[HIGH COURT OF AUSTRALIA.]

AMAD - - - - - - - - - - - APPELLANT;
DEFENDANT,

AND

GRANT - - - - - - - - - - RESPONDENT.
COMPLAINANT,

GROSGLIK - - - - - - - - - - APPELLANT;
DEFENDANT,

AND

GRANT - - - - - - - - - - RESPONDENT.
COMPLAINANT,

Landlord and Tenant—Tenancy—Termination—Notice to quit—Periodic tenancy—Notice to determine otherwise than at end of period—Validity—Agreement to let premises—Nature of tenancy—Letting for indefinite term—Tenancy from month to month—Premises let at weekly rent, payable monthly in advance—Tenancy to continue for three years at least and not to cease until a month's notice given—Landlord and Tenant Act 1928 (*Vict.*) (*No.* 3710), *Part V.—National Security* (*Landlord and Tenant*) *Regulations* (*S.R.* 1945 *No.* 97—1946 *No.* 98), *reg.* 62.

To determine a periodic tenancy, whether it is yearly, quarterly, monthly or weekly, a notice to quit must (unless the parties have otherwise agreed) take effect at the end of a period of the tenancy.

Lemon v. *Lardeur*, (1946) 1 K.B. 613, followed.

An agreement in writing provided that premises were let "at the weekly rent of £2 2s. 6d. payable in advance such tenancy to commence on" 17th May 1937 "and not cease . . . until one month's notice in writing shall have been given . . . and such tenancy to continue for the term of three years at the least." The agreement also provided that "the rent is to be paid . . . monthly in advance the first of such payments amounting to £9 4s. 2d. to be paid on the signing of" the agreement "and hereafter such similar amounts on the 17th day of each month following."

H. C. OF A. 1947.

MELBOURNE, *March* 5-7.

SYDNEY, *May* 8.

Latham C.J., Rich, Dixon, McTiernan and Williams JJ.

H. C. OF A. 1947. AMAD v. GRANT. GROSGLIK v. GRANT.

Held, by *Latham* C.J., *Rich* and *Williams* JJ. (*Dixon* and *McTiernan* JJ. dissenting), that after the first three years the tenancy was from month to month and that the words of the agreement referring to one month's notice did not constitute an agreement that the tenancy might be determined by notice at a time other than the end of a monthly period.

Held, further, by *Latham* C.J., *Rich*, *McTiernan* and *Williams* JJ. (*Dixon* J. expressing no opinion) that reg. 62 of the *National Security* (*Landlord and Tenant*) *Regulations* will not validate a notice to quit which would be invalid under the law apart from the regulations.

APPEALS from a Court of Petty Sessions of Victoria.

In 1941 Alfred George Alexander Grant purchased premises at 353 Exhibition Street, Melbourne, the ground floor of which he occupied for the purposes of his business. At the time of the purchase Wadee Haikel Amad and David Grosglik were in possession of the first and second floors respectively as tenants of the previous owners. They remained in possession and paid rent monthly to Grant.

Amad's Case.—Amad's tenancy of the first floor was created by an agreement in writing dated 17th May 1937 whereby the then owners agreed to let the floor to him " at the weekly rent of £2 2s. 6d. payable in advance such tenancy to commence on the 17th day of May 1937 and not cease (except as hereinafter provided) until one month's notice in writing shall have been given by either party to the other and such tenancy to continue for the term of three years at least. 1. The rent is to be paid by the said tenant (*a*) Monthly in advance the first of such payments amounting to £9 4s. 2d. to be paid on the signing hereon [sic] and hereafter such similar amounts on the 17th day of each month following." By a notice to quit dated 19th September 1945 Grant required Amad to " deliver up possession of the whole of the first floor of the premises situate at . . . 353 Exhibition Street Melbourne . . . which said first floor you hold of me as tenant thereof from month to month on the twenty-second day of November 1945. This notice to quit is given under the *National Security* (*Landlord and Tenant*) *Regulations* and is given on the ground that the said first floor being part of the said premises and not being a dwelling-house or part of a dwelling-house is reasonably required for occupation by me in my trade profession calling or occupation." Amad did not comply with the notice. In accordance with the procedure provided by Part V. of the *Landlord and Tenant Act* 1928 (Vict.), Grant applied to a court of petty sessions, constituted by a police magistrate, at Melbourne, for a warrant of ejectment.

The magistrate ordered that the warrant should issue, and from this decision Amad appealed to the High Court in the manner described hereunder.

Grosglik's Case.—By a notice to quit, which was dated 24th July 1946 and was in substantially the same terms as that given to Amad, Grant purported to determine Grosglik's tenancy (described in the notice as a tenancy from month to month) on 25th September 1946. Grosglik did not deliver up possession as required by the notice, and Grant proceeded against him in the same manner as against Amad. The application was heard together with that against Amad. No evidence was given as to the date of the commencement of Grosglik's tenancy. The only evidence having any bearing on the nature of that tenancy consisted in the following statements by Grant:—In answer to counsel for Amad, "There was no mention made of the tenancy when I bought the premises nor has there been any discussion since. The tenants paid their rent monthly and have always paid that way since"; in answer to counsel for Grosglik, "As far as I know the rent has always been paid monthly. I do not know what Mr. Grosglik's original lease was. I have made no inquiries from the agents or anybody else as to his lease," and the evidence of Grosglik that "I went into the premises under a lease for some years. I do not remember how many. I was there for some years under the lease. I do not remember the exact terms of the lease. I have not got it now and I do not know where it is."

The magistrate made an order for the issue of a warrant of ejectment, and Grosglik also appealed to the High Court.

Each appeal was brought on the basis that, by reason of the *National Security* (*Landlord and Tenant*) *Regulations*, the magistrate had exercised Federal jurisdiction and, therefore, an appeal lay from his decision to the High Court under s. 73 (ii.) of the Commonwealth Constitution. In compliance with Part II., Section IV., rule 1, of the *High Court Rules*, the appeals were brought in the manner prescribed in relation to the Supreme Court of the State by s. 150 of the *Justices Act* 1928 (Vict.), under which a person aggrieved by a decision of a court of petty sessions may obtain an order to review the decision. The respondent did not question the competency of the appeals.

The two appeals were heard together.

Hudson K.C. (with him *J. A. Lewis*), for the appellant Amad. The notice to quit was not effectual to determine the tenancy. If,

H. C. OF A. 1947. AMAD v. GRANT. GROSGLIK v. GRANT.

after the expiration of the first three years, the tenancy provided for by the agreement was a monthly tenancy, the first month began on 17th May, and ended on 16th June, 1940. The letting continued for recurring periods of the same duration, and could only be determined by notice to quit at the end of one of those periods. That is the general rule laid down for all periodic tenancies by the Court of Appeal in *Lemon* v. *Lardeur* (1), accepting the principle of the decision of the Divisional Court in *Queen's Club Gardens Estates Ltd.* v. *Bignell* (2) in preference to the decision of an earlier Divisional Court in *Simmons* v. *Crossley* (3). The decision of the Court of Appeal should be adopted in this case. It lays down a satisfactory general rule for all periodic tenancies, putting weekly and monthly tenancies on the same footing as tenancies from year to year, as to which the rule was well established, and clearing up the doubts which existed as to weekly and monthly tenancies. *Simmons* v. *Crossley* (3) was wrongly decided and should not be followed. Other decisions which refused to follow it were *Savory* v. *Bayley* (4) and *Precious* v. *Reedie* (5). The rule is, of course, subject to any special agreement between the landlord and the tenant. In the present case, however, the provision that the tenancy should "not cease . . . until one month's notice . . . shall have been given" is not sufficient to take the case out of the general rule; it merely fixes the length of notice to be given and does not deal with the matter of the terminal date. If the agreement had provided that the tenancy might be determined by one month's notice "at any time," it would, according to some of the authorities, have indicated an intention that the terminal date could be a date other than the end of a current period. Some such indication is necessary to take the case out of the general rule. The general rule is particularly appropriate to such a case as the present one, where the rent is payable in advance. If the rule did not apply, the result would have been that Amad was obliged to pay rent for a month commencing on 17th November 1945 although he would be (and it was then known that he would be) obliged to quit on the 22nd. He would have had no right to recover any portion of the month's rent. The *Apportionment Act* 1870 (Imp.) (in Victoria, the *Supreme Court Act* 1928, ss. 73-76) would not have helped him (*Ellis* v. *Rowbotham* (6)), and there is nothing in the written agreement from which an intention to make an apportionment could be inferred. This strongly supports the view that the agreement does not contemplate the termination of the letting at any

(1) (1946) 1 K.B. 613.
(2) (1924) 1 K.B. 117.
(3) (1922) 2 K.B. 95.
(4) (1922) 38 T.L.R. 619.
(5) (1924) 2 K.B. 149.
(6) (1900) 1 Q.B. 740.

time other than the end of a month of its currency. Even if it were held that the letting was for an indefinite period (that is, not periodic in the sense of being from month to month), it would still be the proper construction of the agreement that it did not provide for the termination of the letting before the end of a month for which rent had been paid. So far as weekly and monthly tenancies are concerned, there has always been great doubt; the authorities both in England and in Victoria have been conflicting, and the decision of the Court of Appeal offers a satisfactory solution. It was even held in Victoria that no notice was necessary in the case of a weekly tenancy (*Calvert* v. *Turner* (1)), but this is inconsistent with *Jones* v. *Mills* (2), which has been accepted in subsequent cases. [He referred to *Kemp* v. *Derrett* (3); *Doe d. King* v. *Grafton* (4); *Dixon* v. *Bradford and District Railway Servants' Coal Supply Society* (5); *Soames* v. *Nicholson* (6); *R.* v. *Sutcliffe*; *Ex parte Brooks* (7); *Kurrle* v. *Heide* (8); *Carter* v. *Aldous* (9); *Mornane* v. *All Red Carrying Co. Pty. Ltd.* (10); *Bridges* v. *Potts* (11); *Res Judicatae* (Publication of the Law Students' Society of Victoria), vol. 1, No. 2, p. 98.] It is submitted, however, that the true nature of the tenancy here is that it is from year to year from 17th May 1940. A letting for an indefinite term at a rent fixed by relation to an aliquot part of a year creates, prima facie, a yearly tenancy (*Lewis* v. *Baker* (12)). That is the position here except that the parties have made a special agreement for one (instead of the usual six) months' notice; but that provision, as already submitted, relates only to the length of notice, not to the terminal date. Regulations 58-62 of the *National Security* (*Landlord and Tenant*) *Regulations* do not affect the general question of the validity of a notice to quit, and they do not help the respondent here. The position under the regulations is that the notice must comply with the special requirements of the regulations and also with the requirements of the general law.

Voumard, for the appellant Grosglik. There is no satisfactory evidence that Grosglik's tenancy had ever been determined by a proper notice to quit. The presumption from the facts is that Grosglik was a tenant either from month to month or from year to year. If the tenancy was monthly, then there is no evidence that the notice to quit expired at the end of a month of the tenancy.

(1) (1865) 2 W.W. & a'B. (L.) 174.
(2) (1861) 10 C.B.N.S. 788: See p. 796 [142 E.R. 664, at p. 667].
(3) (1814) 3 Camp. 510 [170 E.R. 1463].
(4) (1852) 18 Q.B. 496 [118 E.R. 188].
(5) (1904) 1 K.B. 444.
(6) (1902) 1 K.B. 157.
(7) (1878) 4 V.L.R. (L.) 150.
(8) (1899) 20 A.L.T. 171.
(9) (1921) V.L.R. 234.
(10) (1935) V.L.R. 341.
(11) (1864) 17 C.B.N.S. 314, at pp. 349, 350 [144 E.R. 127, at pp. 141, 142].
(12) (1906) 2 K.B. 599.

H. C. OF A. 1947. AMAD v. GRANT. GROSGLIK v. GRANT.

For all that appears in the evidence, the tenancy may have begun on any day of the month. There is a special form of notice for cases in which the date of commencement of the tenancy is not known; if this form is not used, the burden is on the landlord to prove that notice was given to expire on the last day of the current term (*Lemon* v. *Lardeur* (1)). This appellant adopts the argument put on behalf of the appellant Amad that, in the absence of a special agreement, the notice in the case of a periodic tenancy must determine on the last day of the current term. The only direct authority on this point in Victoria is *Mornane* v. *All Red Carrying Co. Pty. Ltd.* (2): It was based on a misconception of the effect of *Calvert* v. *Turner* (3) and was wrongly decided. On the evidence, Grosglik's case, if it is a case of a monthly tenancy, is a simple case of a letting without any special agreement as to notice. If the agreement in Amad's case is to be regarded as a special agreement taking that case out of the general rule, then Amad's case is differentiated from Grosglik's case; there is no evidence here of any such agreement. It is not conceded, however, that the tenancy was monthly. In the present state of the authorities, the presumption is that the tenancy was from year to year (*Moore* v. *Dimond* (4)); if so, the respondent is still confronted with the difficulty as to the terminal date of the notice. For the purposes of the presumption of a yearly tenancy, a month is an aliquot part of a year (*Beattie* v. *Fine* (5)).

Eustace Wilson, for the respondent. In neither Amad's nor Grosglik's case do the facts warrant the conclusion that the tenancy was from year to year. In Grosglik's case the only relevant fact appearing in evidence is that the rent was paid monthly. This alone does not import a tenancy from year to year (*Halsbury, Laws of England*, 2nd ed., vol. 20, p. 124: See also p. 126). It is evidence (a month being an aliquot part of a year) which, with other circumstances rendering it probable that such was the nature of the tenancy, may support a finding that a tenancy was from year to year. Without such additional circumstances, it makes a monthly tenancy seem more probable (*Ladies' Hosiery and Underwear Ltd.* v. *Parker* (6)). It was certainly not sufficient of itself to compel the magistrate to find that there was a yearly tenancy. In Amad's case the facts are even less in favour of a yearly tenancy. The true construction of the written agreement is that the letting is to be for three years at least and is then to continue until determined by notice: that

(1) (1946) 1 K.B. 613.
(2) (1935) V.L.R. 341.
(3) (1865) 2 W.W. & a'B. (L.) 174.
(4) (1929) 43 C.L.R. 105, at pp. 114-117.
(5) (1925) V.L.R. 363, at p. 374.
(6) (1930) 1 Ch. 304, at pp. 325, 328.

is to say, it is a letting for an indefinite term; there is no letting by reference to recurring periods which might leave room for an implication as to the terminal date of the notice. The contention on Amad's behalf seeks to read into the habendum of the agreement something which is not a necessary implication; this is inconsistent with the principle governing implications (*Salmond and Williams* on *Contracts*, 2nd ed. (1945), p. 39; *Aspdin* v. *Austin* (1), per Lord *Denman* C.J.). The suggestion made was in substance that the provision for payment of rent in advance (there being no provision for apportionment) made it necessary to read the words "one month's notice" as if they were qualified by some additional words requiring that the month coincide with the period for which rent had been paid. If any implication were necessary, there would be stronger reason for implying a provision for apportionment. If the true construction of the agreement is that the letting is for an indefinite term, then the magistrate was wrong in treating it as a letting from month to month; but, even if his reason were wrong, his conclusion that the notice was valid would be correct, and Amad's appeal should be dismissed. If the magistrate was right in regarding it as a monthly tenancy, it is submitted that as to Amad (whatever the position may be as to Grosglik) the notice given was valid as being within the terms of the agreement; the natural meaning of the words referring to notice is inconsistent with the idea that the month of the currency of the notice must terminate on a particular day of the calendar month. It is submitted, further, both as to Amad and Grosglik, that, even if the notices would not be valid under the general law apart from the *National Security* (*Landlord and Tenant*) *Regulations*, they are saved by those regulations. For the purposes of those regulations a notice to quit must be of such length as to comply with the requirements of reg. 59, even if a shorter notice would serve under the general law. Then reg. 62 provides (apart from one exception which is not relevant here) that a notice which accords with reg. 58 (which for present purposes means a notice of the length required by reg. 59) shall operate to determine the tenancy at the expiration of the period specified in the notice. The exception is that the notice shall not so operate if its effect would be to determine the tenancy at a date earlier than that at which it could be determined under the general law. The reason for this is that the length of notice under reg. 59 might be greater or less than that which the general law would require. In Amad's case, for instance, regarding it as a letting for an indefinite term, if the parties had not agreed on a month's notice, the law would require reasonable notice, and

(1) (1844) 5 Q.B. 671, at p. 684 [114 E.R. 1402 at p. 1407].

H. C. OF A. 1947.

AMAD v. GRANT.

GROSGLIK v. GRANT.

this, conceivably, could be longer than the notice under reg. 59. On the other hand, regarding Amad's case as one of a tenancy from month to month, the notice in fact given was given so far in advance that, if it had had to comply with the rule contended for by the appellants, it could have determined the tenancy on 17th, instead of 22nd, November. The result would be (on the assumption made by the appellants) that it would be bad under the general law for going beyond the 17th, but it would not be within the exception in reg. 62. Accordingly, the notice in Amad's case is not within the exception in reg. 62 and is, therefore, saved by that regulation. A similar result follows in Grosglik's case. The respondent's difficulty, if the appellant is right, is that on the evidence the respondent cannot point to a particular day as the end of a current month of the tenancy. This difficulty is overcome by reg. 62 so long as the notice is more than a month in length. If these submissions are not correct, the question then is whether this Court should adopt the decision of the Court of Appeal in *Lemon* v. *Lardeur* (1) in preference to the decision in *Simmons* v. *Crossley* (2). The decision of the Court of Appeal is not so manifestly right that this court should feel bound to follow it. In accepting *Queen's Club Gardens Estates Ltd.* v. *Bignell* (3), the decision assumes that the incidents of a weekly or monthly tenancy are the same as those of a yearly or quarterly tenancy. That this assumption should not be made is just as convincingly supported by *Simmons* v. *Crossley* (2). There were sound practical reasons (especially as to farms) for fixing the end of the year as the terminal of a yearly tenancy, and the extension of the same rule to quarterly tenancies may be similarly supported; but these reasons do not apply to weekly or monthly tenancies. That the Court of Appeal felt bound to extend the rule in England to weekly and monthly tenancies is no reason for a similar extension in Australia. If the rule does not apply, recourse must be had to the general principle, which is that reasonable notice must be given. That is the rule adopted in *Calvert* v. *Turner* (4) and *Mornane* v. *All Red Carrying Co. Pty. Ltd.* (5), and it should be adopted here. In Amad's case the parties have determined the question by their own agreement, and in Grosglik's case it has not been suggested that, if reasonable notice is the test, the notice given does not pass the test.

Voumard, in reply.

Hudson K.C., in reply.

Cur. adv. vult.

(1) (1946) 1 K.B. 613.
(2) (1922) 2 K.B. 95.
(3) (1924) 1 K.B. 117.
(4) (1865) 2 W.W. & a'B. (L.) 174.
(5) (1935) V.L.R. 341.

The following written judgments were delivered :—

LATHAM C.J. These two cases are appeals by orders to review from decisions of a magistrate ordering that the appellants deliver up possession of certain premises of which they have been in possession as tenants. The order was made under the *Landlord and Tenant Act* 1928 (Vict.), Part V. The jurisdiction of the magistrate depended upon the term or interest of the tenants having been " duly determined by a legal notice to quit or otherwise " : See s. 69. The landlord Grant relied upon determination of the tenancies by legal notices to quit. The *National Security* (*Landlord and Tenant*) *Regulations* contain various provisions limiting the right of a landlord to recover possession of premises from tenants, and the tenants relied upon defences for which the regulations provided. The orders to review were granted upon the basis that the magistrate was exercising Federal jurisdiction, and this view has not been contested upon the appeals. Analysis of the facts in each case shows that the important question which arises is whether, in the case of a monthly tenancy, a notice to quit must expire at the end of one of the monthly periods of the tenancy.

In Amad's case it was proved that Grant's predecessor in title on 17th May 1937 made an agreement in writing with Amad to let the first floor of premises at 353 Exhibition Street, Melbourne, " at the weekly rent of £2 2s. 6d. payable in advance, such tenancy to commence on the 17th day of May 1937 and not cease (except as hereinafter provided) until one month's notice in writing shall have been given by either party to the other and such tenancy to continue for the term of three years at the least.

1. The rent is to be paid by the said tenant (*a*) Monthly in advance the first of such payments amounting to £9 4s. 2d. to be paid on the signing hereon and hereafter such similar amounts on the 17th day of each month following."

After the three years mentioned in the agreement had expired, the tenant continued to occupy the premises, paying the monthly rent specified in the agreement.

The landlord on 19th September 1945 gave a notice to quit on 22nd November 1945. It was not contended that, if the criterion of the sufficiency of a notice to quit is, in the case of such a tenancy as the agreement between the parties creates in this case, that it should be a reasonable notice, the nine weeks' notice was not a reasonable notice. But the notice did not expire on the 17th day of the month, which was the date of the expiry of monthly periods under the tenancy. The magistrate held that the tenancy was a monthly tenancy and was determinable by a month's notice to quit expiring at any time.

H. C. OF A. 1947. AMAD v. GRANT. GROSGLIK v. GRANT. Latham C.J.

It was argued that the agreement created a tenancy from year to year. In my opinion it is clear that this was not the case. There was obviously no actual agreement for a tenancy from year to year. The circumstances did not show a holding over, after an expired term, under a tenancy at sufferance or a tenancy at will. The tenant did not hold over, but continued to hold on the terms of the agreement. There was no payment of rent as an annual rent. There was a payment only of a monthly rent. The agreement created a periodic tenancy, namely a monthly tenancy expressly made determinable by a month's notice in writing. It is settled that in the case of such a tenancy there is not a new tenancy with the beginning of each month (*Bowen* v. *Anderson* (1)) but a letting for a period determinable by notice to quit: See *Mellows* v. *Low* (2). In *Todd* v. *Enticott* (3), there was an agreement for a tenancy not to cease "until a month's notice shall have been given by either party to the other and which was to continue for one year at the least." It was held that this was not a yearly tenancy but a monthly tenancy with a proviso that the notice by which the tenancy was to be determined should not be given so as to terminate it before the expiry of one year. So in the present case the tenancy is a monthly tenancy with a proviso that the tenancy shall not be terminated within the first three years.

In *Todd* v. *Enticott* (3) it was held that the notice might be given at any time of the year. So also in the present case the notice may be given at any time during the year. It must (by reason of the express terms of the agreement) be a month's notice in writing, and the question which has to be decided is whether a notice which is otherwise in accordance with the terms of the agreement is invalid because it does not expire with a month of the tenancy.

In *Mornane* v. *All Red Carrying Co. Pty. Ltd.* (4) *Mann* C.J. held that in the case of a weekly tenancy a notice to quit need not expire at the end of a periodic week, basing his decision upon the view which he took of the decision of the Full Court in *Calvert* v. *Turner* (5). In *Calvert* v. *Turner* (5), however, what was held was that no notice to quit was necessary in the case of a weekly tenancy in order to determine the tenancy. The notice which was given did not expire with one of the weeks of the tenancy, but the decision was not that the notice was not invalid for that reason. The decision was, "Strictly speaking, we think that no notice was necessary" (6). In *R.* v. *Sutcliffe*; *Ex parte Brooks* (7), it was held

(1) (1894) 1 Q.B. 164.
(2) (1923) 1 K.B. 522.
(3) (1887) 13 V.L.R. 475.
(4) (1935) V.L.R. 341.
(5) (1865) 2 W.W. & a'B. (L.) 174.
(6) (1865) 2 W.W. & a'B. (L.), at p. 175.
(7) (1878) 4 V.L.R. (L.) 150.

by the Full Court that in the case of a weekly tenancy, although no formal notice to quit was necessary, the *Landlord and Tenant Act* required that the interest of the tenant should have ended or been duly determined by legal notice to quit or otherwise, and that therefore some demand of possession was necessary before proceedings could be taken under the *Landlord and Tenant Act*: See also *Fitzgerald* v. *Button* (1). But in *Kurrle* v. *Heide* (2) *Hodges* J. held that, in order to determine a weekly tenancy, some reasonable notice to quit should be given, and that it should expire at the end of one of the weekly periods. In *Carter* v. *Aldous* (3) *Cussen* J. held that in the case of a weekly tenancy it was not necessary that a week's notice should be given, but reasonable notice should be given and a week's notice would probably in all cases be held sufficient to determine the tenancy. His Honour expressed no opinion as to the date when a notice to quit should expire.

In *Mornane's Case* (4) *Mann* C.J. considered both the above-mentioned cases, and certain conflicting English cases. In *Simmons* v. *Crossley* (5) it had been held in the case of a monthly tenancy that, in order to determine it, reasonable notice must be given and that a notice was not rendered invalid merely because it expired on a day other than the last day of the month, calculated from the commencement of the tenancy. This decision of a Divisional Court was not followed by another Divisional Court in *Queen's Club Gardens Estates Ltd.* v. *Bignell* (6), where in the case of a weekly tenancy it was held that a notice to quit, in order to be valid, should be a week's notice and should expire at the end of a periodic week from the commencement of the tenancy. *Lush* J. based his decision upon a consideration of the nature of a periodic tenancy as explained in *Bowen* v. *Anderson* (7). A periodic tenancy, whether it be yearly, quarterly, monthly or weekly, is not a series of separate tenancies, but is a single tenancy which continues until it is duly determined. Thus, when a new period begins the tenant is entitled, as *Lush* J. explains, to continue to hold as a tenant for the complete period which has begun—" When a fresh week begins the tenancy continues for another week, just as, in the case of a quarterly tenancy, when a fresh quarter begins, the tenancy continues for another quarter " (8). The decision in *Simmons* v. *Crossley* (5) had been founded in part upon two Irish decisions which are examined by *Lush* J. in the *Queen's Club Case* (6). This analysis, in my opinion, justifies the conclusion of the learned judge that those authorities did not really

(1) (1891) 17 V.L.R. 52.
(2) (1898) 4 A.L.R. 294.
(3) (1921) V.L.R. 234.
(4) (1935) V.L.R. 341.
(5) (1922) 2 K.B. 95.
(6) (1924) 1 K.B. 117.
(7) (1894) 1 Q.B. 164.
(8) (1924) 1 K.B., at p. 125.

H. C. OF A. 1947.

AMAD v. GRANT.

GROSGLIK v. GRANT.

Latham C.J.

support the proposition which was laid down in *Simmons* v. *Crossley* (1).

In *Precious* v. *Reedie* (2) it was held by a Divisional Court, following the *Queen's Club Case* (3), that, in order to determine a monthly tenancy by notice to quit, the notice, in the absence of special agreement, must be a month's notice expiring at the end of a periodic month from the commencement of a tenancy.

In this state of the authorities the matter came before the Court of Appeal in *Lemon* v. *Lardeur* (4). The Court of Appeal considered the *Queen's Club Case* (3) and *Simmons* v. *Crossley* (1), approved the former decision and overruled the latter decision. In my opinion the reasoning of *Lush* J. in the *Queen's Club Case* (3) is convincing. It has been approved by the Court of Appeal and this Court should adopt the same conclusion, namely that in any periodic tenancy, whether it be yearly, quarterly, monthly or weekly, the notice to quit must (unless the parties have otherwise agreed) expire at the end of a period of the tenancy. The present cases do not raise the question of the length of notice required, because it is not disputed in either case that the notices were sufficient in this respect.

In Amad's case there is a further consideration which, in my opinion, is of itself conclusive upon the point in question independently of the matters already mentioned. Under the agreement between the parties rent was payable in advance. If a notice to quit did not expire at the end of one of the monthly periods, the position would be that the tenant would be bound to pay a full month's rent when a month began, and, the notice to quit expiring at a time not being the end of a month, would, if such a notice were held to be valid, nevertheless be bound to go out of possession before the expiration of the period for which he had paid rent. I can see no principle which would entitle the tenant to recover part of the rent which he had paid—he would not have made the payment under any mistake of fact. Rent payable in advance is not apportionable : *Ellis* v. *Rowbotham* (5). These difficulties, however, do not arise if it is held that a notice to quit is not good in the case of a periodic tenancy unless it expires with the period of the tenancy.

Thus in Amad's case, where the notice to quit did not expire with the month of the tenancy, the tenancy was not terminated by notice to quit or in any other manner, and the order for recovery of possession therefore should not have been made. The appeal should be allowed in this case.

(1) (1922) 2 K.B. 95.
(2) (1924) 2 K.B. 149.
(3) (1924) 1 K.B. 117.
(4) (1946) 1 K.B. 613.
(5) (1900) 1 Q.B. 740.

Grosglik was the tenant of the second floor of 353 Exhibition Street. An order was made for the recovery of possession from him. The order was made upon the basis that a monthly tenancy was proved and that a notice to quit had determined the tenancy. The notice to quit was given on 24th July for 25th September. It was not suggested that it was not a reasonable notice, but there was no evidence that it expired with a period of the tenancy. The evidence which was before the magistrate showed merely that Grosglik, who was in occupation before Grant became the owner of the premises, held under a written lease or agreement for a lease the terms of which were unknown, as the document had been lost. The only evidence was that he paid rent by the month. This was evidence of a monthly tenancy, but there was no evidence of the day of the month upon which the tenancy began. If the notice to quit had been given to expire at the end of the next complete month of the tenancy after the service of the notice, the notice would have been good : *Sidebotham* v. *Holland* (1) ; *Queen's Club Case* (2). But, as this procedure was not adopted, the position is that the notice to quit was bad because it was not shown that it expired with a period of the tenancy. Accordingly, upon the evidence before the magistrate, the order for recovery of possession should not have been made, and the appeal should be allowed in this case.

The court was informed during the hearing of these appeals that a lease or agreement for a lease to Grosglik had just been discovered. For reasons which I stated on behalf of the court, permission to adduce this fresh evidence before this court was refused (*Grosglik* v. *Grant* (*No.* 2) (3). The fact that the appeal is allowed will not prevent the landlord giving a new notice to quit and taking fresh proceedings. I would therefore allow the appeal and order that the complaint be dismissed.

The conclusions which I have reached are not, in my opinion, affected by reg. 62 of the *National Security* (*Landlord and Tenant*) *Regulations*. This regulation provides in the first place that a notice to quit given in accordance with reg. 58 shall, if the tenancy in respect of which the notice was given has not otherwise terminated, operate so as to terminate the tenancy at the expiration of the period specified in the notice. Regulation 58 (3) requires that a notice to quit shall be given " for a period determined in accordance with " reg. 59. Regulation 59 prescribes a minimum period of seven days, together with an additional seven days for each completed period of six months occupation. It is not disputed that the notices to quit

(1) (1895) 1 Q.B. 378.
(2) (1924) 1 K.B., at p. 126.
(3) *Post*, p. 355.

H. C. OF A. 1947. AMAD v. GRANT. GROSGLIK v. GRANT. Latham C.J.

given in the present cases satisfied the requirements of regs. 58 and 59. Regulation 62 further provides, however, that nothing in that regulation shall operate so as to determine any tenancy before the date on which it would have terminated if the regulation had not been made. The effect of these provisions is that a notice given in accordance with reg. 58 (that is, I understand, for the minimum period prescribed in reg. 59, and truly upon one or more of the grounds specified in reg. 58, and served in the manner thereby allowed) shall determine a tenancy if it has not otherwise been terminated, but not at an earlier date than that on which it would have terminated apart from the regulation. In my opinion these provisions mean that the regulations must be observed, but that compliance with the regulations by a lessor will not enable him to determine a tenancy at a date earlier than that at which he could have determined it if the regulations had not been made . Thus if a tenant has a right, under the law apart from the regulations to a particular length of notice to quit, that right is preserved. Accordingly, reg. 62 does not prevent the tenants in these cases from relying upon rules of law relating to the time at which a monthly tenancy may be determined by a notice to quit.

RICH J. *Amad* v. *Grant.*—In this appeal, the parties have chosen to regulate their legal relations by a document prepared with lofty indifference to rules of law or practice with the natural result that they have succeeded in bogging themselves in the morass which awaits those who diverge from the straight and narrow path.

The document is dated 17th May 1937. By it a person as landlord agrees to let, and a person as tenant agrees to take, the premises in question at a weekly rental of £2 2s. 6d. payable in advance, the tenancy to commence on 17th May 1937 and not to cease until one month's notice in writing shall have been given by either party to the other, and to continue for three years at least. The rent is to be paid monthly in advance, the first payment, amounting to £9 4s. 2d. to be paid on the signing of the document, and thereafter similar amounts on the 17th day of each month following. The notice to quit which gave rise to the present proceeding was dated 24th July and required that possession should be delivered up on 25th September 1946.

The first question is, what is the nature of the tenancy provided for by this document? Tenancies are of two kinds, tenancies at will and tenancies for terms. A tenancy for a term may be for a single term, or it may be periodical, that is, for the period of a specified term, but with provision for the continuation of the tenancy

for successive periods until it is terminated in accordance with some provision agreed upon by the parties or implied by law in the absence of agreement.

By the document in the first instance the rent is stated on a weekly basis (payable in advance). But the tenancy, which is commenced on 17th May 1937, is not to cease until one month's written notice shall have been given by either party, and it must continue for at least three years. The special provision with respect to payment of rent is significant. It is to be paid monthly in advance, the first payment of £9 4s. 2d. to be made on 17th May 1937 and thereafter a similar amount on the 17th day of each succeeding month. Now, £9 4s. 2d. is four and one-third times £2 2s. 6d., the agreed rent when calculated on a weekly basis. To reduce weekly payments to a calendar monthly basis, it is necessary to multiply the weekly amount by four and one-third, since twelve times four and one-third gives the number of weeks in the calendar year. Hence the parties are seen to be endeavouring to create a tenancy, to commence on the 17th of each month, and which is not to terminate except by a month's notice on either side. Superadded is a provision that the tenancy must continue for at least three years. We should, I think, give effect to the apparent intention of the parties, so far as the law will permit, however inartificially that intention may be expressed. *Benignae sunt faciendae interpretationes charlarum propter simplicitatem laicorum.* I think that what the parties have been struggling to provide for, and what they have sufficiently provided for, is a calendar monthly tenancy beginning on 17th May 1937, terminable by a calendar month's notice on either side, subject to the condition that it must continue at least until 17th May 1940, with the result that no month's notice to quit at any earlier date can be effectual. I know of nothing in the law of landlord and tenant which prevents the recognition of such a tenancy, or full effect being given to it.

It is now settled that, at common law, in the case of a periodical tenancy, a notice to quit, to be valid, must expire at the end of a period, *Lemon* v. *Lardeur* (1), in the absence of some provision by the parties to the contrary, as in *Soames* v. *Nicholson* (2). It follows, in my opinion, that the notice to quit given in the present case was invalid, since it did not provide for the giving up of possession on, or, it would appear from the case of *Dagger* v. *Shepherd* (3), on or before, the 17th of a month. *National Security* (*Landlord and Tenant*) reg. 62 does not assist the landlord, in view of reg. 59 (2) (*b*).

For these reasons, I am of opinion that the appeal succeeds.

(1) (1946) 1 K.B. 613.
(2) (1902) 1 K.B. 157.
(3) (1946) 1 K.B. 215.

H. C. OF A. 1947.

AMAD v. GRANT.

GROSGLIK v. GRANT.

Rich J.

Grosglik v. *Grant.*—In my opinion the facts in this case bring it within the periodic tenancy class in which a notice to quit must expire at the end of a current period of the tenancy and the onus is on the landlord to show that it has done so : *Lemon* v. *Lardeur* (1). The complainant, assuming that the tenancy was a monthly tenancy, gave a notice to the defendant requiring him to deliver up possession on 25th September 1946 but he was unable to lead evidence to prove that the tenancy ran from the 25th of each month. And I do not think that reg. 62 of the *National Security* (*Landlord and Tenant*) *Regulations* affords the complainant any relief or takes his case out of the rule to which I have referred.

Accordingly I am of opinion that the appeal should be allowed and the complaint remitted to the magistrate for rehearing.

DIXON J. *Amad* v. *Grant.*—This appeal was argued with that in Grosglik's case and, like that appeal, it comes to us under s. 39 (2) (*b*) of the *Judiciary Act.* For the reasons I have stated in Grosglik's case I think the proceeding before the magistrate was a matter of Federal jurisdiction.

The objection again is to the notice to quit, but in this appeal a lease in writing or an agreement for a lease was put in evidence. The notice to quit, which was dated 24th July 1946, described the tenancy as one from month to month and required that possession should be delivered up on 25th September 1946.

The instrument governing the relations of the parties is dated 17th May 1937. It is described as a memorandum of agreement on the part of the landlord to let to the tenant and on the part of the tenant to take from the landlord the premises in question at the weekly rent of £2 2s. 6d., payable in advance, such tenancy to commence on 17th May 1937 and not to cease until one month's notice in writing shall have been given by either party to the other and such tenancy to continue for three years at the least. The document goes on to provide that the rent is to be paid by the tenant monthly in advance, the first of such payments, amounting to £9 4s. 2d., to be paid on the signing of the instrument and thereafter such similar amounts on the seventeenth day of each month following. It contained other provisions, but they do not seem material to the question in hand.

Regulation 62 of the *National Security* (*Landlord and Tenant*) *Regulations* is relied upon as, in any event, enough to make the notice to quit effectual. But I do not find it necessary to consider how reg. 62 operates in a case like this, where the notice to quit is of greater length than the terms of the tenancy require and cannot be

(1) (1946) 1 K.B. 613.

otherwise if it is to comply with regs. 58 and 59 and yet be given on the date it bears. It is unnecessary for me to consider the question because, in my opinion, under the general law the notice to quit was valid and sufficiently fulfilled the requirements of the tenancy agreement. The objection taken to its validity is that the date upon which it requires delivery of possession falls within one of the periods in respect of which monthly rent is payable under the tenancy agreement and not upon the seventeenth day of a month. In a yearly, half-yearly or quarterly tenancy, when there are no express conditions governing the termination of the tenancy, the notice to quit must expire at the end of a year, half year or quarter. It is now settled in England that the same rule applies to monthly and weekly tenancies (*Lemon* v. *Lardeur* (1)), and, as I have said in Grosglik's case, I think that there is no reason why the rule should not be considered as applicable to Victoria. In the present case, however, there is an express condition governing the termination of the tenancy. The tenancy is to continue until one month's notice in writing shall have been given by either party to the other. Nothing is said about the necessity of such a notice expiring upon a specific day of the month or about its following any recurring period. To invalidate the notice to quit that has been given a restriction upon or condition of the power to terminate the tenancy must be imported which is not expressed. An implication must be made in the tenancy agreement requiring the month's notice to expire with a period corresponding to the monthly rent days. I can see no sufficient support for such an implication. I am prepared to concede that, where in a lease or agreement for a periodical tenancy there is a clause providing for the termination of the tenancy by a notice of the length which the law would otherwise imply or regard as sufficient, it is to be taken, in the absence of anything to the contrary, to be a notice expiring with a period of the tenancy. Thus a provision for a half-year's notice for a yearly, a quarter's notice for a quarterly, a month's notice for a monthly and a week's notice for a weekly tenancy may, prima facie, be interpreted as referring to a notice expiring with a recurrent period of the tenancy. This may also be the prima-facie construction where there is a yearly tenancy and the provision cuts down the length of notice to a quarter and so perhaps similarly with other periodical tenancies. That view, at all events, is suggested by *Dixon* v. *Bradford and District Railway Servants' Coal Supply Society* (2) and supported by *Lewis* v. *Baker* (3), affirmed (4). But the foundation of this presumptive construction is a periodical

(1) (1946) 1 K.B. 613.
(2) (1904) 1 K.B. 444.
(3) (1905) 2 K.B. 576.
(4) (1906) 2 K.B. 599.

H. C. OF A. 1947. AMAD v. GRANT. GROSGLIK v. GRANT. Dixon J.

tenancy and also, I think, some apparent or presumed connection between the length of time provided for the notice and the recurring period of the tenancy. I cannot believe, for instance, that a provision for a week's or a month's or six-weeks' notice terminating a tenancy from year to year would be construed as meaning prima facie that the notice must expire with a year. But it is not material how the periodical character of the tenancy appears. It may arise from the reservation of the rent and the fact that it is calculated by the year, the quarter, the month or as the case may be. The tenancy need not be expressly described as yearly, quarterly or monthly. Even where there is a periodical tenancy, it is enough to displace the interpretation requiring the notice to expire with one of its periods if there are expressions showing that the time was unrestricted when the notice might be served : *Wembley Corporation* v. *Sherren* (1) : *Soames* v. *Nicholson* (2). If the notice may be given at any time, its prescribed currency may terminate on any date. In *Doe d. Pitcher* v. *Donovan* (3) the premises were let at a yearly rent from Michaelmas to quit at a quarter's notice. After five or six years a quarter's notice to quit at Midsummer was given. It was decided by the Court of Common Pleas that the notice was bad because it did not expire at the end of a year, viz. Michaelmas. But the report says :—" *Chambre* J. observed, in the course of the argument, that the meaning of the quarter's notice depended upon the whole contract ; if it was a tenancy from year to year, with a quarter's warning, it would be a quarter ending with the year : but if it were a demise for one year only, and then to continue tenant afterwards, and quit at a quarter's notice, it would be a quarter ending at any time " (4). This appears to me to be a correct view of the matter. *Chambre* J. meant, of course, that, if the tenancy was not periodical, the interpretation would be different and the notice stipulated for would not be considered to be one expiring with a year or a division of a year.

In the agreement before us the parties expressed the term as one indefinitely continuing until notice and excluded for three years the possibility of the giving of a notice. So far as their intention goes, it seems clear that they did not mean the tenancy to be from year to year, from month to month or from week to week. During the first three years, at all events, the reservation of a weekly rent could not justify a construction of the term as by the week and the payment of the rent monthly could not justify a construction as by the month.

(1) (1938) 4 All E.R. 256.
(2) (1902) 1 K.B. 157.
(3) (1809) 1 Taunt. 555 [127 E.R. 949].
(4) (1809) 1 Taunt., at pp. 557, 558 [127 E.R., at p. 950].

It is true that the indefinite description of the term, the absence of a definite terminus *ad quem*, might make it necessary to treat the tenancy as periodical so as to obtain a term recognized by the common law. It could not be a tenancy at will, because of the provision against termination except on a month's notice and then not for three years: see per *Isaacs* J. in *Landale* v. *Menzies* (1). But it would be difficult to regard the reservation of a weekly rent or the provision for monthly payment of rent in advance as a ground for treating as a monthly or weekly tenancy one that must according to the terms of the contract continue for three years at least. The case is unlike that of *Moore* v. *Dimond* (2) in one respect, namely, the agreement for the minimum term is not lacking in form. For the requirement of a seal does not apply to a demise for a term which may end at or before the end of three years, as the present tenancy might have done: see *Re Knight*; *Ex parte Voisey* (3) per *Brett* L.J. But here, as in *Moore* v. *Dimond* (2), the law finds it necessary to ascribe a known term or tenure to the holding or occupation of the tenant. In the present case the reason is that the agreement fixes a term of indefinite duration defeasible by notice but subject to a minimum period. That is not itself a term. In *Moore* v. *Dimond* (2) it was because the actual intention of the parties failed at common law for want of form. But the result is the same. For the reasons explained at length in the majority judgment in that case (4) where there is an indefinite letting the law ascribes a term from year to year unless there are reasonably clear indications of some other tenure.

The tenancy agreement in this case discloses nothing to lay hold of but the two provisions as to rent. But, in view of the minimum period of three years, it would be quite ridiculous to raise from them an implication against the tenancy from year to year and reduce it to a monthly or weekly term. The fact that the estate or interest is a tenancy from year to year in the contemplation of the common law does not mean that its mode of termination is not that specified in the agreement of the parties. If they had agreed on a fixed term greater than three years, the tenancy would automatically terminate on its expiry notwithstanding that owing to the want of a seal the legal estate or interest had to be considered a tenancy from year to year: see *Moore* v. *Dimond* (5) and cases there cited. So the provision as to a month's notice is applicable and would enable either party to bring the tenancy from year to year to an end at the expiration of the minimum period. Any provision may be made for the

(1) (1909) 9 C.L.R. 89, at pp. 130-132.
(2) (1929) 43 C.L.R. 105.
(3) (1882) 21 Ch. D. 442, at p. 458.
(4) (1929) 43 C.L.R. 105, at pp. 113-117.
(5) (1929) 43 C.L.R., at p. 113.

H. C. OF A. 1947.

AMAD v. GRANT.

GROSGLIK v. GRANT.

Dixon J.

termination of a tenancy from year to year, notwithstanding the reservation of an annual rent: see cases cited in *Halsbury, Laws of England*, 2nd ed., vol. 20, p. 130, note (*n*). The fact that the minimum period ends does not appear to me to be a reason for converting the tenancy to one by the month or the week.

Independently altogether from the rather technical necessity of ascribing a term and fixing upon a tenancy from year to year, the reasons for treating the tenancy as one by the month or the week seem to me to be inadequate. The parties meant the term to continue indefinitely until brought to an end by notice. They had to fix a rent and calculate it according to period. The period of enjoyment they selected for this purpose was a week. For the purpose of payment, however, they evidently considered this interval of time too short. To avoid frequent payments of rent they therefore fixed a monthly amount and said it must be paid in advance. From this it is hard to infer that they meant to create either a weekly or a monthly tenancy, and, if a choice had to be made between the two, I do not know on what grounds it should proceed, unless perhaps the period of enjoyment selected as the basis of calculation, viz. a week, should be treated as having stronger claims than the periodicity of the actual payments, a month.

The strongest argument in favour of the implication of a condition or restriction controlling the generality of the provision for a month's notice and limiting it to a notice expiring with a rental month is that, otherwise, a month's rent may be payable in advance though a notice has been given and the remaining period of the tenancy is less, perhaps much less, than a month. But if this is so intolerable a result of the bare words of the agreement that some implication must be made to avoid it, then I should have thought the more business-like implication was one which made the stipulation for payment of rent in advance at monthly intervals inapplicable once a notice terminating the tenancy had been given, that is if the expiry date would create a broken period. That event must occur unless the notice expired with a rental month. Then the weekly rent would be payable for the broken period. If it were considered payable in arrear, it would be apportionable according to the days: *Ellis* v. *Rowbotham* (1). If the weekly rent were regarded as taking the place of the monthly amounts in the stipulation for payment in advance, then a week's rent would be payable in advance for every week or part of a week in the broken period. But, however this may be, I am unable to see in the argument any sufficiently strong

(1) (1900) 1 Q.B. 740.

ground for introducing an implication that the month's notice must expire with any given period, whether a week, a month or a year.

One point remains. It may be thought that the reference to monthly tenancy in the notice of the owner's intention to apply to a court of petty sessions vitiates that document unless the tenancy is truly by the month : See *Westacott* v. *Williams* (1). But precise technical exactness in such a document is not indispensible to validity and I think that, as the tenancy was terminable by a month's notice and the rent payable was monthly, this reference could not mislead the tenant (see per *Cussen* J. in *Carter* v. *Aldous* (2) as to an erroneous date) and that it was sufficient for the substantial purpose such a notice has in view : See *Ellis* v. *Dalgleish* (3).

In my opinion the appeal should be dismissed.

Grosglik v. *Grant.*—This is an appeal from the decision of a police magistrate in summary proceedings under Part V. of the *Landlord and Tenant Act* 1928 by a landlord to recover possession of premises from his tenant. The magistrate decided to issue a warrant of possession.

The tenant had relied upon the *National Security* (*Landlord and Tenant*) *Regulations* and he now appeals directly to this Court under s. 39 (2) (*b*) of the *Judiciary Act* as a matter of Federal jurisdiction, although his ground of appeal depends upon State law.

Proceedings to recover possession from a tenant are so restricted and controlled by the regulations that a landlord's claim against a tenant for possession of the demised premises must depend upon fulfilment of the conditions they prescribe and therefore may be considered to arise under a law of the Commonwealth. I am, therefore, prepared to accept the view that the magistrate exercised Federal jurisdiction. That being so, an appeal lies to this Court even although it is supported upon no grounds except those arising under State law. The ground of appeal argued was that the landlord did not establish the validity of the notice to quit. In my opinion the burden lay upon the landlord, as complainant, of showing by evidence that the defendant occupied the premises as tenant holding from him and that the tenancy had been determined. In the circumstances this burden involved proof that an effective notice to quit had been given. The evidence showed that the defendant had occupied the premises for some fourteen or fifteen years and had always paid a monthly rent. He went in under a lease, but before the magistrate the instrument was not produced and its nature and

(1) (1896) 18 A.L.T. 110.
(2) (1921) V.L.R. 234, at p. 238.
(3) (1921) V.L.R. 333, at p. 337.

H. C. OF A. 1947. AMAD v. GRANT. GROSGLIK v. GRANT. Dixon J.

terms were not proved. The document, we are told, has since been discovered; but the defect in proof cannot be cured in this Court, which decides appeals upon the material before the Court appealed from: *Harrison* v. *Goodland* (1).

As matters stand, the presumption is that the defendant held under a tenancy from month to month. Three years ago the complainant purchased the land and buildings a floor of which the defendant has so long occupied and the defendant appears to have recognized him as his landlord by paying him the rent. The complainant gave a month's notice to quit on the footing that it was a monthly tenancy and required the defendant to deliver up possession on 25th September 1946. There is nothing to show that the defendant held the premises for monthly periods extending from the twenty-fifth day of one month to the twenty-fourth of the next month. Even the date to which rent was calculated was not stated. In my opinion it was necessary for the complainant to offer proof at least of circumstances from which it might have been inferred that the monthly tenancy ran from the twenty-fifth of each month. The decision of the Court of Appeal in *Lemon* v. *Lardeur* (2) now establishes in England that, when the parties have made no provision as to the length or terminating date of the notice by which a tenancy may be determined, then in a tenancy from month to month or from week to week a month's or a week's notice must be given terminating with a periodical month or week as the case may be. As explained by *Cussen* J. in *Carter* v. *Aldous* (3), a different rule was early adopted in Victoria: See *Mornane* v. *All Red Carrying Co. Pty. Ltd.* (4). But I can see no reason why on this matter the law as now settled by the Court of Appeal should not have as much application in Victoria as elsewhere. It is, I think, dependent not upon custom or usage or upon local circumstances but upon implications to be attributed to a rule of the common law.

I am, therefore, of opinion that the complainant failed to show that, apart from any special operation ascribed to reg. 62 of the *National Security* (*Landlord and Tenant*) *Regulations*, the defendant's tenancy had been lawfully terminated and accordingly that an order for the issue of a warrant of possession ought not to have been made in his favour. I do not think that reg. 62 operates in a way which will overcome the objection. Apparently part of its purpose is to make a notice complying with reg. 58 and therefore with reg. 59 effective, although in order so to comply the notice names a date for delivery up of possession which does not coincide with that

(1) (1944) 69 C.L.R. 509, at p. 521.
(2) (1946) 1 K.B. 613.
(3) (1921) V.L.R. 234, at pp. 238, 239.
(4) (1935) V.L.R. 341.

required under the terms of the tenancy. But the last part of reg. 62 makes it necessary that it shall not be an earlier date than that on which, according to the terms of the tenancy, the notice to quit might have terminated the tenancy. We do not know on what date the tenancy might have been terminated.

The appeal should be allowed and the complaint remitted to the magistrate for rehearing.

McTIERNAN J. *Amad* v. *Grant.*—In my opinion this appeal should be dismissed. The question to be decided is whether the notice to quit was sufficient to terminate the tenancy. The tenancy was created by an express contract. The notice was sufficient so far as regards its length. The controversy is centred on the question whether the terms of the contract require that it should expire on the 17th day of a month. The day on which the notice was expressed to expire was not such a day. The contract was of a special kind. The parties were free to contract that it be determined by notice expiring at any time and the law will give effect to their agreement. The duration of the tenancy is described in the habendum. In *Foa's* book on the *Law of Landlord and Tenant*, 5th ed. (1914), at p. 106, the following principle is stated : " The habendum is the proper place to look to in the lease for the purpose of ascertaining the true period of the letting ; but the other parts of the instrument may be looked at, though, in order that they may control the habendum, they must establish clearly that it could not have been the intention that the habendum should operate according to its words." The words of the habendum are : " such tenancy to commence on the 17th day of May 1937 and not cease (except as hereinafter provided) until one month's notice in writing shall have been given by either party to the other and such tenancy to continue for the term of three years at the least." In *Landale* v. *Menzies* (1) *Griffith* C.J. said : " A contract for the exclusive occupation of land for a determinate period, however short, constitutes a lease : *R.* v. *Morrish* (2). A period determinable at the will of either party is such a period. In such a case the lease is called a lease at will. And, in one sense, and perhaps in strictness, every lease which is not for a term certain is a lease at will, although of late years the phrase is ordinarily used to describe a tenure under which the lessor may determine the lease instanter." The Chief Justice added : " A lease until either party shall give six months' notice to the other does not constitute a

(1) (1909) 9 C.L.R. 89, at pp. 100, 101.

(2) (1863) 32 L.J.M.C. 245.

H. C. OF A. 1947.

AMAD v. GRANT.

GROSGLIK v. GRANT.

McTiernan J.

tenancy from year to year, but it is a good lease: *Doe d. King* v. *Grafton* (1). I suppose it is technically a lease at will, and it was so described by counsel *arguendo* in *Lewis* v. *Baker* (2). *Farwell* L.J., however, described it as a 'term certain' (3)".

The words of the habendum grant a term of three years and a further term determinable by a month's notice. There is no need to classify the tenancy created by the contract. The parties were free to make a tenancy of any duration they pleased. The important consideration is that it is not possible to get out of the words of the habendum an intention to create a periodic tenancy. The present contract resembles that in *Todd* v. *Enticott* (4). There the contract said that the tenancy was to be for one year at least and that it was not to cease until one month's notice had been given by either party to the other. The Full Court of Victoria held that it was not a yearly tenancy and it was determinable after one year by a month's notice at any time. The magistrate who heard the present case relied upon this decision.

In order to uphold the argument that the tenancy is determinable by a notice expiring on the seventeenth day of the month and on no other day of a month, it would be necessary to imply a stipulation which is not expressed in the contract. The argument is based upon the terms of the contract with respect to rent. The principle upon which the court should determine whether a condition not expressed should be implied in a contract is stated by Lord *Esher* M.R. in *Hamlyn & Co.* v. *Wood & Co.* (5). The passage is as follows: "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned" (6). Considering the contract in that way, I do not agree that the implication necessarily arises that after the tenancy had run for three years the landlord was not free to give a month's notice expiring on any day of the month in order to terminate the tenancy.

I agree that the law laid down in *Lemon* v. *Lardeur* (7) would be the right law to apply if the contract created a tenancy from week to week or from month to month.

(1) (1852) 18 Q.B. 496 [118 E.R. 188].
(2) (1906) 2 K.B. 599.
(3) (1906) 2 K.B., at p. 603.
(4) (1887) 13 V.L.R. 475.
(5) (1891) 2 Q.B. 488.
(6) (1891) 2 Q.B., at p. 491.
(7) (1946) 1 K.B. 613.

Grosglik v. *Grant*.—I agree that this appeal should be allowed and the complaint remitted to the magistrate. It does not seem to me to be necessary to add anything by way of reasons for this order.

WILLIAMS J. These two appeals have been heard together and can be disposed of in the one judgment. The appellant Wadee Amad occupies the first floor and the appellant Grosglik the second floor of 353 Exhibition Street, Melbourne. The respondent Grant is the owner of the building.

On 24th July 1946 the respondent gave the appellants notice to quit their respective floors on 25th September 1946, the notices stating that they held their respective floors as tenants from month to month, and that the notices to quit were given under the *National Security* (*Landlord and Tenant*) *Regulations* on the ground that the respective floors were reasonably required for occupation by the respondent in his trade, profession, occupation or calling. Neither tenant vacated his floor pursuant to the notice to quit, and the respondent thereupon took summary proceedings under the *Landlord and Tenant Act* 1928 (Vict.), Part V., to recover possession.

Upon the hearing of the applications the magistrate ordered that warrants of ejectment should issue in favour of the respondent. The appeals come to this court by way of orders nisi to review the orders of the magistrate granted by *Starke* J. The grounds in both orders relate to the failure by the respondent to give valid notices to quit at common law and do not challenge the decision of the magistrate that in accordance with the *National Security* (*Landlord and Tenant*) *Regulations* the respondent had established that the floors were reasonably required for occupation by the respondent for the purposes of his trade.

The rights of the parties in the appeal of Wadee Amad depend upon the true construction of an agreement made on 17th May 1937 between Cooke, from whom Grant subsequently purchased the property, and Wadee Amad. In Grosglik's case there is evidence that Grosglik paid rent monthly, but there is no evidence of the day of each month on which the rent became due or was paid. During the hearing of Grosglik's appeal counsel for the respondent stated that his client had discovered a written lease between Grosglik and Cooke, but Grosglik's counsel would not consent to the lease being tendered in evidence, and we held, for reasons given by the Chief Justice, that we had no power to admit fresh evidence under Part II., Section IV., rule 1, of the rules of court (1).

I shall deal first with the appeal of Wadee Amad. The agreement of 17th May 1937, so far as material, provided that, in consideration

(1) post p. 355.

H. C. OF A. 1947.

AMAD v. GRANT.

GROSGLIK v. GRANT.

Williams J.

of the rent thereinafter reserved and the covenants and agreements thereinafter contained, the landlord agreed to let and the tenant to take the premises situate on the first floor of 353 Exhibition Street, Melbourne, at the weekly rent of £2 2s. 6d. payable in advance, such tenancy to commence on the 17th day of May 1937 and not to cease (except as thereinafter provided) until one month's notice in writing should have been given by either party to the other and that such tenancy should continue for the term of three years at the least, the rent to be paid by the tenant monthly in advance, the first of such payments amounting to £9 4s. 2d. to be paid on the signing of the agreement and similar amounts on the 17th day of each month following. The period of three years expired on 17th May 1940, so that on 24th July 1946, the date of the notice to quit, the appellant was holding under a tenancy at a weekly rent payable in advance not to cease until one month's notice in writing should have been given by either party, the rent to be paid monthly in advance on the 17th day of each month. In *Lemon* v. *Lardeur* (1) the Court of Appeal has recently decided, after reviewing the relevant English authorities, that it is an incident of all periodical tenancies, whether from year to year or month to month or week to week, that the notice to quit, in the absence of an agreement to the contrary, must expire on the last day of the tenancy. Prior to this case the authorities, while unanimous to this effect in the case of a yearly tenancy, were somewhat in conflict in the case of monthly and weekly tenancies. I have no doubt that this Court should conform to the decision of the Court of Appeal, with which I respectfully agree. It follows that *Mornane* v. *All Red Carrying Co. Pty. Ltd.* (2) must be considered to be overruled. A tenancy originally for a minimum term of three years, which provides for the payment of weekly or monthly rent in advance, and gives a right to either party to determine it by one month's notice in writing, is clearly capable of raising vexed questions whether, after the expiration of the three years, it is a yearly, monthly or weekly tenancy, or whether it is simply a tenancy for an indefinite period until determined by one month's notice in writing. The overriding provision in the agreement is for payment of the rent monthly in advance, so that the earlier provision for payment of the rent weekly in advance would appear to have been inserted merely as a means of computing the amount of the monthly rent. These monthly payments are not calculated as aliquot portions of a yearly rent. They are simply payments of rent from month to month under an agreement which provides for its termination by either party giving one month's notice in writing to the other. The

(1) (1946) 1 K.B. 613. (2) (1935) V.L.R. 341.

tenancy is, in my opinion, a tenancy from month to month and not a tenancy from year to year or week to week: *Halsbury, Laws of England*, 2nd ed., vol. 20, p. 125, note (*i*): *Ellis* v. *Dalgleish* (1).

The crucial question is whether the month's notice must be given so as to expire on the 16th day of a month or may be given so as to expire at any time. The tenant is under an absolute obligation to pay a month's rent in advance on the 17th day of each month. There is no provision for any apportionment of the rent if the notice can expire during the currency of the succeeding month. The Apportionment Act (*Supreme Court Act* 1928 (Vict.), s. 73) does not apply to payments of rent in advance: *Ellis* v. *Rowbotham* (2). It would seem that the payment of a month's rent in advance must have been intended to confer upon the tenant the right to the exclusive possession of the demised property for a month. But if the month's notice need not expire on the 16th day of a month, either the tenant must pay a whole month's rent for a right to occupy the property for part only of the succeeding month, or an implication must be read into the agreement that upon the giving of a notice to quit expiring during a month, the rent for that month becomes apportionable. It is noticeable that in cases in which it has been held that a periodical tenancy could be terminated by a notice to quit expiring at any time the express agreement contained the words " at any time " or other words to that effect: See for instance *Bridges* v. *Potts* (3); *Cannon Brewery* v. *Nash* (4); *Soames* v. *Nicholson* (5); *Mayo* v. *Joyce* (6); *Wembley Corporation* v. *Sherren* (7); *Land Settlement Association Ltd.* v. *Carr* (8). In one of these cases, *Bridges* v. *Potts* (3), the court was strongly influenced in deciding that the tenancy could be so terminated by the fact that the agreement contemplated an apportionment. In *Wembley Corporation* v. *Sherren* (7) there was an express provision for an apportionment. There are cases in which the judgments at first sight lend some support to the view that without such words the notice could expire at any time: See for instance *Doe d. King* v. *Grafton* (9); *Todd* v. *Enticott* (10). But it will be found that the notice in fact expired on the last day of the period, so that these cases are colourless. It seems to me that in order to give effect to the agreement of 17th May 1937 as a whole, and to have regard to a usual incident of periodic tenancies, it is necessary to read the right to give a month's notice to quit as a right to give a notice expiring on the 16th day of a month. This was

(1) (1921) V.L.R. 333.
(2) (1900) 1 Q.B. 740.
(3) (1864) 17 C.B.N.S. 314 [144 E.R. 127].
(4) (1898) 77 L.T. 648.
(5) (1902) 1 K.B. 157.
(6) (1920) 1 K.B. 824.
(7) (1938) 4 All E.R. 255.
(8) (1944) 1 K.B. 657, at p. 668.
(9) (1852) 18 Q.B. 496 [118 E.R. 188].
(10) (1887) 13 V.L.R. 475.

H. C. OF A. 1947.

AMAD v. GRANT.

GROSGLIK v. GRANT.

Williams J.

the view taken in *Kemp* v. *Derrett* (1) and *Savory* v. *Bayley* (2), cases which correspond to the present case on their facts. For these reasons I would allow the appeal of Wadee Amad.

The facts of Grosglik's case are on all fours with the facts in *Lemon* v. *Lardeur* (3). There it was held that, in proceedings similar to the present proceedings, the onus was on the landlord to prove the day of the month on which the monthly tenancy expired and that notice to quit had been given so as to expire on that day. The respondent failed to prove these facts, so that I would also allow this appeal, but in view of the discovery of the written lease I would remit the case to the magistrate for further hearing.

In so concluding I have not overlooked the contention of counsel for the respondent that the notices to quit complied with the *National Security* (*Landlord and Tenant*) *Regulations* and that, even if they were ineffective at common law to terminate the tenancies, they derive efficacy from the provisions of reg. 62 of these regulations. But I cannot read the concluding words of this regulation as meaning other than that to terminate a periodic tenancy the landlord must give a notice to quit which is effective both at common law and under the regulations. In the present cases the notices to quit should have been for the period and have contained the other particulars required by the regulations and should also have expired on the last day of the month of the tenancies.

Amad v. *Grant.*—*Appeal allowed. Order of Court of Petty Sessions set aside. In lieu thereof order that complaint be dismissed.*

Grosglik v. *Grant.*—*Appeal allowed. Order of Court of Petty Sessions set aside. Case remitted to Court of Petty Sessions, Melbourne.*

Solicitors for the appellants: *Corr and Corr*; *Sylvia Rothstadt.*
Solicitors for the respondent: *Hall and Wilcox.*

E. F. H.

(1) (1814) 3 Camp. 510 [170 E.R. 1463]. (3) (1946) 1 K.B. 613.
(2) (1922) 38 T.L.R. 619.