[HIGH COURT OF AUSTRALIA.]

TURNER AND OTHERS . . . . . APPELLANTS; DEFENDANTS,

AND

YORK MOTORS PROPRIETARY LIMITED . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 8, 10, 11; MELBOURNE, *Oct.* 3.

Dixon, Williams, Webb and Kitto JJ.

Landlord and Tenant—Tenancy agreement—No formal document—Occupation of land by tenant—Rent paid and accepted monthly—Nature of tenancy—At will or from month to month—Yearly tenancy—Implication—Notice to quit—Validity—Ejectment proceedings in the Supreme Court—"Prescribed premises"—"Bare" land—"Protected person"—Conveyancing Act 1919-1943 (*N.S.W.*) (*No.* 6 *of* 1919—*No.* 15 *of* 1943), *s.* 127 (1)—*Landlord and Tenant* (*Amendment*) *Act* 1948-1949 (*N.S.W.*) (*No.* 25 *of* 1948—*No.* 22 *of* 1949), *ss.* 8, 69—*Defence* (*Transitional Provisions*) *Act* 1946-1950 (*No.* 77 *of* 1946—*No.* 78 *of* 1950), *s.* 6 (2)—*National Security* (*War Service Moratorium*) *Regulations*, *regs.* 28A, 30.

About 9th October 1946, the defendants went into possession of about 1¼ acres of land, after a telephone conversation had taken place between T., one of the defendants, and S. the registered proprietor of the land. S. had told T. that he was willing to lease the 1¼ acres to the defendants at a rental of £6 per week and that they could take possession immediately. This they did, and thereafter paid S. rent, at first £6 every week and later £26 every month. The defendants extended their occupation on to the balance of the land owned by S. which had a total area of about five acres. Upon the land there had been erected a number of temporary buildings but these were to be removed or were in course of removal. Late in 1947 or early in 1948, after S. had made unsuccessful efforts to confine the defendants to the 1¼ acres, the defendants increased their payments to £52 per month, and S. accepted these payments as rent for the whole area. S. sold the land to the plaintiff in October 1948, and for a short period thereafter the plaintiff accepted rent from the defendants at the rate of £52 per month for the whole

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area. No formal lease was ever executed. S. deposed that he had expressly stipulated that a lease would have to be drawn up by a solicitor and signed by the defendants. T. denied that there was any mention of a formal lease. There was also conflict as to whether it had been agreed that the letting should be for two years, or, as affirmed by T., for two years and to continue thereafter until determined by six months' notice if the land should be resumed and three months' notice otherwise. On 23rd March 1949, the plaintiff gave the defendants a notice in writing dated 21st March 1949, requiring them on 25th April 1949, to quit the land and deliver up possession thereof to the plaintiff. It stated that the plaintiff was owner and that the defendants held the land from the plaintiff as tenants at will. The notice not having been complied with a writ in ejectment was issued on 2nd May 1949. The defendants claimed (i) to have become lessees of the land and denied that the notice to quit sufficed to determine the tenancy; (ii) that the land was " prescribed premises " within the meaning of s. 8 of the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W.); and (iii) that two of the defendants were " protected persons " as defined in regs. 28A and 30 of the *National Security (War Service Moratorium) Regulations* and they relied upon those regulations.

The following questions were left to the jury: (1) Was the occupation by the defendants under an oral agreement that a formal lease should be drawn up by the solicitor for S. to be signed by him and by the defendants? (2) (a) Was the tenancy between S. and the defendants for a term of two years only? (b) Was the agreement for a term of two years and to continue thereafter until terminated on three months' notice? (3) Is the land prescribed premises? and (4) Were any of the defendants protected persons? The jury answered question (1) Yes; question (2) (a) No; question (2) (b) Yes; and, by direction of the judge, questions (3) and (4) No. A verdict for the plaintiff was confirmed by the Full Court of the Supreme Court. On appeal,

Held, by *Dixon*, *Webb* and *Kitto* JJ. (*Williams* J. dissenting), that the appeal should be allowed because upon the real facts the tenancy was not a tenancy at will but was from month to month therefore the notice to quit was bad and ineffectual to bring the tenancy to an end.

Held, by *Dixon*, *Webb* and *Kitto* JJ., that the rent having been fixed on a monthly basis, a yearly tenancy would not have been implied at common law from the payment of the rent therefore s. 127 (1) of the *Conveyancing Act* 1919-1943 (N.S.W.) did not apply.

Held, by *Dixon* and *Williams* JJ., (1) that " prescribed premises " as defined by s. 8 of the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W.) do not include " bare " land; and (2) that regs. 28A and 30 of the *National Security (War Service Moratorium) Regulations* are void.

Queensland Newspapers Pty. Ltd. v. *McTavish*, (1951) 85 C.L.R. 30, referred to.

Decision of the Supreme Court of New South Wales (Full Court), reversed.

APPEAL from the Supreme Court of New South Wales.

By a writ in ejectment issued out of the Supreme Court of New South Wales on 2nd May 1949, the plaintiff, York Motors Pty. Ltd. sought to recover from the defendants, Ernest Henry Samuel Turner, Ernest Lidwell Turner, Selda Felice Turner, Donald Gordon Turner, Ronald Manning Turner, Noel Paige Turner and Edward Lyn Smith, the land known as Number 360 Bourke Street, Waterloo, Sydney, situated at the intersection of Bourke Street and Botany Road, Waterloo, and being the residue of the land comprised in Certificate of Title registered Volume 5857, Folio 108. The plaintiff claimed to have been entitled to the possession of the land on and since 26th April 1949, and to eject other persons therefrom, and sought to recover £52 per month mesne profits since 14th January 1949.

In its particulars of claim the plaintiff alleged that it was seised of the land in fee simple; that the defendants held the land as tenants to the plaintiff under a tenancy at will determinable by one month's notice in writing expiring at any time; and that that tenancy was duly determined by one month's notice in writing expiring on 25th April 1949. These allegations were denied by the defendants who, in their particulars of defence, alleged, *inter alia*, that in or about October 1946, they became the lessees of the property claimed; that the said tenancy had never been determined; and that they were in occupation of that property pursuant to the terms of the tenancy agreement. The defendants relied upon the following matters as defences to the plaintiff's claim to possession: (a) their own possession of the property; (b) that the property was "prescribed premises" within the meaning of s. 8 of the *Landlord and Tenant* (*Amendment*) *Act* 1948 (N.S.W.); (c) that they were lessees of the property within the meaning of s. 8; (d) that their tenancy to the property had not been determined within the meaning of ss. 62 and 67 of that Act, or at all; (e) that the defendants Ronald Manning Turner and Noel Paige Turner were "protected persons" as defined in regs. 28A and 30 of the *National Security* (*War Service Moratorium*) *Regulations*; (f) that the defendants relied upon reg. 30; and (g) that it was a term of the tenancy agreement that the lessor should give to the lessees three months' notice of his intention to terminate the tenancy and such notice had not been given. The plaintiff denied the defendants' allegations, and said that even if the two defendants were "protected persons" within the meaning of the regulations, that fact would not avail the defendants; that regs. 28A and 30 were irrelevant, and that there was not any registration of any

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lease on the certificate of title of the land claimed which was under the *Real Property Act* 1900 (N.S.W.).

The land in question consisted of about five acres and in October 1946 was owned by George Harold Sears. In that month as the result of a telephone conversation between Sears and the defendant Ernest Henry Samuel Turner, the defendants, who were then registered and carrying on business of selling motor cars and trucks under the title and firm name of General Motors (Australia) Pty., were let into possession of part of the land (one and a quarter acres) and rent therefor of £26 per calendar month was paid by the defendants and accepted by Sears.

The defendants actually used a greater area than that for which arrangements had been originally made, but ultimately, in October or November 1947, Sears and Ernest Henry Samuel Turner agreed, apparently, that the defendants should occupy the whole area at a rent of £52 per month, and thereafter, until 14th January 1949, that amount was paid by the defendant and accepted as rent by Sears or his successor in title. The land was sold to the plaintiff and upon the registration of a memorandum of transfer dated 14th October 1948, the plaintiff became the registered proprietor of the land. Tenders of rent by the defendants were accepted by the plaintiff for each of the three months up to 14th January 1949, but after that date they were refused.

As shown in the judgments of *Dixon* J. and *Williams* J. hereunder, there was a conflict of evidence as to the character and details of the tenancy and as to whether it was a term of the negotiations between Sears and the defendants that a formal lease should be prepared.

On 23rd March 1949, the plaintiff gave the defendants a notice in writing dated 21st March 1949, requiring them on 25th April 1949, to quit the land and deliver up possession thereof to the plaintiff and stating that the plaintiff was owner and that the defendants held the land from the plaintiff as tenants at will. The notice not having been complied with the plaintiff issued the writ in ejectment referred to above.

Upon the hearing of the action the following questions were left by *Kinsella* J. to the jury: (1) Was the occupation by the defendants under an oral agreement that a formal lease should be drawn up by Sears' solicitor to be signed by Sears and the defendants? (2) (a) Was the tenancy between Sears and the defendants for a term of two years only? (b) Was the agreement for a term of two years and to continue thereafter until terminated on three months' notice?

(3) Is the land prescribed premises? and (4) Were any of the defendants protected persons?

The jury answered question (1) Yes; question (2) (a) No; question (2) (b) Yes; and, by direction of the judge, questions (3) and (4) No.

A verdict for the plaintiff was upheld by the Full Court of the Supreme Court (*Street* C.J., *Owen* and *Herron* JJ.), on appeal.

From that decision the defendants appealed to the High Court.

Relevant statutory provisions are sufficiently set forth in the judgments hereunder.

G. E. Barwick K.C. (with him *B. Seletto*), for the appellants. The answers given by the jury to questions (1) and (2) did not entitle the respondent to a verdict. Evidence that two of the appellants were "protected persons" as defined in ss. 3 and 4 of the *Landlord and Tenant* (*War Service*) *Act* 1949 (N.S.W.) was wrongly rejected by the trial judge. The evidence supports the appellants' claim that the subject property was "prescribed premises" as defined by s. 8 of the *Landlord and Tenant* (*Amendment*) *Act* 1948-1949.

G. Wallace K.C. (with him *C. M. Collins*), for the respondent. The parties are bound by the way in which the case was conducted at the hearing of the action. The respondent alleged a tenancy at will determinable by one month's notice in writing expiring at any time. The appellants alleged that there was not any such tenancy, but they relied upon a tenancy created in October 1946 and claimed that it was a term of such tenancy that they were to be given three months' notice. That was the main issue raised and it was for that reason that the trial judge said that it was immaterial that there was an increase in the area of land leased and in the rental. On the issues so raised the respondent was entitled on the jury's finding to a verdict in its favour. There was an agreement for a lease, followed by a going into occupation and the payment of rent. Thus under s. 127 of the *Conveyancing Act* 1919-1943, which section applies to land under the *Real Property Act* 1900, a tenancy at will arose. The arrangements between the parties cannot be regarded as a present demise, with the addition that a formal lease would be drawn up. There was not to be any lease until the written document was executed. With regard to the increase of area and rental, three positions may have arisen, but all favourable to the respondent: (i) there was originally an

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entry under an agreement for a lease and the payment of rent. Then at the end of 1947 or the beginning of 1948, the parties agreed to increase the area and the rental but on the terms of the existing lease. That still amounted only to a tenancy at will; (ii) there may have been a fresh lease of the extra area and a new rent paid, leaving the old lease untouched. In that event, both leases fell within s. 127 of the *Conveyancing Act* and the one notice to quit and the one writ in ejectment covered both; and (iii) there may have been a surrender in 1947 or 1948 of the old lease by the creation of a new lease of the full area and at a higher rent. Again the only tenancy that arose was from the occupation and payment of rent, and that new lease fell within s. 127. As to the words "and no agreement as to its duration" they must mean an agreement as to how long the lease is to last. A term that the lease will not be determined except on three months' notice cannot give any indication as to duration. The meaning of s. 127 of the *Conveyancing Act* was considered in *Dockrill* v. *Cavanagh* (1). There should not be read into a tenancy at will any term inconsistent with such a tenancy. Hence if the agreement for the lease was for two years, to read into the tenancy at will a term of two years would be a term inconsistent with tenancy at will (*Tooker* v. *Smith* (2)). In any event, at the date when the notice to quit was given any such term as originally agreed upon had expired and there then was only a tenancy at will. As regards the premises being "prescribed premises", the land leased was vacant. The only appellant who gave evidence admitted that he wrote a letter saying that the land was vacant. The draft leases all spoke of the premises let being vacant. The lessor did not own any structure that may have been on the land. The word "premises" must mean a building. In the definition of "prescribed premises" the expression is to include any part of any premises and any land leased with any premises. There is thus a distinction drawn between land and premises. Section 15 of the *Landlord and Tenant* (*Amendment*) *Act* 1948-1949, speaks of premises which were not in existence. All land was in existence. A building might not have been in existence on a certain date. Section 21 speaks of the erection of the premises. The *Landlord and Tenant* (*War Service*) *Act* 1949, says that "premises" includes land, thus showing that "premises" would not otherwise include land. There was not a tittle of evidence that any of the appellants was a protected person within the meaning of s. 4 of the *Landlord and Tenant* (*War Service*) *Act* 1949. There was not any evidence

(1) (1944) 45 S.R. (N.S.W.) 78; 62 W.N. 94.

(2) (1857) 1 H. & N. 732 [156 E.R. 1396].

that any appellant was by reason of war service required to live in premises other than premises occupied by him.

G. E. Barwick K.C., in reply.

Cur. adv. vult.

Oct. 3.

The following written judgments were delivered :—

DIXON J. This is an appeal from an order of the Supreme Court of New South Wales dismissing with costs an application by way of appeal made by the defendants in an action of ejectment to set aside a judgment entered for the claimant and to enter a judgment for the defendants or alternatively for a new trial or for such further and other relief as to the court might seem meet. No general verdict was taken at the trial, but certain questions were put to the jury, and upon the answers given by the jury, answers which in some cases were directed, judgment was entered for the claimant for the recovery of the land. The land consisted of five and a quarter acres at the intersection of Bourke Street and Botany Road, Waterloo, occupied by the defendants as a site for the storing or parking of motor bodies, motor vehicles, caravans, machinery, goods to be carried or transhipped, and junk generally. The defendants were let into possession of the land by the predecessor in title of the claimant as lessees or intending lessees. On 23rd March 1949 the claimant gave the defendants a notice in writing dated 21st March 1949 requiring the defendants on 25th April 1949 to quit the land and deliver up possession thereof to the claimant and stating that the claimant was owner and that the defendants held the land from the claimant as tenants at will. The defendants did not comply with the notice to quit and the claimant issued a writ in ejectment on 2nd May 1949. The defendants claimed to have become lessees of the land and denied that the notice to quit sufficed to determine the tenancy. They further claimed that the land was " prescribed premises " within the meaning of s. 8 of the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W.). They said also that two of the defendants were " protected persons " as defined in regs. 28A and 30 of the *National Security (War Service Moratorium) Regulations* and they relied upon those regulations.

The evidence upon none of the issues raised by these defences or answers to the writ in ejectment was left in a satisfactory condition.

It appeared that the defendants formed a firm of seven members carrying on a business described in the registration of the firm as that of motor car and truck selling. On 16th April 1946 one George Harold Sears became registered proprietor of the land by transfer.

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The land had been occupied by the Commonwealth for some purpose arising out of the war and upon it there had been erected a number of temporary buildings but these were to be removed or were in course of removal.

At a time fixed as about 9th October 1946 the defendant E. H. S. Turner communicated with Sears and sought a lease of the land for the defendants' business. The upshot of the conversation, according to Sears' version, was that he was agreeable to lease a portion of the land to the defendants at a rent of £6 a week for two years with immediate possession but that a lease must be drawn up by Sears' solicitor. According to Sears he said to Turner " You can sign the lease and you can take possession ". On Turner saying that it would take him three or four days to move Sears added " You can take possession straight away ".

An undated letter from Turner to Sears, said to have been written on 10th October 1946, was put in evidence. The letter began " Enclosed cheque for £24 being rent for 4 weeks for block of land fenced ", describing it. The letter stated that the land would be used for a junk yard for storing repossessed vehicles that would cost more to do up than they were worth and for storing caravans and trailers and garaging and servicing them. Turner's letter proceeded to say that he understood from Sears that the lease of the land would be subject to six months' notice if certain other premises of Sears should be resumed and subject to three months' notice if Sears should require the use of the land the subject of the lease. In cross-examination Sears in effect agreed that something to this effect was said, though he was indefinite about the periods of notice. Turner gave an account which differed in two respects from Sears' version. In the first place, according to Turner no mention of a formal lease was made. In the second place, in one part of his evidence Turner made the provision as to six months' or three months' notice operative not during, but after the expiry of, the term of two years. His evidence was that Sears said: " ' The place is going to be resumed ', or ' likely to be resumed at any time ', as he had received notice from the hospitals or something to do with the hospital at Camperdown, and they may resume it at any time, but he would get two years' notice from the authorities, and he could give me two years. But after that it would be subject to six months' notice, if he received notice from the hospitals or whoever was buying for the hospitals." A little later he deposed that Sears said that he would get six months' notice if the council resumed and he would get three months' notice if Sears wanted to build on the land: that was after the

first two years. But in his cross-examination Turner said "He gave me a two years' lease, a two years' lease subject to six months' notice if the hospitals wanted to build on his land where the factory is or three months' if he wanted to use the land himself". That Sears intended to reserve a power by notice to abridge the fixed term, not to provide for a notice terminating a tenancy after the fixed term, is shown by a draft lease which Sears' solicitors prepared and forwarded to Turner on 24th October 1946. The draft lease was expressed to grant a term of two years and it contained a provision enabling the lessor to terminate the lease by three months' notice in writing if the lessor required to use the land for his own purposes.

The area of the portion of the land of which the defendants were to become tenants was about one and a quarter acres. They went into possession at once, according to Sears, without his consent, that is, I understand it, on 10th October 1946. For some time they carried on their business on the land. They brought two caravans upon the land and connected them by a platform and a covering roof. Turner used the connected caravans as an office and a habitation. Indeed he was prosecuted and convicted for erecting a building without the approval of the municipal council. Though in answer to the defendants' letter attributed to the date 10th October 1946 enclosing a cheque for £24 Sears' solicitors said they would hold the cheque until some appropriate agreement was prepared embodying the conditions of tenancy, the defendants regularly paid rent to Sears at the rate of £26 a calendar month and Sears accepted it. As time went on the defendants began to extend the area they used beyond the one and a quarter acres which they were to occupy. In the meantime, although Turner had received a draft lease neither he nor his partners had executed a lease nor had they agreed upon the terms of such a document.

Sears put forward various proposals or requests as to the precise portion of the block which the defendants should occupy. The defendants actually used a greater area than that for which they had originally arranged but eventually Sears and Turner appear to have agreed that the defendants should occupy the whole area at a rent of £52 a month. There is some doubt when this took place. Turner said it was in October or November 1947. At the trial a letter was referred to dated 15th March 1948 from Sears' solicitors to the defendants suggesting that the lease of the whole area should commence on 1st April 1948, mentioning the rent of £52 a month and the necessity of a lease being drawn up which should contain proper conditions. When the defendants' holding of the entire area

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began is not important. What is important is that the defendants entered into occupation of the whole area and paid a periodical rent for it of £52 a month in advance which was accepted by Sears.

In or about September 1948 some discussions appear to have taken place concerning the possibility of the defendants purchasing the land or some of it. The land was however sold by Sears to York Motors Pty. Ltd., which is the claimant company. A transfer to the claimant company dated 14th October 1948 was executed and it became the registered proprietor of the land. The company accepted payments of rent from the defendants, for three months, up to 14th January 1949 it was said, but after that the tenders of rent by the defendants were refused.

Whatever may be the proper conclusion as to the duration of the tenancy upon which the defendants held the land, it is clear enough that a tenancy subsisted between Sears and the defendants, even if it amounted to a tenancy at will only. It was of course a tenancy for less than three years and at the time of the transfer of land by Sears to the claimant company the defendants were in possession. The land was under the *Real Property Act* 1900-1940 (N.S.W.) and it follows that under s. 42 (d) of that Act the claimant company's title was subject to the defendants' tenancy, whatever its character should be held to be. The question whether the notice to quit sufficed to determine the tenancy depends upon the character of the tenancy upon which the defendants held at the time the notice to quit was given. No less than five possible conclusions as to the duration or character of the tenancy at that time may be said to be open upon the circumstances which I have described. It is important to keep steadily in view the fact that what matters is the nature of the tenancy at the time when the notice to quit was given and not at the time when the defendants first entered upon the land. And that is so for two reasons. The first is that the two years' term that was contemplated in the first instance, if calculated from 10th October 1946, expired on 9th or 10th October 1948 and at best the defendants must have been holding under some periodical tenancy on 23rd March 1949 the date of the notice to quit. The second is that when the defendants became tenants of the entire area of five or five and a quarter acres that necessarily involved or implied a surrender of their tenancy of the smaller area contained within the larger.

The five possible views which, as it is or may be suggested, it is open to take of the character of the tenancy then subsisting are these. First, the defendants may have been tenants at will only. Secondly, they may have been governed by s. 127 (1) of the *Con-*

veyancing Act 1919-1943 (N.S.W.) so that the tenancy is to be deemed to be a tenancy determinable at the will of either of the parties by one month's notice in writing expiring at any time. Upon either of these two views the notice to quit would suffice. Thirdly, the tenancy may have been terminable by three months' notice only. Fourthly, the defendants may have been tenants from month to month. Fifthly, they may have held on a tenancy from year to year falling outside s. 127 (1) of the *Conveyancing Act* 1919 1943. Upon either the third, the fourth or the fifth view the notice to quit would not suffice, in the fourth case because, although the currency of the notice is a month, it does not expire at the end of a periodical month from the commencement of the tenancy and in the third and fifth cases because three or six months' notice would be required.

The first of these five views is based upon the notion that the defendants went into possession of the premises provisionally pending agreement upon and the execution of a lease and that from beginning to end the defendants' possession remained of this character so that no fixed or periodical term arose and the defendants held as tenants at will only. If an intending lessor lets the intending lessee into occupation of the premises in anticipation of an agreement for a lease or of a lease, simply so that he may temporarily occupy while they proceed to negotiate concerning the conditions upon which the intending tenant shall hold, it is of course true that in the meantime the intending lessee holds as a tenant at will only. It is not inconsistent with the intending lessee's continuing so to hold that he pays the landowner some compensation for the use of the land and indeed if it is not intended that his occupation of the land shall be gratuitous the owner may recover from him upon a *quantum valebat* for use and occupation. But the reservation and receipt of a periodical rent as such affords strong evidence of the creation of a periodical term. " Where parties enter under a mere agreement for a future lease they are tenants at will; and if rent is paid under the agreement, they become tenants from year to year, determinable on the execution of the lease contracted for, that being the primary contract " : per *Littledale* J. in *Hammerton* v. *Stead* (1). The case where the parties have not actually reached an agreement for a future lease depends upon the same principle, that is upon the implication from the receipt of a compensation for the use of the land, but the inference to be drawn from the circumstances may be less certain. In *Moore*

(1) (1824) 3 B. & C. 478, at p. 483 [107 E.R. 811, at p. 813].

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v. *Dimond* (1), some observations were made concerning the manner in which the principles applied whenever the tenant held under an agreement for a lease, whether the agreement was expressed as an executory contract or consisted of an intended demise for more than three years void because not under seal:—

"In such cases the contractual intention of the parties is completely expressed in a binding manner, but is formally inefficacious to create a legal interest of the intended duration.

There is little resemblance between such a case and the very many instances in which a person has been let into, or has retained, possession of land without any express contract, and the question is whether he is a tenant, and if so, for a term of what duration. Such cases occur when a tenant overholds; when a tenant for life has granted a lease in excess of his power and dies before its determination, and the remainderman allows the lessee to retain possession; when a mortgagor has granted a lease without statutory or other power; and when the terms of entry are too vague or uncertain to be ascertainable. In such cases payment or acknowledgment of rent constitutes evidence of the establishment of a tenancy, and the fact that the rent is paid by reference to a year, or aliquot part of a year, affords evidence of a tenancy from year to year. The existence and duration of the tenancy in such a case were, however, questions of fact. On the other hand, in *Doe d. Thomson* v. *Amey* (2), in deciding that a proviso for re-entry formed a condition of a tenancy from year to year, implied from entry and payment of rent pursuant to an agreement for a lease containing such a condition, *Patteson* J. said (3): 'The terms upon which the tenant holds are in truth a conclusion of law from the facts of the case, and the terms of the articles of agreement'".

See also *Finlay* v. *Bristol and Exeter Railway Co.* (4); *Jones* v. *Shears* (5); *Neall* v. *Beadle* (6). Although entry into possession and payment of rent calculated by reference to a year, a month or a week are not legally conclusive of a yearly, monthly or weekly tenancy and amount only to evidence of such a tenancy they are facts which according to circumstances may afford such evidence that any other conclusion would be unreasonable.

In the present case the possession and the regular payment of rent went on for a long time; what is of great importance, the rent

(1) (1929) 43 C.L.R. 105.
(2) (1840) 12 A. & E. 476 [113 E.R. 892].
(3) (1840) 12 A. & E., at p. 480 [113 E.R., at pp. 893, 894].
(4) (1852) 7 Ex. 409, at pp. 414, 415, 417, 420 [155 E.R. 1008, at pp. 1010, 1011, 1012].
(5) (1836) 4 Ad. & El. 832, at p. 837 [111 E.R. 997, at p. 999].
(6) (1913) 107 L.T. 646.

was paid in advance and further payment of rent had been going on for a considerable time when the occupation was extended to the entire premises and then a rent was fixed for what amounted to a new occupation and was paid in advance in respect of each succeeding month. Rent in advance is compensation for the land in respect of an ensuing period and necessarily implies a title to occupy throughout the period for which it is paid in advance. Nothing but an express reservation of the right nevertheless to terminate the tenancy at volition during the currency of a period for which rent in advance has been paid would seem enough to justify an inference that a common intention persisted that the tenancy should remain at will only. There is evidence of a desire on the part of Sears' solicitors to preserve him from the inference that a periodical tenancy had been created but their efforts could not but be ineffectual in face of his own acts in letting the defendants into possession of the larger area of land at an increased monthly rent payable in advance and his regular acceptance of the rent.

It seems to me to be impossible to suppose that for two and a half years the parties proceeded on the basis that the defendants were in possession provisionally pending negotiations and liable to be turned out at any moment. The very term contemplated had expired : a new tenancy of a larger area had been created and the rent was fixed and paid as a compensation for successive periods of future enjoyment.

At the trial the question was treated in a very curious way. The jury were asked two questions which related to the initial arrangement between Sears and Turner. The first question was—(1) Was the occupation by the defendants under an oral agreement that a formal lease would be drawn up by the solicitor for Mr. Sears to be signed by him and by the defendants ? To this question the jury answered, Yes. The second question was divided into two parts. The earlier part asked, (2) (a) Was the tenancy between Mr. Sears and Mr. Turner for a term of two years only ? To this the jury returned an answer, No. The second part asked, (2) (b) Was the agreement for a term of two years and to continue thereafter until terminated on three months' notice ? The jury answered, Yes.

Uninstructed I should have thought that these questions and answers meant that a concluded agreement for a lease had been reached between Sears and the defendants under which the defendants occupied and that it was an agreement for a lease for two years certain and thereafter until terminated by three months' notice expiring at any time. Indeed, it is hardly going too far to

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assert that, in a slightly expanded form, that is what the findings actually say.

The legal consequence of such a finding, coupled with the fact of payment of rent would be that the defendants held upon a tenancy from year to year terminable upon three months' notice expiring at any time: see *Moore* v. *Dimond* (1), where the reasons for that result are explained.

But though, as it seems to me, the questions and answers can mean nothing else than that there was an agreement for a lease of the term stated and that the defendants held under such agreement it is said that the questions and answers must be read in the light of the direction which the jury received and that when so read they have or the first of them has the very opposite meaning. I shall not set out the passages from the summing up which are said to require such an interpretation of the jury's findings. I have studied the direction closely; but for the purpose of my decision it is not necessary to discuss it at length. It is I think plain that it was intended to submit to the jury the question whether the defendants went into possession subject to the drawing up and execution of a formal lease. I advisedly state what was intended in this form. But I think that it is equally clear that the distinction was never explained to the jury between the two very different positions that may be covered by the brief and deceptively simple statement I have employed. The one position is an entry provisionally and without any agreement but pending negotiations for an agreement or a lease with a common intention that notwithstanding payment of compensation for the use of the land described as rent the occupier shall remain nothing but a tenant at will until a formal lease is executed or an agreement reached. The other position is that the parties agree on the main terms of a tenancy including rent and agree also that the transaction shall be carried out by a proper conveyancing document and that in the meantime the tenant shall hold in pursuance of the agreement. In the latter case at common law payment of rent established a tenancy of a periodical character (usually from year to year) coming to an end automatically with the effluxion of the agreed term: see *Moore* v. *Dimond* (2).

The consequences in equity of holding under an agreement for a lease are of course well known but in this case the equity jurisdiction of the court was not invoked and we are not concerned with the position in equity.

(1) (1929) 43 C.L.R., particularly at pp. 116, 117.

(2) (1929) 43 C.L.R., particularly at pp. 112, 113.

The form in which the first question was framed was probably the result of a failure to make the necessary distinction. The second question appears to me to show that an actual agreement between Sears and the defendants was assumed. Doubtless it was supposed that if one of the conditions of the agreement was that a lease should be prepared and executed that would make the agreement ineffective and leave the defendants tenants at will. But that of course would be an error.

In order to give to the first question and answer a meaning which would deny the existence of any agreement between Sears and the defendants, it is suggested that the second question and answer must be rejected. Apparently the second question was submitted at the request of counsel for the claimant company, the respondents, because so it is suggested he feared a negative answer to the first question. On this view the jury ought not to have answered the question having said yes to the first question. But a jury's findings cannot be treated in this fashion.

The findings as expressed are clear and consistent and carry a very sensible meaning. To give one question a secondary meaning obtained from the oral direction of the presiding judge (and at that a secondary meaning its language will not bear) and then reject the second altogether as incompatible with that meaning is I venture to think contrary to the principles upon which a jury's findings are dealt with. If the proper conclusion from the summing up is that the jury have misunderstood what was intended, then their findings must both be set aside.

For myself, however, I would assume that the jury had read the written questions sent in to them and had answered them according to their natural meaning and consequently with complete consistency. In any case the direction given to the jury does not make clear the essential point, namely that there should be a common intention that the occupation of the land should be provisional pending the agreement of terms and notwithstanding payment of rent an occupation at will only.

The answer to the second question, however, appears to me to be possibly open to the serious criticism that it is contrary to the weight of the evidence. For the weight of the evidence may well be regarded as being that the three months' notice was intended to apply during and not after the two years. But the true effect of that evidence does not seem to have been brought home to the jury. The Full Court no doubt had jurisdiction to set aside any of the findings of the jury, but at the trial the learned judge's power under the implied reservation of authority to enter a verdict was

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to enter such verdict as upon the undisputed facts the jury's specific findings warranted in law, not to go behind the jury's findings. It is however not really of great importance to consider these findings because they relate to a date when the more material events affecting the rights of the parties had not occurred—and are concerned only with what may be called preliminary evidentiary facts. As I have said the long continued occupation, the agreement that the defendants should take definite possession of the entire area, the expiry of the term of two years, the fixing of a new monthly rent payable in advance, its repeated payment in advance and the receipt thereof by Sears, are facts of very great importance. There is no sufficient evidence of a continuing common intention that notwithstanding these facts the occupation of the land should be provisional and the tenancy be a tenancy at will only.

I think that the claimant company fails in its contention that the defendants held as tenants at will only so that at the end of the period fixed by the notice to quit the tenancy ended.

It is therefore necessary to consider the second of the suggested possible views of the character of the defendants' tenancy, namely that it was governed by s. 127 (1) of the *Conveyancing Act* 1919-1943 (N.S.W.). This sub-section provides that no tenancy from year to year shall be implied by payment of rent; if there is a tenancy and no agreement as to its duration, then such tenancy shall be deemed to be a tenancy determinable at the will of either of the parties by one month's notice in writing expiring at any time. The second part of this provision, if detached from the first, would govern every case where the character of the tenancy was implied from the payment of rent and where there was no agreement as to its duration. Thus, on that hypothesis, payment of rent by the week, the month, the quarter or the year assuming no agreement as to duration would all alike result in a tenancy at will terminable by a month's notice expiring at any time. It might govern the present case if the second part were thus read, independently of the first part. For if the jury's finding that the agreement was for a tenancy for two years and thereafter until terminated on three months' notice were set aside or disregarded there would be a tenancy and no agreement as to its duration. The two years were ended. Disregarding that finding the defendants held the land without any further agreement as to duration than would be implied from the payment of a monthly rent.

Doubtless on a literal reading of s. 127 (1) there is much to be said for treating the second part as laying down a general rule to be applied universally wherever there is a tenancy and no agree-

ment as to duration. But unfortunately for the claimant that is not the way the provision has been read. The whole sub-section has been interpreted as applying only to cases where at common law a tenancy from year to year would be implied from the payment of rent. In *Burnham* v. *Carroll Musgrove Theatres Ltd.* (1), in a judgment in which *Harvey* C.J. in Eq. and *Campbell* J. concurred, *Ferguson* J. dealt with the case of the continuance of a tenant in possession after a weekly tenancy had expired and the acceptance of a weekly rent from the tenant so continuing in possession. *Ferguson* J. said :—" Sect. 127 of the *Conveyancing Act*, in my opinion, has no application to the case. That section was intended to prevent the implication of a tenancy from year to year from the payment of rent, and to substitute for such implied tenancy a tenancy determinable by a month's notice. It was never intended to apply to cases where before the Act no implication of a tenancy from year to year would have arisen " (2).

In this Court the reasons of *Ferguson* J. were " substantially adopted " by *Knox* C.J., *Gavan Duffy* J. and *Powers* J. (3) and the view of s. 127 (1) expressed by *Ferguson* J. obtained the express approval of *Higgins* J. (4). *Isaacs* J. however appears to have thought that the provision should be literally construed (5). I think we must treat *Burnham's Case* (6) as having placed upon s. 127 (1) a construction which limits its application to states of facts in which a tenancy from year to year would at common law be implied from the payment of rent.

The payment of rent in the present case was not referable in any way to a year. The rent was fixed at a monthly rate as compensation for monthly periods. Accordingly a yearly tenancy would not have been implied at common law from the payment of rent.

The third possible view of the character of the tenancy is that, whether from year to year or month to month or at will, it is by express agreement liable to determination only by three months' notice in writing expiring at any time. This view depends entirely on the finding of the jury. It seems to have been assumed at the trial that if such an agreement were made as to the original occupation of the one and a quarter acres it was necessarily carried over to the occupation of the five acres. But that inference of fact is not self-evident.

(1) (1927) 28 S.R. (N.S.W.) 169; 45 W.N. 23.
(2) (1927) 28 S.R. (N.S.W.), at p. 180; 45 W.N., at p. 26.
(3) (1928) 41 C.L.R. 540, at p. 548.
(4) (1928) 41 C.L.R., at p. 563.
(5) (1928) 41 C.L.R., at p. 556.
(6) (1927) 28 S.R. (N.S.W.) 169; 45 W.N. 23; (1928) 41 C.L.R. 540.

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Yet there stands a finding of the jury which, if it is not set aside and if the assumption made at the trial is adhered to, appears certainly to entitle the defendants to succeed. On the evidence I should think that the finding embodied an erroneous conclusion of fact and one upon which the jury had been insufficiently directed with regard to the material considerations affecting the issue. But it is not easy to say that there is no evidence to submit to a jury upon the question.

This finding might perhaps be set aside as against evidence or, departing from what I understand to be the assumption at the trial, it might be treated as insufficient because it does not relate to the material tenancy or to the material time, that of the entire parcel as at the time of the notice to quit. To set it aside as against evidence does not necessarily mean that the Court can ignore the issue or refuse to submit it to another jury. For myself I cannot avoid the feeling that the jury intended their findings upon the first and second questions to be findings in favour of the defendants; and that in truth is their legal tendency so far as they go.

It seems to me to be strange that notwithstanding these findings a verdict should have been entered for the claimant. However it is not a matter that it is necessary to pursue: for, as I think, upon the real facts a tenancy from month to month arose and for that reason the notice to quit is insufficient. This means that independently of the foregoing findings of the jury I adopt the view that the fourth suggested possible view of the tenancy is well-founded.

This view is based on very simple facts, namely that the defendants were in occupation of the whole land at a monthly rent payable in advance and that the rent was paid by the defendants and received by Sears and afterwards by the claimant as and for rent. These facts raise a strong prima facie case in favour of a monthly tenure. There is no sufficient evidence of an agreement between Sears and the defendants that they were to be considered throughout the whole period tenants at will only and such a position would be incongruous with the repeated receipt of rent in advance for successive future monthly periods of tenancy. I assume of course for this purpose that there was no express agreement for three months' notice. No case can be found in which a party let into possession pending the agreeing of the terms of tenancy has paid periodical rent, still less rent in advance, and has yet been considered a tenant at will only. It appears to me to be unreasonable to suppose that for two and a half years the parties proceeded

on a provisional basis intending that there should be no tenancy except at will notwithstanding the payment of rent, rent moreover for future monthly periods and not merely for past enjoyment and notwithstanding that the defendants, by a new transaction, were placed in occupation of the whole premises as tenants.

As I see the matter the strong presumptive conclusion from the facts is that the defendants held as tenants from month to month and upon the whole evidence any contrary conclusion would be unreasonable. A tenancy from month to month means that the notice to quit should expire on the day before, or perhaps on (see *Quartermaine* v. *McCleery* (1), and cases there cited) a periodical monthly date corresponding with that as upon which the tenancy from month to month commenced. As the evidence stands there is some difficulty in fixing the date of the commencement of the monthly tenancy of the five acres. Originally the defendants seem to have entered into possession of the one and a quarter acres on 10th October 1946 in pursuance of the conversation of the previous day. I do not think that that conversation should be taken to include an oral demise and possibly 10th October 1946 was the commencing day of the original tenancy. But it does not follow that a corresponding monthly date afforded the commencing day of the tenancy of the whole area. For what exact monthly period rent was paid in advance does not appear. But, if the claimants experienced a real difficulty in ascertaining the correct date, it was open to them to adopt the course of specifying the date in the notice to quit as best they could and then giving as an alternative the expiration of the month of the tenancy which should expire next after one month from the service of the notice (*Doe d. Campbell* v. *Scott* (2) ; *Hirst* v. *Horn* (3) ; *Sidebotham* v. *Holland* (4)).

The possible view of the nature of the tenancy fifthly suggested would of course also make the notice to quit insufficient, that is to say the view that it was a tenancy from year to year outside s. 127 (1) of the *Conveyancing Act*. But that view appears to me to be ill-founded. It is based upon the idea that an agreement for two years having been made originally and the monthly rent having been fixed as periodical part payment of compensation for the entire period, the correct conclusion is that a tenancy from year to year was established and went on. This reasoning treats s. 127 (1) as excluded because the tenancy from year to year is the result of more than the payment of rent.

(1) (1947) V.L.R. 412.
(2) (1830) 6 Bing. 362 [130 E.R. 1319].
(3) (1840) 6 M. & W. 393 [151 E.R. 464].
(4) (1895) 1 Q.B. 378, at p. 389.

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I think that the view is ill-founded because it leaves out of account some most important factors. In the first place, assuming such a tenancy from year to year had arisen in this manner, it would end with the expiration of the two years (*Moore* v. *Dimond* (1); *Dockrill* v. *Cavanagh* (2)). In the second place the question relates to the tenancy of the whole land and not that of the original one and a quarter acres. In the third place the question is of the inference to be drawn or the implication to be made from the fact of a tenant holding after the expiration of the two years and paying a monthly rent in advance without reference to a year.

It follows however from the conclusion that the tenancy was from month to month that the notice to quit was bad and ineffectual to bring the tenancy to an end.

In the Full Court the view was taken that the defendants could not rely upon the tenancy being one from month to month terminable only by a notice expiring with a monthly period because the point had not been made at the trial. There appears to have been a great deal of confusion at the trial. But the particulars of defence said the tenancy had never been determined and the defendants' counsel submitted that there was no case to go to the jury because among other reasons the notice to quit was insufficient. Further, after the summing up, he said that he suggested that it was a monthly tenancy terminable on three months' notice.

As I see the position the claimant obtained no finding at all upon which the notice to quit could be supported and the defendants obtained in the answer to question 2 (b) a finding which so far as it went tended to support the defendants' contention that three months' notice was necessary. The claimant was left in the position, after the jury's findings, of having to establish that consistently with the findings the judge should hold as a matter of law that they were entitled to judgment because the notice to quit had operated to end the tenancy. That in my opinion the claimant could not do nor could the claimant establish a right to judgment even if the jury's findings were disregarded. Nothing the defendants' counsel said or failed to say could have put a different complexion on the claimant's position. What he did say, namely that three months' notice was requisite, was borne out by the jury's answer to question 2 (b) and if he is deprived of the benefit of that answer I cannot see why no attention should be paid to the residue of the submission he made, namely that it was a monthly tenancy. However I think that the claimant made no case on the whole evidence and that its failure to do so was in no way due to anything

(1) (1929) 43 C.L.R., at p. 113.

(2) (1944) 45 S.R. (N.S.W.) 78; 62 W.N. 94.

the defendants' counsel did or omitted to do. This conclusion strictly speaking makes it unnecessary for me to deal with the two other grounds upon which the defendants-appellants relied. But it is better that I should state shortly my opinion concerning them.

The first of these grounds is that the recovery of possession of the land occupied by the defendants is governed by Part III of the *Landlord and Tenant* (*Amendment*) *Act* 1948-1949 (N.S.W.) and that under s. 69, a provision of that Part, the Supreme Court is not a competent court in which proceedings for the recovery of possession may be brought. The question depends entirely upon the application to the land of the definition of " prescribed premises " in s. 8 and in the end that comes down to the meaning of the word " premises ". The language comes from reg. 8 of the *National Security* (*Landlord and Tenant*) *Regulations*. In three jurisdictions the word " premises " as there used was interpreted as not including " vacant land without more " but as requiring something in the nature of buildings before land could be considered " premises " (*Simms* v. *Lee* (1); *McNamara* v. *Quinn* (2); *Re Mayne* (3)). It was after these decisions that the provision was adopted by the legislature of New South Wales in common with other States.

According to Lord *Chelmsford*, speaking for the Privy Council, the word " premises " in popular language is applied to buildings, although in legal language it means the subject or thing previously expressed (*Beacon Life and Fire Assurance Co.* v. *Gibb* (4)). This statement is confirmed by the *Oxford New English Dictionary* which, s.v. " premise " pl. 5, gives the meaning of the plural " premises " as " a house or building with its grounds or other appurtenances ".

The word " premises " is no doubt a vague one but in legislation of this sort there are great advantages in a test of its application which is objective and consists in a readily ascertainable physical fact. Having regard to the history of the provision and the dictionary meaning of the word " premises ", I think that we should adhere to the rule laid down that bare land without buildings, if let for the purpose of occupation as bare land, does not constitute premises. If land is let upon terms that the tenant shall or may erect buildings which are not removable by him but will pass with the freehold, then I should say that the land and building when erected would form premises. Here I think that the land was let

(1) (1945) 45 S.R. (N.S.W.) 352; 62 W.N. 182.
(2) (1947) V.L.R. 123.
(3) (1947) Q.W.N. 40.
(4) (1862) 1 Moore N.S. 73, at p. 97 [15 E.R. 630, at p. 639].

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to be occupied as bare land and that what the defendants did concerning the caravans is irrelevant. The structures remaining on the one and a quarter acres at the time of the defendants' entry upon the one and a quarter acres were to be removed and were not comprised in their tenancy. Further the structures were removed before the defendants became tenants of the whole area, and that was a new tenancy.

I am therefore of opinion that the recovery of possession of the land in question is not a matter governed by Part III of the *Landlord and Tenant* (*Amendment*) *Act* 1948-1949 (N.S.W.).

The remaining ground upon which the defendants relied is that two of their number were protected persons within regs. 28A and 30 of the *National Security* (*War Service Moratorium*) *Regulations*. The writ in the action was issued on 2nd May 1949. Regulation 30 which is relied upon is that substituted by Statutory Rules 1948 No. 109 for the previous reg. 30, a substitution made because of the discontinuance of the *National Security* (*Landlord and Tenant*) *Regulations*. Regulation 30 appears to depend for its force upon s. 6 (2) of the *Defence* (*Transitional Provisions*) *Act* 1946-1950. Regulation 28A is concerned only with definitions.

In *Queensland Newspapers Pty. Ltd.* v. *McTavish* (1) the Court decided that it was beyond the power of the Commonwealth, by the *Defence* (*Transitional Provisions*) *Act* 1946-1949, to continue these regulations in force for the year ended 31st December 1950. The reasons given by the Court apply with equal force to the continuance of the regulations during the preceding year, that ended 31st December 1949, by the *Defence* (*Transitional Provisions*) *Act* 1946-1948. As the regulations are held void, I do not propose to express any opinion upon the questions which were raised under them as a result of the defendants' reliance upon them.

The place of the *National Security* (*War Service Moratorium*) *Regulations* has been taken in New South Wales by the *Landlord and Tenant* (*War Service*) *Amendment Act* 1949. But that Act came into force on 6th June 1949 after the issue of the writ. Section 2 (1) brings under the operation of the Act any application or other proceeding under the corresponding Commonwealth Regulations which was pending immediately before the commencement of the Act. But this action was not an application or proceeding under the regulations. It is a common law action of ejectment and the regulations have no connection with it except that the defendants vainly attempted to invoke them by way of defence.

(1) (1951) 85 C.L.R. 30.

This ground taken by the defendants was therefore not sustainable.

However in my opinion the defendants were entitled to judgment because the tenancy under which they held the land was not brought to an end before the issue of the writ.

The ground upon which the defendants have succeeded appears to me to be covered by the objections made for the defendants at the trial. Their counsel in supporting his contention that the notice to quit was ineffectual may have put his argument too high by claiming a right to three months' notice but the claimant was never able to make a case sufficient to meet the objection that the notice to quit was ineffectual and it was incumbent upon the claimant to show that the tenancy had been terminated.

I do not think that there is any sufficient reason for depriving the defendants-appellants of any part of the costs which would in ordinary circumstances be awarded.

I think that this appeal should be allowed with costs and the order of the Full Court of the Supreme Court discharged. In lieu of the order of the Full Court of the Supreme Court I think that it should be ordered that the appeal to that court be allowed and that a verdict and judgment in the action should be entered for the defendants (appellants) with costs.

WILLIAMS J. This is an appeal by the defendants from an order of the Full Supreme Court of New South Wales dismissing their appeal from a verdict and judgment in ejectment entered for the plaintiff by *Kinsella* J. pursuant to the answers of the jury to four questions submitted to them at the trial. The land in dispute is held under the provisions of the *Real Property Act* 1900 (N.S.W.) as amended and comprises an area of about five acres situated at the intersection of Bourke Street and Botany Road, Waterloo. In October 1946 the land was owned by one G. H. Sears. In that month he was approached by the defendant H. S. Turner with a view to leasing about one and a quarter acres of the land. Turner is the managing partner in a firm consisting of himself and the other defendants which carries on the business of building caravans and truck bodies and parking goods under the name of General Motors (Australia) Pty. Sears and Turner gave evidence of the negotiations that took place principally over the telephone and their evidence is contradictory on a vital point. Sears said that he would lease the land for two years at £6 a week, that Turner could go into immediate possession but that a lease would have to be drawn up by his solicitors which Turner would have to sign.

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Turner said no mention was made of a lease and that it was orally agreed that he should lease the land for two years and thereafter until the tenancy was terminated on three months' notice if Sears wanted the land for his own purposes or on six months' notice if it was resumed. No lease was ever signed although several drafts were submitted to Turner by Sears' solicitors and Turner was repeatedly pressed to execute a lease. The defendants went into immediate possession of the land and thereafter paid rent to Sears at first at the rate of £6 per week and later at the rate of £26 per month. They gradually encroached from the one and a quarter acres on to the balance of the five acres and at some date late in 1947 or early in 1948 Sears agreed to the defendants occupying the whole of the five acres, the rent being increased from £26 to £52 a month. There were further requests to execute a lease after that date.

Sears sold the five acres to the plaintiff company in October 1948. The company accepted rent at the rate of £52 per month from the defendants for a short time. On 21st March 1949 the company served a notice to quit in writing on the defendants expiring on 25th April 1949. Upon the defendants refusing to comply with the notice the company brought the present action. The writ was issued on 2nd May 1949. The particulars of claim alleged that the defendants held the property as tenants of the plaintiff under a tenancy at will determinable by one month's notice in writing expiring at any time and that the tenancy was duly determinable by the above notice to quit. The defendants in their particulars of defence alleged, *inter alia*, that the tenancy was still on foot because it was a term of the tenancy that the landlord would give the tenants three months' notice of his intention to terminate it and this notice had not been given. They also alleged that the property claimed was prescribed premises and that they were tenants thereof within the meaning of s. 8 of the *Landlord and Tenant* (*Amendment*) *Act* 1948 (N.S.W.). They also alleged that the defendants R. M. Turner and N. P. Turner were protected persons as defined in regs. 28A and 30 of the *National Security* (*War Service Moratorium*) *Regulations* and that they relied on the provisions of the latter regulation. At the trial *Kinsella* J. in his summing up directed the jury that according to Sears the agreement was that Turner could have the land for two years at £6 a week but that was subject to a formal lease to be drawn up by his solicitors, whereas Turner denied that there was any mention of a lease at all. His Honour said that if the intention of the parties was that the terms of the lease, whatever that might be, should be

embodied in such a document the legal result would be, since no lease was executed, that Turner would not be a tenant in the terms of the lease but a tenant at will. " He becomes a tenant even if he does not sign a lease, as long as the landlord likes to have him there, and with this qualification that the landlord cannot require him to leave with less than a month's notice ". The first question his Honour left to the jury was—(1) Was the occupation by the defendants under an oral agreement that a formal lease should be drawn up by the solicitor for Mr. Sears to be signed by him and by the defendants ? At the request of counsel for the plaintiff his Honour also left the following question to the jury—(2) (a) Was the tenancy between Mr. Sears and Mr. Turner for a term of two years only ? (b) Was the agreement for a term of two years and to continue thereafter until terminated on three months' notice ? His Honour also left the following questions to the jury—(3) Is the land prescribed premises ? (4) Were any of the defendants protected persons ? He directed the jury to answer these two questions in the negative. The jury answered question (1) " Yes ", question (2) (a) " No " and question 2 (b) " Yes ".

On these findings his Honour entered a verdict and judgment for the plaintiff. It is evident that he considered that the tenancy was one which fell within the provisions of s. 127 of the *Conveyancing Act* 1919 (N.S.W.) as amended. The Full Supreme Court on appeal were of the same opinion.

The first question that arises is whether this is right. It is evident from the answer of the jury to the first question, read in the light of the summing up, that they accepted Sears' evidence that the negotiations which resulted in the defendants entering into possession of the one and a quarter acres and paying rent were subject to the execution of a formal lease. Later the defendants extended their possession to possession of the five acres and the rent was increased to £52 per calendar month. Whatever tenancy the defendants had in the one and a quarter acres was then surrendered by operation of law because there could not be two simultaneous leases in possession of the same land. It was, however, common ground that the agreement of the parties with respect to the five acres, apart from the enlargement of the area and the increase of rent, depended upon the October conversations. The plaintiff's claim that the defendants were tenants at will determinable on one month's notice in writing expiring at any time and the defendants' defence that their tenancy was determinable on three months' notice both rested on these conversations. In his summing up his Honour said " the vital point, of course, Gentlemen, is the

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telephone conversation in October, 1946, because after that they (that is Sears and Turner) never agreed about anything, apparently, except, perhaps, the indirect agreement for the extension of the area from one and a quarter acres to the whole five acres, but I do not think anything very much turns on that". Rule 151B of the *Supreme Court Rules* provides that no direction or omission to direct given by the judge presiding at the trial shall, without the leave of the court, be allowed as a ground for a notice of motion for a new trial or to enter a verdict &c. unless objection was taken at the trial to the direction or omission by the party on whose behalf the notice of motion was filed. No objection was taken by counsel of either side to this portion of his Honour's summing up. With the consent of both parties the case went to the jury on the footing that the rights of the parties, apart from the agreement to enlarge the area and increase the rent, remained the same as they had been with respect to the one and a quarter acres. The land in dispute is under the *Real Property Act* 1900 (N.S.W.) as amended. The registered proprietor of the land at the date of the issue of the writ was the plaintiff. There was no memorandum of lease registered on the certificate of title. But the title of the plaintiff was subject to the tenancy whereunder the defendants were in possession by virtue of s. 42 (d) of the *Real Property Act* (introduced by s. 38 (a) of the *Conveyancing (Amendment) Act* 1930 (N.S.W.)).

The jury found that it was a condition of the bargain that the agreement of the parties should be embodied in a formal lease. Until that condition was fulfilled there was no enforceable contract. The effect of this finding was that the defendants were not in possession of the land under any concluded lease or agreement for a lease. The law does not recognize an agreement to enter into an agreement (*Von Hatzfeldt-Wildenburg* v. *Alexander* (1); *Spottiswoode, Ballantyne & Co. Ltd.* v. *Doreen Appliances Ltd.* (2); *Brilliant* v. *Michaels* (3); *Eccles* v. *Bryant and Pollock* (4); *Summergreene* v. *Parker* (5)). At common law a person who enters upon land pending negotiations for a lease or an agreement for a lease becomes a tenant at will of the owner of the land and as such liable to pay reasonable compensation for the use and occupation of the land: *Coggan* v. *Warwicker* (6); *Dawes* v. *Dowling* (7); *Doe d. Hollingsworth* v. *Stennett* (8). In those cases no rent had

(1) (1912) 1 Ch. 284, at pp. 288, 289.
(2) (1942) 2 K.B. 32.
(3) (1945) 1 All E.R. 121.
(4) (1948) Ch. 93.
(5) (1950) 80 C.L.R. 304.
(6) (1852) 3 Car. & K. 40 [175 E.R. 454].
(7) (1874) 31 L.T. (N.S.) 65.
(8) (1799) 2 Esp. 717 [170 E.R. 507].

been paid whereas in the present case the defendants paid rent at first weekly and then monthly for the one and a quarter acres and later monthly for the five acres. If they had simply entered into possession of these respective parcels of land with Sears' consent and paid these rents, tenancies from week to week and later from month to month would have arisen by implication of law. But the defendants did not simply enter into possession and pay rent. They were let into possession pending the negotiation, preparation and execution of the formal lease and in those circumstances the payments of rent were referable to their use and occupation of the land in the meantime. They were not to be let into possession under some weekly or monthly tenancy until the lease was executed and then to have a lease of two years from that date and thereafter from year to year until terminated by three months' notice. The term of the lease was to commence from the date they entered into possession and the payments of rent which they made in the meantime would be referable to their provisional use and occupation of the land and subsequently credited in discharge of their obligation to pay rent under the lease. I can see no reason for limiting the application of such decisions as *Coggan* v. *Warwicker* (1) and *Dawes* v. *Dowling* (2) to cases where there has been nothing more than entry into possession pending the execution of a formal lease and no rent has been paid. The payment of a weekly, monthly or yearly rent is not conclusive evidence of a weekly, monthly or yearly tenancy. It is simply evidence of such a tenancy and the true agreement of the parties must be found as a fact from all the relevant circumstances. Agreements for weekly, monthly and yearly tenancies should not be implied where there is evidence that it was not intended to create such tenancies by entry into possession or holding over and payment of rent: *Doe d. Moore* v. *Lawder* (3); *Doe d. Rogers* v. *Pullen* (4); *The Mayor &c. of Thetford* v. *Tyler* (5); *Finlay* v. *Bristol and Exeter Railway Co.* (6); *Smith* v. *Widlake* (7); *Moore* v. *Dimond* (8). Rent paid whilst a proposed tenant is in occupation pending negotiations for a lease does not convert the tenancy at will into something more (*Simkin* v. *Ashurst* (9); *Caulfield* v. *Farr* (10)). In my opinion it follows from the answers of the jury to the first question that the defendants remained throughout tenants at will and nothing more. At

(1) (1852) 3 Car. & K. 40 [175 E.R. 454].
(2) (1874) 31 L.T. (N.S.) 65.
(3) (1816) 1 Stark. 308 [171 E.R. 481].
(4) (1836) 2 Bing. N.C. 749 [132 E.R. 288].
(5) (1845) 8 Q.B. 95 [115 E.R. 810].
(6) (1852) 7 Ex. 409 [155 E.R. 1008].
(7) (1877) 3 C.P.D. 10.
(8) (1929) 43 C.L.R., at p. 116.
(9) (1834) 1 C.M. & R. 261 [149 E.R. 1078].
(10) (1873) 7 Ir.L.R. (C.L.) 469.

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common law they could have been ejected after a demand for possession, but it was evidently considered that s. 127 of the *Conveyancing Act* was applicable and they were served with one month's notice to quit in accordance with that section. In *Burnham* v. *Carroll Musgrove Theatres Ltd.* (1), it was held that that section has no application to cases where before the Act no implication of a tenancy from year to year would have arisen from payment of rent. Notice under the section was therefore unnecessary. A demand for possession is all that is required to determine a tenancy at will. The notice the defendants received was therefore more than they were entitled to and valid to determine the tenancy.

His Honour only asked the second question at the request of counsel for the plaintiff. It really only arose if the jury answered the first question in the negative. They answered this question in the affirmative so that all that the answer to the second question can mean is that the parties intended the duration of the proposed lease to be for two years and thereafter to be determinable on three months' notice. But this intention could only have legal efficacy once a term to that effect had been embodied in the formal lease and that lease had been executed by the parties. Accordingly, subject to the questions of law that arise with respect to the answers of the jury to the third and fourth questions, his Honour was right in holding that the tenancy was duly determined by the notice to quit on 25th April 1949.

It is therefore necessary to consider the answers of the jury to the third and fourth questions. The third question raises the issue whether the defendants were tenants of prescribed premises within the meaning of the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W.). If they were, the plaintiff's case must fail, firstly because the notice to quit did not comply with s. 62 of that Act, and secondly because the Supreme Court is not a competent court in which a lessor of such premises can bring proceedings for the ejectment of the lessee therefrom (s. 69). In October 1946 there was a building on the land in dispute but it was the property of the Commonwealth and was in process of demolition. Otherwise, apart from a sentry box at the gate, it was bare land. The defendants, in the course of their occupation, brought two caravans on wheels on to the land, built upper stories on such caravans, connected water and electric light and used the caravans partly as offices and partly as a dwelling for H. S. Turner. An old bus was also brought on to the land and converted into a workshop and the caravans and bus were still on the land when the occupation was

(1) (1928) 41 C.L.R. 540.

extended to the five acres. They remained the property of the defendants and could be removed at any time. The rent was paid for the occupation of the land and not for the occupation of any buildings. The tenancy was a tenancy of land only and not of land and buildings. Section 8 of the *Landlord and Tenant (Amendment) Act* defines prescribed premises to mean " any premises, other than—(a) premises which are for the time being used, or which are ordinarily used, as a grazing area, farm, orchard, market garden, dairy farm, poultry farm, pig farm or bee farm; (b) holiday premises; and (c) any premises, or the premises included in any class of premises, declared by the Governor, by order published in the Gazette, to be excluded from the operation of this Act, and includes any part of any premises and any land or appurtenances leased with any premises ". The definition is taken directly from the definition of prescribed premises in reg. 8 of the *National Security (Landlord and Tenant) Regulations* in their ultimate form. The Supreme Courts in two States held that this definition did not include bare land (*McNamara* v. *Quinn* (1); *Re Mayne* (2)). *Roper* C.J. in Eq. in a third State had expressed the same opinion in *Simms* v. *Lee* (3) when the definition of prescribed premises in the Landlord and Tenant Regulations was slightly different but to the same effect. The definition in s. 8 of the *Landlord and Tenant (Amendment) Act* 1948-1949 was adopted after these three decisions. It may be assumed that the New South Wales Parliament used the words in the sense these decisions have attached to them. This Court should be slow to place another interpretation on the words in these circumstances although it should not hesitate to do so if it considers the decisions are wrong (*Barras* v. *Aberdeen Steam Trawling & Fishing Co. Ltd.* (4); *The Royal Court Derby Porcelain Co.* v. *Raymond Russell* (5); *Platz* v. *Osborne* (6)). But, in my opinion, they are right. The word " premises " is used in a popular sense and in this sense has a wide meaning. It is wide enough to include bare land. Its true meaning in any particular statute must be ascertained from the context in which it appears and from an examination of the scope and purpose of the statute as a whole. If the word " premises " in the present definition is intended to include bare land that part of the definition which refers to any land leased with any premises would be otiose. There are cases decided under other Acts in which the same word has been held not to include bare land (*Metro-*

(1) (1947) V.L.R. 123.
(2) (1947) Q.W.N. 40.
(3) (1945) 45 S.R. (N.S.W.) 352; 62 W.N. 182.
(4) (1933) A.C. 402, at p. 447.
(5) (1949) 2 K.B. 417.
(6) (1943) 68 C.L.R. 133.

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politan Water Board v. *Paine* (1); *Summers* v. *Roberts* (2); *Ilford Corporation* v. *Mallinson* (3)). In my opinion his Honour was right in directing the jury to answer the third question in the negative.

The fourth question raises the issue whether the defendants R. M. Turner and N. P. Turner were protected persons as defined by regs. 28A and 30 of the *National Security* (*War Service Moratorium*) *Regulations*. These regulations, as well as the *National Security* (*Landlord and Tenant*) *Regulations*, were continued in force during 1947 and 1948 by the *Defence* (*Transitional Provisions*) *Acts* 1946 and 1947. But by an order made under reg. 7AA of the Landlord and Tenant Regulations on 12th August 1948 it was provided that the recovery of leased premises in New South Wales should cease to be restricted and the fixing of fair rents in New South Wales should cease to be controlled under these regulations from 16th August 1948. This was the date on which the *Landlord and Tenant* (*Amendment*) *Act* 1948 (N.S.W.) came into force. The Landlord and Tenant Regulations were discontinued by the *Defence* (*Transitional Provisions*) *Act* 1949. Prior to 13th August 1948 reg. 30 of the War Service Moratorium Regulations depended for its operation upon the existence of the Landlord and Tenant Regulations. But on that date this regulation was repealed by Statutory Rule 1948 No. 109 made under the *Defence* (*Transitional Provisions*) *Act* 1947 and a new regulation inserted in its stead having an independent operation. In *Collins* v. *Hunter* (4), this Court held that the *Defence* (*Transitional Provisions*) *Act* 1948 was invalid so far as it purported to continue regulations 30A to 30AF of the War Service Moratorium Regulations in force after 31st December 1948, but this decision did not directly affect the validity of regs. 28A and 30. These regulations are contained in Part V of the War Service Moratorium Regulations and were continued in force during 1949 and 1950 by the *Defence* (*Transitional Provisions*) *Acts* 1948 and 1949. They ceased to have effect in New South Wales when an order was made under reg. 7 of the War Service Moratorium Regulations on 13th September 1950 that from and including 21st September 1950 Part V of these regulations should cease to have effect in that State. After the argument of the present appeal, however, the question of the validity of reg. 30 arose in the later appeal of *Queensland Newspapers Pty. Ltd.* v. *McTavish* (5) and it was held that the *Defence* (*Transitional Provisions*) *Act* 1949 was invalid so far as it purported to continue

(1) (1907) 1 K.B. 285.
(2) (1944) 1 K.B. 106.
(3) (1932) 147 L.T. 37.
(4) (1949) 79 C.L.R. 43, at p. 67.
(5) (1951) 85 C.L.R. 30.

reg. 30 in force during 1950, and I have no doubt that the effect of that decision is that the *Defence* (*Transitional Provisions*) *Act* 1948 was also invalid so far as it purported to continue the regulation in force during 1949. Accordingly, the defendants cannot rely on the regulation as a defence to the action.

Sections 3 and 4 of the *Landlord and Tenant* (*War Service*) *Amendment Act* 1949 (N.S.W.) correspond with regs. 28A and 30 of the War Service Moratorium Regulations. Both reg. 30 (2) of the War Service Moratorium Regulations and s. 4 (2) of the *Landlord and Tenant* (*War Service*) *Amendment Act*, so far as material, define premises as including land, any part of any premises and any land or appurtenances leased with any premises. The insertion of the word " land " in this definition before the words " any part of any premises " distinguishes it from the definition of " premises " in s. 8 of the *Landlord and Tenant* (*Amendment*) *Act* 1948. Bare land appears therefore to be within the scope of reg. 30 of the War Service Moratorium Regulations and s. 4 of the *Landlord and Tenant* (*War Service*) *Act*, although it is difficult to imagine why the definition of " premises " should differ for the purposes of this Act and the *Landlord and Tenant* (*Amendment*) *Act*. But the *Landlord and Tenant* (*War Service*) *Amendment Act* only came into operation on 6th June 1949. By that time the writ had issued and the defendants were at common law not lessees but trespassers. As that Act only applies to an existing relationship of landlord and tenant, the defendants cannot rely upon it as a defence to the action. It is therefore unnecessary to discuss the issue to which question 4 was directed, that is whether his Honour was right in directing the jury that there was no evidence that any of the defendants were protected persons within the meaning of reg. 30 (1) (*a*) of the War Service Moratorium Regulations and of s. 4 (1) (*a*) of the *Landlord and Tenant* (*War Service*) *Act*, which are in the same terms.

I would dismiss the appeal.

WEBB J. I would allow this appeal for the reasons given by *Kitto* J.

The tenancy which is the subject of the proceedings out of which this appeal arises is that which came into existence when the appellants began to pay £52 per calendar month for the whole five acres. This tenancy arose simply from the payment and acceptance of that amount: there was no agreement apart from that. Sears, the then owner, agreed to take £52 per calendar month

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for the five acres because he could not get the appellant to sign a lease. But it was assumed by both parties at the trial that the conditions of a prior tenancy of part of the five acres, whatever those conditions may have been, were imported into this tenancy. On that assumption the appellants claimed that they were entitled to three months' notice to quit whereas the respondent company on 21st March 1949, had given them a notice to quit expiring on 25th April 1949. This notice was also based on the assumption that the conditions of the prior tenancy of part of the five acres still obtained and made the tenancy of the five acres a tenancy from year to year determinable, under s. 127 (1) of the New South Wales *Conveyancing Act* 1919, by one month's notice in writing expiring at any time.

However, the tenancy in question is not a tenancy from year to year, and so s. 127 (1) had no application. There was no holding over giving rise to a tenancy at will which had been converted into a tenancy from year to year by the subsequent payment of rent; and no implication of a tenancy from year to year arises otherwise (see *Burnham* v. *Carroll Musgrove Theatres Ltd.* (1), per *Higgins* J.). The acceptance of £52 per calendar month for the five acres, without any further agreement as to terms, affords the presumption of a monthly tenancy, a periodic tenancy, determinable by a notice to quit expiring at the end of the current period, and it was for the respondent company who as plaintiff pleaded that the tenancy had been determined by the notice to quit to prove it was a valid notice, that is that the current period expired on 25th April 1949. See *Lemon* v. *Lardeur* (2), per *Morton* L.J., followed by all the justices of this Court in *Amad* v. *Grant* (3), per *Latham* C.J. (4), *Rich* J. (5), *Dixon* J. (6), *McTiernan* J. (7) and *Williams* J. (8). No such evidence was given: the respondent relied, as already stated, on s. 127 (1) of the *Conveyancing Act* as applicable and as authorising the notice. The uncontradicted evidence of the appellants was that the rent in respect of both tenancies was paid in advance and that the first tenancy began on 9th October 1946. This is supported by the draft lease and suggests that, as the occupation by the appellants was throughout unbroken, although under successive tenancies, and the rent was paid each calendar month in advance, the current period in respect of each tenancy began on the 9th and not on the 25th of the month.

(1) (1928) 41 C.L.R., at p. 565.
(2) (1946) 1 K.B. 613, at p. 616.
(3) (1947) 74 C.L.R. 327.
(4) (1947) 74 C.L.R., at p. 338.
(5) (1947) 74 C.L.R., at p. 341.
(6) (1947) 74 C.L.R., at p. 343.
(7) (1947) 74 C.L.R., at p. 352.
(8) (1947) 74 C.L.R., at p. 354.

KITTO J. The appellants in this case were the defendants in an action of ejectment brought against them by the respondent company as claimant in the Supreme Court of New South Wales. The action was tried before *Kinsella* J. and a jury. The jury were asked by the learned Judge to answer four questions, and in view of the answers they returned his Honour entered judgment for the claimant for possession of the subject land and for mesne profits. The defendants moved the Full Court of the Supreme Court to set aside the judgment for the claimant and to enter a verdict for the defendants or alternatively to order a new trial of the action. The motion was refused, and the defendants now appeal to this Court.

The claimant by its writ claimed to have been entitled to the possession of the land therein described on and since 26th April 1949. Particulars of claim filed with the writ alleged that the claimant was seised in fee simple, that the defendants held the property as tenants to the claimant under a tenancy at will determinable by one month's notice in writing expiring at any time, and that the tenancy was duly determined by one month's notice in writing expiring on 25th April 1949. The defendants by their particulars of defence set up a number of defences. It is necessary here to mention only that they denied the allegations in the particulars of claim, and alleged that in or about October 1946 they became lessees of the property claimed, that the tenancy had never been determined, and that they were in occupation of the property claimed pursuant to the terms of the tenancy agreement. The claimant gave particulars in reply which alleged, *inter alia*, that the defendants were not in occupation of the property in pursuance of any tenancy agreement and that any tenancy the defendants had had of the property had been duly determined.

It was thus common ground that the defendants had been tenants to the claimant of the property claimed, and the claimant rested its case upon the efficacy of a notice to quit, which it had served upon the defendants, to determine the defendants' tenancy. The notice to quit was put in evidence, and service of it on 23rd March 1949 was admitted by the defendants at the trial. The notice required the defendants to deliver up possession of the land mentioned in the writ on Monday, 25th April 1949, and it described the land as being held by the defendants as tenants at will.

The claimant neither alleged in its particulars of claim nor sought to prove at the trial a tenancy at will at common law. Its case was that the defendants' tenancy was a statutory tenancy at will under s. 127 (1) of the *Conveyancing Act* 1919, which provides

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as follows:—"No tenancy from year to year shall, after the commencement of this Act, be implied by payment of rent; if there is a tenancy, and no agreement as to its duration, then such tenancy shall be deemed to be a tenancy determinable at the will of either of the parties by one month's notice in writing expiring at any time."

It is settled by the decision of this Court in *Burnham* v. *Carroll Musgrove Theatres Ltd.* (1), that the second limb of this sub-section applies only to cases in which, but for the enactment of the first limb, a tenancy from year to year would have been implied from payment of rent: see also *Larke Hoskins & Co. Ltd.* v. *Icher* (2), and *Dockrill* v. *Cavanagh* (3).

At the trial there was a conflict of evidence as to some questions of fact, but as to others there was no disagreement amongst the witnesses. The facts as to which there was no dispute may be briefly stated. The defendants had gone into possession of a portion of the subject land, comprising about one and a quarter acres, in October 1946, after a telephone conversation had taken place between the defendant H. S. Turner and the then owner of the land, one Sears. Sears had told Turner that he was willing to lease the one and a quarter acres to the defendants at the rental of £6 per week and that they could take possession immediately. This they did, and thereafter paid him rent, at first paying £6 every week and later paying £26 every month. The defendants gradually extended their occupation on to the balance of the land, which had a total area of about five acres. Late in 1947 or early in 1948, after Sears had made unsuccessful efforts to confine the defendants to their one and a quarter acres, the defendants increased their payments to £52 per month, and Sears accepted these payments and either expressly agreed to, or at least acquiesced in, their continuing to occupy the whole area and paying £52 per month as rent. Sears sold the land to the claimant in October 1948, and for a short period thereafter the claimant accepted rent from the defendants at the rate of £52 per month for the whole area. No formal lease was ever executed. On two points relating to the telephone conversation in 1946 the witnesses were in conflict. One was as to whether it was agreed that a formal lease should be executed, and the other was as to whether it had been agreed that the letting should be for two years, or for two years and to continue thereafter until determined by six months' notice if the land should be resumed and three months' notice otherwise.

(1) (1928) 41 C.L.R. 540.
(2) (1929) 29 S.R. (N.S.W.) 142; 46 W.N. 38.
(3) (1944) 45 S.R. (N.S.W.), at p. 83; 62 W.N., at pp. 97, 98.

On these points the claimant relied on the evidence of Sears. As to the first of them, Sears deposed that he had expressly stipulated that a lease would have to be drawn up by a solicitor and signed by the defendants. His evidence was interpreted by the learned judge in his summing up as meaning that the agreement come to between Sears and Turner was subject to a lease being drawn up. No objection was raised by either side to this interpretation of the evidence, and the conflict between Sears and Turner was not as to whether the stipulation for a formal lease was superadded to a concluded oral agreement or was a condition precedent to the making of a concluded agreement; Turner's attitude was that there was no mention of a formal lease at all. The learned judge told the jury that he would ask them to answer the question whether the agreement was "subject to the drawing up of a formal draft lease." The first question he ultimately put to them was framed, with the concurrence of both counsel, in these terms: "Was the occupation by the defendants under an oral agreement that a formal lease should be drawn up by the solicitor for Mr. Sears to be signed by him and by the defendants?" To this question the jury answered: "Yes". In view of the explanation which the jury had been given as to the import of the question, I should take their answer to mean that the telephone conversation resulted only in an agreement subject to the drawing up of a formal lease. If that is the meaning of the answer, there was no concluded agreement for a lease at all (*Spottiswoode, Ballantyne & Co. Ltd.* v. *Doreen Appliances Ltd.* (1); *Summergreene* v. *Parker* (2)). However, the jury went on to answer the second question, which was divided into two parts:—"(a) Was the tenancy between Mr. Sears and Mr. Turner for a term of two years only? (b) Was the agreement for a term of two years and to continue thereafter until terminated on three months' notice?"

The jury answered: (a) No, and (b) Yes. If the answer to the first question has the meaning I have mentioned, the answers to the second question must mean no more than that the parties had a common intention that the formal lease to be drawn up should provide for a term to endure for two years and thereafter until terminated on three months' notice. (Apparently no one troubled about the stipulation for six months' notice in the event of resumption, as the land was in fact not resumed.)

On this interpretation of the jury's answers, the situation must be taken to be that the defendants entered into possession of the one and a quarter acres as tenants of Sears and paid him rent at

(1) (1942) 2 K.B. 32. (2) (1950) 80 C.L.R. 304.

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the rate first of £6 per week and later of £26 per month, without any concluded agreement for a lease for a term. In my opinion the implication of law from the payment and acceptance of rent is that a periodic tenancy was created (cf. *Bishop* v. *Howard* (1)). If that implied tenancy would have been a tenancy from year to year apart from s. 127 (1) of the *Conveyancing Act*, that section would have operated to make it a tenancy at will determinable by one month's notice expiring at any time. But there was nothing from which a yearly tenancy could be implied at common law. On the contrary, the rent being reserved and paid at a weekly rate, and later at a monthly rate, the implication of the law is that the tenancy was first a weekly and then a monthly tenancy. A letting without any agreement as to a period, followed by entry and payment of rent, does not result in a yearly tenancy unless the rent is reserved by reference to a year or an aliquot part of a year (*Richardson* v. *Langridge* (2) ; *Moore* v. *Dimond* (3) ; *Anthony* v. *Stanton* (4) ; *Willshire* v. *Dalton* (5)) ; and in the statement of this rule a rent reserved by reference to an aliquot part of a year means a rent which is a yearly rent though payable at intervals constituting aliquot parts of a year : *Halsbury's Laws of England*, 2nd ed., vol. 20, p. 126, note (1).

The case is unlike *Moore* v. *Dimond* (6), because in that case there was entry and payment of rent under an agreement for a lease for a term of years, and the fact that the rent was reserved by the week was held insufficient to make the tenancy a weekly tenancy, having regard to the agreed duration of the intended lease. Here, on the assumed interpretation of the jury's finding, there was no concluded agreement for a lease for a term. There were only negotiations for such a lease, and the character of the tenancy created by entry and payment of rent cannot be affected by the fact that the negotiations had reached a stage at which the duration of the proposed term was not one of the matters outstanding between the parties : cf. *Doe d. Bingham* v. *Cartwright* (7) ; *Coggan* v. *Warwicker* (8).

But the matter does not end there. In 1947 or 1948 Sears accepted £52 per month as rent for the whole five acres. The payment and acceptance of that rent created a new tenancy, and that involved a surrender by operation of law of the tenancy of the

(1) (1823) 2 B. & C. 100 [107 E.R. 320].
(2) (1811) 4 Taunt. 128 [128 E.R. 277].
(3) (1929) 43 C.L.R., at p. 115.
(4) (1943) V.L.R. 179.
(5) (1948) 65 W.N. (N.S.W.) 54.
(6) (1929) 43 C.L.R. 105.
(7) (1820) 3 B. & Ald. 326 [106 E.R. 683].
(8) (1852) 3 Car. & K. 40 [175 E.R. 454].

one and a quarter acres: cf. *Fenner* v. *Blake* (1); *Knight* v. *Williams* (2); *Foa's General Law of Landlord and Tenant*, 7th ed. (1947), p. 618. The new letting was a general letting at £52 per month, and in my opinion a monthly tenancy should be held to have arisen.

To such a tenancy s. 127 (1) of the *Conveyancing Act* has no application, and a month's notice expiring at any time is not effective to determine it; there must be a month's notice expiring at the end of a complete month of the tenancy (*Lemon* v. *Lardeur* (3); *Amad* v. *Grant* (4); *Willshire* v. *Dalton* (5)). Whether this rule is satisfied by a notice to quit which expires, not on the last day of a month of the tenancy, but on the first day (see *Sidebotham* v. *Holland* (6); *Quartermaine* v. *McCleery* (7)), is a question which need not be considered here. As to the date of commencement of the original tenancy of the one and a quarter acres Sears was unable to give any evidence, as he said he could not swear to the date of the telephone conversation. Turner, however, fixed that date as 9th October 1946. There was no precise evidence as to the date of commencement of the tenancy of the whole five acres, but, as this tenancy arose from the acquiescence of Sears in the continuance of the formerly unauthorized encroachment by the defendants on to the portion of the area beyond the one and a quarter acres and his acceptance of an increased monthly rental, the only conclusion open on the evidence is that this tenancy commenced at the end of a month of the earlier tenancy. A proper notice to quit must therefore have expired on a date which could not be later than the 10th day of a month, if Turner's evidence fixing 9th October 1946 as the date of the telephone conversation were accepted. If his evidence on this point were not accepted, the date of commencement of the tenancy, and therefore the proper date for expiration of a notice to quit, were not established at all. The claimant, if in doubt as to the correct date to choose for the expiration of its notice to quit, might have given a notice so expressed as to expire on a specified day " or at the expiration of the current month of your tenancy which shall expire next after the end of one month from the service of this notice ": see *Cole* on *Ejectment*, (1857), p. 51; *Queen's Club Gardens Estates Ltd.* v. *Bignell* (8); *Amad* v. *Grant* (9). But it did not do so; it miscon-

(1) (1900) 1 Q.B. 426.
(2) (1901) 1 Ch. 256, at p. 257.
(3) (1946) 1 K.B. 613.
(4) (1947) 74 C.L.R. 327.
(5) (1948) 65 W.N. (N.S.W.) 54.
(6) (1895) 1 Q.B. 378.
(7) (1947) V.L.R. 412.
(8) (1924) 1 K.B. 117, at p. 126.
(9) (1947) 74 C.L.R., at p. 339.

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ceived the tenancy as being one to which s. 127 (1) of the *Conveyancing Act* applied, and it gave notice to quit " on Monday the 25th April 1949 ". Failing to adduce any evidence upon which it could be found that that was a date upon which a notice to quit could be made to expire so as to be effectual to determine the tenancy, the claimant failed to make a case for the possession which it claimed in the action.

In the Supreme Court the learned Judges who composed the Full Court were apparently disposed to take this view, but they declined to give effect to it, because they considered that the point had not been raised at the trial. They gathered from the transcript that, although it had been contended by counsel for the defendant that the tenancy was a monthly tenancy, it had never been contended that the proper notice to quit was other than a three months' notice. But the sufficiency of the notice to quit was put in issue by the particulars of defence, and counsel for the defendants made the general submission that there was no evidence to go to the jury and that the notice to quit was insufficient. I do not think that the point should be treated as having been raised on appeal for the first time ; but even if it was, since it was a point fatal to the claimant and incapable, according to the evidence, of being cured at the trial, the defendants were entitled to rely upon it in the Full Court (*Adams* v. *Chas. S. Watson Pty. Ltd.* (1)).

On the footing, then, that the jury's findings mean that Sears and the defendants never reached a binding agreement for the lease which they intended should be drawn up, I should be of opinion that the defendants were entitled to judgment. But the questions put to the jury were not framed with precision, and the answers to them may well have been intended to express a finding that there was a concluded agreement for a term to continue for two years and thereafter until determined by three months' notice, and that the stipulation for the execution of a formal lease did not deprive that agreement of immediately binding force. If that is the meaning of the answers, it appears to me to be a necessary consequence that, when the defendants' tenancy of the one and a quarter acres was replaced by a tenancy of the five acres without any further agreement as to period or notice, the new tenancy was for the unexpired balance of the two years and was to continue thereafter until terminated by three months' notice. A finding that the defendants, when they obtained the larger area, gave up such security of tenure as they had with respect to the smaller

(1) (1938) 60 C.L.R. 545, at p. 548.

area, would require evidence of an agreement to that effect, and there was no such evidence. It is true that the jury did not make any finding as to the terms of the lease of the five acres, but in my opinion there was no room for any other conclusion than that which I have stated. It therefore becomes unimportant to consider whether the tenancy after the expiration of the two years was a monthly tenancy or a yearly tenancy, for in either case it was competent for the parties to make any agreement they wished as to the length of notice which should suffice to determine the tenancy. Even if the tenancy should be regarded as a yearly tenancy implied by payment of rent, it was not one as to the duration of which there was no agreement, and s. 127 (1) of the *Conveyancing Act* therefore had no application to it.

In my opinion, the claimant could not have been entitled to succeed on the jury's findings unless it had obtained further findings establishing first, that the creation of the tenancy of the five acres marked a completely new departure so that the terms of that tenancy should be ascertained without reference to the terms of the pre-existing tenancy of the one and a quarter acres, and, secondly, that the new tenancy was one which at common law would have been a yearly tenancy implied by payment of rent. But no such findings were made or could properly have been made on the evidence. Indeed a finding which would support the first proposition would have destroyed the possibility of establishing the second; for, since the rental agreed upon and paid for the new tenancy was a monthly rental, there was nothing from which a yearly tenancy could be implied by payment of rent unless the character of the tenancy of the five acres were affected by the fact that the tenancy of the one and a quarter acres had been for an agreed term of two years. A tenancy which arises when a tenant holds over and pays rent may no doubt be held to be a yearly tenancy having regard to the duration of the original term and the fact that the rental is payable monthly (*Beattie* v. *Fine* (1)); but such a conclusion would be excluded in this case by the hypothesis that the agreement for the tenancy of the five acres was made without reference to the agreement for the tenancy of the one and a quarter acres.

I am therefore of opinion that judgment should have been entered for the defendants. They raised additional defences upon which the trial judge ruled in the claimant's favour, but I need not consider those defences in view of the conclusion I have stated.

(1) (1925) V.L.R. 363, at p. 374.

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In my opinion the appeal should be allowed and the order should be in the terms proposed by *Dixon* J.

Appeal allowed with costs. Order of the Full Court of the Supreme Court of New South Wales discharged. In lieu of such order order that the appeal to the Full Court of the Supreme Court be allowed with costs and that a verdict and judgment in the action be entered for the defendants with costs.

Solicitors for the appellants, *Chas. A. Morgan, Potts & Cullen.*
Solicitor for the respondent, *J. J. Kiely.*

J. B.