[HIGH COURT OF AUSTRALIA.]

ARNOLD AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

MANN . . . . . RESPONDENT.
CLAIMANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 16, 17; *Oct.* 3.

Dixon C.J., Fullagar and Kitto JJ.

Landlord and Tenant—"Prescribed premises"—Lease for term—Holding over—Weekly tenancy—Notice to quit—Expiry—Purported assignment after expiry—Ground of notice to quit true in fact—Writ in ejectment against assignees—Receipt of rent after expiry of notice and before assignment—Whether new tenancy created before assignment—Intention of parties—Inferences to be drawn.

M., the owner of a certain shop and dwelling commenced proceedings in the Supreme Court of New South Wales to recover possession of the premises from A. and W., who defended their possession upon the grounds (a) that K. the predecessor in title of M., who acquired the premises in September 1952, had by deed leased the premises for a term of three years from 16th May 1949 to one T. with a proviso that if T. should be permitted to hold over he should be deemed a weekly tenant, that T. had held over and had by deed dated 24th October 1952 assigned his weekly tenancy to the defendant and (b) that K. had by conduct after the date of the assignment accepted the defendants as tenants. On 17th June 1952 K. had given T. a notice to quit the said premises expiring on 18th July 1952 upon the ground that T. was guilty of a breach of a covenant in the said deed of lease against the carrying out of structural alterations to such premises. After the expiry of such notice to quit no steps were taken by K. to eject T. from the said premises, rent *eo nomine* was accepted from T. up to the date of the assignment to the defendants and there were protracted negotiations by correspondence between the respective solicitors of K. and T. concerning the proposed assignment by T. of what was described as his "present weekly tenancy" of the said premises to the defendants. At the trial of the action the jury found in answer to the only question left to them that at the date of the service of the notice to quit T. was guilty of the breach of the covenant therein charged. The trial judge declined to leave to the jury the further question whether after the expiry of

the notice to quit and before the said assignment a tenancy existed between T. and K., the interest in which passed to the defendants under the said assignment. On appeal the Full Court held that this question should have been left to the jury there being evidence of such a tenancy fit to be submitted to the jury and directed a new trial limited to this issue. Such issue was by consent tried by a judge without a jury, who found that no such tenancy did in fact exist. The Full Court declined to interfere with this finding. Upon appeal,

Held, by *Dixon* C.J. and *Kitto* J., *Fullagar* J. dissenting, that upon the evidence the trial judge was justified in refusing to infer an intention to create a new tenancy or to impute an intention to revive or continue the old one and accordingly that his finding should not be disturbed.

Observations by *Dixon* C.J. on the jurisdiction of the Supreme Court to entertain the action in ejectment and the passage in *Andrews* v. *Hogan* (1952) 86 C.L.R. 223, at pp. 233, 234, referred to and distinguished.

Observations by *Dixon* C.J. and *Fullagar* J. on the decision in *Tayleur* v. *Wildin* (1868) L.R. 3 Exch. 303 and on the effect of the withdrawal of a notice to quit before its expiry.

The distinction between waiver of a forfeiture and waiver of a notice to quit explained by *Fullagar* J.

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

APPEAL from the Supreme Court of New South Wales.

On 2nd November 1953 Joyce Narelle Mann (hereinafter called the claimant) issued a writ of ejectment out of the Supreme Court of New South Wales against Walter Arnold and Karol Warzecha (hereinafter called the defendants) claiming to be entitled to recover possession from the defendants of the land and premises situated and known as Number 117-121 Liverpool Road Enfield. The claimant had by this time acquired the fee simple in the subject land and premises which had previously, at all times relevant to the questions which arose for decision in the action, been vested in one Mabel Keen. The defendants claimed to be lessees of the said land and premises and claimed to be assignees of one James Towers who had previously been the lessee of the said Mabel Keen. By deed dated 13th May 1949 the said Mabel Keen had demised the premises to the said James Towers for a term of three years from 16th May 1949 and the lease contained a provision that if the lessee were permitted to hold over after the expiration of that term he should be deemed to be a weekly tenant only at a rental of £5 per week, and such tenancy should be determinable by a week's notice in writing by either party. The said James Towers remained in possession of the said

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land and premises after the three year term had expired. In June 1952 the said Mabel Keen served upon the said James Towers a notice to quit based upon an alleged breach of a covenant contained in the said deed against the making of structural alterations and additions without her written consent. The notice required the said James Towers to quit the premises by 18th July 1952. Towers, however, remained in possession after that date and on 24th October 1952 by deed made between himself and the defendants and which recited the said deed of 13th May 1949 and that he was holding over under the said lease the said James Towers purported to assign to the defendants his tenancy as weekly tenant under the said deed.

The action in ejectment was first tried before *McClemens* J. and a jury in June 1955 and an issue was litigated at that trial as to whether there had in fact been a breach of covenant as alleged in the notice to quit. This issue was determined by the jury in favour of the claimant with the result that it thus became established that the notice to quit was a proper one and was effective to determine the tenancy under the deed as at 18th July 1952. The defendants appealed to the Full Court of the Supreme Court upon a number of grounds and in the result a new trial was ordered limited to one issue only, namely whether after 18th July 1952 a tenancy existed between the said James Towers and the said Mabel Keen. The court held that there was evidence fit to be submitted to a jury that a fresh tenancy had come into existence between the said James Towers and the said Mabel Keen after 18th July 1952 and was still in existence on 24th October 1952 when the said James Towers executed the assignment to the defendants. This issue was tried by *Maguire* J. sitting, by consent, without a jury, and his Honour held that he was not satisfied that any new tenancy came into existence after the expiry of the notice to quit and accordingly found a verdict for the claimant and entered judgment in her favour.

The defendants appealed against this decision to the Full Court of the Supreme Court (*Owen*, *Herron* and *Walsh* JJ.), which dismissed the appeal.

From this decision the defendants appealed to the High Court.

Dr. F. Louat Q.C. and *H. H. Glass*, for the appellants.

M. F. Loxton Q.C. and *P. G. Addison*, for the respondent.

Cur. adv. vult.

The following written judgments were delivered :—

DIXON C.J. This is an appeal as of right by the defendants in an action of ejectment against an order of the Full Court of the Supreme Court of New South Wales dismissing an appeal from a judgment for the claimant given by *Maguire* J. sitting by consent without a jury. Though the result of the trial before *Maguire* J. was a judgment in the action for the claimant, that learned judge sat to try only one issue. There had already been a trial of the action before a judge with a jury. That trial had resulted in verdict and judgment for the claimant but on an appeal by the defendants the Full Court of the Supreme Court had decided that the issue in question ought to have been put to the jury in addition to the issue that was in fact submitted to them, an issue which they found for the claimant. The finding of that issue was not set aside by the Full Court and is not now questioned.

The premises in question form the site of a butcher's shop and dwelling in Liverpool Road, Enfield. The business was carried on by one James Towers, who, before the first trial of the action, but after the events which here matter, lost his life by drowning. He had taken a lease of the premises from the owner in fee simple, a lady named Mabel Isabel Keen. The lease was for three years expiring on 16th May 1952 at an annual rent of £260 payable monthly. There was an option of renewal exercisable not later than 16th February 1952 which Towers, the lessee, failed before that date to exercise. The lease contained a provision that if the lessee were permitted to hold over after the expiration of the term he should be deemed to be a weekly tenant only at a rent of £5 per week and that such tenancy should be determinable by a week's notice in writing by either party. There were numerous covenants by the lessee, one of which was against assignment or subletting without consent. Combining the operation of s. 133B (see too s. 132 and s. 86) of the *Conveyancing Act* 1919-1943 with the modifications contained in the covenant, the effect was that the lessor might not withhold her consent if the proposed assignee or lessee were proved to the reasonable satisfaction of the lessor to be respectable and responsible.

Another of the lessee's covenants was not to carry out any structural alterations or additions to the said premises without the written consent of the lessor. It appears that towards the end of the term Towers without consent proceeded to build a brick retaining wall round the yard of the shop, and by filling the enclosed space with earth to make a level yard. The lessor claimed that this amounted to a breach of the covenant. Towers held over but on 17th June 1952

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there was served upon him a formal notice to quit based upon the breach of covenant and expressed to expire on 18th July 1952, thus giving a period in excess of thirty days satisfying s. 63 (2) (a) (ii) of the *Landlord and Tenant (Amendment) Act* 1948-1951.

The ground stated by the notice to quit is within that prescribed by s. 62 (5) (b) (i) of the Act and, if in truth the covenant was broken by the work caused to be done by the lessee Towers, his tenancy would end at the expiration of the notice on 18th July 1952. That is the effect that has been ascribed to s. 67. If, as Towers did, the tenant continues in occupation of the premises he does so not in the exercise of the proprietary right the lease gave him before it was determined but in reliance upon the protection given him by the Act. As provided by s. 62 (3) the lessor may proceed in a competent court as defined by s. 69 to recover possession from him and that court must take into consideration before making an order many matters besides the fact that the tenancy has been lawfully determined: s. 70. But unless and until an order is made the tenant may continue to occupy the premises notwithstanding that his tenancy has been determined by a valid notice to quit given on a ground authorised by s. 62 (5) which in point of fact truly existed. See *Anderson* v. *Bowles* (1); *Andrews* v. *Hogan* (2); *Bonnington and Co. Pty. Ltd.* v. *Lynch* (3); *Read* v. *Morris* (4). His possession or occupancy however involves no more than a personal right and it does not pass by assignment to a stranger to the former tenancy; *Richardson* v. *Landecker* (5). But to assign his tenancy of the land is precisely what Towers proceeded to do. By a deed dated 24th October 1952 he purported to assign to Arnold and Warzecha, the present defendants appellants, the weekly tenancy arising under the lease in consequence of his holding over after the expiry of the term. The assignment was a formal document reciting the lease and its relevant provisions including that already mentioned deeming the lessee to be a weekly tenant at a rent of £5 per week if he was permitted to hold over. It recited that he was holding over under the lease and assigned the weekly tenancy of him Towers as weekly tenant as aforesaid at £5 per week in the said premises. In September 1953 Mrs. Keen transferred the estate in fee simple in the land to her daughter Mrs. Mann who is the claimant respondent.

Taking the view that, if Towers had ceased to be a weekly tenant before the assignment, the assignment could pass nothing to Arnold and Warzecha who would be strangers to the tenancy and outside

(1) (1951) 84 C.L.R. 310, at p. 320.
(2) (1952) 86 C.L.R. 223.
(3) (1952) 86 C.L.R. 259, at p. 268.
(4) (1952) 53 S.R. (N.S.W.) 39; 70 W.N. 53.
(5) (1950) 50 S.R. (N.S.W.) 250; 67 W.N. 149.

the protection of s. 62, Mrs. Mann caused a writ in ejectment to be issued out of the Supreme Court in her name as claimant against Arnold and Warzecha as defendants to recover possession of the premises from them. That was as long ago as 2nd Novemeber 1953.

The first question which naturally suggests itself is whether, on the assumption that Towers at the date of the assignment no longer occupied the land in virtue of a tenancy but only under the protection of the statute, an action of ejectment in the Supreme Court would lie against Arnold and Warzecha who came in as his purported assignees. In other words do sub-ss. (1) and (3) of s. 62 apply to such a case and give exclusive jurisdiction to a court of competent jurisdiction as defined by s. 69 ? It is, I think, convenient to repeat a passage from what I said in *Andrews* v. *Hogan* (1) concerning the possibility after the determination of a lease of maintaining in the Supreme Court an action of ejectment against persons who had come in under the tenant but whom I did not regard as within the definition of lessee contained in s. 8 (1). The passage is as follows : " The question is whether such a proceeding comes within the fair meaning of the words of s. 62 (1). The words are ' to recover possession of the premises from the lessee or for the ejectment of the lessee therefrom '. These words should, I think be given the widest meaning of which they are capable. They are obviously directed at all forms of proceeding for obtaining the possession which belongs to or is attributable to the lessee. In s. 62 (3), the correlative provision, the lessor is authorised to take proceedings in a court of competent jurisdiction subject to the prescribed conditions for the recovery of prescribed premises, but in that case the description of the proceedings is not limited by any mention of the character of the person from whom there is to be the recovery. In s. 70 (1) (a) the hardship to be considered is that of the lessee or any other person, and in s. 70 (2) the requirement of suitable alternative premises is made a condition of an order for recovery of any dwelling house in terms capable of including a proceeding directed against anyone and for that matter in any court. In s. 82 (3) and (4) provision is made for the protection of sub-tenants when the lessee receives a notice to quit and is proceeded against. All these provisions show that the plan of the Act is to throw the protection it gives round the tenant and those claiming under him as sub-tenants. The plan makes it important that a wide application should be given to the leading prohibition against proceedings for recovery of possession from the lessee upon which the whole plan hangs. I think therefore the words of that provision should be interpreted as extending to a

(1) (1952) 86 C.L.R. 223.

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proceeding by writ of ejectment where, although the lessee is not named, the direction of the writ to persons by description is sufficient to include him and he may defend the action and where a judgment for the claimant would terminate his possession by the sub-tenants who are defendants (1) ".

In that case the tenant had died and his possession was notionally attributable to the Public Trustee who treated himself as a passive and interim repository of the interest. Recovery from the defendants would however have operated against the possession attributable to the Public Trustee. In the present case I think Towers by giving up possession to Arnold and Warzecha lost the protection of s. 62. No doubt the possession obtained by the latter may be regarded as derived from him but, on the assumption that at the time of the assignment Towers occupied under no right except the protection of the statute, it is clear enough that on his side he could not assign that protection to Arnold and Warzecha and that on their side the recovery of the land from them involves no right of possession of his.

For after going out of possession, albeit in their favour, he can have no right to possession or occupation whatever be the event. Without qualifying in any way what I said in the passage quoted from *Andrews* v. *Hogan* (1), I do not think the present case falls within the principle which the passage attempts to state. I therefore am of opinion that, on the hypothesis adopted, an action of ejectment might be maintained in the Supreme Court against Arnold and Warzecha.

That hypothesis, of course, could not accord with fact unless the ground stated in the notice to quit in truth existed, that is to say, unless the building of the retaining wall and the other work which Towers caused to be done amounted to a breach of the covenant in the lease so that, within the meaning of s. 62 (5) (b) (i), Towers as lessee had failed to observe a term or condition of the lease. This however was denied by the defendants and at the first trial the learned judge who presided was of opinion that it was the only issue, in the sense that on the evidence the claimant was entitled to succeed unless upon that issue the jury found against her. Accordingly he submitted that issue and no other to the jury. The verdict was for the claimant. On appeal however the learned judges forming the Full Court (*Street* C.J., *Roper* C.J. in Eq., and *Herron* J.,) considered that there was evidence to support an alternative view of the case which, if found, would entitle the defendants to succeed.

(1) (1952) 86 C.L.R., at pp. 233, 234.

That view is that after the notice to quit and before the assignment a new weekly tenancy arose between Mrs. Keen and Towers and that Towers's interest as such weekly tenant passed under the assignment to the defendants. If that were so s. 62 (1) and (2) would apply and an action in the Supreme Court of ejectment would not be maintainable.

Adopting this view of the evidence the court granted a new trial limited to the issue in question ; the decision was pronounced on 2nd November 1955 and is reported (1) ; but a question of costs was disposed of on 29th Feburary 1956 (2) and the rule is drawn up as of that day. The issue for trial as framed by the rule of court is—whether after the 18th day of July 1952 a tenancy existed between James Towers and Mabel Isabel Keen the predecessor in title of the present claimant.

The issue was tried by *Maguire* J. sitting by consent without a jury. His Honour found the issue in favour of the claimant, that is to say in the negative. From that decision the defendants appealed to the Full Court of the Supreme Court. The appeal was heard by *Owen, Herron and Walsh* JJ., who unanimously dismissed the appeal. It is from that decision that the appeal comes to this Court. For the appellants it was suggested that the decision is not altogether compatible with the earlier decision of the Full Court. But evidently *Herron* J., was unconscious of any such incompatibility : for he was a member of the court on both occasions. The earlier decision was that there was evidence fit to be submitted to a jury that a new tenancy was created and quite consistently with that view the court as a tribunal of fact may find that no such tenancy in truth came into existence. Now we in our turn are called upon to consider the correctness of the finding made upon the issue by *Maguire* J., and of the decision of the Full Court confirming that finding.

The difficulty arises from the fact that after the expiration of the notice to quit Mrs. Keen took no proceedings to evict Towers, received rent from him and by her solicitors conducted a correspondence with Towers's solicitors which might be considered to be based on the continued acceptance of Towers as a tenant. Little importance attaches to the receipt of the rent during the period named in the issue which it should be noted begins on the day when the notice to quit expired. For by s. 80 where notice to quit has been given the acceptance of rent in respect of any period within six months after the giving of the notice is not of itself to constitute

(1) (1956) S.R. (N.S.W.) 212 ; 73 W.N. 250.

(2) (1956) 73 W.N. (N.S.W.) 149.

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evidence of a new tenancy or operate as a waiver of the notice. The words " of itself " show that it may be included with other circumstances as part of the proofs by which a real intention to form a new tenancy may be shown. But the six months from the giving of the notice to quit had not expired when the assignment was made on 24th October 1952 and since in the meantime Towers remained in enjoyment of the premises the acceptance of rent is a wholly equivocal circumstance.

There seems little room for doubt that at the end of the term of three years the lessor had resolved to take measures to terminate Towers's tenancy. A notice as under s. 129 of the *Conveyancing Act* 1919-1943 dated 15th May 1952 and signed by Mrs. Keen's son as the lessor's agent required Towers to remedy the breach of covenant pulling down the dwarf wall and also to pay £300 for the breach. The notice informed him that the lessor would be entitled to re-enter in the event of failure to comply with the notice within a reasonable time. The notice was in fact complied with except as to compensation and by 1st July 1952 at all events the wall was demolished and the filling removed. It is suggested for the appellants that this must have weakened the ground upon which the notice to quit was based so greatly that Mrs. Keen's advisers may have considered that a magistrate would refuse to make an order for the ejectment of Towers. It is suggested that this may be the explanation of the failure of Mrs. Keen to proceed at once and of the apparent acceptance by the solicitors in their correspondence of the position that Towers remained a tenant.

It appears that as early as 22nd May 1952 Towers through his solicitor asked for a new lease for three years on the old terms except as to rent which he desired to be fixed by named valuers. After referring this request to their client and her son, Mrs. Keen's solicitors on 13th June 1952 refused it, adding that rent was now payable at the rate of £5 per week and that receipt of rent did not constitute a waiver of any rights accruing to Mrs. Keen under the lease. Towers's solicitors retorted that so far as they knew he had validly exercised his option of renewal, a view that had no foundation. On 1st July 1952 they wrote to Mrs. Keen saying that Towers had consulted them about the notice to quit alleging the structural alterations. The letter said that the wall had now been pulled down and the filling removed and expressed regret on behalf of Towers at his failure to observe the strict letter of his obligations. This called forth a letter from Mrs. Keen's solicitors requesting information as to Towers's willingness to vacate the premises and threatening ejectment proceedings.

To this there was a categorical reply from Towers's solicitors that he was not prepared to vacate the premises. That was on 4th July 1952. After this there are no written communications until 19th September 1952. On that day Towers's solicitors wrote to Mrs. Keen's solicitors referring to a contemplated sale of the butcher's business of which, as they wrote, she had been advised. At the earlier trial evidence had been given of the conversations thus referred to but for some reason that evidence was not led on the second trial. All we know is that there was a dispute about them. The letter enclosed references as to the suitability of the purchasers who in fact were the now defendants appellants. The letter ended by requesting on behalf of Towers the approval of Mrs. Keen " to the transfer of the existing tenancy to Messrs Arnold and Warzecha " and asking that her instructions be obtained.

It will be seen that up to this point nothing appears in evidence which would warrant the conclusion that Towers continued in occupation otherwise than under the protection of the *Landlord and Tenant (Amendment) Act*. The notice to quit had, according to the hypothesis demanded by the jury's verdict on the first trial, been validly given on a statutory ground existing in fact and it had expired. Towers had been asked if he would get out and had refused to do so. Nothing else had been done except that he paid rent and it was received as s. 80 contemplates. But Towers's solicitors then proposed a transfer of " the existing lease " and submitted the credentials of the proposed transferees on the apparent footing that the covenant against assignment without consent contained in the old lease still applied. Five weeks later, namely on 24th October 1952, Towers assigned his supposed tenancy to the defendants. If such a tenancy was created it must have arisen out of what took place in the interval. Of course what had occurred before and what occurred afterwards might have the one a prospective and the other a retrospective value as evidence because of some light it might throw on the conduct of the parties during that five weeks. But, as it seems to me, in the end it must be what they did and said in the period between 19th September and 24th October 1952 that governs the question whether a new tenancy had been created. For so far as the evidence discloses the facts it seems clear enough to me that up to 19th September it had not done so. Materials however were soon forthcoming to provide a footing for the contention that at all events Mrs. Keen's solicitors took the description " weekly tenant " to be apt to describe Towers, whatever the legal result of that might be. For on 23rd September 1952 they wrote— " We wish to acknowledge receipt of your letter of 18th instant

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and to our subsequent telephone conversation with your Mr. Hill" (Towers's solicitor). "We confirm the fact that your client desires either an assignment of his present weekly tenancy or a fresh weekly tenancy granted in favour of the purchasers. We wish to advise that we have requested instructions of our client and as soon as we receive the same we shall again communicate with you".

Perhaps the reference to a letter of 18th is a mistake for that of 19th September. There is little evidence of the conversation to which the letter refers except that Mr. Hill in his evidence said that in it no mention of the notice to quit was made. He said that there had been some earlier discussions about it but from his letter of 19th September onwards there was never any mention of it in any conversation. The words "his present weekly tenancy" in the sentence in the letter beginning "We confirm" look very much like a flat admission that a weekly tenancy existed. But conceivably it may be merely part of the statement of Mr. Hill the making of which is confirmed.

Next comes a letter dated 1st October from Mrs. Keen's solicitors saying that she was prepared to give a new lease to the purchasers of a smaller area at a slightly lower rent. To this on 10th October Towers's solicitors reply in a long letter referring to some telephone conversations and confirming the details of Mrs. Keen's proposal. The letter proceeds—"We place on record that we have not at any time nor have the proposed tenants requested a Lease but in fact we have specifically requested approval to 'the transfer of the existing tenancy'. And your letter of the 23rd ult. reads in part '. . . your client desires either an assignment of his present weekly tenancy or a fresh weekly tenancy'. Having made our request for consent on the 19th ult. we can only assume from the correspondence and the telephone conversations which the writer has had with Mr. Connolly Jnr. that your client has refused to consent to the proposed assignment." Then finally a claim is made that the purchasers have not been objected to on the ground of want of respectability or responsibility and accordingly that consent has been unreasonably withheld. On 13th October Mrs. Keen's solicitors replied in an argumentative letter which did not take the point that the tenancy had been determined. There is a passage which says, somewhat obscurely—"Furthermore, with relation to the question of the weekly tenancy, your client has never admitted and has in fact denied that he did not in fact comply with the terms of the written lease with relation to the exercise of an option for a renewal". Perhaps this means that Towers always claimed to have exercised his option. But that is not the footing in which the letters were

written: for it would mean a term of three years not a weekly tenancy.

The letter of 13th October ends—" We would request that you convey to your client the advice that any assignment without consent will be the subject of immediate ejectment proceedings. However, should the purchasers wish to obtain an assignment, if the usual documentary evidence as required in these cases is submitted to us, we shall forward the same to our client with a request for further instructions ". Again this looks like acquiescence in the assumption that there is a tenancy. On 14th October Towers's solicitors send further references and on 15th October Mrs. Keen's solicitors write saying that they have received further instructions and offer a new lease to the purchasers at a still lower rent but of a smaller area. The letter expresses dissatisfaction with the references and demands a comprehensive bank reference. Finally, on 22nd October 1952, two days before the assignment, Towers's solicitors write enclosing various documents, supporting the eligibility of the purchasers. There were enclosed a statutory declaration, a form of guarantee and finally the assignment for approval. It was said too that failing consent consideration would be given to assigning without Mrs. Keen's consent. In fact this is what was done.

It is not unimportant that the assignment does not refer to any new tenancy but relies wholly on the old one existing under the lease, that which in fact was terminated by the notice to quit. It must be remembered too that it is in virtue of the fact of the erection of the dwarf wall and the filling of the space enclosed that a breach of covenant took place and only so did the notice to quit obtain its efficacy. Looking at the matter now on the basis of the now unchallengeable finding of the jury this may seem clear enough. But it was a fact that Towers doubtless put on one side as cured by the removal of the wall and filling and which ultimately he contested.

It would hardly accord with reality to ascribe to the parties an actual intention to create a new tenancy. Such a thing does not seem to have been present to their minds or the minds of their solicitors. The correspondence and the events which followed do not seem to me to give any different complexion to what occurred between 19th September and 24th October 1952. Mrs. Keen continued to deny the right of the purchasers to occupy the premises, but it was not, so it is said, until after the issue of the writ on 2nd November 1953 that the right ground was taken. Cheques for rent were given to her agent but with two exceptions they were not

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banked and those exceptions were explained as due to the mistake of an unauthorised agent, the money being returned.

In my view the case of the defendants must fail. One may put aside at once the possibility of saying that independently of intention the law imputes to the parties the formation of a new tenancy, or in other words to imply artificially an intention of forming again the relation of landlord and tenant, the kind of intention which Lord *Sumner* described as " one of those so-called intentions which the law imputes ; it is the legal construction put on something done in fact " : *Blott's Case* (1). That I think cannot be done. There must be some actual intention that the relation should subsist.

Once the notice to quit took effect on 18th July 1952 as a termination of the tenancy it became necessary for the parties in some way to form a new tenancy before any subject matter could exist upon which the assignment of 24th October 1952 could operate. The right enjoyed by Towers to the protection of the statute was incapable of assignment : see *Keeves* v. *Dean* (2) and *John Lovibond & Sons Ltd.* v. *Vincent* (3).

Once the notice to quit expires the old tenancy is gone. It is too late to continue the old tenancy by a common agreement that the notice to quit shall be withdrawn. Indeed according to *Tayleur* v. *Wildin* (4), the facts of which are much better stated in (5), even before the expiration of the notice to quit nothing can save the old tenancy : a new one must be created. One would have thought that if by mutual consent the unexpired notice were withdrawn a conventional estoppel would arise requiring the parties to treat it as if it had never been. For the term or interest had not at that time been destroyed. But be that as it may, after the destruction of the tenancy nothing but a new tenancy will serve. If a new tenancy between Towers as tenant and Mrs. Keen as landlord had arisen, it might perhaps be argued that the assignment expressed as it is to relate to the tenancy under the lease would be insufficient to pass it. However as the new tenancy would be an identical interest though under a different title it would seem that it would pass under the provisions of s. 68 of the *Conveyancing Act* 1919-1943 construed with the definitions in s. 7 of the words " conveyance " and " property ". Again, although a new tenancy must be created and an intention, express or implied, must be found that there shall be a weekly tenancy between the parties, certain distinctions must be kept in

(1) (1921) 2 A.C. 171, at p. 218.
(2) (1924) 1 K.B. 685.
(3) (1929) 1 K.B. 687.
(4) (1868) L.R. 3 Exch. 303.
(5) (1868) 18 L.T. (N.S.) 655.

mind. On the one hand what is needed is a common intention that there shall be a tenancy : not an intention that the tenancy shall be a new one as opposed to a revival or continuation of the old one. If the parties really intended to revive or continue the old tenancy mistakenly believing that they could do so, for example, by a retraction *ex post facto* of the notice to quit, this might perhaps be construed as the creation of a new tenancy. On the other hand a mistaken belief that the notice to quit had not destroyed the tenancy is not the same as an intention to revive or continue it. Such a mistake might quite well arise from reliance upon the doctrine of *Krupa* v. *Zacabag Pty. Ltd.* (1), and a failure to realise that, at all events after the decision in *Andrews* v. *Hogan* (2), it was no longer law : see *Read* v. *Morris* (3). Again a fear on the part of Mrs. Keen or her advisers that a magistrate would refuse to turn out Towers and an acquiescence in his remaining in occupation would not be the same as an intention to revive or continue the old tenancy.

The fact is that the situation created by the *Landlord and Tenant (Amendment) Act* is not only complicated. It places the parties in such a position, for the landlord one perhaps of disadvantage and for the tenant of advantage, that it is impossible to spell out of conduct which formerly would mean an intention express or implied to form or continue the relation of landlord and tenant any such intention. Nor can the use of terms be given its former significance. For no new terminology to describe their statutory relation has come into existence. In the present case I think that the correspondence which I have discussed should not be construed as intending to create any relation of landlord and tenant or to revive or continue one. It is no more than a reflexion of an understanding of the *de facto* position which the tenant was able to occupy and a misuse of terms.

The solicitors did not mean to depart at all from the legal situation that resulted from what had been done, even if in all the confusion of statute and case law they neither accurately understood nor described it. I think that *Maguire* J., was justified in refusing to infer an intention to create a new tenancy and I see no room for imputing an intention real or artificial to revive or continue the old one.

For these reasons I think that the appeal should be dismissed.

(1) (1950) 50 S.R. (N.S.W.) 304 ; 67 W.N. 221.
(2) (1952 July 31) 86 C.L.R. 223.
(3) (1952) 53 S.R. (N.S.W.) 39 ; 70 W.N. 53.

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FULLAGAR J. This is an appeal from a judgment of the Supreme Court of New South Wales (Full Court) dismissing an appeal from *Maguire* J. The proceeding before *Maguire* J. was an action of ejectment commenced by a writ issued so long ago as 2nd November 1953. The respondent claimant, Mrs. Mann, is the owner of the fee simple of certain premises in a suburb of Sydney, which at all times material have been occupied as a butcher's shop. The appellants went into possession of those premises in October 1952 and have been in possession ever since. They claim to be in possession as assignees from one James Towers of a weekly tenancy. The claimant's contention (which has so far been upheld) is that the weekly tenancy, which Towers purported to assign to the appellants, had been terminated before the assignment by a notice to quit given by her predecessor in title, Mrs. Keen, so that Towers had no tenancy to assign. To this the reply of the appellants (which has so far been rejected) is that the notice to quit had been " waived " before the assignment, with the result that a new tenancy was created, to which the protection afforded by the *Landlord and Tenant (Amendment) Act* (1948) (N.S.W.) attaches. The land is under the general law. The premises are prescribed premises within the meaning of the Act.

The story begins with a lease dated 13th May 1949, whereby Mabel Keen demised the premises in question to James Towers for a term of three years from 16th May 1949. The lease provided that if the tenant should hold over after the expiration of the term he should hold on a weekly tenancy at a rent of £5 per week. The lessee was given an option of renewal on giving notice three months before the expiration of the term, provided that no breach of covenant had been committed. There was a clause in the lease which purported to modify the provision contained in s. 133B of the *Conveyancing Act* 1919 that, where there is in a lease a covenant not to assign without the landlord's consent, consent shall not be unreasonably withheld. The lease also contained a covenant not to make any structural alteration or addition in or to the premises. The notice to quit, which was given under s. 62 of the *Landlord and Tenant (Amendment) Act* and was based on a breach of this covenant, was given on 17th June 1952, and expired on 18th July 1952.

Before examining the facts further it is necessary to consider the effect of the expiration of a notice to quit duly given in accordance with the provisions of the *Landlord and Tenant (Amendment) Act*. The case of *Anderson* v. *Bowles* (1) was concerned with the *National Security (Landlord and Tenant) Regulations* and the *Landlord and Tenant Act* 1948 of Queensland. The material provisions of those

(1) (1951) 84 C.L.R. 310.

regulations and that Act did not differ materially from those of the New South Wales Act here in question, and in that case the law was stated thus:—"A body of judicial decision exists for the view that, after a valid notice to quit has been given in accordance with reg. 58 (which corresponds with s. 41 of the Act) and expires, a tenancy is brought to an end by virtue of reg. 62 (s. 46), but nevertheless the lessee remains protected against dispossession by the lessor whether by peaceable re-entry or otherwise unless and until an order for possession is made by a court of competent jurisdiction under the statutory provisions and the time for the execution of the order expires, the tenant being liable to pay the rent and observe the other obligations of the tenancy, so far as applicable, in the meantime (1)". The effect of this is that on the expiration of the notice the tenancy and the true relation of landlord and tenant come to an end, and (what is the important point for present purposes) the rights and immunities given by the Act to the tenant are personal to him and not capable of assignment. A considerable number of cases decided by State Courts was cited in *Anderson* v. *Bowles* (2) as supporting the passage quoted above, and these included the New South Wales case of *Richardson* v. *Landecker* (3). In *Krupa* v. *Zacabag Pty. Ltd.* (4) a different view was taken by the Full Court of New South Wales. It was held in that case that the expiration of a notice to quit given under the Act did not terminate the tenancy, but that the tenancy continued to subsist until the tenant vacated the premises or an order for possession was obtained under the Act. If an order was applied for and refused, the position continued as before the giving of the notice to quit. *Krupa* v. *Zacabag Pty. Ltd.* (4) was followed in *Furness* v. *Sharples* (5). Those two cases, however, were overruled in *Read* v. *Morris* (6); where the law was again stated as in *Anderson* v. *Bowles* (2) and *Richardson* v. *Landecker* (3). It must clearly now be taken that the effect of a valid notice to quit under the Act is the same as that of a valid notice to quit at common law. That is to say, it terminates the tenancy as from its expiration.

Both before and after the expiration of the notice to quit certain correspondence took place between the solicitors for Mrs. Keen and the solicitors for Towers. This will have to be considered later in some detail. It is enough at the moment to say that Towers wished to assign the weekly tenancy, which he appears to have believed

(1) (1951) 84 C.L.R., at p. 320.
(2) (1951) 84 C.L.R. 310.
(3) (1950) 50 S.R. (N.S.W.) 250; 67 W.N. 149.
(4) (1950) 50 S.R. (N.S.W.) 304; 67 W.N. 221.
(5) (1950) 51 S.R. (N.S.W.) 13; 68 W.N. 18.
(6) (1952) 53 S.R. (N.S.W.) 39; 70 W.N. 53.

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himself to have, to the appellants, who had bought, or were proposing to buy, his business. He sought the consent of Mrs. Keen to such an assignment, and supplied a number of references as to the character and credit of the appellants. A guarantee of one of them was also tendered. No consent being given, Towers on 24th October 1952 executed an instrument whereby he purported to assign to the appellants the weekly tenancy which under the terms of the lease followed on the expiration of the term. This was doubtless done in reliance on s. 133B of the *Conveyancing Act* 1919 (N.S.W.) and the decisions of which *Treloar* v. *Bigge* (1), is a well-known example. The appellants appear to have entered into possession immediately after the assignment. The right to assign, if it be assumed that Towers had anything to assign, does not appear to have been disputed in these proceedings.

If, of course, Towers had remained in possession, he could only have been ejected by proceedings in a court of petty sessions under the *Landlord and Tenant (Amendment) Act*, and in those proceedings questions of comparative hardship and other questions might have been raised and required consideration. The respondent's contention, however, is that, Towers having no tenancy to assign, there is no relation of landlord and tenant between her and the appellants, who may therefore be ejected in the ordinary way by proceedings in the Supreme Court. Section 75 of the Act does not, it is said, apply, because the respondent is not the appellants' lessor. For about a year after the assignment correspondence took place somewhat intermittently between the solicitors for the assignees and the solicitors who acted first for Mrs. Keen and later for the respondent Mrs. Mann. This correspondence also it will be necessary to consider with some care. The conveyance of the fee simple to Mrs. Mann was executed on 17th September 1953, and on 2nd November 1953 the writ in the action was issued.

The action has had a chequered career. It came on first for hearing on 15th June 1955 before *McClemens* J. and a jury. His Honour left to the jury the question whether there had been a breach of covenant by Towers, and the jury answered this question in the affirmative and returned a verdict for the claimant. His Honour, however, refused to leave to the jury any question as to whether the relation of landlord and tenant was subsisting between Towers and Mrs. Keen at the date of the assignment. The appellants appealed to the Full Court, which held that the learned judge had fallen into error in refusing to leave the other question to the jury, and ordered a new trial limited to the issue whether after 18th July 1952 a tenancy

(1) (1874) L.R. 9 Ex. 151.

existed between Towers and Mrs. Keen. The new trial took place before *Maguire* J., the parties by consent dispensing with a jury. *Maguire* J. correctly observed that the Full Court had held no more than that there was evidence of a tenancy fit to be submitted to a jury, and he decided as a matter of fact that there was no tenancy in existence at the material time. A second appeal was made to the Full Court, which affirmed the judgment of *Maguire* J. It is from this decision that the present appeal is brought.

The question whether there was a tenancy subsisting at the date of the assignment would, of course, if *Maguire* J. had sat with a jury, have been a question for the jury. But it would have had to be left to the jury with a very careful direction as to certain matters of law. And a proper charge to the jury must, in my opinion, have included directions to the effect that (1) what the tenant had to prove was an agreement that the tenancy should continue in spite of the expiration of the notice to quit, and (2) if they found that the parties had by mutual consent treated the tenancy as still subsisting after the expiration of the notice, they should infer that such an agreement had been made. It would not, I think, have been necessary to tell them that the effect in law of such an agreement would be to create a new tenancy, and it would have been perhaps not wrong, but certainly most misleading, to tell them without more that what the tenant had to prove was that the parties had agreed that a new tenancy should be created. Yet it was, I think, along these lines that *Maguire* J., proceeding without a jury, directed himself, and I think that his ultimate finding was reached on a misunderstanding of the true position at common law.

Both *Maguire* J. and the Full Court correctly stated the difference between what has been called waiver of a forfeiture and what has been called waiver of a notice to quit. When a forfeiture is incurred, the tenancy becomes voidable only and not void: the landlord has an election whether he will re-enter or sue in ejectment or whether he will allow the tenancy to continue. The important point is that "waiver" is here a unilateral matter: any unequivocal act or statement by the landlord will suffice to establish it. If once the landlord has shown an election to allow the tenancy to continue, he cannot change his mind against the tenant's will, and the tenancy continues notwithstanding anything he may say or do: *quod semel in electionibus*, etc. But, when a valid notice to quit has been given and has expired, no question of election arises. The tenancy simply comes to an end, and the relation of landlord and tenant cannot be re-established by any unilateral act: the agreement or

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assent of both parties is necessary. The distinction is well illustrated by contrasting *Doe d. Cheny* v. *Batten* (1) with *Davenport* v. *The Queen* (2).

In the present case, it has never been disputed that it was necessary for the tenant to prove assent or agreement. What has been in dispute is the effect of certain cases in which it has been held that the legal result of assent or agreement is not that the old tenancy is continued but that a new tenancy is created. In *Blyth* v. *Dennett* (3) (although the point was of no importance) the court clearly took the view that, if there was a " waiver " or " withdrawal " of a notice to quit *after* its expiration, a new tenancy would be created. It would seem impossible to doubt the correctness of this view. In *Tayleur* v. *Wildin* (4), however, the Court of Exchequer went much further. In that case there had been a " withdrawal " of a notice to quit *before* its expiration, and it was held that a new tenancy, distinct from the old, was created as from the expiration of the notice. It is indeed not surprising that this decision did not commend itself to the Court of Appeal in Ireland in *Lord Inchiquin* v. *Lyons* (5). However, in *Freeman* v. *Evans* (6) the Court of Appeal applied *Tayleur* v. *Wildin* (4), saying that it had been uniformly accepted and acted upon in England.

In the present case, as in *Blyth* v. *Dennett* (3), the agreement, if any was made, was made *after* the expiration of the notice to quit. It is therefore clear, whatever may be thought of *Tayleur* v. *Wildin* (4), that, if any agreement were made, it would have technically the effect of creating a new tenancy. It is not, therefore, wrong to say that the ultimate question in the case is whether the landlord and the tenant agreed that a new weekly tenancy should follow on the old weekly tenancy, which had been terminated by the notice to quit. But such a statement of the question is apt to be very misleading. For it is not to be supposed that a tenant in the position of the appellants fails to establish the subsistence of a tenancy at the material time unless he shows that there was a conscious intention on the part of himself and his landlord to create a new tenancy as distinct from continuing the old. If (to take a very clear example) the tenant wrote to the landlord, saying :— " I ask you to allow my tenancy to continue as from the expiration of your notice to quit ", and the landlord wrote back, saying :— " I am quite agreeable to that course ", the tenant would have a clear defence in an action of ejectment. The result would be the

(1) (1775) 1 Cowp. 243 [98 E.R. 1066].
(2) (1877) 3 A.C. 115.
(3) (1853) 13 C.B. 178 [138 E.R. 1165].
(4) (1868) L.R. 3 Ex. 303.
(5) (1887) 20 L.R. Ir. 474.
(6) (1922) 1 Ch. 36.

same if the actual terms of their agreement were that the notice to quit should not be regarded as having terminated the tenancy. What the law says in such cases as this is not that the parties must have consciously assented to a new tenancy, but that, if they have assented to the existence of a tenancy, the tenancy which their assent creates is a new tenancy. In other words, a new tenancy may be effectively created after the expiration of a notice to quit, although the parties never addressed their minds to a new tenancy as such, but have thought throughout in terms of an uninterrupted and unchanged relation of landlord and tenant. There are passages in *Blyth* v. *Dennett* (1) and in *Clarke* v. *Grant* (2), which might at first sight appear to be opposed to the view which I have expressed, but they were clearly, I think, not intended to deny that view. If that view were incorrect, tender and acceptance of rent could never be sufficient evidence of the existence of a tenancy. Yet it is well settled at common law that tender and acceptance of rent, if unexplained, will establish the existence of a tenancy : see *Blyth* v. *Dennett* (1), per *Jervis* C.J. (3) and per *Maule* J. (4).

One other observation should be made. While it must not be forgotten that in the one case agreement must be proved while in the other a unilateral act will be enough, yet, generally speaking, very much the same *kind* of evidence will suffice to establish " waiver " of a notice to quit as will suffice to establish waiver of a forfeiture. The agreement which it is necessary to prove may (as has often been said) be either express or implied, and it is far more common to find a tenant setting up an implied agreement than an express agreement. Moreover, in this type of case, perhaps more than in any other, it is necessary to remember that the effect of what one party says or does must depend not on what his real intention is, but on what the other party would reasonably believe to be his intention. If we find the parties clearly acting on a conventional basis, we may find quite enough to require the inference of an implied agreement. The same inference may arise if we find one party acting as he would presumably not have acted if it had not been for a reasonable belief induced by the other that that other was accepting a certain position as subsisting.

One other matter must be mentioned before proceeding to consider the evidence in this case. In such cases at common law tender and acceptance of rent will often be decisive in favour of the tenant. This is because it is prima facie not explainable on any

(1) (1853) 13 C.B. 178 [138 E.R. 1165].
(2) (1950) 1 K.B. 104.
(3) (1853) 13 C.B., at p. 180 [138 E.R., at p. 1166].
(4) (1853) 13 C.B., at p. 181 [138 E.R., at p. 1166].

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other basis than that the parties are treating the relation of landlord and tenant as still subsisting. In the present case, however, the position is affected by s. 80 of the *Landlord and Tenant (Amendment) Act* 1948, which provides that in the case of prescribed premises tender and acceptance of rent for a period of six months after the giving of a notice to quit shall not " of itself constitute evidence of a new tenancy or operate as a waiver of a notice to quit ". There is an obvious ambiguity in these words. Applying the principle that a statute should not be construed as altering the common law to a greater extent than is made clear by its language, I would not treat s. 80 as meaning that evidence of tender and acceptance of rent is inadmissible on the issue of waiver or new tenancy, but as meaning only that such evidence cannot be alone sufficient to establish the affirmative of the issue. I agree, with respect, with the view of the Full Court in *Arnold* v. *Mann* (1), where their Honours said : " The unqualified acceptance of rent by a landlord, after the expiration of a notice to quit is, however, a circumstance to be considered along with other facts when the inquiry is whether a new tenancy has been created or not " (2).

It is in the light of all these considerations that the matters on which the appellants rely must now be approached. Those considerations were evidently fully present to the minds of the Full Court on the former appeal, and, although the judgment delivered on that occasion determined only that there was a question to go before a jury, one is left in little doubt as to how that court would have decided the question if the decision had been for them. In fact the question did not go before a jury, and, since it turns entirely on correspondence and facts which are not in dispute, this Court (whatever might have been the position if a verdict of a jury had been in question) is in as good a position as the learned trial judge to decide it. It should be mentioned at the outset that the lessor, Mrs. Keen, had authorised her solicitors, Messrs. Warrington Connolly & Co., to deal with the whole matter and conduct all negotiations on her behalf up to the time when she conveyed the property to the respondent.

The option of renewal contained in the lease was not exercised within the time prescribed. The term, as has been said, expired on 16th May 1952 and Towers (whom it will be convenient to call the lessee) became after that date a weekly tenant at a rental of £5 per week. On the day before it expired Mrs. Keen (whom it will be convenient to call the lessor) gave notice under s. 129 of the

(1) (1956) S.R. (N.S.W.) 212 ; 73 W.N. 250.

(2) (1956) S.R. (N.S.W.), at p. 218 ; 73 W.N., at p. 254.

Conveyancing Act 1919 requiring the lessee to remedy an alleged breach of covenant within a reasonable time. The notice to quit was given on 17th June 1952, and expired according to its terms on 18th July 1952. In the meantime on 1st July the lessee's solicitors wrote to the lessor referring to the notice to quit, and saying that Towers had removed the structure alleged to have been erected in breach of his covenant. They added : " We feel sure that you will appreciate that he has rectified the position as promptly as possible". On 3rd July the lessor's solicitors wrote acknowledging this letter as an admission of a breach of covenant, and asking to be advised whether the lessee was " prepared to vacate the premises on or before 18th July in accordance with the notice to quit served upon him ". The letter concluded : " Should he not be prepared to vacate the premises, our instructions are to proceed with ejectment proceedings ". This letter brought a prompt reply. On 4th July the lessee's solicitors wrote saying that their client " is definitely not prepared to vacate the subject premises ".

This letter of 4th July is, I think, as the Full Court thought, of considerable importance. The lessee has remedied the breach of covenant, and has declared unequivocally that he will not go out when the notice to quit expires. One would certainly have expected that declaration, if the lessor did not intend the tenancy to continue, to be met, at latest immediately on the expiration of the notice to quit, by a declaration that the lessee had no right to remain in possession. There has been a good deal of discussion as to whether the lessor's silence and inactivity were dictated or influenced by the decision in *Krupa* v. *Zacabag Pty. Ltd.* (1). This may indeed serve to explain the attitude of her solicitors. At any rate, nothing in fact happens, except that rent continues to be tendered and accepted, until 18th September 1952, two months after the expiration of the notice to quit, when it is the lessee's solicitors who become active.

In September the lessee was contemplating selling his business to the appellants and on the 19th of that month his solicitors wrote to the lessee's solicitors, enclosing a number of references as to the appellants' character and financial standing, and requesting " the approval of your client to the transfer of the existing tenancy to the purchasers ". The lessor's solicitors replied on 23rd September 1952 referring to a telephone conversation which had taken place between them and saying : " We confirm the fact that your client desires either an assignment of his present weekly tenancy or a fresh weekly tenancy granted in favour of the purchasers". It

(1) (1950) 50 S.R. (N.S.W.) 304 ; 67 W.N. 221.

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seems to me difficult to imagine a clearer recognition of an existing weekly tenancy than is contained in this letter. It is true, as *Maguire* J. said, that it purports literally to do no more than repeat a statement made by the lessee's solicitors. But that is not the whole truth. It imports also a clear acceptance of the position so stated. But much more was to follow.

On 1st October 1952 the lessor's solicitors wrote to the lessee's solicitors a letter, which did not refer to the proposal for an assignment or to the references as to the purchasers, but offered a lease to the purchasers of a reduced area of land. The lessee's solicitors replied on 10th October " placing on record " that they had not requested a lease but had requested " approval to the transfer of the existing tenancy ". They add that they can only assume from the correspondence and telephone conversations that the lessor has refused to consent to the proposed assignment, and they say that such refusal is a breach of the covenant in the lease that consent to an assignment shall not be unreasonably withheld. The next letter was written on 13th October by the lessor's solicitors to the lessee's solicitors. It begins by taking a rather nice point by " presuming " that when the lessee's solicitors speak of the transfer of the existing tenancy they mean an assignment. There follows a rather obscure reference to " the question of the weekly tenancy ", which I take to refer to a contention which had been put forward some time before by the lessee that he was entitled to a renewal of the lease as distinct from a weekly tenancy, a contention which seems to have been untenable and which had been emphatically rejected before the notice to quit was given. The letter repeats the offer of a lease, but says that the references submitted are definitely not satisfactory. It says that any assignment without consent will be the subject of immediate ejectment proceedings and concludes : " However, should the purchasers wish to obtain an assignment, if the usual documentary evidence is submitted to us, we will forward the same to our clients with a request for further instructions ". A further reference was forwarded by the lessee's solicitors on 14th October, and on 15th October the lessor's solicitors write saying that, if the lessee is prepared to have his tenancy varied by excluding part of the premises, the landlord will be prepared to grant a lease at a rental of £3 10s. 0d. per week. They add that they are " still not satisfied with the references produced ". This letter again appears to me clearly to recognise the existence of a tenancy.

It is against the background of all this correspondence that the payment of rent must be viewed. In fact rent was tendered and

accepted up to the date of the assignment, and one month's rent was tendered and accepted in November, which was after the assignment. That alone would not be enough, but in its setting it assumes special significance, and s. 80 of the Act does not, in my opinion, as I have said, forbid us to attach significance to it.

The assignment of the tenancy is dated 24th October 1952, but it appears to have been forwarded by the lessee's solicitors to the lessor's solicitors on 22nd October 1952 with a letter asking for the lessor's approval and stating that they regard consent as having been unreasonably withheld. The appellants appear to have entered into possession immediately, and on 25th October their solicitor writes to the lessor enclosing cheque for £20 for rent for the four weeks commencing 20th October. On 16th December he writes again saying that a draft lease has been handed to him and asking for the survey plan of the land comprised in it. The reply to this letter, which is dated 18th December (i.e. two months after the assignment) is remarkable. There is no suggestion that the lessee had nothing to assign. It says that there is no survey plan in existence, and then, obviously referring to the assertion, on the basis of which the assignment has been executed, that consent had been unreasonably withheld, says : " The solicitors acting for *the outgoing lessee* had occasion to refer us to the restriction imposed by the Conveyancing Act on the lessor's refusal to consent to an assignment or subletting, but this right is expressly restricted in a clause of the lease granted to Mr. James Towers on 30th May 1949."

The next letter from the lessor's solicitors is not written until 10th March 1953, i.e. some five months after the assignees have taken possession. This letter enclosed a cheque for £20 by way of refund of an amount of £20 which had been paid by cheque as for rent in November. This letter says that the lessor " does not recognise you as having any rights to be in possession of the property and accordingly appropriate action will be taken ". Even now there is no suggestion that Towers had nothing to assign. What is said is quite consistent with the view that the challenge to the assignment is on the ground that consent had not been unreasonably withheld. The reply to this letter, which is dated 18th March 1953, points out that the amount said to be refunded was paid as long ago as 22nd November 1952, the cheque having been presented for payment on 29th November. It says : " Your statement that my clients have no right to occupy the property is emphatically denied. As you are aware, the tenancy of the property was assigned to them by Mr. Towers, the former tenant, after protracted negotiations to obtain the consent of your client." There was no reply to this letter.

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The rest of the correspondence does not, I think, matter. It continues in a very desultory way, with much tender and refusal of cheques, until 2nd November 1953, when the writ is issued.

In considering what inference should be drawn from all the evidence it is permissible, I think, to look at all the letters up to and including the letter of 18th December 1952. Some of these were written after the assignment, and it was not contended that any new tenancy was created after the assignment between Mrs. Keen or Mrs. Mann and the appellants. But letters written after the assignment may have a very definite bearing on the inference to be drawn from the earlier correspondence, and the later letters here do, in my opinion, strongly support the view that Towers and Mrs. Keen were both proceeding before the assignment on the agreed basis that Towers's tenancy had not come to an end. And that, in my opinion, is quite sufficient for the appellants. It is, as I have said, nothing to the point to say that neither of them thought about creating a new tenancy as distinct from continuing the old.

The position as I see it was simply this. Towers was asserting throughout that the weekly tenancy which followed on the expiration of the term of his lease was still existing notwithstanding the notice to quit. This was no idle assertion. Apart altogether from the fact that this assertion may have seemed to be supported by *Krupa* v. *Zacabag Pty. Ltd.* (1) he might have denied breach of covenant or asserted that any breach had been remedied within a reasonable time. The lessor's solicitors knew from the beginning that he was maintaining that he had a weekly tenancy. He remained in possession without challenge after the expiration of the notice to quit and in September he asked for the lessor's consent to an assignment of his existing tenancy. The reply to this request refers to his present weekly tenancy. The lessor does not wish to consent to an assignment but desires to grant a new lease of a smaller area to the assignees. Knowing that the lessee's purpose in obtaining references is to effect an assignment, she expresses dissatisfaction with the references forwarded regarding the character and financial resources of the appellants, and further references are obtained. She says that a mere invitation to make inquiry of a bank is insufficient, because it is " the purchaser's obligation to place the relevant evidence before the lessor." The lessee is asked to agree to " have his tenancy varied " by excising a portion of the area. With regard to the references she remains dissatisfied. The lessee then expresses the view that consent to an assignment has been unreasonably withheld, and he assigns without consent. No

(1) (1950) 50 S.R. (N.S.W.) 304 ; 67 W.N. 221.

suggestion that the lessee had nothing to assign is made until many months afterwards. Nothing at all is said or done by the lessor for some two months, and then she makes no suggestion that the lessee had no tenancy. Instead, in a letter which refers to the "outgoing lessee", she says that the statutory requirement that consent shall not be unreasonably withheld was qualified by the terms of the lease. In other words, she relies, and relies only, on the view that the assignment could not be justified on the ground that consent had been unreasonably withheld. No question of consent could arise if there was no tenancy to assign. Looking at the whole of the facts and the correspondence, I think the conclusion inescapable that, between the expiration of the notice to quit and the assignment, the lessor and the lessee were dealing with one another on the agreed and accepted basis that the weekly tenancy had not come to an end but was still subsisting. And the legal result is, in my opinion, that a new tenancy was created between them.

The appeal should, in my opinion, be allowed.

KITTO J. The appellants in this case were the defendants and the respondent was the claimant in an action of ejectment in the Supreme Court of New South Wales. The respondent is seised of an estate in fee simple in the land the subject of the action, having acquired his title by a conveyance from a Mrs. Keen about September 1953. The appellants, as appears from a letter of 24th December 1953 from their solicitors to the respondent's solicitors, defended their possession of the land on two grounds: (1) that Mrs. Keen had leased the land by a deed of 30th May 1949 to one James Towers, and that by virtue of an assignment from Towers dated 24th October 1952 they held the land as tenants from week to week; and (2) that Mrs. Keen, by certain conduct of hers after the date of the assignment, had accepted the defendants as lessees of the land from her.

The action was tried before *McClemens* J. and a jury. The lease of 30th May 1949 from Mrs. Keen to Towers was proved. It was a lease of the subject land for a term of three years from 16th May 1949, with a proviso that if the lessee should be permitted to hold over after the expiration of the term he should be deemed to be a weekly tenant only, at a rental of £5 per week, the tenancy to be terminable by a week's notice in writing by either party. There was an option of renewal, but it was not exercised. From 16th May 1952, therefore, Towers was a weekly tenant.

The lease made applicable to the weekly tenancy certain covenants of which two only need be mentioned. One was a covenant

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against assigning or subletting without leave, the meaning which would otherwise be given to that covenant by Pt. II of Sched. IV of the *Conveyancing Act* 1919 (N.S.W.) being modified so as to provide that the lessor's consent should not be refused in the case of an assign tenant or occupier proved to the reasonable satisfaction of the lessor to be respectable and responsible. The other covenant was that the lessee should not make or carry out any structural alterations or additions to the premises without the written consent of the lessor.

On 17th June 1952, Mrs. Keen served on Towers a notice to quit the premises on or before 18th July 1952. It is not disputed that this notice satisfied the requirements of the common law for the determination of Towers's weekly tenancy. By reason of the provisions of s. 62 (2) of the *Landlord and Tenant (Amendment) Act* 1948 (N.S.W.), the notice could not operate to produce this result unless it were given upon one of the grounds prescribed in the several paragraphs of s. 62 (5). It purported to be given upon the ground stated in par. (b) (i), namely that the lessee had failed to observe a term or condition of the lease the observance of which had not been waived or excused by the lessor, the term or condition referred to being the covenant against making or carrying out structural alterations or additions without consent. The jury found at the trial that such a breach had in fact been committed. The notice to quit therefore operated, by force of s. 67 of the *Landlord and Tenant (Amendment) Act*, to terminate Towers's tenancy. It is nothing to the point, though it is the case, that Mrs. Keen had given Towers a notice to remedy the breach of covenant and that after the service of the notice to quit the breach was remedied. The situation brought about by the expiration of the notice to quit on 18th July 1952 was that Towers had no tenancy in the strict sense of the word, but that he remained protected against dispossession by the lessor, whether by peaceable re-entry or otherwise, unless and until an order for possession should be made by a court of competent jurisdiction under Pt. III of the Act and the time for the execution of the order should expire, being liable to pay the rent and observe the other obligations of the former tenancy, so far as applicable, in the meantime : *Anderson* v. *Bowles* (1) ; *Bonnington & Co. Pty. Ltd.* v. *Lynch* (2). He thus had a personal right of occupation, but no interest in the land capable of assignment : *Read* v. *Morris* (3).

(1) (1951) 84 C.L.R. 310, at p. 320.
(2) (1952) 86 C.L.R., at p. 268.
(3) (1952) 53 S.R. (N.S.W.) 39, at pp. 43, 45, 53 ; 70 W.N. 53, at pp. 56 *et seqq.*

Nevertheless Towers purported to assign to the appellants, by the deed of 24th October 1952 upon which they relied in the action, a weekly tenancy under the proviso in the lease of 1949 as to holding over after the expiration of the three year term. Since he had no such tenancy, the proof of this purported assignment at the trial did not enable the defendants to succeed on the first of the grounds specified in their solicitors' letter of 24th December 1953. Neither did they succeed on their second ground, namely that Mrs. Keen had accepted them as her tenants after the date of the purported assignment. The jury accordingly returned a verdict for the claimant.

An appeal was taken to the Full Court of the Supreme Court, and that Court ordered a new trial, limited to the question whether, after the expiration of the notice to quit, a tenancy existed between Mrs. Keen and Towers: *Arnold* v. *Mann* (1). This meant, of course, whether after the expiration of the notice to quit a new tenancy was created by agreement between Mrs. Keen and Towers. The reason for directing the new trial on this question was that their Honours considered that there was evidence from which a finding might be made that such a tenancy was created, and that if the finding should be made it would follow, by reason of the provisions of ss. 62 and 69 of the *Landlord and Tenant (Amendment) Act*, that the question whether the appellants had acquired the status of assignees or not would be a matter within the exclusive jurisdiction of a court of petty sessions: (2).

The new trial was had before *Maguire* J., who sat, by consent, without a jury. His Honour found that there was no tenancy between Mrs. Keen and Towers after the expiration of the notice to quit, and accordingly he gave a verdict and judgment for the claimant. The Full Court, on appeal, affirmed this decision, and from that Court's judgment the present appeal is brought.

The material relied upon by the appellants to establish that a new tenancy arose between Mrs. Keen and Towers after 18th July 1952 consisted of the fact that Towers thereafter remained in possession, the fact that he made and Mrs. Keen accepted payments of rent *eo nomine*, and the contents of a body of correspondence between the parties' respective solicitors. The payments of rent were accepted in respect only of periods within six months after the giving of the notice to quit; and, that being so, Mrs. Keen's acceptance of them cannot of itself be regarded as constituting evidence of a new tenancy, for s. 80 of the *Landlord and Tenant (Amendment) Act* 1948 so provides. What weight it should be

(1) (1956) S.R. (N.S.W.) 212; 73 W.N. 250.

(2) (1956) S.R. (N.S.W.), at p. 222; 73 W.N., at p. 257.

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given in a consideration of the facts as a whole is another matter; though even in such a consideration the existence of s. 80 must be taken into account as a relevant circumstance. Indeed the existence of all the provisions of the *Landlord and Tenant (Amendment) Act* as they applied to the situation must be borne constantly in mind, for it provides a background against which the conduct of the parties may take on an aspect quite different from that which it would wear if it had occurred in a situation governed only by the common law. This has been recognised time and again by the courts both in England and in this country. One of the earliest cases in which it was brought out was *Davies* v. *Bristow* (1). We do not need in the present case to consider whether the learned judges in *Davies* v. *Bristow* (2) were right in the view they appear to have taken that at common law a landlord's acceptance of money tendered by his former tenant as rent in respect of a period after the expiration of a notice to quit is not conclusive evidence of a tenancy in that period. The Court of Appeal has agreed with that view in *Clarke* v. *Grant* (3), but without adverting to the question whether the landlord should be allowed to set up that money offered to him for one purpose he has wrongfully retained for another: see a learned article by Mr. *J. F. Clerk* (4); *Foa's General Law of Landlord and Tenant* 7th ed. (1947) p. 608, note (o). But even if, in a state of affairs unaffected by statute, proof of an acceptance of rent in respect of a period after the expiration of a notice to quit is conclusive at common law to establish the creation of a new tenancy, it is clear enough that it cannot be conclusive when the period in question is one in which the former tenant is protected by statute from being dispossessed. In England there is no such provision as is made in New South Wales by s. 80; yet the fact that because of protective legislation the landlord has no choice but to leave the former tenant in possession has been consistently held, except in *Hartell* v. *Blackler* (5) where the effect of the statutory provisions was not brought to the court's attention, to create a situation in which of necessity the inquiry must always be whether a contract of tenancy in respect of a period after the expiration of the notice to quit was formed by an actual agreement between the parties: *Shuter* v. *Hersh* (6); *Felce* v. *Hill* (7); *Morrison* v. *Jacobs* (8); *Marcroft Wagons Ltd.* v. *Smith* (9). See also the Australian cases cited by *Davidson* J. in *Long* v. *Fairbank* (10), and the

(1) (1920) 3 K.B. 428, at p. 439.
(2) (1920) 3 K.B. 428.
(3) (1950) 1 K.B. 104.
(4) (1921) 37 L.Q.R. 203.
(5) (1920) 2 K.B. 161.
(6) (1922) 1 K.B. 438.
(7) (1923) 92 L.J.K.B. 974.
(8) (1945) 1 K.B. 577.
(9) (1951) 2 K.B. 496.
(10) (1947) 64 W.N. (N.S.W.) 205.

more recent cases of *Piggott* v. *Seeberg* (1) and *Christopher* v. *Wright* (2). What is said in these cases in relation to payments of rent illustrates the broader proposition, that words and conduct upon which a former tenant relies as having created a new tenancy must be considered and interpreted in the context of the statutory situation as known to the parties at the time.

It is necessary, then, to consider the correspondence, remembering that the appellant was at all material times in possession of the land and paying rent, and to see whether, interpreted in the light of what appears to have been understood of the effect of the *Landlord and Tenant (Amendment) Act* as applied to the case, a new relationship of tenancy was formed between Mrs. Keen and Towers. The inquiry is not, of course, whether any particular form of words was used. It is simply whether the parties at any stage came to be *ad idem* in mutual manifestations of intention that a relationship of landlord and tenant should exist between them notwithstanding any effect which the notice to quit had produced. I express the question in this way because there was room at the relevant period for difference of opinion as to whether or not the expiration of the notice to quit had terminated the tenancy which arose by holding over. On the view which had been expressed by the Full Court of the Supreme Court in one case it had : *Richardson* v. *Landecker* (3). On the view which had been expressed by the same court in two other cases it had not : *Krupa* v. *Zacabag Pty. Ltd.* (4) ; *Furness* v. *Sharples* (5). And what the High Court had had occasion to say on the point in *Anderson* v. *Bowles* (6) had not been decisive. The evidence does not reveal whether the solicitors who wrote the letters were aware of any of these cases, or what views they held as to the state of the relevant law.

The first of the letters which needs to be noticed was written by Mrs. Keen's solicitors to Towers's solicitors on 3rd July 1952, the notice to quit being then current. They referred to a written acknowledgment by Towers that the covenant (*scil.* as to the structural alterations) had been broken and a statement that the breach had been rectified. After asking whether Towers was prepared to vacate the premises on or before 18th July in accordance with the notice to quit, they threatened ejectment proceedings if he should not. The reply, dated the next day, was that Towers was definitely not prepared to vacate the premises. Apart from

(1) (1949) 66 W.N. (N.S.W.) 198, at pp. 199, 200.
(2) (1949) V.L.R. 145, at pp. 148, 149.
(3) (1950) 50 S.R. (N.S.W.) 250 ; 67 W.N. 149.
(4) (1950) 50 S.R. (N.S.W.) 304 ; 67 W.N. 221.
(5) (1950) 51 S.R. (N.S.W.) 13 ; 68 W.N. 18.
(6) (1951) 84 C.L.R., at p. 320.

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payments of rent, which in the circumstances must be regarded as equivocal, nothing more was said or done by either side until some communication of an undisclosed nature occurred between Towers and Mrs. Keen which led to a letter being written by Towers's solicitors to Mrs. Keen's solicitors on 19th September 1952. This letter referred to " previous correspondence in connection with premises (describing the subject premises) in respect of which our client, Mr. James Towers, is the Tenant of Mrs. M. I. Keen of a Butcher Shop". It stated that Towers was contemplating a sale of his business, enclosed references in respect of the proposed purchasers, and requested Mrs. Keen's approval " to the transfer of the existing tenancy " to the purchasers. This was, clearly enough, an assertion that Towers had an assignable tenancy of some unspecified description. The reply, dated 21st September 1952, said " We confirm the fact that your client desires either an assignment of his present weekly tenancy or a fresh weekly tenancy granted in favour of the purchasers " ; and it added that the client's instructions had been asked for. The words quoted were regarded by *Maguire* J. as merely a recapitulation of what was understood by the request for approval of a " transfer of the existing tenancy " ; but it is to be noticed that they not only speak of an " existing tenancy " but describe it as a weekly tenancy. The addition of this description makes the words more than a recapitulation ; they show that Mrs. Keen's solicitors either were under the impression that because of the operation of the *Landlord and Tenant (Amendment) Act* the weekly tenancy in respect of which the notice to quit had been given was undetermined, or that the Act had given rise to new rights in Towers which might be described as a weekly tenancy. But whichever it was, two things are clear : the letter evinces no intention on the part of the writer to affect in any way the legal situation existing between his client and Towers, and so far as appears the writer had no authority from Mrs. Keen, who as yet knew nothing of the inquiry to which the letter was a reply, to express for her any intention or to make for her any promise concerning the property. In truth the letter is no more than an admission, which turns out to have been misconceived on any view of its meaning. It was not contractual in character. It was not a response to anything which sought a declaration of Mrs. Keen's intention as to whether or not a tenancy should be taken to exist. There seems to me to be a wide distinction between, on the one hand, an assent by one party to an assertion by the other that a consensual tenancy is to be taken to exist between them, and, on the other hand, an assent by one party to an assertion by the other

that a tenancy exists between them in consequence of the operation of a statute and independently of any *consensus*. The former may have the effect of an acceptance of an offer. The latter cannot be, or be understood as, anything more than an admission of an existing fact; it leaves unaltered the relation of each party to the property, and, subject to any question of estoppel, it may later be withdrawn. Of the latter kind is the admission in the letter of 23rd September 1952. It does not support a conclusion that a tenancy was created " by two assenting minds " : cf. *Maconochie Bros. Ltd.* v. *Brand* (1).

Mrs. Keen's solicitors wrote again on 1st October 1952, saying that subject to certain conditions being fulfilled their client was prepared to grant to the purchasers a lease of a reduced area at a weekly rental of £4. Apparently a few days later they altered this offer by telephone, reducing the area still further, increasing the rent to £4 10s. 0d., and requiring a premium of £200. To this the solicitors for Towers replied on 10th October 1952, placing on record that neither they nor the proposed tenants had requested a lease but in fact had requested approval to (they quoted) " the transfer of the existing tenancy ". They said they could only assume that Mrs. Keen had refused to consent to the proposed assignment, and that her consent had been withheld unreasonably. Mrs. Keen's solicitors answered this in a letter of 13th October 1952. Though not remarkable for clarity, this letter showed that the question whether the references which had been submitted in regard to the proposed purchasers were satisfactory had been considered from the point of view only of granting a new lease. A statement which Towers's solicitors had made, that Mrs. Keen might refer to a certain bank, was answered by saying that it was the purchasers' obligation to place the relevant evidence before the lessor in order that a decision might be arrived at. In the context, the only decision which this can be taken to have contemplated was a decision as to whether the purchasers were suitable to be given a fresh lease. But there followed two paragraphs which plainly admitted that Towers had an assignable tenancy. One said that " any assignment without consent will be the subject of immediate ejectment proceedings ", and the other said that " should the purchasers wish to obtain an assignment, if the usual documentary evidence as required in these cases is submitted to us we shall forward the same to our clients with a request for further instructions ". This admission, like the admission in the letter of 23rd September 1952, must mean either that the weekly tenancy under the holding-over provision of the old lease was thought to be, by

(1) (1946) 2 All E.R. 778, at p. 779.

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reason of the statute, undetermined by the notice to quit, or that after the determination of that tenancy an assignable statutory tenancy had arisen in favour of Towers. But here again it must be recognised that the admissions, occurring as they do in a discussion of possible future dealings, disclose no intention to produce by their own force any effect upon the existing situation, either by creating a tenancy or by confirming or continuing a tenancy. And, as I have pointed out, admitting in the course of a discussion as to future action that a tenancy exists as a consequence of the operation of a statute is a very different thing from expressing an intention to join in creating or keeping on foot a consensual tenancy.

Towers's solicitors next submitted some additional references, and on 15th October 1952 Mrs. Keen's solicitors wrote that, provided Towers was prepared " to have his tenancy varied by reason of having the dwelling portion of the premises excluded from the area previously outlined to you ", subject to formalities being attended to Mrs. Keen would be prepared " to grant a lease " in favour of the purchasers. They added that the references were not satisfactory and indicated generally what was required. The expression " to have his tenancy varied " admits once more that Towers had some form of tenancy; but it adds nothing to the case. What was said in the letter about further references obviously referred only to the question of granting a new lease.

Mrs. Keen's solicitors wrote no other letter before Towers executed the assignment under which the appellants claim to retain possession. Nothing that happened thereafter can be relied upon as having created a tenancy, for the issue to be tried before *Maguire* J. related only to any tenancy between Mrs. Keen and Towers. Even when the correspondence which subsequently passed between Mrs. Keen's solicitors or Mrs. Mann's solicitors and the solicitors for the purchasers is searched for possible admissions, there is little to be considered and nothing to which the observations already made do not apply. There were silences at some points where denials of a tenancy might have been expected if the true legal position had been realised, but whether it was realised or not there is nothing to indicate.

The conclusion to be drawn from the correspondence as a whole seems to me to be that neither party addressed his or her mind either to creating a new tenancy or to continuing the old. Each took a view as to what was the situation which had arisen out of the application of the *Landlord and Tenant (Amendment) Act* to the case. Each seems to have thought that that situation was more favourable to Towers than it really was, but neither is shown to

have had the slightest intention of either creating a new tenancy or giving a new consensual force to their existing relationship. Towers continued at all times to insist upon what he conceived that relationship to be, and Mrs. Keen admitted that she took the same or a similar view of it, except that she refused to concede that Towers had a right in the circumstances to make an assignment to the purchasers without her consent.

At least that is as high as the appellants seem to me to be able to put the case. In my opinion *Maguire* J. and the Full Court were right in concluding that the appellants had not discharged the onus that lay upon them of establishing the creation of a new tenancy between Mrs. Keen and Towers after the expiration of the notice to quit.

The appeal, in my view, should be dismissed.

Appeal dismissed with costs.

Subject to an undertaking on the part of the appellant to pay a sum of £5 a week to the respondent in respect of the premises in the meantime, the Court will direct that this order be drawn up as of Thursday, 14th November, 1957.

Solicitors for the appellants, *Meyer-Thoene & Kandy.*
Solicitors for the respondent, *Warrington Connolly & Co.*

R. A. H.