[HIGH COURT OF AUSTRALIA.]

HALL AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

HOYTS THEATRES LIMITED . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1934.

MELBOURNE, *May* 15.

SYDNEY, *Aug.* 7.

Gavan Duffy C.J., Starke, Dixon, and McTiernan JJ.

Landlord and Tenant—Rent reduction—Sub-tenant becoming tenant—Landlord receiving higher rent under new lease—Tenant paying lower rent than under sub-lease—Sub-lease "current or in operation"—Reduction made on rent in sub-lease—Reduced rent under sub-lease greater than rent under new lease—Rent under new lease not reduced by Act—Sub-lease including use of chattels—Reduction of Rents Act 1931 (*No.* 21 *of* 1931) (*W.A.*), *secs.* 2*, 3*, 4*—*Reduction of Rents Continuance Act* 1933 (*No.* 11 *of* 1933) (*W.A.*).

The plaintiffs leased certain land in Fremantle to lessees at a rental of £25 per week. In 1920 this lease was extended until 16th September 1931. These lessees sub-leased to the defendant, who on and prior to 7th April 1931 was paying £40 per week rent to the sub-lessors. On 19th March 1931 the plaintiffs offered to lease the premises to the defendant for five years from 19th September 1931, the rental to be £25 per week for the first year, increasing yearly by £2 10s. per week. On 7th April 1931 the defendant accepted the offer of the

* The *Reduction of Rents Act* 1931 (W.A.) provides:—"2. 'Lease' means any lease or agreement, whether in writing or verbal, under which land is held by a lessee of a lessor for any term or period which is not determinable at the will of the lessee by less than one month's notice; 'Lessee' includes any sub-lessee or tenant; and 'Lessor' includes any sub-lessor or landlord."

"3. (1) This Act shall apply and have effect, except as herein otherwise provided, to and in respect of all leases current or in operation at the commencement thereof; and, except by leave of the Commissioner, it shall not be lawful for the lessor, under any lease hereafter granted or entered into in respect of any land which is or has been subject to a lease current or in operation

H. C. OF A. 1934. HALL v. HOYTS THEATRES LTD.

lease on those terms. On 19th August 1931 the *Reduction of Rents Act* 1931 (W.A.) came into operation, and on 19th September the defendant entered into possession of the premises as tenant of the plaintiff on the terms of the above agreement.

Held, by the whole Court, that a lease within the meaning of the Act came into existence on 19th September, when the defendant entered into possession pursuant to the agreement of 7th April, and was therefore subject to the Act, but, by *Gavan Duffy* C.J., *Dixon* and *McTiernan* JJ. (*Starke* J. dissenting), that as at the commencement of the Act the land was the subject of both a lease and sub-lease, the maximum rental for the purposes of sec. 3 of the Act should be determined by reference to the higher of the two rentals previously paid.

Decision of the Supreme Court of Western Australia (*Dwyer* J.) reversed.

APPEAL from the Supreme Court of Western Australia.

Florence Augusta Hall and Lucius Charles Manning brought an action against Hoyts Theatres Ltd. in the Supreme Court of Western Australia. The statement of claim in substance alleged that:— 1. The plaintiffs were registered as proprietors of an estate in fee simple in portions of Fremantle Town upon which were erected certain buildings known as the Majestic Theatre. 2. By letter dated 19th March 1931 the plaintiffs gave the defendant an option, expiring six weeks from the date thereof, to lease the premises for five years from 19th September 1931 on the terms and conditions: first year at a weekly rental of £25, second year at £27 10s. per week, third year at £30 per week, fourth year at £32 10s. per week, and fifth year at £35 per week, the tenant to pay all rates and taxes, and the lease to contain all the usual clauses governing picture theatres. 3. On 7th April 1931 the defendant, by letter from its solicitors,

at the date of the commencement of this Act, to reserve charge or receive a greater or higher rental in respect of such land than that permitted by or under this Act to be charged and received under the lease current or in operation at the date aforesaid. (2) Any contract or agreement made or entered into or to be made or entered into by any lessee shall, in so far as it purports to annul or vary any of the provisions of this Act or to deprive the lessee of the benefit thereof, be null and void, without prejudice, however, to any provisions of the contract or agreement which are distinct and severable from the provisions hereby annulled." "4. Rent accruing or to accrue due and payable during the operation of this Act under any lease shall be and is hereby reduced by twenty-two and one-half per centum of the amount thereof and shall be calculated and payable at such rate accordingly, unless and until the lessor has obtained from a Commissioner an order permitting him to charge and receive rent under such lease at a higher rate, and the lease shall be deemed to be altered to such extent as is necessary to give effect to this section. . . ."

accepted the offer of the lease of the premises in terms of the option. 4. On 19th September 1931 the defendant entered into possession of the premises as tenant of the plaintiffs on the terms of the option and acceptance. 5. On 5th October 1931 a formal lease of the premises was executed by the parties. 6. On 7th April 1931 the defendant was, and had for some years prior thereto, been in possession of the premises as sub-tenant from the plaintiffs' tenants at a rental of £40, or thereabouts, per week; the rental which the plaintiffs were receiving from their tenants was £25 per week. 7. On 19th August 1931 an Act of the Parliament of Western Australia, No. 21 of 1931, cited as the *Reduction of Rents Act* 1931, came into operation. 8. The defendant said that there was a lease current or in operation at the date of the commencement of the Act under which the plaintiffs received a rental of £25 per week, and accordingly claimed that the only rent which the plaintiffs were entitled to charge during the operation of the Act was £25 per week less 22½ per cent, notwithstanding the provision for the payment of a higher rental as set out in par. 2 above during the second and succeeding years. 9. The plaintiffs claim that the rental of the premises on 19th August 1931 was the sum of £40 per week, and that accordingly the defendant was liable to pay the rentals set out in par. 2 above without any reduction, or alternatively such rentals less a reduction of 22½ per cent during the operation of the Act; and the plaintiffs claimed an order for payment of such rent as might be found to be due, owing and unpaid.

By its defence the defendant alleged in substance that:—1. The plaintiffs or their predecessors in title leased the land in question to the lessees named in the lease for a term of ten years from 18th September 1916. 2. By an instrument of extension dated 10th May 1920 the lease was extended for a term of five years from 17th September 1926 at a rental of £25 per week. 3. By virtue of such extension the lease remained current and in operation until 16th September 1931. 4. The defendant admitted that for some time prior to April 1931 it was a sub-lessee of the premises, paid rent at the rate of £40 per week to the sub-lessors, and remained a sub-lessee until 16th September 1931. The rental of £40 per week was paid

H. C. OF A. 1934. HALL v. HOYTS THEATRES LTD.

not only for the premises in question, but also for the seating accommodation and all other tenant's fixtures and fittings, furniture and biograph, and other plant with which the premises were equipped. 5. The lease referred to in par. 5 of the statement of claim was entered into without the plaintiffs first having obtained the leave of the Commissioner under sec. 3 (1) of the *Reduction of Rents Act* 1931 to reserve, charge or receive the rentals specified in the lease, some of which were higher than the rent reserved by the plaintiffs under the lease current and in operation at the commencement of such Act. 6. On 9th February 1932 the plaintiffs made an application under sec. 5 of the *Reduction of Rents Act* 1931 to the Chief Justice of Western Australia, the Commissioner under the said Act, for leave to charge and receive from the defendant under the lease dated 5th October 1931 referred to in par. 5 of the statement of claim the rents set out in par. 2 of the statement of claim. 7. The application came on for hearing before the Commissioner on 14th March 1933 and was dismissed.

By their reply, the plaintiffs said that:—1. Except as to any admissions contained in the defence they joined issue. 2. As to par. 4 of the defence, the plaintiffs said that the seating accommodation, fixtures, chattels and plant therein referred to had been in use in the theatre since about November 1916, and that the rental value thereof did not materially affect or reduce the rental of £40 per week which the defendant was paying as sub-lessee. 3. As to pars. 6 and 7 of the defence, the plaintiffs would contend that the application under sec. 5 of the *Reduction of Rents Act* 1931 and dismissal thereof, were not relevant to the matters in issue.

The only evidence called was that of an estate agent who collected the rents of the Majestic Theatre, who said, in substance, that the head lease expired on 16th September 1931, and after that the defendant company became the lessee; that formerly it was a sub-tenant; that prior to the expiry of the head lease he valued the theatre chattels, consisting of biograph machine, seating accommodation, &c., at £750, which price was accepted, and the defendant company acquired them at that price; that the original lessees had taken the land on building lease in about 1916, and equipped it then at a cost of £2,364; that the normal rental for chattels is ten

per cent per annum on the capital cost. There was also produced, but not put in evidence, an account showing that without reduction under the *Reduction of Rents Acts* 1931-1933 (W.A.) the balance of the rent due under the agreement of 7th April 1931 by the defendant to the plaintiffs on 1st June 1933 amounted to £631 3s. 2d.; but that the balance of such rent less 22½ per cent amounted on 1st June 1933 to £109 12s. 3d. The defendant contended that he should pay £25 per week less 22½ per cent, namely, £19 7s. 6d. per week.

The action was heard by *Dwyer* J. who dismissed the plaintiffs' claim.

From that decision the plaintiffs now appealed to the High Court.

Fullagar K.C. and *Sholl*, for the appellants. The appellants are not struck by the *Reduction of Rents Act* (1931) (W.A.) at all. If they are, they are affected only by the first part of sec. 3 of the Act, but if the latter part of sec. 3 applies to them, the standard rent is either £40 as reduced, or the rent reserved by the agreement as reduced, and not £25 as reduced. It is the value of the land and not the identity of the parties that the Legislature is looking at in this legislation (*Glossop* v. *Ashley* (1); *Prout* v. *Hunter* (2); *Ratkinsky* v. *Jacobs* (3); *Haskins* v. *Lewis* (4)). The standard rent cannot be referred to the 1916 rent, because in the meantime the premises have lost their identity. The land was altered by building the picture theatre upon it (*Sinclair* v. *Powell* (5); *Phillips* v. *Barnett* (6); *Marchbank* v. *Campbell* (7)). Where there is a lease of land and chattels, the rent issues out of the land only (*Newman* v. *Anderton* (8); *In re Pulverized Coal (Australasia) Ltd. and Maize Products Pty. Ltd.'s Lease* (9)).

Phillips, for the respondent. The judgment of the Supreme Court is right. The present lease comes within sec. 3 (1). The expressions "granted or entered into" and "current and in operation" mean the same thing. They mean, in effect, that there is an operative term existing. The distinction is between a lease in the future and a lease in the past. An agreement for a lease is never

(1) (1922) 1 K.B. 1.
(2) (1924) 2 K.B. 736, at p. 744.
(3) (1929) 1 K.B. 24, at p. 27.
(4) (1931) 2 K.B. 1, at pp. 9, 15, 16.
(5) (1922) 1 K.B. 393.
(6) (1922) 1 K.B. 222.
(7) (1923) 1 K.B. 245.
(8) (1806) 2 Bos. & P. (N.R.) 224; 127 E.R. 611.
(9) (1932) V.L.R. 506.

H. C. OF A. 1934. HALL v. HOYTS THEATRES LTD.

anything more than an agreement. It does not create a term. "Granted or entered into" are apt words to indicate the present creation of a term. The Act is looking to a lease, and that can only be the formal lease, or the document of which equity would grant specific performance. The document which creates the term, and which entitles the tenant to hold the land, is the critical document.

[STARKE J. referred to *Moore* v. *Dimond* (1); *Dimond* v. *Moore* (2).]

The only question is—What is the rent? The words of the section are equally capable of covering the lease or the sub-lease. The English and the Western Australian rent restriction Acts were to secure different objects, and, therefore, the English cases are not applicable to the Western Australian Act. The English Act was to create a permanent statutory tenancy. The Western Australian Act was directed not so much to the relief of tenants as limiting the income of landlords. On the pleadings the rent reserved was not a rent of the land alone. In *Marchbank* v. *Campbell* (3) the issue was whether the house came within the Act. That is different from the present case where the issue is whether the rent paid is for the land and buildings, or for the land, buildings and fixtures. This rent was not paid in respect of the land, but for other rights as well and, therefore, did not come within the Act.

Sholl, in reply.

Cur. adv. vult.

Aug. 7. The following written judgments were delivered :—

GAVAN DUFFY C.J., DIXON AND MCTIERNAN JJ. The question upon this appeal is whether the amount of the weekly rent payable by the respondent as lessee to the appellants as lessors of certain land in Fremantle is limited by the *Reduction of Rents Acts* 1931-1933 (W.A.), to any and what sum less than that reserved in the lease. The question depends upon the interpretation to be placed upon sec. 3 (1) of the Act, which is as follows :—"This Act shall apply and have effect, except as herein otherwise provided, to and in respect of all leases current or in operation at the commencement thereof; and, except by leave of the Commissioner, it shall not be lawful for the lessor, under any lease hereafter granted or entered

(1) (1929) 43 C.L.R. 105. (2) (1931) 45 C.L.R. 159.
(3) (1923) 1 K.B. 245.

into in respect of any land which is or has been subject to a lease current or in operation at the date of the commencement of this Act, to reserve charge or receive a greater or higher rental in respect of such land than that permitted by or under this Act to be charged and received under the lease current or in operation at the date aforesaid." As a result of the definitions contained in sec. 2 of "Lease," "Lessee" and "Lessor," this provision does not apply to a tenancy which may be determined by the tenant by less than a month's notice. But it does apply to all other leases, or agreements for leases, under which land is held by a lessee from a lessor, expressions which respectively include any sub-lessee or tenant, and any sub-lessor or landlord. What rental is "permitted by or under this Act to be charged and received" appears from sec. 4 (1), which, subject to exceptions and qualifications not presently material, provides that rent accruing during the operation of the Act under any lease shall be reduced by 22½ per cent, and the lease shall be deemed to be altered to such extent as is necessary to give effect to the section.

The premises yielding the rent in dispute consist of a picture theatre. At the commencement of the Act the respondent was in occupation, but not as lessee of the appellants. The respondent held as sub-lessee under a sub-lease, which the appellants' lessees had granted. Head lease and sub-lease were then shortly to expire. The rent reserved by the head lease was £25 and that by the sub-lease £40 a week. From the indistinct account of the facts upon which the parties were content to rest, it appears that under the sub-lease the respondent obtained the use of the seating accommodation and other fixtures, fittings, furniture and plant with which the premises were equipped, but what part, if any, of these were pure chattels is not stated.

Before the commencement of the Act, the appellants and the respondent in anticipation of the termination of the existing head lease and sub-lease had made an agreement for a new lease to the respondent as the immediate tenant of the appellants. The term was to commence within three days of the termination of the existing lease and sub-lease, and was to be of five years duration. A weekly rent was reserved of £25 for the first year, increasing in each of the four succeeding years by £2 10s. After the respondent had ceased to be a sub-tenant, it held the premises under this agreement for a lease for a fortnight or more, when a formal lease was executed.

H. C. OF A. 1934. HALL v. HOYTS THEATRES LTD. Gavan Duffy C.J. Dixon J. McTiernan J.

The respondent contends upon these facts, that, inasmuch as when the Act came into force the appellants were receiving rent under a head lease then current, sec. 3 (1) operates to limit the rent which they may reserve, charge, or receive under any subsequent head lease, to a sum 22½ per cent less than the previous rent, although the later lease had been agreed upon before the commencement of the Act, and although it is not a lease to the same tenant. The appellants do not deny that the restriction imposed by sec. 3 (1) upon the rent obtainable under leases granted after the commencement of the Act applies to all leases of land under lease at its commencement, whether the new lease is granted to the same or some other tenant, and whether by the same landlord or by some other person who has since acquired the land. But they do deny that the new lease was " granted or entered into " after the commencement of the Act, as those expressions should be understood in the sub-section. Their contention is that, as the agreement for the lease was made before the commencement of the Act, a " lease," as defined in the definition of that word, was already " granted or entered into," and that neither by the term then agreed to taking effect in possession, nor by their afterwards executing, pursuant to the agreement, a formal instrument of lease, did they again grant or enter into a lease, particularly as the land appears to be under the *Transfer of Land Act* 1893 (W.A.), and there is nothing to show that the instrument was registered. If the words in the sub-section " any lease hereafter granted or entered into " apply only to leases agreed upon after the commencement of the Act, it is evident that a term of years, which took effect in possession soon after the legislation, will not be within the operation of the statute at all, if the agreement of the parties was arrived at before its commencement, and this although at that time the land was held under an unexpired lease. For, on the one hand, it is not easy to bring such agreements for future terms within the first limb of the sub-section, which applies the Act to leases current and in operation, and, on the other hand, they would escape the second limb. The plan of sec. 3 (1) appears to have been to bring under sec. 4 (1) a lease, which, at the commencement of the Act, had taken effect in possession and had not expired or determined, and to forbid the reservation upon any lease, which might succeed that lease, of any greater rent than had been payable under the earlier lease as affected by the statute. The suggested interpretation of the words " any lease hereafter granted or entered

into " would not be consistent with this plan, and should be avoided if another interpretation be open. It may be thought, however, to receive support from the expression " land which is or has been subject to a lease current or in operation at the date of the commencement of this Act." The alternative " is or has been " refers to the time when the new lease is " granted or entered into," and thus contemplates the two cases, first, of a lease still current or in operation when the new lease is granted or entered into, and second, of a lease which has been, but has then ceased to be current, or in operation. The first case could only occur in two ways, namely: (1) when, during the currency of a lease, another lease to take effect at or after its expiry or sooner determination is agreed upon; and (2) when, during the currency of a lease, a sub-lease is granted. Whether the form of expression was adopted because of the first case, or because of the second only, does not appear. But, notwithstanding the implication which may be thought to be contained in it, we think the words " any lease hereafter granted or entered into " should be understood as including cases in which after the Act the full relation of landlord and tenant at law is for the first time established, either by the execution of a formal demise for a term commencing immediately or from a past date, or by the tenant going into possession under an agreement, and paying rent or otherwise acknowledging the tenancy, or in some other manner, although, before the Act, the lease was contracted for, or a lease or agreement for a lease was made, for a term commencing at a date after the commencement of the Act. This interpretation is supported by the apparent intention of the sub-section to cover all cases in which land held under lease at the commencement of the Act continued under lease or was again leased, and by the language of the definition of " lease," one of the conditions of which is that land should be *held* under the lease or agreement.

It follows from this construction of the sub-section that, under the lease upon which the respondent now holds the land, it was not lawful for the appellants " to reserve charge or receive a greater or higher rental in respect of such land than that permitted by or under this Act to be charged and received under the lease current or in operation at the date " of the commencement of the Act. Now at that date there were two leases of the land current and in operation, the head lease reserving a weekly rental of £25, and the sub-lease reserving a weekly rental of £40. Under the first, the

H. C. OF A. 1934. HALL v. HOYTS THEATRES LTD. Gavan Duffy C.J. Dixon J. McTiernan J.

statute permitted to be charged and received a weekly rent of £19 7s. 6d. : under the second, of £31. Which of these sums constitutes the limit set by the sub-section upon the rent obtainable for the land ? In favour of the larger sum, it is said by the appellants that the statute is looking at the rent paid by the occupying tenant, and seeking to reduce and control the expenditure upon rent which is incident to his occupation and to the occupation of all who shall succeed him while the legislation remains in operation.

On the side of the respondent, another motive is said to have primarily actuated the Legislature, namely, to reduce and control what is received by a landlord in respect of his estate or interest in land which, at the commencement of the Act, he treated as a rent producing investment. Upon this view a head lessor is restricted to the rent which, when the Act came into force, he obtained upon the head lease, and a sub-lessor to the rent he obtained upon the sub-lease : while a sub-lessee would be altogether unrestrained, if, at that time, he, or some other sub-lessor, was the occupier, and a lessee, if there was no sub-lease. In substance, this was the view which *Dwyer* J. adopted in the judgment under appeal. His Honor said :—" Now, although the term ' lessor ' includes a sub-lessor as well as a landlord, and ' lessee ' includes a sub-lessee, and ' leases ' therefore cover sub-tenancies, it seems necessary, in interpreting the section, and applying it to particular cases, to maintain consistency in the relative meanings given to these words. A sub-lessor is also a lessee, and if he is to be considered in any particular case as the person referred to as a lessor, then it would appear proper to treat a reference to a lessee as meaning the sub-lessee, and a reference to a lease as meaning the sub-lease to which they are parties ; and similarly, a reference to landlords as lessors imports that the lease referred to in the same connection is the head lease. If this is so, then the plaintiffs, who are the landlords, are not permitted to charge a greater rent than that chargeable under the head lease current and in operation on the " date of the commencement of the Act.

In choosing between this construction and that by which one rent is to be ascertained which, after reduction by $22\frac{1}{2}$ per cent, will supply the maximum beyond which no lease may go, whether it be a head, mesne or sub-lease, reliance must be placed upon considerations of context and general legislative intention which do not provide highly demonstrative reasons : for they are neither many nor certain.

But there is no escape for a Court, which is called upon to apply the Act, from making the choice, because it arises out of the very nature of the subject with which the provision deals.

In our opinion, the reasons which preponderate are those in favour of interpreting the provision as intending to establish one maximum for all leases by whomsoever given. It is, we think, an important consideration that, in respect of land under lease at the commencement of the Act, sub-sec. 1 restricts the rent which may be reserved by a lessor who has acquired the land since the Act, and restricts it in favour of tenants who are strangers to the lease then existing. The sub-section contains no words which could confine its operation to the parties to the lease current when the Act came into force and their privies. On the contrary, it is expressed in language which clearly extends to strangers to those parties. The general legislative intention, therefore, appears to have been to attach the restriction to the land without regard to the identity of the parties. No doubt the reduction of rents, for which it is the expressed object of the Act to provide, was determined upon as part of the general plan embodied in the statutes of Commonwealth and States which included the reduction of mortgage and other interest. But that plan concerned itself less with the return to the individual than with the return which a form of investment or source of income would or should give, and with the amount which should be paid by the mortgagee, tenant or other person upon whom fell the corresponding liability. Distinctions between leases and sub-leases do not appear material to such of the objects in view as can be collected from this and other legislation, such as the *Financial Emergency Act* 1931 (W.A.), which is mentioned in sec. 2 of the *Reduction of Rents Act* 1931.

If the land was treated at the time of the Act as a rent-producing investment, it appears to have been considered proper to place a limit upon the rent it might produce as an investment, no matter into whose hands the investment might fall. As a source of that form of income, the amount to be produced was restricted, not only because the maximum amount to be received in respect of it should be fixed, but because the maximum amount to be paid should also be prescribed. Doubtless, in leaving unregulated the rents of land not under lease when the statute was passed, the legislation stopped short of complete logic. But the fact that it did so does not, we think, weaken the inferences to be drawn from the considerations

H. C. OF A. 1934. HALL v. HOYTS THEATRES LTD. Gavan Duffy C.J. Dixon J. McTiernan J.

which tend to support the conclusion that one maximum only was intended to be set for the rent receivable for a piece of land. That conclusion receives some further support from the form of the language of sub-sec. 1. The land to be affected is described as "land . . . subject to a lease current or in operation at the date of the commencement of this Act." Any one of the leases, where there are head lease, mesne lease, and underlease, can be relied upon to satisfy this description or condition. Under each the land is "held" within the meaning of the definition of "lease." But when this condition is fulfilled, the sub-section makes it unlawful for the lessor under any lease, that is, by the definitions of "lease," "lessee" and "lessor," any lease or agreement under which land is held by a lessee, sub-lessee or tenant of a lessor, sub-lessor or landlord, to reserve more than the maximum rent prescribed. This appears to us to mean, as a matter of language, that none of these things can be done whenever the condition is fulfilled, whatever is relied upon for that purpose; not that when it is fulfilled by the existence of a head lease, there can be no greater reservation on a head lease, and when by an underlease, then on an underlease.

When there is more than one rent paid in respect of the land, we should think the highest would be taken. The later words "rental . . . under the lease current or in operation at the date aforesaid," where there is a plurality of leases, may, perhaps, be thrown into the plural, so that what is forbidden is the reservation, receipt or charge of a rental greater than the rentals under the leases current or in operation at the date of the Act, which we think would naturally be understood as meaning greater than the highest of these rents. Or perhaps the word "the" before the word "lease" may be emphasized as referring back to the lease relied upon as fulfilling the condition. When more than one lease fulfils the condition, they may be considered to do so in combination, in which case the rental permitted is again the highest. There is, no doubt, something to be said for the view that the policy of the Act includes the relief of the occupier, and accordingly that the rent taken should be that of the tenant holding in possession, and not that paid by a tenant holding in reversion upon a sub-lease granted by himself or his predecessor in title. But, on the whole, we think the solution which takes the maximum to be fixed by the highest of the several rents has the better support. In most cases it will come to the same thing.

For these reasons we think the rent reserved upon the sub-lease, less 22½ per cent, namely, £31, provides the maximum, unless the inclusion of the use of the chattels among the rights it conferred upon the tenant puts that rent outside the description of the sub-section. It is not clear that chattels which were not fixtures were included, but in any case we do not think that the result would be altered if under the sub-lease the tenant had obtained a right to use such chattels. The rent in point of law would issue out of the land: "the rent . . . shall follow the reversion of the land, which is more worthy, and not the reversion of the chattels" (*Read* v. *Lawnse or Lawse* (1); *Farewell* v. *Dickenson* (2); *Brown* v. *Peto* (3)).

For these reasons we are of opinion that the maximum rent permitted by the *Reduction of Rents Acts* 1931-1933 was £31 a week and not £19 7s. 6d. It follows that up to 31st May 1933, when the writ issued, the respondent had underpaid the lawful rent to the extent of £631 3s. 2d.

We think the appeal should be allowed with costs, the judgment of the Supreme Court discharged, and in lieu thereof judgment entered for the plaintiffs appellants for £631 3s. 2d. with costs.

STARKE J. This appeal depends upon the proper construction of the *Reduction of Rents Act* 1931 (No. 21 of 1931) of Western Australia, which came into operation on 19th August 1931. The Act provided that during its operation rent accruing or to accrue due and payable under any lease should be and it was thereby reduced by 22½ per cent of the amount thereof, and should be calculated and payable at such reduced rate accordingly unless and until the lessor obtained an order from a Commissioner appointed by the Governor for the purposes of the *Financial Emergency Act* 1931, permitting him to charge and receive rent under such lease at a higher rate. And sec. 3 (1) enacted: "This Act shall apply and have effect, except as herein otherwise provided, to and in respect of all leases current or in operation at the commencement thereof; and, except by leave of the Commissioner, it shall not be lawful for the lessor, under any lease hereafter granted or entered into in respect of any land which is or has been subject to a lease current or in operation at the date of the commencement of this Act, to reserve charge or receive a

(1) (1560) 2 Dyer 212 (b); 73 E.R. 469, at p. 470; and 1 And. 4 (9); 123 E.R. 323.

(2) (1827) 6 B. & C. 251; 108 E.R. 446.

(3) (1900) 1 Q.B. 346, at p. 354; (1900) 2 Q.B. 653.

H. C. OF A. 1934. HALL v. HOYTS THEATRES LTD. Starke J.

greater or higher rental in respect of such land than that permitted by or under this Act to be charged and received under the lease current or in operation at the date aforesaid." By sec. 2, "'lease' means any lease or agreement, whether in writing or verbal, under which land is held by a lessee of a lessor for any term or period which is not determinable at the will of the lessee by less than one month's notice; 'lessee' includes any sub-lessee or tenant; and 'lessor' includes any sub-lessor or landlord."

The appellants were the proprietors of certain lands in Fremantle upon which buildings known as the Majestic Theatre were erected. They had leased these lands to certain tenants at a rental of £25 per week, and this lease was running or current when the Act came into operation. The tenants had sub-let the land, together with certain seating accommodation, tenant's fittings and fixtures, furniture, and biograph and other plant with which the theatre was equipped, to the present respondent at a rental of £40 per week or thereabouts. This sub-lease was also running or current when the Act came into operation. Both head lease and sub-lease expired on 17th September 1931. In March and April of 1931, the appellants and the respondent entered into an agreement or arrangement for a new lease of the premises directly to the respondent for a term of five years, from 19th September 1931, at a weekly rental of £25 for the first year, £27 10s. for the second year, £30 for the third year, £32 10s. for the fourth year, and £35 for the fifth year. On 5th October 1931, the appellants formally leased or demised the premises to the respondent in terms of the arrangement of March and April 1931. It was insisted that the arrangement or agreement of March and April 1931 was current and in operation at the commencement of the Act. But this arrangement or agreement was reduced to a lease on 5th October 1931. It is that lease which governs and controls the rights of the parties to the premises, and not their preliminary arrangement or agreement. The lease was granted or entered into after the commencement of the Act, and falls within the inhibition contained in sec. 3 (1).

On the part of the appellants it is claimed that the rental of the land under the lease current or in operation at the date of the commencement of the Act was £40 per week, whilst the respondent contends that it was £25 per week. The Act contemplates, I think, identity in subject matter, that is, in the land, but it does not require identity in parties between a lease of the land granted or entered

into after the commencement, and some other lease of that land current or in operation at the date of the commencement, of the Act. It does, however, require comparison with a lease of that land current or in operation at the date of the commencement of the Act. But what lease? Is the Act, as Mr. *P. D. Phillips* forcibly urged, conditioned upon the acts of the person granting the new lease? Or is it, as the interpretation clause suggests, any lease or agreement under which the land was held by a lessee or a lessor, for any term or period not determinable at the will of the lessee by less than one month's notice? The object of the Act was undoubtedly to bring rents within the general scheme of what is known as the Premiers' Plan (see *Commonwealth Year Book* 1933, pp. 892, 893), and to keep them steady. But if, as I think, the Act does not require identity in parties between the old lease and the new lease of the land, then the Act is not conditioned upon the acts of the person granting the new lease. The Act, however, is not regarding the economic value of the land or any standard rent; it imposes upon the leasing of lands a restriction, arbitrary and artificial in character. It simply requires comparison with the lease current or in operation at the date of the commencement of the Act. The Act does not deal explicitly with cases in which a lease and a sub-lease are current and in operation at the date of its commencement. But it is implicit, I think, in the scheme of the Act, that like shall be compared with like, for the purpose of determining the relation between the rent reserved by the old lease and that reserved by the new: in short, that the new lease shall be compared with the lease current and in operation at the commencement of the Act, and sub-lease with sub-lease. The provision that lessee includes sub-lessee or tenant, and lessor sub-lessor does not detract from this conclusion; it anticipates the existence of sub-leases, and thus provides for the case of a sub-lessee. It does not, however, provide that a lease shall be deemed a sub-lease or a sub-lease a lease.

But this view does not solve the whole difficulty. It appears that the appellants in 1916 demised the land in question here for a term of ten years at a rental of £25 per week, and that this term was extended for a period of five years from 17th September

H. C. OF A. 1934.

HALL v. HOYTS THEATRES LTD.

Starke J.

1926. I gather that the lessees erected a theatre upon the land, and then equipped it, at a cost of £2,364, with furniture and biograph and other plant. So equipped, the land was sub-let to the respondent at a rental of £40 per week. The question is whether the subject matter of the demise of October 1931 of land on which a theatre had been erected and equipped, was identical with the subject matter of the demise and extension of 1916 and 1926. In 1916 a theatre had not been erected upon the land, but it was erected and equipped before the extension of 1926. A demise of land and chattels at one entire annual or other payment creates a rent which issues out of the land alone (*Spencer's Case* (1); *Newman* v. *Anderton* (2); *Farewell* v. *Dickenson* (3)). In my opinion, the contention that the premises lost their identity by reason of the fact that a theatre was erected and equipped upon the land since 1916, cannot be sustained in law or in fact. The rent reserved in both the old and the new leases issues out of the same land, and out of that land alone. Further, the theatre was erected upon the land before the extension of 1926, and the equipment does not seem to be included in the new lease; it was acquired by the respondent, as I understand the facts, for the sum of £750.

In my opinion the judgment below was right and should be affirmed.

Appeal allowed with costs. Judgment of the Supreme Court discharged. In lieu thereof judgment for the plaintiffs, appellants, for £631 3*s.* 2*d. with costs.*

Solicitor for the appellants, *Frank Unmack.*

Solicitors for the respondent, *Northmore, Hale, Davy & Leake.*

(1) (1583) 5 Co. 16 (a), at p. 17 (a); 77 E.R. 72, at p. 74.

(2) (1806) 2 Bos. & P. (N.R.) 224; 127 E.R. 611.

(3) (1827) 6 B. & C. 251; 108 E.R. 446.

H. D. W.