

[HIGH COURT OF AUSTRALIA.]

HARE APPELLANT ;
DEFENDANT,

AND

TERRY RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF
SOUTH AUSTRALIA.

H. C. OF A. *Licensing—Lease of hotel—Right to surrender—Person in occupation “under or by
1918. virtue of” a lease—Transferee of lease—Time of transfer—New covenant to
pay rent—Waiver—Licensing Acts Further Amendment Act (No. 2) 1915 (S.A.)
(No. 1236), sec. 70—Real Property Act 1886 (S.A.) (No. 380), secs. 150, 151.*
MELBOURNE,
May 15, 22.

Isaacs,
Gavan Duffy
and Rich JJ.

Sec. 70 of the *Licensing Acts Further Amendment Act* (No. 2) 1915 (S.A.) provides that “If any premises with respect to which a licence exists at the time of the commencement of this Act is in the occupation of some person other than the owner of the same under or by virtue of a lease or agreement of tenancy granted or entered into before the twenty-seventh day of March, nineteen hundred and fifteen, such person . . . may, at any time within the period of twelve months from such commencement, give to the lessor or landlord of the said premises, as the case may be, written notice of his intention to surrender such lease or agreement of tenancy at the expiration of fourteen days from the giving of such notice, and the lessor or landlord, as the case may be, shall, at the cost of the lessee or tenant, execute all documents and do all things necessary to give effect to such surrender.” By a proclamation issued on 9th March 1916, the Act came into operation on 26th March 1916.

The respondent, who was the registered proprietor of certain land upon which was erected a hotel, by a memorandum of lease, executed on 16th June

1914, leased the hotel and land to C. for a period of seven years from that date. By the lease C. for himself and his permitted assigns covenanted during the continuance of the lease to pay the rent at the times and in the manner appointed, and also covenanted not to assign without the written consent of the respondent first being had and obtained. On 10th March 1916 C. transferred the lease to the appellant, and the appellant by the memorandum of transfer covenanted during the unexpired term to duly pay the rent and perform and keep all the covenants, conditions, agreements and restrictions on C.'s part expressed or implied in or by the memorandum of lease. On the memorandum of transfer the respondent indorsed her consent to the transfer, which was dated 11th March 1916, stating her consent to be "on the understanding and express condition that the lessee's covenants and obligations are in no way impaired relaxed or released thereby but continue in full force and in effect."

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*Held*, that the appellant was in occupation of the premises under or by virtue of the lease of 16th June 1914, and was entitled under sec. 70 to surrender the lease.

Decision of the Supreme Court of South Australia reversed.

APPEAL from the Supreme Court of South Australia.

On 16th June 1914 Harriet Terry, who was the registered proprietor of certain land upon which was erected a hotel, executed a memorandum of lease of the land and premises to David Callel for a period of seven years from that date. The memorandum of lease, which was also executed by Callel and was duly registered, contained (*inter alia*) a covenant by him, his executors, administrators and permitted assigns that "The lessee shall from time to time and at all times during the continuance of this lease well and truly pay or cause to be paid to the lessor the rent hereby reserved at the respective times and in manner hereinbefore appointed for the payment thereof free and clear from all deductions or abatements whatsoever." It also contained a covenant not to assign or sub-let without the written consent of the lessor first being had and obtained.

On 27th March 1915 a poll of electors was taken which resulted in favour of an alteration of the hour for closing hotels from eleven o'clock at night to six o'clock in the evening, and that alteration was effected by the *Licensing Act Further Amendment Act* 1915 (No. 1195). On 9th March 1916 a proclamation was published in the *Government Gazette* that the *Licensing Acts Further Amendment Act*



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On 10th March 1916 a memorandum of transfer was executed by which David Callel transferred the lease to Charles Newton Hare, and which contained the following covenant : " I the said Charles Newton Hare for myself my executors administrators and permitted assigns do hereby covenant with the said David Callel and as a separate and independent covenant with the said Harriet Terry their executors administrators and assigns that I the said Charles Newton Hare and my executors administrators and permitted assigns will during the unexpired term of seven years from the sixteenth day of June one thousand nine hundred and fourteen duly pay the rent and faithfully carry out observe perform and keep all the covenants conditions agreements and restrictions on the lessee's part reserved expressed or implied in or by the said memorandum of lease Register No. 617587 In witness whereof we have hereunto subscribed our names the tenth day of March one thousand nine hundred and sixteen." Indorsed on this memorandum of transfer was the following consent, which was signed by Harriet Terry and dated 11th March 1916 : " I consent to the within transfer on the understanding and express condition that the lessee's covenants and obligations are in no way impaired relaxed or released thereby but continue in full force and effect and in particular that my written consent is to be previously obtained to every future transfer underlease mortgage or parting with the possession of the within premises or any part thereof and that on any default in the obtaining of such consent previous to any transfer underlease mortgage or parting with the possession thereof the right of re-entry given to the lessor by the within mentioned lease for breach of covenant shall immediately arise and become exercisable and there shall be no obligation on my part to grant any such consent."

On 20th February 1917 Hare gave a written notice to Mrs. Terry that it was his intention pursuant to sec. 70 of the *Licensing Acts Further Amendment Act* (No. 2) 1915 to surrender the lease at the expiration of fourteen days from the date of the notice.

Mrs. Terry then brought an action against Hare in the Supreme Court, claiming a declaration that Hare was not entitled under sec.



70 of the Act above mentioned to surrender the lease or to require her to accept such surrender. On a summons for immediate relief *Gordon J.* made an order in the terms of the claim, and on appeal the Full Court (*Murray C.J.* and *Gordon J.*, *Buchanan J.* dissenting) affirmed that order.

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From the decision of the Full Court the defendant now appealed to the High Court.

*Cleland K.C.* (with him *H. Edmunds*), for the appellant. The appellant was in occupation of the premises "under or by virtue of" the original lease within the meaning of sec. 70 of the *Licensing Acts Further Amendment Act* (No. 2) 1915. The right of surrender given by that section was given because the Act made provision for the early closing of public houses. That the appellant was, as between himself and the respondent, in occupation under or by virtue of the original lease is shown by sec. 151 of the *Real Property Act* 1886, which provides that upon the transfer being registered the estate of the transferor with all rights, powers and privileges thereto belonging shall pass to the transferee, and such transferee, while he remains the registered proprietor of the estate, shall be subject to and liable for all the requirements to which he would have been subject and liable if named in the transferred instrument as lessee. The proclamation of the coming into operation of the Act having been issued the day before the lease was transferred, the appellant must be taken to have known that he was acquiring a lease with the right of surrender attached to it. The covenant entered into by the appellant in the memorandum of transfer has no more effect than if it had been contained in the original lease. If the lease came to an end by surrender, the covenant also came to an end. The object of the covenant was to create a contractual relationship between the appellant and the respondent.

[*RICH J.* It also effected the purpose of creating an indemnity between the appellant and the respondent which otherwise would not have existed.]

It had the effect of making a continuing relationship which, without it, would have ceased on a transfer by the appellant. See sec. 151 of the *Real Property Act* 1886. There is nothing in the



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covenant or in the terms of the consent given by the respondent to the transfer from which can be implied a waiver by the appellant of his right to surrender. [Counsel referred to *Baynton v. Morgan* (1).]

*Mann*, for the respondent. The covenant in the transfer is part of the consideration moving to the respondent for her consent. The consent cannot be separated from the transfer to which she consented, and the covenant can only have been inserted in the transfer for her benefit. If it was an agreement with the respondent, then the case does not fall within sec. 70 of the *Licensing Acts Further Amendment Act* (No. 2) 1915. That section was intended to protect those who had entered into obligations without knowing of the impending change, and it does not apply to a person who became a tenant after 27th March 1915. That being the date of the poll which resulted in the alteration of the hour of closing hotels from eleven o'clock at night to six o'clock in the evening, there was no reason for giving the right of surrender to persons entering into agreements after that date. The occupation must be immediately and solely under or by virtue of the lease. The appellant does not hold under or by virtue of the original lease. The section does not refer to persons in possession of the term created by a lease, and occupation under or by virtue of a lease is not synonymous with possession of the term created by a lease. A man does not hold under or by virtue of a lease unless he is in possession of the term and holds it on the conditions of the lease. Here the appellant is in possession of the term but with the important variation of the conditions created by the covenant in the transfer. No transferee of a lease comes within sec. 70. Under sec. 151 of the *Real Property Act* 1886 a transferee of a lease does not become the lessee, but he has, during the term of the lease, all the rights and obligations of the lessee, who himself remains liable under the lease. That section draws a clear distinction between the lessee, which means the person holding under the lease, and a person who comes under the same obligations as the lessee. Sec. 70 is only concerned with lessees and sub-lessees.

(1) 22 Q.B.D., 74, at pp. 78, 81.



*Cleland K.C.*, in reply. By virtue of the transfer of a lease the occupation of the transferee becomes occupation under or by virtue of the lease. The lessee ceases to be lessee upon the transfer. Under sec. 151 of the *Real Property Act* 1886, upon the transfer of the lease the right to surrender attached to the transferee.

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*Cur. adv. vult.*

The judgment of the COURT, which was read by ISAACS J., was as follows :—

We are of opinion that this appeal should succeed.

May 22.

We agree with the learned Chief Justice of South Australia and *Buchanan J.* that apart from the question of waiver the appellant had the right to surrender the lease. It was argued that the conditions upon which the lessor gave her consent so modified or varied the terms of the lease as to constitute in conjunction with those terms a new agreement dating from the time of consent. But we think that the proper view is that the parties acted on the basis that the lease as originally granted and registered should be preserved intact and should be transferred unaltered, and that whatever be the effect of the conditions of consent—whether amounting to new contractual relations or not, respecting which we express no opinion—they were treated as entirely separate and distinct from the lease itself. The appellant, having with the consent of the lessor been registered as transferee of the lease granted to *Callel*, henceforth occupied the premises “under or by virtue of” that lease, and so far fulfilled the terms of the section.

We agree with the learned Chief Justice that the occupation referred to in the section is not limited to that existing at the date the Act commenced. The crucial point of time for criterion of rights is 27th March 1915, when the poll took place; the date of commencement of the Act gives rise to no new consideration of justice, except as a starting-point for limiting the period of election to surrender.

As to the question of waiver, we agree with *Buchanan J.* that the terms of the transfer do not amount to a waiver. Assuming, without deciding, that they effected any alteration in mutual rights,

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The question of waiver by the conditions of consent as distinct from alteration of the then existing terms of the lease was not pressed in argument before us.

The appeal will be allowed with costs, and judgment for defendant with costs.

*Appeal allowed with costs. Judgment for the  
defendant with costs.*

Solicitor for the appellant, *C. A. Edmunds*, Adelaide, by *Plante & Henty*.

Solicitor for the respondent, *P. R. Stow*, Adelaide.

B. L.

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