at will, even if there has been an actual determination of the tenancy, and though that actual determination of the tenancy may have taken place before twenty years have run out from the end of the first year of the tenancy. *Quære*, however, whether in the present case, by means of the letting and transferring by the tenant at will, any actual determination of the tenancy had taken place before twenty years had run out from the end of the first year of the tenancy.

[19 W. R. 1017.—P. C. C.]

This was an appeal from the Supreme Court of New South Wales in an action of ejectment.

The facts will be found fully stated in the judgment of the Judicial Committee.

July 15, 17.—*J. Brown*, Q. C., and *Laing*, for the appellant.—It is agreed between us that the English Statute of Limitations, 3 & 4 Will. 4, c. 27, applies* as was assumed below. The true construction of the 7th section is that which was put upon it by the dissenting judge in the Court below, viz., that the statute runs in the case of a tenancy at will from the determination of the tenancy, or from the end of the first year of the tenancy, "whichever shall first happen." It can never run from a later period than the end of the first year. That the true construction of the section is such as we say, is clear, and was expressly decided in *Bennett* v. *Turner*, 7 M. & W. 226 (not dissented from in error, 9 M. & W. 643); *Goody* v. *Carter*, 9 C. B. 863. The construction put upon it by Lord St Leonards is the same. Sugden's Vendors and Purchasers, vol. 2, p. 350 of 10th edition. Therefore, even if there was an actual determination of the tenancy at will in the present case by the tenant's underletting and transferring, that fact alone is immaterial. We admit that, if a tenant at will underlets, his landlord has a right to treat the tenancy as determined; but, if the landlord does not exercise his right, the tenancy remains, as in any other case of forfeiture. It is doubtful, therefore, whether in the present case there was an actual determination of the tenancy. No doubt if there was an actual determination of the tenancy, followed by the creation of a fresh tenancy, that may have been material; but a tenancy at will can only be created by actual agreement express or implied; *Ley* v. *Peter*, 6 W. R. 437, 3 H. & N. 101, 27 L. J. Ex. 239; and there was no evidence of such an agreement. It is clear that mere inaction of a landlord whose tenant at will had done an act determining his tenancy, cannot be construed as the grant of a fresh tenancy at will.

C. E. Pollock, Q. C., and *J. C. Day*, for the respondents.—The true construction of 3 & 4 Will. 4, ch. 27, s. 7, is that the statute is to run from the actual determination of the tenancy or from the end of the first year of the tenancy "whichever shall last happen," or that it is so to run, if there has been such an actual determination before the lapse of twenty years from the end of the first year of the tenancy. If that is not the construction of the section, then the true construction is, that the words "if there has been no actual determination of the tenancy" are to be considered as inserted, and the section is to be read thus:—The right of entry shall be deemed to have accrued either at the determination of the tenancy, or if there has been no actual determination of the tenancy (or no actual determination of the tenancy before the end of the period which would suffice to create a bar on the next following alternative) then at the expiration of one year next after the commencement of such tenancy. Either form of this construction is sufficient for us. There was not only an actual determination of the tenancy before the litigation arose but an actual determination before the end of twenty years from the end of the first year of the tenancy, *i. e.*, before the lapse of the time sufficing to give a bar upon the second alternative. Upon this view of the section, the section intended to provide for the case where the joint will of the lessor and the tenant could not be shown to have actually ceased, and, in such a case, to feign a determination of the tenancy at the end of one year from its commencement, which, by reason of the frailty of a tenancy at will, might not be an unreasonable fiction,—the statute being left to run from the actual determination of the tenancy, where an actual determination could be shewn to have taken place, or at all events where an actual determination could be shown to have taken place within twenty years from the end of the first year of the tenancy. There are, no doubt, decisions against such a construction, even in the second and modified form, but, as was said by Lord Campbell in *Randall* v. *Stevens*, 2 E. & B. 652, the question whether these decisions are right, is still open for consideration in a court of error. In *Doe d. Bennett* v. *Turner*, 7 M. & W. 226, the Court of Exchequer held that, although there had been an actual determination of the tenancy at will ten years after its commencement, the statute nevertheless ran from the end of the first year of the tenancy: but they held also that, if a second tenancy was created, the statute ran only from the second tenancy; and the Exchequer Chamber, affirming a ruling in accordance with the latter decision, expressly left the former point undecided; S. C. 9 M. & W. 543. In *Doe d. Dayman* v. *Moore*, 9 Q. B. 559, Patteson, J. speaks of the judges having always avoided the point, and says he always has. In *Goody* v. *Carter*, 9 Q. B. 863, the decision of the Exchequer was followed; but in *Randall* v. *Stevens*, 2 E. & B. 641, where the point was mentioned but did not need to be decided, the Court doubted (see p. 652) whether the point had been rightly decided; and in *Locke* v. *Mathews*, 11 W. R. 343, 32 L. J. C. P. 98, where a fresh tenancy was created, and the statute was held to run only from the fresh tenancy, Erle, C. J., says that, on the true construction, the statute runs from the end of the first year of the tenancy only where the tenancy has continued for the whole twenty-one years, and Willes, J., agrees with that construction, saying also that it is an open question in a court of error. If this construction is right, then the appellant must fail, for the acts done by the tenant at will in letting and transferring clearly amounted in law to a determination of the tenancy, the necessary condition that they should be known to the landlord being fulfilled. It is admitted by the appellant that, if a tenant at will lets the land, the landlord has a right to treat the tenancy as determined; but they have

* The 3 & 4 Will. 4 c. 27, was adopted in New South Wales, by the Colonial Act, 8 Will. 4, No 3. See *Devine* v. *Holloway*, 9 W. R. 642, 14 Moo. P. C. 290.