[HIGH COURT OF AUSTRALIA.]

ROWSTON . . . . . APPELLANT;
DEFENDANT,

AND

SYDNEY COUNTY COUNCIL . . . RESPONDENT.
CLAIMANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 24, 25; *Nov.* 22.

Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.

Landlord and Tenant—Notice to quit—Validity—Lease—Rent-day—Thursday—Monday used by parties for several years—Operation of statute—Exemption—Practice of State courts—Disturbance by High Court—Landlord and Tenant Act 1899-1948 (*N.S.W.*), *ss.* 22A, 26, 27—*Landlord and Tenant (Amendment) Act* 1948-1952 (*N.S.W.*), *s.* 6—*Conveyancing Act* 1919-1943 (*N.S.W.*), *s.* 127.

Section 22A of the *Landlord and Tenant Act* 1899-1948 (N.S.W.), which for the purposes of proceedings in courts of petty sessions for recovery of possession creates certain presumptions as to the existence of a tenancy and its duration, does not apply to proceedings in ejectment commenced by a landlord in the Supreme Court or a District Court, where after an adjudication by a magistrate, the tenant, pursuant to s. 26 of the Act, gives security to defend an action in ejectment. *Willshire* v. *Dalton* (1948) 65 W.N. (N.S.W.) 54, referred to.

Section 127 (1) of the *Conveyancing Act* 1919-1945 (N.S.W.) provides:—"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".

Held that the application of this sub-section is limited to states of facts in which a tenancy from year to year would at common law be implied from the payment of rent.

Burnham v. *Carroll Musgrove Theatres Ltd.* (1928) 41 C.L.R. 540, applied; *Turner* v. *York Motors Pty. Ltd.* (1951) 85 C.L.R. 55, per *Dixon* J., at p. 71, approved.

According to the practice appearing to be settled in New South Wales in the case of summary proceedings in ejectment under O. 21, r. 27 of the

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Rules of the Supreme Court (N.S.W.) where nothing but a point of law is in question, the judge at chambers may either himself decide the point, or if he thinks it a point of such importance and difficulty that it should be dealt with by the Full Court, he may refer it. The High Court does not readily disturb a settled practice in the courts of a State unless it is necessarily contrary to principle or some specific provision having statutory force and accepted the rule.

Decision of the Supreme Court of New South Wales (Full Court): *Rowston* v. *Sydney County Council* (1954) 55 S.R. (N.S.W.) 37; 71 W.N. 190, affirmed.

APPEAL from the Supreme Court of New South Wales.

The Sydney County Council was the owner of certain premises, situate at Numbers 77-79 Sussex Street, Sydney, which consisted of a large residential known as the Exchange Coffee Palace, and used as such by St. John Zealot Rowston. The residential was occupied by approximately ninety sub-tenants of whom, it was claimed, twelve were, on 24th October 1952, "protected persons" within the meaning of the *Landlord and Tenant* (*War Service*) *Amendment Act* 1949, as amended, and thereafter by virtue of s. 99 of the *Landlord and Tenant* (*Amendment*) *Act* 1948-1952.

Rowston became the tenant of the premises about the month of November 1943 when the Maritime Services Board of New South Wales was the registered proprietor of the subject land. On 9th July 1947, a memorandum of lease was entered into between Rowston and the Maritime Services Board by which Rowston became tenant of the premises for one year computed from 28th November 1946, with the rental payable each Thursday during the tenancy.

After the expiration of that year Rowston remained on as tenant. A short time prior to 28th November 1947 the premises were acquired from the Maritime Services Board by the Sydney County Council and Rowston was informed of the transfer.

By an order published in the Government *Gazette* dated 24th October 1952 and in pursuance of powers contained in s. 6 of the *Landlord and Tenant* (*Amendment*) *Act* 1948-1951, the premises were excluded from the operation of that Act.

The Sydney County Council served upon Rowston a notice to quit the premises, expiring on 5th January 1953, and subsequently followed that up by issuing a summons for possession of the premises which came on for hearing before a stipendiary magistrate on 30th March 1953 when an order was made adjudging the Sydney County Council entitled to possession of the premises and authorizing the issue of a warrant for possession.

Rowston and his sureties gave a bond to defend an action of ejectment in the Supreme Court, which in due time was commenced

by way of summons under O. 21 of the *Rules of the Supreme Court* of New South Wales, and in which this application arose.

In an affidavit Rowston deposed, *inter alia*, that at all material times he had held the subject premises upon and subject to the terms and conditions of the lease mentioned above, and that he had always paid the rent thereunder in accordance with the terms of that lease at first to the Maritime Services Board and later to the Sydney County Council; that he had never entered into any new lease or agreement with the Sydney County Council nor had the terms and conditions of that lease been varied or altered in any manner; and that he admitted that the Sydney County Council had refused to accept rent from him for the subject premises in respect of any period beyond 5th January 1953, but that he had always paid the rates assessed upon the property by the Metropolitan Water, Sewerage and Drainage Board and he held a receipt for the sum of £34 3s. 4d. rates assessed thereon for the twelve-month period commencing on 1st July 1953.

The secretary to the Sydney County Council deposed in an affidavit, *inter alia*, that after the purchase by that council of the subject premises, the first payment for rent of those premises paid by Rowston to the council was made on 22nd December 1947, in respect of the period from Monday 1st December 1947 to 28th December 1947, and thereafter Rowston continued to pay varying amounts for rent in respect of weekly periods, such periods commencing on the Monday of each and every week; that an order made on 7th September 1948 by a magistrate on the ground that the premises were reasonably required for demolition, was rescinded on 25th August 1949, permission to demolish having been refused, the occupation fee of £8 10s. 5d. having, in the meantime, been paid; and that the first payment for rent of the subject premises paid by Rowston to the Sydney County Council after the rescission of the order was made on 31st August 1949, and thereafter varying amounts for rent were paid by Rowston in respect of weekly periods such periods commencing on the Monday of each and every week.

McClemens J. ordered that Rowston's appearance in the summons and his particulars of defence therein be struck out and his Honour granted leave to the Sydney County Council to sign judgment therein within a specified period. That order was affirmed by the Full Court of the Supreme Court of New South Wales on appeal: *Rowston* v. *Sydney County Council* (1) (*Street* C.J., *Owen* and *Herron* JJ.).

From that decision Rowston appealed to the High Court.

(1) (1954) 55 S.R. (N.S.W.) 37; 71 W.N. 190.

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Sir *Garfield Barwick* Q.C. (with him *B. Seletto*), for the appellant. The respondent's secretary has not given any evidence that accounts were rendered. To create a yearly tenancy the weekly payment must be an aliquot part of the yearly rent. The initial tenancy was a weekly tenancy. The holding over would give rise to a yearly tenancy at common law (*Burnham* v. *Carroll Musgrove Theatres Ltd.* (1)). There was a holding over. That holding over gave rise to a weekly tenancy, and there was not any break in the continuity of the relation of landlord and tenant. So long as the day was other than a Monday it was immaterial as to on what day the weekly tenancy commenced or ended. The accounts were made on the basis of a calendar month. The sending out of accounts on Mondays operated to create a new relation between the parties. It would not be correct, in a summary sort of way, to say that the defendant has not a shadow of a defence. There is not any warrant for summary judgment in this case because the matter was not one of law. The mere demand and receipt of it was not, in the circumstances, a conclusive fact. The rescission of the order vacated the whole of the proceedings and left the matter *in statu quo*. As regards the disposal by the judge of first instance see *Sharp* v. *Glasser* (2) and *Sidebottom* v. *Cureton* (3).

J. W. Smyth Q.C. (with him *D. F. Lewis*), for the respondent.

D. F. Lewis. The fact that the notices terminated on a Friday did not bring any comfort to the claimant. The finding was based on the practical side of the judge's discretion not to make a perfectly useless order. In general, as far as the facts are concerned, see *Goddard* v. *Polar Cream Pty. Ltd.* (4). No substantial fact is to be tried. On a question of law there is not any reason why any point of law should not be determined on an application as this one. The latest decision on this point is *Amad* v. *Grant* (5). Really difficult questions of law are not involved in this matter. There is not one relevant fact put forward by the appellant as being a fact in dispute on which he can rely. The appellant does not place any reliance on the fact that he paid rates. There is nothing for a jury to decide. The facts are not disputed. The issue is: Was it or was it not, a good notice to quit ? The subject notice was a good notice to quit. There would have been a tenancy from year to year. There was not any holding over. A yearly rent was reserved : *Hammond and Davidson* on *Landlord and Tenant*, 4th ed. (1953), p. 14, par. 40.

(1) (1928) 41 C.L.R. 540.
(2) (1946) 46 S.R. (N.S.W.) 379, at p. 383 ; 63 W.N. 207, at p. 209.
(3) (1937) 54 W.N. (N.S.W.) 88.
(4) (1946) 47 S.R. (N.S.W.) 154, at p. 157 ; 64 W.N. 5, at p. 7.
(5) (1947) 74 C.L.R. 327.

As to holding over see *Adler* v. *Blackman* (1). On that basis there could be a yearly tenancy from year to year. It would be converted under s. 127 of the *Conveyancing Act* 1919-1943 (N.S.W.) into a tenancy at will. Therefore the notice to quit given was valid. Regard should be had to the conduct of the parties, including payment of rent and accounts between the parties. If in fact rescission of the order restored the original position then the position would be either a tenancy at will under s. 127 of the *Conveyancing Act* 1919-1943, or a weekly tenancy. There was a new relation between the parties namely, a weekly tenancy from Monday to Monday. Section 22A of the *Landlord and Tenant Act* 1899-1948 (N.S.W.) must apply to proceedings taken by virtue of s. 26, which is in the same Part of that Act and is part of a general scheme. Section 22A must apply to any proceedings taken before the Supreme Court under s. 26. The fresh action was based on the same notice to quit. Exactly the same issues as were in the application before the magistrate were tried. The same date as to termination of tenancy was before the magistrate and the Supreme Court. The appeal is of right (*Oertel* v. *Crocker* (2)).

Sir *Garfield Barwick* Q.C., in reply. The original scheme in the *Landlord and Tenant Act* 1899 (N.S.W.) was to confer jurisdiction on the District Court and on magistrates to give summarily recovery of the property. Under s. 26 in a proper case the whole matter was voided and the parties were remitted to their common law remedies. The legislature deliberately limited s. 22A to Pt. IV of the Act. The purpose of s. 26 was to prevent the adjudication from being effective.

[DIXON C.J. referred to *Hammond and Davidson* on *Landlord and Tenant*, 4th ed. (1953), p. 214.

KITTO J. referred to *Willshire* v. *Dalton* (3).]

Section 22A shows that these provisions are limited to proceedings for the recovery of the premises before justices, and are not carried over to common law proceedings by way of s. 26. Under Pt. IV an agent can take proceedings, but he cannot take ejectment proceedings.

[KITTO J. referred to *Cole* on *Ejectment*, p. 671.]

A tenancy from year to year under s. 127 of the *Conveyancing Act* 1919-1943 would only apply if rent were paid on a yearly basis (*Adler* v. *Blackman* (1) ; *Ladies' Hosiery & Underwear Ltd.* v. *Parker* (4)). An inference is not necessarily to be drawn by reason

(1) (1952) 2 All E.R. 41 ; on appeal, 945 ; (1953) 1 Q.B. 146.
(2) (1947) 75 C.L.R. 261, at p. 267.
(3) (1948) 65 W.N. (N.S.W.) 54.
(4) (1930) 1 Ch. 304, at pp. 322, 323.

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of yearly rental. The effect of holding over is to create a tenancy at will. Subsequent payment of rent converts that tenancy to such a tenancy as appropriately can be inferred from the conduct of the parties. The landlord did not take rent on an annual basis; it was taken on a weekly basis. The magistrate's order was made on a notice to quit which ended on a Friday. There has been a continuous course of payment. The initial effect of holding over continues throughout.

Cur. adv. vult.

NOV. 22.

THE COURT delivered the following written judgment:—

This is an appeal from an order of the Full Court of the Supreme Court of New South Wales dismissing an appeal to that Court from an order made at chambers by *McClemens* J. It was made pursuant to O. 21, r. 31, of the *Rules of the Supreme Court.* The order struck out the appearance and particulars of the defence filed by the defendant in an action of ejectment.

The claimant in the action is the Sydney County Council. The writ was issued on 13th April 1953. The Sydney County Council claimed by the writ to have been entitled to possession since 6th January 1953. The premises are situated in Sussex Street and are called the Exchange Coffee Palace. They are premises which have been specifically exempted from the operation of the *Landlord and Tenant (Amendment) Act* 1948-1951 by an order of the Governor in Council made on 15th October 1952 pursuant to s. 6 of that Act. The claimant Council, which is the respondent in the appeal, is the registered proprietor of an estate in fee simple in the premises. The defendant who is the appellant in the appeal held the premises as tenant. The claimant's case is that the defendant was a tenant from week to week, Monday being the periodical day of the week, and that the tenancy was determined by a notice to quit given on 2nd December 1952 and expiring on Monday, 5th January 1953, or, alternatively, if this were wrong, the tenancy was in consequence of s. 127 of the *Conveyancing Act* 1919-1943 a tenancy at will terminable by a month's notice expiring at any time, so that the notice in fact given operated to put an end to the tenancy.

Under the lease the premises were to be held by the lessee as a tenant for the term of one year computed from 28th November 1946 at the yearly rent of £443 (and so in proportion for any less period than a year) payable by equal weekly payments of £8 10s. 5d. to be made in advance on or before Thursday of each and every week during the said term subject to certain covenants, conditions and restrictions thereinafter expressed. One of these conditions

was that the Maritime Services Board might at any time during the term determine the same without compensation should the demised premises or any part thereof be required for any public purpose by giving to the lessee at least three calendar months' previous notice in writing to that effect. The claimant council acquired the fee simple in the premises from the Maritime Services Board as at 1st December 1947, including that day. At all events the first payment of rent by the defendant appellant to the council was made on Monday, 22nd December 1947 and the rent paid was calculated from and including Monday, 1st December, until 28th December. Thereafter rent was paid by the defendant from time to time in varying amounts, but always in respect of weekly periods commencing with the Monday of each week and at the rate of £8 10s. 5d. In January 1948 the council took steps, which ultimately came to nothing, to terminate the defendant's tenancy and recover possession of the premises. At that time the *National Security* (*Landlord and Tenant*) *Regulations* were regarded as in operation and presumably they applied to the premises. It may well have been thought that a notice to quit complying with regs. 58-62 need not terminate on or with a periodical day. That is the effect of *Sharp* v. *Glasser* (1) : see, however, *Amad* v. *Grant* (2) and *Grosglik* v. *Grant* (3) ; *Anderson* v. *Bowles* (4) and *Griffiths* v. *Reid* (5). At all events, the notice to quit was given on Friday, 9th January 1948, expiring on Friday, 9th July 1948. The ground relied upon was that the premises were reasonably required for demolition. Proceedings were taken to recover possession and at first the magistrate decided that a warrant should issue but a permit for demolition was afterwards refused by the Minister and because of this the magistrate subsequently, namely on 25th August 1948, rescinded his order. The date which he had originally fixed for the issue of the order, if it matters, was Monday, 17th January 1949. The next payment of rent after the rescission of the order was made on Wednesday, 31st August 1949. The defendant paid an aggregate sum representing the amounts of rent for four weeks each commencing with a Monday. Thenceforward until the notice to quit now in question was given the defendant paid rent, generally once a month, at a weekly sum calculated in respect of four weeks each ending on a Monday. If the result of the foregoing history is that a weekly tenancy existed and that the weekly period commenced with a Monday, then the notice to quit expiring on Monday, 5th

(1) (1946) 46 S.R. (N.S.W.) 379, at pp. 382, 383 ; 63 W.N. 207, at pp. 208, 209.
(2) (1947) 74 C.L.R. 327.
(3) (1947) 74 C.L.R. 327.
(4) (1951) 84 C.L.R. 310.
(5) (1951) 51 S.R. (N.S.W.) 377, at p. 381 ; 68 W.N. 275, at p. 277.

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January 1953, would be effective to terminate the tenancy: see *Crate* v. *Miller* (1) and per *Davidson* J., *Union Trustee Co. of Australia Ltd.* v. *Baker* (2).

There are, however, logically three other possible positions. First, there is a possible question whether s. 22A of the *Landlord and Tenant Act* 1899-1948 applies. The reason is that before the issue of the writ in the Supreme Court the claimant council had proceeded under that Act and sought from the Court of Petty Sessions a warrant of possession. The magistrate gave a direction for the issue of a warrant and thereupon the defendant as tenant invoked s. 26 of that Act. He gave the requisite security and thus prevented further proceedings being taken under or in pursuance of the adjudication of the magistrate. It was in consequence of this that the claimant council sued in the Supreme Court. In *Willshire* v. *Dalton* (3), *Jordan* C.J. suggested that in such circumstances it is possible that s. 22A continues to apply and governs the relation of landlord and tenant even in the Supreme Court. Secondly, it is possible that s. 127 of the *Conveyancing Act* 1919-1943 may control the situation so that a month's notice expiring at any date is sufficient. If either of these possibilities were correct the notice to quit actually given would be good and sufficient and the claimant respondent would be entitled to recover possession of the premises. But, thirdly, the correct view may be that Thursday was under the written lease the periodical day for the payment of rent and that it has always remained so in point of law, notwithstanding the period for which the rent has been consistently computed. This is the view for which the defendant appellant contends and it forms the ground upon which his appeal to this Court was supported.

The appellant, however, also attacks the order of *McClemens* J. and of the Full Court on the ground that the question involved is not of a description which should be decided by summary proceedings under O. 21, r. 27. It is convenient to deal with this question first. Order 21 represents what was formerly r. 504 which was described by *Jordan* C.J. in *Goddard* v. *Polar Cream Pty. Ltd.* (4) as in substance an adaptation restricted to actions of ejectment of the English O. 14 which is general in its scope. The practice in New South Wales seems formerly to have conformed with that followed under O. 14 in jurisdictions where that Order is in force. It does not appear to have been thought proper at one time to make an order entitling the claimant to summary judgment in ejectment where there was a serious question of law, just as it has

(1) (1947) K.B. 946.
(2) (1948) 65 W.N. (N.S.W.) 247, at p. 248.
(3) (1948) 65 W.N. (N.S.W.) 54.
(4) (1946) 47 S.R. (N.S.W.) 154, at p. 156; 64 W.N. 5, at p. 6.

never been thought right to do so if there is any substantial question of fact to be determined. In *Sharp* v. *Glasser* (1), *Jordan* C.J. said :— " It has more than once been pointed out that the summary jurisdiction conferred by this rule must be used with great care, that a defendant ought not to be shut out from defending unless it is very clear indeed that he has no defence, and that summary judgment should not be granted when any serious conflict as to matter of fact, or any real difficulty as to matter of law, arises : *Sidebottom* v. *Cureton* (2) ; *Thorpe* v. *Quinn* (3) " (4). However, the Full Court, consisting of *Jordan* C.J., *Davidson* and *Street* JJ., in *Goddard* v. *Polar Cream Pty. Ltd.* (5), a case decided later in the same year, expressed a different view as to the use of the order when nothing but a question of law stood between the defendant and a judgment for possession. *Jordan* C.J. discussed the English authorities upon O. 14 and then added : " However, in this State, when nothing but a point of law is in question in a case which is sought to be disposed of under Rule 504, I think that the matter may be left to the discretion of the Judge. He is as well able to decide it in chambers as he would be to rule on it if it arose in the trial of an ejectment action ; and, if he thinks it a point of such importance and difficulty that it should be dealt with by the Full Court, he can refer it " (6). Later in the judgment his Honour said : " The whole purpose of Rule 504, like that of Order 14, is to obviate the necessity of sending the case to a jury where the facts are ' too plain for argument ' and ' it is clear that there is no real substantial question to be tried ' " (6). It seems that in point of actual practice O. 21 is regularly used for the purpose of obtaining an immediate determination of actions of ejectment depending upon matters of law and not matters of fact. In other jurisdictions actions for possession of land would not normally be tried by a jury and it may be that this consideration accounts for the difference in the practice which seems to have arisen in New South Wales. This Court does not readily disturb a settled practice in the courts of a State unless it is necessarily contrary to principle or some specific provision having statutory force. In all the circumstances it seems better to accept a rule which has been adopted and evidently followed for several years in the Supreme Court of New South Wales.

It was suggested, however, that in the present case the choice between a weekly tenancy, the periodical day of which was Monday

(1) (1946) 46 S.R. (N.S.W.) 379 ; 63 W.N. (N.S.W.) 207.
(2) (1937) 54 W.N. (N.S.W.) 88.
(3) (1943) 60 W.N. (N.S.W.) 180.
(4) (1946) 46 S.R. (N.S.W.) 379, at p. 383 ; 63 W.N. (N.S.W.), at p. 209.
(5) (1946) 47 S.R. (N.S.W.), at pp. 156, 157 ; 64 W.N. (N.S.W.), at p. 7.
(6) (1946) 47 S.R. (N.S.W.), at p. 157 ; 64 W.N. (N.S.W.), at p. 7.

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and one the periodical day of which was Thursday depended entirely upon an inference of fact. But once the correct legal test is applied this would not seem to be a case in which it is reasonably open to a jury to draw any but one inference.

Before discussing the question whether the periodical day on which the week of the tenancy began was Monday or Thursday it is desirable to deal with the two possible views of the case the adoption of either of which would mean the answer to that question does not govern the validity of the notice to quit. If it were a case to which s. 22A of the *Landlord and Tenant Act* 1899-1948 applied, a week's notice terminating on that day of the week would suffice. If it were a case to which s. 127 of the *Conveyancing Act* 1919-1943 applied the tenure would be that of a tenancy at will terminable by one month's notice expiring on any day. But there are what appear to be sound reasons for saying that neither of these provisions is applicable.

It is convenient as well as logical to say first why this is so. First, as to s. 22A of the *Landlord and Tenant Act*—par. (e) of that provision makes it enough in a case to which the section applies if the notice to quit is of proper length : it does not matter that the date of the expiry does not coincide with a periodical day. But, as is pointed out by *Jordan* C.J. in *Willshire* v. *Dalton* (1), s. 22A operates only for the purpose of Pt. IV of the *Landlord and Tenant Act* 1899-1948. The opening words of the section are " For the purposes of this Part of this Act ". These words, it can hardly be doubted, were intended to confine the application of the provisions to proceedings before justices which Pt. IV authorizes. How, may it be asked, is it possible to say that an action of ejectment brought by a landlord in a superior court falls within the purposes of Pt. IV. The answer suggested is that the action was brought by the landlord after first taking proceedings before justices pursuant to Pt. IV and because those proceedings were brought to a conclusion pursuant to s. 26, which is contained in Pt. IV. The purpose of s. 26 is to enable a tenant to relieve himself of an adjudication and warrant made and granted by justices upon proceedings under Pt. IV. It authorizes the tenant to do so by giving security to defend an action of ejectment or other appropriate action against him for recovery of possession of the land in question in the Supreme Court or any other court having competent jurisdiction in that behalf to be brought by or on behalf of the landlord. The provision requires him to give security by a joint and several bond of two other responsible persons approved by the justices in such sum of

(1) (1948) 65 W.N. (N.S.W.) 54.

money as to them seems reasonable, having regard to the value of the land and the probable cost of the action and the probable length of time which must elapse before it can be determined. The condition of the security is that it is to be void (in case of the success of the landlord in the action) upon the payment by the tenant of all such costs of suit as are awarded to or recovered by the landlord and of all mesne profits and of all costs awarded by the justices. If he gives such a security then the warrant is not to be executed or put in force but is to be void and no further proceedings are to be taken under or in pursuance of the adjudication of the justices for recovery of the costs or otherwise. The provision places no obligation upon the landlord to bring an action of ejectment. He may do so or not as he chooses. By s. 27 (3) if no such action is brought any court having competent jurisdiction to entertain any such action or any judge of such court may, upon the application of the parties bound by the bond, order the bond to be cancelled.

When an action of ejectment is brought by the landlord he does so not in virtue of any right or title under Pt. IV of the *Landlord and Tenant Act* 1899-1948, but in virtue of the general law. It is therefore difficult to accept the suggestion which no doubt *Jordan* C.J. put forward only tentatively that if an ejectment action is commenced pursuant to the provisions of ss. 26 and 27 then s. 22A might be applicable to the notice to quit relied upon by the claimant in the action. His Honour used the words " pursuant to " and it may be remarked that these words, in themselves in their modern use, at all events in matters of law, commonly suggest action in compliance with or under the authority of the provision to which they are applied. It is hardly correct so to use them of an ejectment action against a tenant who has invoked ss. 26 and 27. The landlord may be put to the action of ejectment because the tenant has invoked these provisions but in no sense is the action brought under the authority of either of the provisions, still less in compliance with them. It follows that s. 22A does not apply in the action.

Next as to s. 127 (1) of the *Conveyancing Act* 1919-1943—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. As the notice in the present case had more than a month's currency, if the second limb of this section applies the notice would be good and sufficient to determine the tenancy. The interpretation of the section was considered in

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Burnham v. *Carroll Musgrove Theatres Ltd.* (1) and it was decided that it did not apply in any case where before its enactment an implication of a tenancy from year to year would not have arisen. The decision which was given by *Ferguson* J. on behalf of the Full Court was adopted in this Court on appeal (2). In *Turner* v. *York Motors Pty. Ltd.* (3), *Dixon* J. said: "I think we must treat *Burnham's Case* (1) 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" (4).

As between the claimant council and the defendant appellant the rent has always been payable as a weekly sum not apparently referable to a year. If no more appeared it would be impossible at common law to regard the tenancy as one from year to year, and it would follow that s. 127 (1) would be inapplicable. But it must be borne in mind that the rent reserved by the reddendum in the lease was expressed as a yearly rent of £443 and so in proportion for any less period than a year payable by weekly payments of £8 10s. 5d. to be made in advance. If the £8 10s. 5d. is considered as nothing but an instalment of a rent calculated as a yearly rent then the inference would at least be open if not inevitable that a tenancy from year to year was implied between the claimant council and the defendant. It is to be noted that £8 10s. 5d. a week is not a true instalment of a rent of £443. A rent at the rate of £8 10s. 5d. a week calculated for 365 days would give a year's rent of £444 6s. 0d. That perhaps is not a very important consideration. What is important, however, is that the Maritime Services Board ceased at the end of the lease to be the landlord, that a period of three days appears to have been ignored, that there was a change of the week in respect of which the rent was calculated from Thursday to Thursday to one from Monday to Monday, and that at once proceedings in the Police Court to obtain possession were taken on the basis that there was no annual lease and that for over six years the weekly rent was paid. Possibly the question of what is the right inference is one of fact and possibly more than one inference might be drawn by a jury. But the true inference of fact appears to be that as between the claimant council and the defendant the tenancy went on upon a weekly basis. Even if it be correct that it is open to either inference as a question of fact, it would be necessary to send it for trial only if it were found that the validity of the notice to quit turned upon the question. But it does not

(1) (1928) 41 C.L.R. 540.
(2) (1928) 41 C.L.R. 540, at p. 548.
(3) (1951) 85 C.L.R. 55.
(4) (1951) 85 C.L.R. 55, at p. 71.

matter for the purpose of the validity of the notice to quit whether the tenancy is governed by s. 127 of the *Conveyancing Act* or is a weekly tenancy unless it be the fact that it was a weekly tenancy in which the periodical day was Thursday and not Monday. It is therefore necessary to turn to the question whether the periodical day of the weekly tenancy is Monday or Thursday. As has been already remarked, three days appear to have been ignored and rent calculated from Monday to Monday immediately upon the claimant Council succeeding to the reversion. This has not been accounted for in the materials placed before *McClemens* J. It is, however, the source of the difficulty. The fact that the lease expired just three days before the title to possession of the premises passed from the Maritime Services Board to the claimant council is a consideration of importance. Nor can the fact that the council at once began the proceedings before the magistrates to recover possession be disregarded. These facts mark a change in the relationship between the landlord and tenant with the introduction of a new landlord. There is first an attempt on the landlord's part to terminate the occupation of the tenant, who had no claim at common law to continue in possession after the end of the lease on 28th November 1947, and then the continuance of the tenant in possession paying rent from Monday to Monday. Up to the rescission of 25th August 1948 of the adjudication and warrant for the dispossession of the tenant the defendant may be regarded as paying for use and occupation and not rent, but from that date his payments resumed the character of rent but a weekly rent payable from Monday to Monday. In all these circumstances it seems impossible to treat the weekly tenancy which arose as a result of the continued possession of the tenant and the payment of rent as being anything but a tenancy from week to week commencing on a Monday. This was the view adopted in the Full Court and it appears clearly to be right.

It follows that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant, *Fred. Croaker.*
Solicitor for the respondent, *B. P. Purcell.*

J. B.