the contract and thus absolved the lessee. After dealing with the unfinished telephone conversation of 1st November 1928 and denying that the lessee was given notice to vacate the premises, the letter said " the lease as originally prepared by us was in accordance with our instructions, a fair copy was submitted to your client and several times we attended your client's shop and at last agreed on the form of the lease which we understood your client said he would sign. According to our instructions it was never agreed that the new lease should be on the same terms and conditions as the former lease, subject only to the deletion of the insurance clause and the consequential increase of rent. However, we will refer the matter to our client and advise you immediately we have been able to obtain her further instructions herein." This was written on Tuesday 6th November 1928. On Saturday 10th November a letter was written to the lessee by the accountant employed by the lessor's son saying, in effect, that the solicitors had no authority to give notice to the lessee to vacate the premises and they denied

doing so, and that the matter had been "passed on" to the lessor in Melbourne, where she resided. In my opinion the letter of the lessor's solicitors did not entitle the lessee to consider himself discharged from the further performance of the agreement. Although it clearly denied a stipulation of the agreement, it did so in express reliance upon their instructions, and promised to refer the matter to their client and upon further instructions immediately to communicate with the lessee's solicitor. This appears to me to amount to a statement that, according to the instructions previously received by the writer, the contract did not entitle the lessee to the lease he demanded, but that the writer would ascertain from the lessor whether she would comply with the demand or no, and at once communicate her answer. Such a statement intimates no intention of declining to fulfil the contract according to its true terms, but, on the contrary, promises consideration of the question whether the demand will be complied with. On Tuesday, 13th November, the lessee's solicitors wrote to the lessor's solicitors that they had been anticipating further advice as promised, and in the absence of further word, and pending further developments, they had instructed their client to return the keys. This evoked a reply that the lessor's solicitors had communicated with their client, who was in Melbourne, and that it might take some days to receive her further instructions. Her further instructions were received, and in the following week her solicitors sought appointments to discuss them with the lessee's solicitors. At length an appointment was made, and the lessee's solicitors were asked whether their client would accept a lease in the form of the old lease except for the insurance and rent. This the lessee finally declined to do on 6th December 1928. This course I think he was not at liberty to adopt. He had kept the contract open up till 6th November, and the lessor's final instructions had not been received by her solicitors on 13th November, when his solicitors spoke of returning the keys pending further developments. It is true that the lessee's solicitors on 2nd November sought an immediate reply. But if they wished to rely upon the lessor's failure to perform her contract within a period of time as distinguished from some refusal by her to observe the obligations imposed upon her, it was necessary for the lessee to name

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some time by which performance was demanded, and in doing so to fix a period sufficient to enable her solicitors to receive her instructions. There was no refusal outstanding to perform on the part of the lessor and no such time was fixed by the lessee. I am therefore of opinion that the lessee was not discharged from the performance of the contract when he declined to accept a lease whether he did so on 13th November or on 6th December 1928. In point of fact the lessor herself was ready and willing to grant the lease in the stipulated form and if, notwithstanding what her solicitors did and omitted to do, the contract was not discharged but remained open for performance, as is my opinion, at the time when the lessee by his last refusal to go on finally dispensed her from actual tender of a lease, it is enough that at that time she and the solicitors to whom she had delegated performance were ready and willing to comply with the conditions of the contract. In fact, by that time they were so ready and willing, and she is entitled to enforce the contract, at least by a common law remedy. The question remains whether her conduct or that of her solicitors has disentitled her to the discretionary equitable remedy of specific performance. It may be said that an attempt should not have been made on 7th December 1927 to put upon the lessee a lease containing terms beyond those contracted for, and that great delay took place before the lessee was interviewed on 1st June 1928. It may further be said that the lease presented on 9th July 1928 was not in conformity with the contract, and thereafter much time was allowed to elapse before the incidents commencing on 1st November 1928. I think the answer to these suggestions is found in the lessee's own conduct. He retained possession, affirmed the contract, and on 1st June 1928 led the solicitors for the lessor to suppose that he would be content with such a lease as they sent to him on 9th July 1928, and thereafter retained possession until 1st November 1928 without suggesting any dissatisfaction. In fact he was in no way prejudiced by the delay. In spite of his evidence to the contrary, it is plain that the transfer of his business to new premises in July 1928 was quite unconnected with the lessor's failure to furnish a lease in the form stipulated. It was planned after the discussion on 1st June 1928 and before the lessee's departure for Western Australia, and carried out before his

return, and therefore before he saw the lease sent on 9th July 1928.

For these reasons I think the judgment appealed from is right and that the appeal should be dismissed with costs.

EVATT J. In the year 1927 the appellant, Lewis Robert Dimond, was carrying on business as a photographer at Adelaide, South Australia. He occupied his business premises under a lease from the respondent, Mrs. Moore, which was to expire on 30th November of that year.

Earlier in the year certain correspondence took place between the parties, concluding with a letter from the appellant dated May 20th, 1927.

This Court has already held that, by the last mentioned date, an agreement was constituted between the parties for a further lease of the premises for five years from November 30th, the rental being £16 10s. per week plus rates and taxes, the store to be painted twice during the currency of the lease, the first occasion being within three years. It was also agreed that the new lease should contain all the clauses in the existing lease excluding only the clause which imposed on the lessee the obligation to pay insurance.

On December 5th, 1927, a few days after the expiry of the old lease, the solicitor for Mrs. Moore submitted for the perusal of the appellant a draft lease of the premises. The covering letter stated that the terms of the lease were those "agreed upon" with Dimond.

This statement was quite incorrect, and the solicitor was soon informed that the draft was not satisfactory. Incidentally the letter shows that the matter was recognized as due for completion in or about the month of December 1927.

Nothing further was done by the respondent to carry out her obligation to prepare a lease in accordance with the agreement until some time in the month of May 1928. In the meantime the appellant continued in occupation and paid the increased rental.

On June 1st Mr. J. A. Williamson, solicitor for the respondent, saw the appellant. It appears that the draft made in December 1927 was discussed between them. Accepting Mr. Williamson's version of the interview, the fair inference is that Dimond said he expected a lease similar to his previous lease with the exception of the agreed

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alterations. He made it quite plain that he certainly would not sign a lease containing the onerous covenants set out in clauses 5 and 12 of the December draft. I need not specify these in detail. They were never agreed to by the appellant. It seems clear from Williamson's evidence that he and Dimond did not come to any agreement as to the form of the lease on June 1st.

On July 9th the solicitors for Mrs. Moore sent the following communication to Dimond :—

"Reverting to our interview with you, we have now received instructions from our clients to prepare the memorandum of lease.

"We now enclose same in triplicate for perusal and execution by you. The lease has been greatly modified and is virtually in the same form as your previous lease. We are instructed to inform you that this is the form of lease which our clients require. We shall therefore be glad if you will execute the document and return the three copies to us in order that we may obtain the lessor's signature and finalize this matter."

As stated in the letter an engrossment in triplicate was forwarded to the appellant. There is no occasion to refer to the new draft memorandum of lease. Clauses 5 and 12 of the earlier draft were omitted, but the terms retained went far beyond the original agreement between the parties. New clause 5, for instance, imposed on the lessee the obligation of complying at his own expense with all requirements of State or Local or Health authorities whether directed to owner or tenant. There was nothing of this character in the old lease.

I find it impossible to read the letter set out as other than an ultimatum to Dimond that Mrs. Moore was insisting upon a lease according to the memorandum forwarded. The documents had been prepared for final execution. "We are instructed to inform you that this is the form of lease which our clients require" is a sentence which is clear and unequivocal. The evidence of C. C. Moore shows that the solicitors, in adopting this course, were acting under and in accordance with the authority of the respondent.

A good deal of light is thrown upon the case by a letter. It is a report by Mrs. Moore's Adelaide solicitors to her Melbourne representative. It is dated November 14th, 1928. In it the following statements occur :—

"For some months past we have been pressing Dimond to sign the lease of the Rundle Street premises from Mrs. Moore to himself. When the draft of the lease was first sent to Dimond he objected to same, contending that

it had been agreed between himself and your Mr. Allen that the new lease should be in the same terms as the former lease. We understand however from Mr. Allen that this is not so and that Mrs. Moore required certain alterations.

"We subsequently saw Mr. Dimond and he informed us that he agreed to the form of lease that we had submitted and which was acceptable to Mrs. Moore. The lease was accordingly engrossed and forwarded to Mr. Dimond."

The draft referred to must be the original draft of December 1927. The interview is that which took place on June 1st, 1928, between Williamson and Dimond.

On July 10th, 1928, the son of the appellant acknowledged a letter of the previous day and the lease enclosed for execution. He added that owing to Dimond's absence in Western Australia until August the lease "will not be able to be signed until then." No further interview between Williamson and Dimond himself took place after June 1st.

On November 1st Williamson was informed by Dimond, junior, that the lease would not be signed as it was not in the agreed form. His reply was that Mrs. Moore was insisting that the matter should be completed. On the following day Dimond's solicitors wrote to the respondent's solicitors stating that the appellant was not prepared to accept a lease in any other form than that of the old lease. The lease in triplicate was returned to Williamson with this letter. On November 6th Williamson replied on behalf of Mrs. Moore as follows:—

"The lease as originally prepared by us was in accordance with our instructions. A fair copy was submitted to your client and several times we attended at your client's shop and at last agreed on the form of the lease which we understood your client said he would sign. According to our instructions it was never agreed that the new lease should be upon the same terms and conditions as the former leases, subject only to the deletion of the insurance clause and the consequential increase of rent."

Although this letter also stated that the solicitors would refer the matter to Mrs. Moore herself, no withdrawal from the position taken up by the parties occurred before November 28th when the keys of the shop were returned.

It seems to me reasonably clear from the history of this dispute that the respondent by her agents was making a determined and persistent attempt to compel Dimond to accept a lease which differed in material and substantial respects from that agreed upon in May

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1927. The first attempt, in December 1927, was based on an alleged agreement between the parties. There was no such agreement. The second attempt, in July 1928, was also not justified. Clauses 5 and 12 of the draft had been omitted. But what was tendered was quite inconsistent with the original agreement.

I have already referred to part of the report dated November 14th, 1928. Notwithstanding the statement in this report of November 14th, J. A. Williamson gave no evidence that there was any agreement on the part of Dimond to accept the memorandum forwarded on July 9th. Indeed, the letter of 9th July itself rather points to prior insistence by Dimond upon the form of the previous lease. It contains the very bold assertion that the engrossment is " virtually in the same form as your previous lease." This assertion was also incorrect. The letter does not say that any agreement was come to with Dimond at the interview on June 1st. It rather suggests that notwithstanding Dimond's desire that the new lease should be in the same form as the old one, the form then tendered would be compulsory.

In this view, the letter of November 14th becomes all the more curious. It has already been pointed out that Williamson saw Dimond personally on one occasion only. But this letter alleges a series of interviews with Dimond after the latter's return from Western Australia :—

> " On Mr. Dimond's return we again got into immediate and constant communication with him, but he continually put us off on one pretext and another and kept your Adelaide office informed."

Whatever legal position was created by the letter of July 9th, any doubt as to the attitude of the respondent's solicitors is resolved by the subsequent correspondence already referred to. After the return of the lease by Dimond's solicitors on November 2nd and the re-statement in the clearest terms of his attitude, Mrs. Moore's solicitors on November 6th again alleged an agreement with Dimond (on 1st June presumably) as to the form of the lease. This allegation is not sufficiently supported by the evidence. They said that, according to their instructions, it was " never agreed " that the form of the new lease should follow that of the old.

After the time for the completion of an agreement for lease has arrived, an insistence by one party upon completion in a form differing

substantially from that agreed upon may amount to such a breach as will discharge the party not in default. So may a "shilly-shallying attitude in regard to the contract" (*Forslind* v. *Bechely-Crundall* (1)). I am of opinion that upon receipt of the letter of November 6th the appellant was entitled to treat the contract as at an end, and that the situation did not alter up to 28th November, when the keys were given up and the agreement was rescinded. The fact that the respondent's solicitors were not aware of the correspondence constituting the original agreement of 1927 explains but does not justify their persistence. Their action must be imputed to their principal, their authority in the matter being clear. Specific performance of the agreement for lease should therefore have been refused.

Two questions remain for consideration. By reason of the breach of the agreement the appellant is entitled to damages from the respondent. But it appears that the real contest between the parties was as to the right of the respondent to treat the actions of the appellant and her agents as discharging him from performance. The evidence as to damages is unsatisfactory and very scanty. The truth of the matter seems to be that no substantial damage was suffered by Dimond as the result of the loss of his bargain. Justice will be done if judgment for nominal damages only is entered for the appellant on the counterclaim.

The second question relates to the alternative claim of the respondent that she is entitled to recover rent of the premises based upon the continuance of a tenancy from year to year between the parties until the due determination by notice of such tenancy. The contention is that upon payment of the increased rental called for by the agreement for renewing the lease, the possession of the appellant being referable to such agreement, the result at law was the creation of a yearly tenancy. This Court has decided that the claim is well based (*Moore* v. *Dimond* (2)). It is now added that nothing has happened to alter such legal relationship. If so, a large sum of money is still owing to the respondent as rent payable under such tenancy in respect of a period after November 28th, 1928.

(1) (1922) S.C. (H.L.) 173, at p. 190.

(2) (1929) 43 C.L.R. 105.

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In the well-known case of *Walsh* v. *Lonsdale* (1) there occur words suggesting that since the commencement of the *Judicature Act* (which has been applied to the Supreme Court of South Australia by the *Supreme Court Act* 1878, sec. 6 (XI.)) the estate at law which would otherwise exist where a tenant enters into possession of premises and pays rent under an agreement for lease is destroyed or converted into an equitable estate on the terms of the agreement. Equity regards as already done that which ought to be done.

> "There is an agreement for a lease under which possession has been given. Now since the *Judicature Act* the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year" (per *Jessel* M.R. (2)).

A Court of Equity grants or refuses a decree for specific performance of an agreement for lease in the light of all the facts including those existing at the time of the institution of the suit. Many circumstances may prevent a plaintiff from succeeding in such a suit, although there was originally a binding agreement for a lease and the plaintiff entered into possession under such agreement. Great difficulties will arise if, in Courts where the judicature system is adopted, a person in possession of land under an agreement is to be treated for all purposes as though specific performance has been decreed from the moment of entry, and the agreement has already been converted into an actual lease on the terms of the agreement. One illustration is provided by the case of *Coatsworth* v. *Johnson* (3). In that case *Lindley* L.J. (as he then was) said that an agreement for a lease followed by entry into possession under it could not be assumed without some reservation to make the agreement equivalent to a lease. (Cf. *Swain* v. *Ayres* (4); *Gray* v. *Spyer* (5).)

(1) (1882) 21 Ch. D. 9.
(2) (1882) 21 Ch. D., at pp. 14, 15.
(3) (1886) 55 L.J. Q.B. 220, at p. 223.
(4) (1888) 21 Q.B.D. 289, at p. 294.
(5) (1922) 2 Ch. 22, at p. 31.

Let it be assumed—contrary to the view expressed in *Walsh* v. *Lonsdale* (1)—that independently of the equitable estate or interest of the appellant created by the agreement, there survived a concurrent estate at law held by the appellant as a yearly tenant from the respondent. The implication of the yearly holding sprang (*inter alia*) from the existence of the agreement. That agreement was broken by the respondent, and on 28th November, 1928, it had come to an end and been duly rescinded for all purposes legal as well as equitable.

The claim of the respondent is that after and notwithstanding such rescission, he was still entitled to fall back on the yearly tenancy and recover rent on such footing. But he insisted that the appellant should be compelled to hold the property on a tenure and under the conditions which would have been contained in a lease executed in accordance with the agreement between the parties. He repudiated and disclaimed any relationship of tenancy from year to year. The agreement, which was intended by both parties to define fully and completely the user and enjoyment of the land, was duly rescinded by acceptance of breach. The respondent should not be allowed to say that there is still a yearly holding. (Cf. *Neall* v. *Beadle* (2).)

And if, on the other hand, the doctrine of *Walsh* v. *Lonsdale* (1) applies and the appellant held upon the terms of the agreement, the agreement came to an end and the appellant ceased to be bound thereby on November 28th, 1928.

In my opinion the appeal should be allowed.

McTiernan J. In my opinion the appeal should be dismissed with costs. I agree with the reasons given by my brother *Dixon*.

Appeal allowed. Judgment of the Supreme Court dated 1st October 1930 set aside. Judgment for the defendant Dimond on the claim. Judgment for the defendant Dimond on the counterclaim for one shilling damages.

(1) (1882) 21 Ch. D. 9.

(2) (1912) 107 L.T. 646, at p. 651.

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Order that the plaintiff do pay to the defendant Dimond his costs of action and of this appeal—such costs to be taxed.

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

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

H. D. W.

FOLL 46 C.L.R. 73
C. at pp. 207/8. 54 A.L.J.R. 5.
C. 144. C.L.R. 377.

[HIGH COURT OF AUSTRALIA.]

DIGNAN . . . . . APPLICANT;
INFORMANT,

51 (N.S.W.) S.R. 307

AND

AUSTRALIAN STEAMSHIPS PROPRIETARY LIMITED . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1931.

SYDNEY, *April* 22, 23.

MELBOURNE, *May* 12.

Gavan Duffy C.J., Rich, Starke, Dixon and Evatt JJ.

Parliament (Cth.)—Senate—Regulations—Disallowance—"Laid before" Senate—By whom to be so laid—"Within fifteen sitting days after"—Notice of motion to disallow—What constitutes notice—Directory or imperative—Procedure in Senate—Standing Orders—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 49, 51 (I.)—*Acts Interpretation Act* 1904-1930 (*No.* 1 *of* 1904—*No.* 23 *of* 1930), *sec.* 10—*Transport Workers Act* 1928-1929 (*No.* 37 *of* 1928—*No.* 3 *of* 1929)—*Transport Workers* (*Waterside Workers*) *Regulations* (*S.R.* 1931, *No.* 34).

Sec. 10 of the *Acts Interpretation Act* 1904-1930 provides that "Where an Act confers power to make Regulations, all Regulations made accordingly shall, unless the contrary intention appears—(*a*) be notified in the *Gazette*; (*b*) take effect from the date of notification, or from a later date specified in the Regulations; (*c*) be laid before each House of the Parliament within fifteen sitting days of that House after the making of the regulations. But if either House of the Parliament passes a resolution of which notice has been given at any time within fifteen sitting days after such regulations have been laid before such House disallowing any regulation such regulation shall thereupon cease to have effect."