[HIGH COURT OF AUSTRALIA.]

HARRIS . . . . . APPELLANT;
PLAINTIFF,

AND

SYDNEY GLASS AND TILE CO. . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1904.

SYDNEY, *Dec.* 15, 16, 19, 23.

Griffith C.J., Barton and O'Connor JJ.

Evidence—Admissibility—Action on covenant to pay rent—Plea on equitable grounds—Prior agreement to accept less rent—Facts alleged in plea available as a defence at law—Plea good as a plea of payment of balance on accounts stated—Ground not taken below—New trial.

Landlord and tenant—Covenant to pay as rent sum equal to one-third of land tax—Validity—Altering incidence of taxation—Land and Income Tax Assessment Act 1895 (*N.S.W.*) (59 *Vic. No.* 15), *sec.* 63—*Land Tax* (*Leases*) *Act* 1902 (*N.S.W.*), (*No.* 115 *of* 1902), *sec.* 5 (1).

In an action at common law to recover a balance of rent due under a covenant in an indenture of lease, the defendants pleaded, as a plea on equitable grounds, that prior to the execution of the lease it was agreed that the plaintiff should allow the defendants certain deductions from the rent for the first six months of the term; that the defendants executed the lease upon the faith of that agreement; that the plaintiff in accordance with the agreement allowed the defendants the deductions agreed upon; that the defendants paid the plaintiff the remainder of the rent due under the covenant, and the

(1) 63. Every contract, agreement, or understanding, whether arrived at or evidenced by matter of record under seal or by writing or by parol, having or purporting to have or which might have the effect of removing, qualifying, or altering the operation of any assessment, return, exemption, or deduction, or if in any way affecting the incidence of any assessment, or tax, or displacing the benefit of any exemption, or deduction authorized by or consequent upon any provision of this Act shall (whether such contract, agreement, or understanding shall have been or be made before or after the passing of this Act) be wholly void and inoperative so far as such contract, agreement, or understanding purports or is intended to have or might have the effect aforesaid, but without prejudice to the validity of such contract, agreement or undertaking in any other respect or for any other purpose.

Sec. 5 of the *Land Tax* (*Leases*) *Act* 1902 is as follows:—

5. No contract, agreement, or covenant made before or after the commencement of this Act shall affect the incidence of any tax imposed by this Act.

H. C. OF A. 1904.

HARRIS v. SYDNEY GLASS AND TILE CO.

plaintiff accepted it in satisfaction and discharge of the whole of the rent due under the covenant; and that the plaintiff was suing for the rent agreed to be allowed off to the defendants, in fraud of the agreement.

At the trial letters which passed between the parties prior to the execution of the lease were tendered in support of this plea and rejected.

Held that, whether the alleged agreement was or was not collateral to the lease, the plea was in effect an allegation of the allowance of cross demands between the parties upon an account stated, and payment of the balance, and afforded substantially a good defence at common law, and that the letters were admissible in evidence in support of it.

Callander v. *Howard*, 10 C.B., 290, followed.

The lease contained a covenant by the lessee to pay "such further sums as rent as shall represent one third of the annual sum payable . . . from time to time during the said term by the said lessor . . . as land tax to the Commissioners of Taxation under the *Land and Income Tax Assessment Act* 1895, or any amendment thereof in respect of the land demised." Subsequently to the execution of the lease, the *Land Tax* (*Leases*) *Act*, 1902, was passed.

Held, that the covenant was void.

Per Griffith C.J., and *Barton* J. :—The intention of the parties, as disclosed by the lease, was that the stipulation in the covenant should be in substitution for the statutory provision then in force, and for any statutory provision that might thereafter be made in place of it, and was therefore void under the *Land and Income Assessment Act* 1895, and inoperative under the *Land Tax* (*Lease*) *Act* 1902; and further, that, even if the parties intended it be cumulative, it was void under the *Land and Income Tax Assessment Act* 1895 and that the original quality of sterility imposed by that upon the stipulation when it was made still attached to it.

Per O'Connor J. :—The stipulation, being a violation of the provisions of sec. 63 of the *Land and Income Assessment Act* 1895 was void from its inception, and therefore, whatever the effect of the stipulation might have been, if it had been made after the passing of the *Land Tax* (*Leases*) *Act* 1902, it could not be made effectual for the purpose of making good the claim for rent alleged to have accrued due under it after the commencement of the latter Act.

When a party has obtained a new trial on the ground of the improper rejection of evidence, if the evidence was relevant to the issue on which it was tendered and the ground on which the evidence was originally rejected was erroneous, it is not a ground for allowing an appeal from the order granting the new trial, that the exact grounds of relevancy were not stated to the Court.

Decision of the Supreme Court, (1904) 4 S.R., 454, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales.

This was an action brought by the appellant against the respondents to recover £94 15s. 2d., rent due under a lease whereby the appellant let certain premises to the respondents for a term of years. The reddendum of the lease, which was under seal, was as follows: "Yielding and paying therefor yearly and every year during the said term . . . the rent or sum of £300 sterling money by several equal payments of £75 each on the first days of April, July, October, and January in each year and also yielding and paying therefor yearly and every year upon demand such further sums as rent as shall represent one-third of the annual sum payable from time to time during the said term by the said lessor . . . as land tax to the Commissioners of Taxation under the *Land and Income Tax Assessment Act* 1895, or any amendment thereof in respect of the land demised."

The lessee covenanted to pay the rent or rents reserved on the days appointed by and under the lease "without any deduction or abatement whatsoever."

The respondents' fourth plea was a plea on equitable grounds, as to £75 of the amount claimed, to the effect that they had executed the lease on the faith of an agreement made prior to the date of the lease, by which the appellant had agreed to allow them 50 per cent. off the rent for the first six months, and had actually allowed that amount and accepted the balance in full satisfaction and discharge of the first six months' rent.

The effect of the plea is more fully set out in the judgment delivered by *Griffith* C.J.

There was also a fifth plea, as to £19 15s. 2d., the amount claimed under the covenant to pay as rent one-third of the amount of land tax for each year, that that portion of the reddendum was void under sec. 63 of the *Land and Income Tax Assessment Act* 1895.

At the trial it appeared that the respondents, on 16th November 1901, wrote a letter to the appellant setting out the conditions on which they were willing to accept the offer to lease, and stating

H. C. OF A. 1904.

HARRIS v. SYDNEY GLASS AND TILE CO.

inter alia, "our lease is to commence from 1st January, 1902, and you agree to allow us 50 per cent. off the rent for the first six months." The solicitor for the appellant replied to this letter, suggesting certain modifications on other points, but not qualifying this particular proposal, and stating further, "otherwise the terms of your letter are satisfactory." The respondents replied assenting to the proposed modifications, and the lease was executed. These letters were tendered in evidence in support of the fourth plea, and rejected, under circumstances appearing more fully in the judgments. *Darley* C.J., who presided at the trial, held that the covenant dealing with the additional rent was not an infringement of sec. 63 of the *Land and Income Tax Assessment Act* 1895, and directed a verdict for the plaintiff, appellant in this appeal, for £94 15s. 2d.

The defendants, respondents in this appeal, appealed to the Full Court, who granted a rule absolute for a new trial as to £75, and ordered that judgment be entered for the defendants as to the £19 15s. 2d.

The reasons for the decision appear from the judgment delivered by *Griffith* C.J.

Dr. Cullen and *J. L. Campbell* (with them *Sheridan*) for the appellant. The letters show that the granting of the lease was to be subject to the condition that certain payments were to be made by the respondents, city rates and taxes, and a portion of the land tax. If the agreement to pay the land tax was illegal, then the promise to grant a lease was founded upon a consideration partly illegal, and, if the appellant had refused to grant a lease, and the respondents had sought to enforce the promise against the appellant, while repudiating their promise to pay land tax on the ground of illegality, they would have failed. The alleged parol agreement therefore discloses no equity in the respondents, and it may be that neither party could have enforced it. The respondents are in this dilemma, either the agreement to pay the land tax, which was the consideration for the appellant's promise to make the refund, is illegal, and therefore the promise is unenforceable, or it is not illegal, and they cannot insist upon the performance of the appellant's promise without performing

theirs. If the Court is of opinion that there was a binding promise to refund the 50 per cent., it will enforce the covenant to pay the further rent.

It almost amounts to fraud on the part of the respondents to plead that the covenant to pay the further rent was illegal, while insisting that the appellant should carry out the promise which she made in consideration of that covenant. No Court of Equity would grant an unconditional injunction under those circumstances. [He referred to *Joliffe* v. *Baker* (1) and cases there cited.] Whatever the position might have been under the parol agreement alone, that has been superseded by the lease. Under that the respondents covenanted to pay rent without any deduction or abatement whatever. This is inconsistent with the alleged prior arrangement, and therefore evidence of that agreement is inadmissible. All transactions prior to the execution must rank as preliminary negotiations affecting the terms of a bargain, and, if the contract under seal, in which the negotiations culminated, is inconsistent with any of the terms of the parol agreement, evidence of that agreement is inadmissible, unless it is on a collateral matter: *Erskine* v. *Adeane* (2). *Morgan* v. *Griffith* (3), which was relied on below, was a case of an action on a parol agreement, and is no authority for the proposition that such an agreement can be pleaded in answer to an action upon a deed.

[GRIFFITH C.J. referred to *Palmer* v. *Johnson* (4).]

Evidence of such a prior agreement may only be given if the subject-matter is collateral, that is, refers to something not dealt with in the lease, and not contradictory of it: *De Lassalle* v. *Guildford* (5); *Leggott* v. *Barrett* (6); *Palmer* v. *Johnson* (7).

[GRIFFITH C.J.—Would it be contradictory of the deed, if the parol agreement were to accept £100 for a piece of land, on condition of executing a deed stating the consideration money to be £200?]

That would be different from this case. That is a condition upon which the execution depends. Here the lease fixes one sum

(1) 11 Q.B.D., 255.
(2) L.R. 8 Ch., 756, at p. 766.
(3) L.R. 6 Ex., 70.
(4) 13 Q.B.D., 351.
(5) (1901) 2 K.B., 215.
(6) 15 Ch. D., 306.
(7) 13 Q.B.D., 351, *per Brett* M.R., at pp. 356, 357.

H. C. OF A. 1904.

HARRIS v. SYDNEY GLASS AND TILE CO.

as rent, and the verbal agreement was that £50 was to be refunded, a new term, inconsistent with that of the lease, upon a matter dealt with by the lease. That is not conditional or collateral, because the agreements overlap. The lease was intended to contain all the terms of the tenancy, as agreed upon beforehand, and therefore it is the only contract of which evidence can be given: *Angell* v. *Duke* (1).

As to the covenant in the reddendum to pay the further rent, the amount claimed is in respect of 2 years, one of which is governed by the *Land and Income Tax Assessment Act* 1895, the other by the *Land Tax* (*Leases*) *Act* 1902. There is nothing in the covenant which contravenes sec. 63 of the Act of 1895. It does not alter or affect the incidence of the tax. The mere reference to the tax for the purpose of measuring the amount of rent does not bring it within the section. The tax, *quâ* tax, is not thereby affected in its incidence. The covenant is altogether independent of the payment, or the liability to pay the tax. A landlord is entitled to get as much for rent as he can get his tenant to pay. The mere fact that he charges a proportionately higher rent because he has to pay a tax, does not bring him within the prohibition. The entire rent might be made up of rates and taxes, but that would not alter the incidence of the tax, because, if there were no tax, the landlord would have all the rent in his pocket, instead of having to pay it away in taxes. [He referred to *Davies* v. *Fitton* (2); and *Colbron* v. *Travers* (3).] In *Ludlow* v. *Pike* (4), which was relied upon by *Owen* J., in the Court below, the covenant in the lease did not state that the sum was to be paid as further rent. *Channell* J., was of the opinion that the decision of Lord *St. Leonards* in *Davies* v. *Fitton* (2) depended upon the fact of there having been a stipulation for a fixed sum as further rent; but that is not borne out by the terms of the decree in the case. In *Cooper* v. *Barron* (5) the covenant which was held to be an infringement, was a direct covenant to pay all taxes. [He referred also to *Beadel* v. *Pitt* (6).]

As to the Act of 1902, which relates to the other half of the

(1) L.R. 10 Q.B., 174.
(2) 2 Dr. & War., 225.
(3) 12 C.B. N.S., 181; 31 L.J., C.P., 257.
(4) (1904) 1 K.B., 531.
(5) 20 N.S.W. L.R., (L.), 175.
(6) 11 L.T. N.S., 592.

further rent, there is no real difference in its effect. The Act deals only with certain leases, which include that in question, and sec. 5 provides generally that no contract agreement or covenant shall affect the incidence of any tax imposed by the Act. An arrangement by which the landlord is re-imbursed cannot be said to affect the incidence of the tax.

Wise K.C. and *Rolin* for the respondents. The consideration moving from the respondents in the parol agreement was the execution of the lease in the terms of the letters. Even if it should turn out that one of the covenants in the lease is illegal or void, that does not affect their right to get the benefit which was promised to them on condition that they executed the lease in the terms proposed to them, now that they have fulfilled that condition. It is for the jury to say what was the effect of that contract. The agreement to give a rebate was an inducement to execute the lease. That agreement has been executed. The allowance of 50 per cent. was actually made off the rent for the first six months. That is alleged in the plea. The fact that it is pleaded on equitable grounds does not prevent the respondents from setting up any legal defence that it may disclose. It is not a plea of payment, but of an executed agreement. The appellant is not entitled now to re-open the matter, and sue for money which has actually been allowed on account.

The agreement was collateral to the lease. By executing the lease the respondents became entitled to sue upon the agreement, and, if they had paid the full rent, could have recovered back half. There is nothing contradictory of the terms of the lease. If the respondents had not paid the rent, or been allowed the rebate, they would have had no answer to an action on the covenant to pay rent, except by way of set-off. There would be an independent debt from the appellant to the respondents, which would not have been recoverable against an assignee of the reversion. The promise was by the lessor personally, and the lessees would have been liable for the full rent to the assignee of the reversion, and would have had to sue the lessor afterwards for the half rent. Evidence may always be given of a promise made for the purpose of inducing a lessee to execute a lease:

H. C. OF A. 1904.

HARRIS v. SYDNEY GLASS AND TILE CO.

Morgan v. *Griffith* (1); *Erskine* v. *Adeane* (2); *Martin* v. *Spicer* (3). On the same principle evidence can be given, in an action on a bill of sale, that a parol agreement had been made between the parties that the bill of sale was not to be available until certain other securities had been realised: *Heseltine* v. *Simmons* (4). It is inequitable to enforce a bond, when there is an agreement that it should not be enforced until the happening of a particular event: *Major* v. *Major* (5). In a sale of land by auction, after conveyance (without any covenants), the purchaser is entitled under the conditions of sale, to compensation for an error in the particulars of sale on the ground that the prior agreement was independent of, and not superseded by, the deed of conveyance: *Palmer* v. *Johnson* (6). The whole of the antecedent course of conduct must be looked at; it is a presumption only that the written agreement, as finally drawn up, contains the whole of the terms: *Gillespie Bros. & Co.* v. *Cheney, Eggar & Co.* (7).

Any agreement to pay a portion of an amount which another is liable to pay, alters the burden of the liability. In the case of a tax, it alters the incidence of the tax. The test is whether as a matter of fact, the effect of the covenant is to wholly or partially indemnify the landlord against the payment of the tax. The covenant in this case amounts to that. The fact that the words "as rent" are used, and that the covenant is placed in the reddendum, cannot affect the nature of the covenant. Sec. 12 directs that the whole tax shall be paid in the first instance by the landlord, and that he may then recover contribution in certain specified proportions. Therefore any arrangement which has in fact altered, or might have the effect of altering, those proportions affects the incidence of the tax and is forbidden by sec. 63. The intention of the parties has nothing to do with the matter; it is a question of fact in each case whether the effect of the agreement is to alter the incidence. The covenant here passes on a part of the liability of the landlord to the lessees, *i.e.*, they pay a greater

(1) L.R. 6 Ex. 70.
(2) L.R. 8 Ch., 756.
(3) 34 Ch. D., 1.
(4) (1892) 2 Q.B., 547.
(5) 1 Dr., 165.
(6) 13 Q.B.D., 351.
(7) (1896) 2 Q.B., 59.

proportion of the tax than they would pay as contribution under the Act.

[GRIFFITH C.J.—The landlord must bear his share of the burden, and must not make any contract with his tenant in order to alleviate it.]

The Act cannot be intended only to prevent direct evasion of the burden; the terms used show that it is the ultimate result or tendency that is to be looked at. The effect of the covenant in this case is the same as that dealt with in *Cooper* v. *Barron* (1). *Colbron* v. *Travers* (2) dealt with a contract of indemnity, which was held void under the Acts relating to the tax in question. Under our Act every agreement &c. having the tendency to indemnify is prohibited. *Ludlow* v. *Pike* (3), is in point, the only difference being that, in that case, the whole amount of the tax was provided for, instead of one third as here.

Dr. *Cullen* in reply. As to the claim for £75, the evidence was tendered to prove a contract of a preliminary nature, which had been superseded by the deed, and was therefore inadmissible: *Greswolde-Williams* v. *Barneby* (4). The letters could not be used to prove an accord and satisfaction, because they only represent the alleged contract out of which the original obligation arose. The plea was bad as a plea of payment because that cannot be proved by evidence of payment of a less sum than due.

No evidence was excluded that would have proved accord and satisfaction. Receipts were put in to prove that, but the letters could only prove the antecedent obligation.

Cur. adv. vult.

23rd December.

GRIFFITH C.J. This is an appeal from a decision of the Supreme Court of New South Wales making absolute an order *nisi* to enter judgment for the defendants as to £19 15s. 2d., and for a new trial as to £75, the residue of the plaintiff's claim.

The questions raised as to the two amounts are entirely different. The action was brought on a covenant in a lease of land demised by the plaintiff to the defendants for a term of fifty years, from

(1) 20 N.S.W. L.R. (L.), 175.
(2) 12 C.B. N.S., 181; 31 L.J., C.P., 257.
(3) (1904) 1 K.B., 531.
(4) 17 T.L.R., 110.

H. C. OF A. 1904.

HARRIS v. SYDNEY GLASS AND TILE CO.

Griffith C.J.

1st January, 1902, at a rental of £300 a year, together with "such further sums as rent as shall represent one-third of the annual sum payable from time to time during the said term by the said lessor . . as land tax to the Commissioners of Taxation under the *Land and Income Tax Assessment Act* 1895, or any amendment thereof in respect of the land demised." The action was brought to recover two years' additional rent under the words I have just read, and also £75, being half the first year's rent of £150. The question with regard to the £75 arose upon the defendants' fourth plea, pleaded upon equitable grounds. That plea was to the following effect:—As to £75 part of the rent claimed by the plaintiff, that before they executed the deed it was agreed between the plaintiff and the defendants that the plaintiff should allow the defendants 50 per cent. off the rent for the first six months of the term of the lease, and that the defendants executed the said deed upon the faith of the said agreement, and not otherwise, and that the plaintiff duly, and in accordance with the terms of the said agreement, allowed the defendants 50 per cent. off the rent so covenanted to be paid, and reserved by and in the said deed, for the first six months of the said term, and that the defendants duly paid the remainder of the said rent due under the said covenant, and the plaintiff accepted the same in satisfaction and discharge of the whole of the said rent, and that the plaintiff is now suing for the said rent as agreed to be allowed off to the defendants, being the said £75, in fraud of the agreement. At the trial, before the learned Chief Justice, certain letters were tendered in evidence to prove the allegations contained in that plea, but he rejected the evidence, holding that it was intended to qualify an agreement under seal, and was therefore nadmissible. With respect to the claim for extra rent, amounting to one-third of the amount payable as land tax, the learned Chief Justice directed the jury to find a verdict for the plaintiff. On appeal to the Full Court, *Owen* J. and *G. B. Simpson* J. were of the opinion that the evidence tendered in support of the plea as to the £75 was admissible, on the ground that it did not tend to qualify the terms of the agreement under seal, but was evidence of a collateral agreement, which came clearly under the authorities. *Pring* J. was of the contrary opinion. But all the learned

Judges were of the opinion that the amount claimed as extra rent could not be recovered, and that as to that there must be a verdict for the defendants. The result of the appeal was, the majority of the Court being of opinion that the evidence as to the £75 was admissible, that it was directed that there should be a new trial as to that sum, and that as to the £19 15s. 2d. extra rent a verdict should be entered for the defendants. Now, there is no doubt about the general rule as to the inadmissibility of written evidence or oral evidence of statements by the parties to qualify the terms of a deed. It is stated very clearly by *James* L.J., in *Leggott* v. *Barrett* (1). He says: "I think it is very important, according to my view of the law of contracts, both at Common Law and in Equity, that if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself." That doctrine was not disputed, but reliance was placed by a majority of the Court upon a series of cases, beginning with *Morgan* v. *Griffith* (2) and ending with *De Lassalle* v. *Guildford* (3). The latter was a case of a lease, which had been duly executed. The lessee alleged that the landlord had verbally represented to him that the drains were in good order, which, it was contended, was a collateral agreement as to the condition of the premises, upon the faith of which the lessee executed the lease. The Court held that the agreement might be proved, but apparently on the ground that the alleged agreement was a warranty. The words of *A. L. Smith* M.R., are (4):— "Then why is not the warranty collateral to anything which is to be found in the lease? The present contract or warranty by the defendant was entirely independent of what was to happen during the tenancy. It was what induced the tenancy, and it in no way affected the terms of the tenancy during the three years,

(1) 15 Ch. D. 306, at p. 309.
(2) L.R. 6 Ex., 70.
(3) (1901) 2 K.B., 215.
(4) (1901) 2 K.B., 215, at p. 222.

H. C. OF A. 1904.

HARRIS v. SYDNEY GLASS AND TILE CO.

Griffith C.J.

which was all the lease dealt with. The warranty in no way contradicts the lease, and without the warranty the lease never would have been executed." Then he refers to other cases, and points out that in one of them, *Angell* v. *Duke* (1), the Court held that oral evidence of an agreement that additional furniture should be provided by a lessor was not admissible, because it was not collateral, but referred to a matter that was dealt with in the lease itself. The foundation of his judgment was that the agreement alleged was upon a subject not dealt with by the lease itself. The agreement as to the £75 does in one sense tend to qualify the terms of the lease, in that the result will be that, instead of £300 a year (which is the amount reserved by the lease) being paid all through the term, rent will be paid at the rate of only £150 per annum for the first six months. In another sense it might be held that it was collateral, that as an inducement to enter into the lease, the lessor agreed to make the lessee a refund of half the first six months' rent, after it was paid. The point is one of great difficulty, but, in the view which we take of the case, it is not necessary to decide whether this objection is valid or not. Because, although the plea is called an equitable one, it may allege facts which would afford a good defence to that part of the claim to which it is pleaded, and the defendants were entitled to take advantage of it in any sense in which it can be read. It is not merely a plea setting up the making of the agreement, and alleging that the plaintiff is suing in breach of it, but it also alleges that the agreement was performed, that there had been a balance struck, and payment of that balance. It will be convenient first to consider the plea as if it set up an agreement, having nothing to do with the lease but relating to entirely extrinsic matter, by which the plaintiff had agreed to pay the defendants £75, or to allow it to them on a settlement of accounts. From that point of view the plea would operate as a plea of payment, or perhaps of accord and satisfaction. For that proposition the case of *Callander* v. *Howard* (2) is clearly an authority. The plea there was that, "after the accruing of the causes of action, &c., and before the commencement of the suit, &c., the defendant and the plaintiff accounted together, and an

(1) L.R. 10 Q.B., 174.

(2) 10 C.B., 290.

account was then stated between them, of and concerning the said causes of action, and . . . certain other claims, &c., and on that accounting . . . . . the sum of £50 was then found to be, and then was, due and owing from the defendant to the plaintiff, which sum of money the defendant then, in consideration of the premises, promised the plaintiff to pay him on request; and that thereupon the defendant afterwards, and before the commencement of this suit, &c., paid to the plaintiff, &c., the sum of £50 in full satisfaction and discharge of such last mentioned sum." To this plea there was a special demurrer, and a joinder in demurrer. The Court in giving judgment for the defendant, held that he was entitled to rely on the plea as an informal plea of payment, and stated the doctrine governing the matter. *Wilde* C.J. said (1): "If the plea in this case amounts to an allegation of the allowance of cross demands upon an account stated, and payment of the balance, there seems to be no doubt but that it sets up substantially a good defence to the action. This appears to have been established, and the reason of the doctrine expounded, at a very early period. Thus in *Coke* upon *Littleton*, 213*a*, it is said:—'If the obligor or feoffor be bound by condition to pay one hundred marks at a certain day, and at the day the parties do account together, and for that the feoffee or obligee did owe £20 to the obligor or feoffor, that sum is allowed, and the residue of the hundred marks paid, this is a good satisfaction; and yet the £20 was a chose-in-action. and no payment was made thereof, but by way of retainer or discharge.' The authority cited for this passage, is a case to that effect in the Year Book, 11 *Ric.* 2." That passage has been cited and followed in later cases. Indeed it appears to be only common sense. When there have been mutual dealings between parties, and a balance has been struck and settled, it would be a very strange thing if either party were to be allowed subsequently to re-open the matter. In the supposed case, the agreement being clearly a good agreement, and having nothing to do with the lease subsequently executed, evidence may, of course, be given in proof of it. That is, assuming the contract to be a good one. Now, suppose that the contract was bad, as for instance under the Statute of Frauds: yet the parties, having dealt with one another

(1) 10 C.B. 290, at p. 296.

H. C. of A. 1904.

HARRIS v. SYDNEY GLASS AND TILE CO.

Griffith C.J.

on the basis of its being a good contract, and having paid or struck a balance on that basis, neither party could come afterwards and rip the matter up again. The admitted debt having been satisfied, the validity of the contract under which it was paid is not material, when the whole matter has been settled on the basis that the contract was a good one which imposed an obligation on the parties, whether perfect or imperfect. The circumstance that the invalidity of the alleged contract depends upon its contradicting a deed, whether the deed sued on or another, cannot make a difference in principle. The plea in this case, whether the alleged agreement was valid or invalid, sets up such a defence, and is in effect a plea of payment. Therefore, if it is proved, the action fails.

It is not necessary to refer in detail to the documents tendered in evidence on this point. It is sufficient to say that they afford ample evidence for a jury that such an agreement was made, and that a settlement upon the basis of the agreement took place. From that point of view the evidence tendered was admissible, and a new trial should be granted.

It was contended that, if the evidence was tendered on an erroneous ground, we should refuse to grant a new trial. But the position is this: the defendants have obtained an order for a new trial on the ground that certain evidence was rejected which was admissible. I express no opinion whether the alleged agreement was valid or invalid: in either case the evidence was admissible, as tending to prove the plea. The substantial ground on which it was tendered was that it tended to prove the plea. The substantial ground of rejection was that the plea was a bad one, *i.e.*, that the alleged agreement, although executed, afforded no defence to the action. The ground on which the evidence was tendered was therefore right, and it was the objection which was illfounded. We do not think that the mere rejection of evidence on an erroneous ground prejudices the right of the party who tenders it to a new trial. So far as the £75 is concerned, the appeal therefore fails. In this judgment we all concur.

Passing to the second question, I will read a judgment, in which my brother *Barton* and myself concur.

The second question raised on the appeal divides itself into two

branches: (1) The effect of the stipulation under the *Land and Income Tax Assessment Act* 1895, and (2) its effect under the *Land Tax* (*Leases*) *Act*, 1902.

The lease under consideration is for a term of fifty years at the fixed rent of £300 per annum payable quarterly. The reddendum goes on—"And also yielding and paying therefor yearly and every year upon demand . . . such further sum as rent as shall represent one-third part of the annual sum payable from time to time during the said term by the said lessor as land tax to the Commissioners of Taxation under the *Land and Income Tax Assessment Act* 1895 or any amendment thereof in respect of the land hereby demised."

Sec. 63 of the *Land and Income Tax Assessment Act* 1895 provides that any contract or agreement, however made, which, if valid, might have the effect of in any way affecting the incidence of the land tax shall be wholly void, so far as it is intended to or might have that effect. The land tax under that Act is payable in the first instance by the owner, but the person who has paid the tax may, under sec. 13, recover by way of contribution from any other person who has an interest in the land a sum to be ascertained according to rules prescribed by that section. It has always, we are told, been taken that this section applies as between landlord and tenant, and we see no reason to doubt the correctness of that construction. It is common ground that the "incidence" of the tax referred to in sec. 63 means the distribution of the total burden of the tax as between the person who pays and the person from whom he is entitled to claim contribution. The test, then, of the validity of a contract or agreement under sec. 63 is whether, if valid, it does or might affect the proportions of their contributions. If so, it is invalid; if not, it is not obnoxious to the provisions of that section.

The lease in question must be construed as at the time of its date, and with reference to the then existing law, which the parties must be taken to have known; and the alteration in the law made by the Act of 1902 cannot affect this construction. We agree with *Pring* J. that little, if any, light is thrown on the case by the English and Irish decisions. If the effect of the stipulation in question is to substitute for the distribution of the burden

H. C. OF A. 1904.

HARRIS v. SYDNEY GLASS AND TILE CO.

Griffith C.J.

prescribed by the Statute another and different distribution, *i.e.*, if the provision is substitutional for, and not cumulative upon, the statutory provisions, it clearly would, if valid, affect the incidence of the tax, and is consequently invalid. If, on the other hand, the provision is merely cumulative upon the statutory provision for contribution, it may not have that effect. What then was the intention of the parties, as ascertained from their language? We think that for the purpose of construction the language of the contract must be regarded irrespective of the provisions of any Statute declaring certain contracts void. We must first ascertain what it is to which the parties have agreed, and then inquire whether that agreement is or is not valid, having regard to the express provisions of the law. Leaving, then, the provisions of sec. 63 out of consideration for a moment, *i.e.*, assuming that the incidence of the land tax may be altered by contract, does this stipulation, fairly construed, alter it?

It is contended for the defendants that, upon the true construction of the lease, the intention was that the payment of a sum under the name of rent, equal to one-third of the land tax for the time being, was to be in lieu of and to supersede the tenants' obligation to contribute the proportion prescribed by sec. 12 of the Act. In favour of this view it is said, applying the doctrine *expressum facit cessare tacitum*, that it would be a strange construction to hold that, when the law adds to a lease a tacit or implied provision that the tenant shall pay the owner or lessor as his contribution to the land tax a proportion of the tax prescribed by Statute, an express stipulation that he shall pay the same person a fixed contribution equal to one-third of the tax is intended to be cumulative.

So far, apart from the provision of the Act. If, however, that provision is called in aid of the construction, it is clear that, if the proportion payable by the tenant under the stipulation in the lease were less than the statutory contribution, the tenant could not set up the stipulation in the lease as an answer to his statutory liability. Why? Because the stipulation so construed would under sec. 63 be invalid. Why then, if the tenant cannot take advantage of the stipulation in diminution of the statutory contribution, should the owner be entitled to take advantage of it

in increment of that contribution? There would be no mutuality in this construction.

It is said, however, that, if the stipulation is construed as cumulative upon the statutory provision, there is no alteration in the incidence of the tax *quâ* tax, but merely an addition to the rent *quâ* rent irrespective of that incidence. We proceed to consider this argument.

It is contended that there is no reason why an owner of land should not agree to let it gratuitously, *i.e.*, on the terms that the tenant shall indemnify him against taxation in respect of it. In such a case, it is said, if the rent were fixed at a sum equal to the land tax, which is itself under the Acts proportionate to the unimproved value, the result would be the same as if the rent were fixed at a per centage of that value, and under such a lease the tenant would still be bound to pay, in addition, his statutory proportion of the land tax by way of contribution, since any agreement to the contrary would be inoperative. In the supposed case, if the stipulation were construed as cumulative, full scope would, it is said, be given to the Act, and the incidence of the tax would not be affected. It is true that in the supposed case this construction would not be in accordance with the intention of the parties, which was that the landlord should be merely indemnified. But this, it is said, is immaterial. But, if the law declares that the tenant cannot merely effectively indemnify the owner against the land tax, an agreement that he shall do so cannot have the effect intended by the parties. And, if it cannot have that effect how can the Court mould it so as to give it an effect admittedly not intended by them? The function of the Court is to interpret, and not to make contracts. The circumstance that the tenant agrees to contribute a third instead of the whole is of course not material. This argument therefore fails.

Again, if the rate of land tax were fixed and permanent, or if the rent reserved were a sum equal to the land tax payable at the date of the lease, the stipulation would, in either case, amount to no more than fixing the rent by reference to a known sum. Nor, although the land tax varies in proportion to the value, would there be any objection to making the rent vary in the same proportion. But the rate of land tax is not fixed or permanent.

H. C. OF A. 1904.

HARRIS v. SYDNEY GLASS AND TILE CO.

Griffith C.J.

The Act of 1895 did not itself impose a tax. The tax was to be declared by Parliament from time to time. The provisions of sec. 63 must be read in view of the probable contingency that it might vary, a contingency which must have been in the minds of the legislature, as it evidently was in the minds of the parties in the present case. And the legislature must, therefore, be taken to have meant that the parties should not be able to provide by agreement that one of them should escape an additional burden which might be cast upon him by a future increase of the tax. To take a concrete case:—Assume that the tenant's contribution to the tax as ascertained under the Act is—say—one fourth. So long as the total amount of the land tax, which I will assume is £30, does not vary, the tenant's contribution remains at £7 10s. and the incidence of this burden is not altered by a covenant to pay an additional rent bearing a fixed proportion to the fixed sum of £30, which, in the case of a stipulation such as that in the present case, will be £10. His total contribution will be £17 10s. of the £30, or 35-sixtieths. Suppose then that the land tax is doubled, and becomes £60. Under the provisions of the Act the tenant's contribution, which is still one-fourth, becomes £15, and the landlord must pay the other £45. But if the rent were to vary in accordance with the stipulation now in question, the burden of the tenant under that stipulation would be doubled, becoming £20, instead of £10, in addition to the £15, so relieving the landlord of the incidence of the tax to that extent. It is true that this arithmetical proportion of his contribution to the whole amount of the tax would be the same as before, 35-sixtieths, but in effect the incidence of the land tax upon the landlord as prescribed by law will have been altered in his favour to the extent of the £10. The result of the stipulation for additional rent, read as cumulative upon, and not substitutional for, that provided by the Act, would therefore be to effect an alteration in the proportional contribution of the tenant, as at the date of the lease. This is plainly an alteration of the incidence of the tax, and as such falls within the prohibition. It follows that the stipulation relied upon, whether construed as substitutional or cumulative, was, when made, void, inasmuch as it might have had the effect of

altering that incidence. This is sufficient to dispose of the claim for the extra rent for the year 1902.

We pass to the effect of the stipulation under the Act of 1902. Sec. 4 of that Act imposes upon land leased for more than thirty years a fixed tax of one penny in the pound of the unimproved value, to be paid by the owner and the lessees of the land. The Commissioners are required to adjust the tax fairly and equitably between the owners and lessees according to their respective interests in the land as unimproved, and their adjustment is final. This fixed tax is, by sec. 3, to be in lieu of the land tax under the Act of 1895. Sec. 5 provides that: "No contract, agreement or covenant made before or after the commencement of this Act shall affect the incidence of any tax imposed by this Act." The stipulation now in question cannot therefore, however construed, affect the obligation of the tenant to pay the contribution as adjusted by the Commissioners. But, since the lease must be construed as of the time when it was made, and seeing that the stipulation in question was then void, how can it be rehabilitated? It is true that sec. 63 of the Act of 1895 only invalidated contracts so far as they were intended to or might affect the incidence of the tax under that Act. But we do not know of any principle of construction under which a stipulation which, by reason of positive law is void when it is made, can be brought into effective operation merely by a subsequent change in the law under which such a stipulation would not be void if made after the change was effected.

On the whole matter we are of opinion that the intention of the parties, as disclosed by the lease, was that the stipulation in question should be in substitution for, and not cumulative upon, the statutory provision then in force, and any statutory provision that might thereafter be made in place of it, and was therefore void under the one Act and inoperative under the other; and further, that, even if this was not the intention, the original quality of sterility, imposed by the law of 1895 upon the stipulation when it was made, still attaches to it. We think, therefore, that the claim for the increased rent for 1903 also fails.

O'CONNOR J. I agree with the Chief Justice that the judgment

H. C. OF A. 1904.

HARRIS v. SYDNEY GLASS AND TILE CO.

O'Connor J.

of the Supreme Court in respect to the admissibility of the evidence should be upheld on the grounds stated by him. Upon that part of the case I wish to add nothing to what he has said. I shall address myself solely to the ground of appeal which deals with the validity of the respondent company's covenant to pay as rent such further sum as shall represent in each year one-third of the amount payable as land tax by the appellant to the Commissioners of Taxation. In regard to the amount claimed by the appellant as payable in 1902, sec. 63 of the *Land and Income Tax Assessment Act* 1895 must be considered. The amount claimed as payable in 1903 is governed by the *Land Tax (Leases) Act* 1902. These periods must therefore be taken separately The English and Irish cases cited to us are of little assistance in this controversy because the decision in each case turned on the words of the Statute then under consideration, and in none of them was the Statute as searching in its terms as sec. 63 of the *Land and Income Tax Assessment Act* 1895. That section aims directly at every contract agreement or understanding which has or purports to have, or which might have, the effect of in any way affecting the incidence of any tax payable under the Act. The "incidence" of the tax must mean the burden of the tax, both as regards the person upon whom it falls in the first instance, the contribution which he is authorized to obtain from others, and the proportion in which the burden of the tax falls upon the original taxpayer and upon the contributor. One illustration will be sufficient to show that "incidence" of the tax cannot be restricted to the narrow meaning of "payment of the tax directly to the Commissioners." A direct guarantee by a tenant to repay the landlord the amount of tax paid by him to the Commissioners as provided by the Act would certainly not affect the incidence of the tax in that narrow sense, because the landlord would in that case still remain the taxpayer; yet no one could say that such an agreement would not be contrary to law if the section is to have any practical operation. Effect can be given to the words of the enactment in such a case as this only by holding that any agreement, however disguised, will affect the incidence of the tax if it in fact has the effect of altering the ratio in which the Statute has directed that the burden of the tax shall be borne by the landlord and the

tenant respectively. Let us now turn to the covenant. It was urged by Dr. Cullen that in this covenant the amount in question was payable as rent, that the land tax was used only as a measure of amount, and that such a method of fixing rent did not infringe the provisions of the Act. But the form of the reddendum is rather against the suggestion that the amount of land tax was named only as a measure of rent. Taking the material words the passage reads as follows:—"Yielding and paying therefor yearly . . . during the said term . . . unto the lessor . . . the rent or sum of £300 by equal quarterly payments of £75 each on the first days of" (mentioning the four quarter days) "in each year." Then follows this provision: "And also yielding and paying therefor yearly and every year upon demand such further sum as rent as shall represent one-third of the annual sum payable from time to time during the said term by the said lessor her heirs, &c., as land tax to the Commissioners of Taxation under the *Land and Income Tax Assessment Act* 1895 or any amendment thereof in respect of the land hereby demised." There is a marked difference between the provisions for payment of this additional sum and for payment of the rent reserved in the earlier part of the reddendum. Although the sum to be paid is described as rent, the promise to pay in effect differs in no way from a direct guarantee to repay the landlord every year one-third of the land tax payable by him. But, whatever the intention of the parties may have been, the Act prohibits any agreement which has or might have the effect of in any way affecting the incidence of the tax. Now, what is the effect of this agreement? It compels the tenant every year to pay a fixed proportion of the land tax to the landlord. Describing the payment as rent cannot alter the effect of the payment. Sec. 12, which regulates the tenant's contribution, enacts that the tenant's contribution each year shall bear the same proportion to the tax paid by the landlord as the value of the tenant's interest bears to the value of the landlord's estate; the tenant's contribution thus becoming smaller each year of the term. How can it be said that the yearly payment of a fixed proportion of the land tax by the tenant to the landlord every year of the term has not the effect of altering the incidence of the proportion in which sec. 12

H. C. OF A. 1904.

HARRIS v. SYDNEY GLASS AND TILE CO.

O'Connor J.

has directed that the burden of the tax is to be borne by the tenant and the landlord respectively? Whether the payment under the covenant is to be in substitution for the statutory contribution, or, as Dr. *Cullen* has contended, in addition to the statutory contribution is immaterial. In either case the tenant will in effect bear the burden of a proportion of the tax different from that which the Statute has directed he shall bear. I may add that I entirely concur in the reasoning by which my learned brother the Chief Justice has arrived at the same conclusion. Under the circumstances it is in my opinion plain that this agreement has, to use the words of the Statute, "the effect of affecting the incidence of the tax" and that therefore it is void within the meaning of sec. 63. The appellant is therefore not entitled to recover the amount claimed in respect of 1902.

Coming now to the amount sued for as payable in 1903, we must consider the terms of the *Land Tax (Leases) Act* 1902. This Act applies only to leases where the term is not less than thirty years. In regard to these leases it takes the place of the *Land and Income Tax Assessment Act* 1895. From the beginning of 1903 the land tax in respect of such leases is raised and made payable by this special Act alone. By sec. 4 landlord and tenant are both made taxpayers, but in such proportions as may be equitably adjusted by the Commissioners of Taxation in proportion to the value of their respective interests. Sec. 5 enacts that the incidence of the tax so provided for shall not be affected by any agreement. It does not make void any agreement affecting the incidence of the tax as sec. 63 of the earlier Act does in regard to agreements contrary to the Act of 1895; it merely declares that the agreement shall not affect the incidence of the tax. If the agreement now under consideration had been made after the passing of this Act it would not be void. It could not relieve the tenant from the obligation to pay his proportion of the tax to the Commissioners, but he would be just as liable under it to repay to the landlord the agreed proportion of the tax as he would be to perform any other agreement. The agreement however was made, as we know, before the passing of the Act of 1902, and became, for certain purposes, void on its execution. The question now arises, how can the landlord

recover from the tenant the one-third proportion of the landlord's payment under this Act by virtue of an agreement made at a time when the rights of the parties were regulated by the Act of 1895, and which, as I have pointed out, was void in so far as it violated the provision of that Act? For the purpose of answering this question it becomes necessary to look again at sec. 63 of the Act of 1895. It will be observed that that section does not make void the whole agreement contravening its provisions. It uses the expression "shall . . . be wholly void and inoperative so far as such agreement . . . might have the effect aforesaid," that is the "effect of in any way affecting the incidence of the tax." The section then goes on, "without prejudice to the validity of such agreement in any other respect or for any other purpose." The only reasonable interpretation of those words is, in my opinion, this—that such part of the agreement as has the effect of affecting the incidence of the tax becomes wholly void. This interpretation is not only reasonable but in accordance with ordinary grammatical construction. Any other reading of the section leads to the absurdity, pointed out by the Chief Justice, of an agreement void and dead under the existing law, but capable of gaining new life and validity from some future alteration of the law, which will render lawful that which was unlawful. Having regard to the object of the legislature apparent on the face of sec. 63, the Court is bound to avoid an interpretation leading to such an absurd consequence, if any other interpretation is grammatically possible. Taking the view of sec. 63 that I have explained, I am of opinion that the part of the agreement which violated the provisions of that section was void from its inception, and never had any validity for any purpose, and therefore cannot now be made effectual for the purpose of making good the appellant's claim in respect of the amount alleged to be due in 1903. For these reasons I concur with my learned brothers in holding that the portion of the covenant in question is void in respect of the appellant's claim for both 1902 and 1903, and that the decision of the Supreme Court on this part of the case must be upheld.

Appeal dismissed with costs.

Solicitor, for appellant, *M. J. Harris.*

Solicitors, for respondents, *Sly & Russell.*

C. A. W.