[HIGH COURT OF AUSTRALIA.]

TOOHEYS LIMITED . . . . . APPELLANT;
PLAINTIFF,

AND

THE MUNICIPAL COUNCIL OF SYDNEY . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *March* 27, 28; *April* 11.

Rich, Starke, Dixon, McTiernan and Williams JJ.

Liquor—Licensed premises—Licence fees—Lessors and lessees—Payment of fees—Statutory apportionment—Recovery of proportion from owner—Right of mortgagee of leasehold in possession—Liquor Act 1912-1937 (*N.S.W.*) (*No.* 42 *of* 1912—*No.* 35 *of* 1937), *s.* 21 (2)—*Real Property Act* 1900-1940 (*N.S.W.*) (*No.* 25 *of* 1900—*No.* 45 *of* 1940), *s.* 64.

The holder of a publican's licence under the *Liquor Act* 1912-1937 (N.S.W.) held the licensed premises under a lease granted to him by a company as mortgagee in possession under a sub-lease. The company was also mortgagee of the head lease and upon default by the mortgagor had, under its mortgage, also entered into the receipt of the rents and profits under the head-lease. The land was under the *Real Property Act* 1900-1940 (N.S.W.) and all the lease and mortgage interests were duly registered under that Act. The holder of the publican's licence, pursuant to s. 21 (2) of the *Liquor Act*, deducted two-fifths of the licence fee from the rent payable by him to the company as mortgagee in possession.

Held that s. 64 of the *Real Property Act* did not operate to confer upon the company the right which a lessee has by virtue of s. 21 (2) of the *Liquor Act* to deduct from the rent payable in respect of the licensed premises, or to recover from his lessor, a sum equal to two-fifths of the licence fee.

APPEAL from the Supreme Court of New South Wales.

The *Liquor Act* 1912-1937 (N.S.W.), by s. 21 (2), provides, so far as material, that the holder of a publican's licence who is not the owner of the premises in respect of which the licence fee is paid shall be entitled to deduct from any rent payable by him in respect of such premises, or to recover from his lessor in any court of competent jurisdiction, a sum equal to two-fifths of the licence fee

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paid by him ; and where such sum is so deducted from such rent or paid by or recovered from such lessor, such lessor may in like manner deduct from any rent payable by him or may recover as aforesaid a sum equal to the amount so deducted or paid or recovered, and so on until the lessor to whom the rent is payable is not himself a lessee of another person.

Section 64 of the *Real Property Act* 1900-1940 (N.S.W.), provides : "Any mortgagee or encumbrancee of leasehold land under the provisions of this Act, or any person claiming the said land as a purchaser or otherwise from or under such mortgagee or encumbrancee, after entering into possession of the said land or the receipt of the rents and profits thereof shall, during such possession or receipt but only to the extent of any benefit rents and profits which may be received by him, become and be subject and liable to the lessor of the said land or the person for the time being entitled to the said lessor's estate or interest in the said land to the same extent as the lessee or tenant was subject to and liable for prior to such mortgagee, encumbrancee, or other person entering into possession of the said land or the rents and profits thereof."

In an action brought by it in the Supreme Court of New South Wales Tooheys Ltd. sought to recover from the Municipal Council of Sydney the sum of £1,592 7s. 5d., being two-fifths of certain licence fees, by virtue of s. 21 (2) of the *Liquor Act* 1912-1937.

The declaration contained nine counts which dealt with successive years, the period referred to in the ninth count commencing from 1st July 1944 and ending on 4th April 1945, the date of the issue of the writ in this action.

The material allegations, as extracted from the first count, were that the defendant council was at all material times the registered proprietor, under the provisions of the *Real Property Act* 1900-1940, for an estate in fee simple of certain land situated in Park Street, Sydney ; that by memorandum of lease dated 30th January 1928 the defendant leased the said land and the hotel premises (the Coronation Hotel) covenanted to be erected thereon by the lessee to one Maurice Wise for the term of thirty years computed from 31st October 1927 at the rent and subject to the covenants and stipulations contained in the instrument of lease ; that on 1st March 1928, with the consent of the defendant, a sub-lease was granted by Wise to Coronation Hotel Ltd. for the balance of the said term of thirty years less one week ; that on 31st March 1928 Wise mortgaged the head-lease to the plaintiff and Coronation Hotel Ltd. mortgaged the sub-lease to the plaintiff ; that default was made by the mortgagors under their respective mortgages ; that in December 1929 the

plaintiff as mortgagee of the head-lease entered into receipt of the rents and profits and as mortgagee of the sub-lease entered into possession; that the plaintiff as mortgagee in possession received by way of rents and profits benefits greater in amount and value than the rent payable under the head-lease and the expenditure required to comply with the other obligations under the covenants and conditions thereof and became liable to pay and in fact paid to the defendant the rent payable under the head-lease; that from 1st July 1936 to 30th June 1937 the hotel was leased, with the consent of the defendant, by the plaintiff as mortgagee in possession to a tenant who was the holder of a publican's licence under the provisions of the *Liquor Act* and who conducted at the hotel the business of a licensed publican; that the tenant paid the licence fee payable under s. 21 (1) (*b*) of the *Liquor Act* and pursuant to s. 21 (2) of that Act deducted two-fifths thereof from the rent payable by him to the plaintiff; and that although under s. 21 (2) the defendant was liable to pay to the plaintiff a sum equivalent to the amount so deducted by the tenant it had not done so either in whole or in part.

The defendant demurred to each count of the declaration on the grounds, *inter alia*, (i) that it did not disclose any cause of action; (ii) that it did not allege any facts from which it appeared or might be inferred that the plaintiff was, pursuant to s. 21 (2) of the *Liquor Act*, entitled to recover from the defendant in any court of competent jurisdiction and in this action a sum equal to the amount alleged in such count to have been deducted from rent payable to the plaintiff; and (iii) that the facts alleged did not establish that at any relevant time the defendant was a lessor of the plaintiff or the plaintiff was a lessee of the defendant within the meaning of s. 21 (2).

After argument upon the demurrer had concluded but before the delivery of judgment the Full Court of the Supreme Court (*Jordan* C.J., *Halse Rogers* and *Street* JJ.) was, at its request, supplied with copies of the documents (including the leases) referred to in the declaration and particulars of such of the leases therein referred to as were not in writing. That Court being of the opinion that such documents and particulars showed that the facts had not been accurately pleaded, ordered that the declaration be taken off the file and gave leave to the plaintiff to file a new declaration if so advised. Accordingly no decision on the demurrer was given by the Supreme Court: *Tooheys Ltd.* v. *Municipal Council of Sydney* (1).

From that decision the plaintiff by leave appealed to the High Court to set aside the order of the Supreme Court and to enter judgment for the plaintiff on the demurrer.

(1) (1945) 63 W.N. (N.S.W.) 131.

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At the hearing of this appeal counsel for the respondent informed the Court that he was not seeking to support the order made by the Supreme Court as his client had neither sought nor desired it.

The High Court, being of the opinion that the Supreme Court had taken a mistaken view of the facts disclosed by the documents and particulars referred to above, and that the order striking out the declaration could not stand, proceeded to hear argument on the question of substantive law raised by the demurrer.

Weston K.C. (with him *Hardie*), for the appellant. The obvious intention of s. 21 (2) of the *Liquor Act* is to provide that of the licence fee paid each year by a licensee who is not the owner, 3/5th is to be borne by him and the remaining 2/5ths is to be recouped by the person to whom he is liable to pay rent. This process of recoupment continues successively until the 2/5ths portion is paid by a person who is not liable to pay rent (i.e. the owner of the freehold). The appellant, though not a lessee of the respondent in a strict sense, was by virtue of s. 64 of the *Real Property Act*, and having regard to the facts disclosed in the pleadings, under a personal liability to the respondent for the rent due under the lease by the respondent to Wise. Accordingly the appellant was entitled under s. 21 (2), if it had wished, to deduct from the rent payable by it to the respondent the 2/5ths of the licence fee deducted by its lessee from the rent payable to it. It did not do this, the reason apparently being that it did not wish to incur the risk of the respondent determining the lease. If s. 21 (2) empowers the appellant to deduct the amount in question, it should be construed so as to authorize the appellant to recover such amount. In other words that portion of the section which provides that the licensee "shall be entitled to . . . recover from his lessor" should, having regard to the context, be read as "shall be entitled to recover from the person to whom rent is payable by him." On this construction of the section the appellant's right to recover from the respondent does not depend upon the existence between the parties of the relationship of lessor and lessee in the strict sense of the term. In *Re Plummer* (1) the Supreme Court construed references in analogous sections of the *Liquor (Amendment) Act* 1919 to "lessee" as including a mortgagee in possession of a leasehold interest.

Kitto K.C. (with him *Sheppard*), for the respondent. The purpose of s. 21 of the *Liquor Act* is plainly indicated in the last words of the proviso. If the stage is reached where a person cannot be

(1) (1925) 25 S.R. (N.S.W.) 129; 42 W.N. 15.

described as lessee the section by its own terms ceases to operate. Section 64 of the *Real Property Act* does not work any substitution. It leaves the lessee still liable to the full extent. All it does is to give to the head lessor an additional right from the mortgagee in possession. The liability of the mortgagee in possession is a liability as to part only of the liability that lay upon the lessee; the section does not make a substitution. The whole point of the section is that a mortgagee in possession is not an assignee. The section does not make the mortgagee in possession liable to pay rent so as to place him in a position where he could deduct the licence fee from rent under s. 21 (2) of the *Liquor Act*. Rent issues out of the land but this liability does not. The liability does not arise by way of a statutory assignment of the burden of the covenant. The application of s. 64 of the *Real Property Act* in respect of rent only makes rent relevant for the purpose of determining the quantum of the liability; that liability, when ascertained, does not partake of the character of rent. Section 64 does not make s. 21 (2) of the *Liquor Act* applicable to this case. There are two missing links in the chain of tenants contemplated by s. 21 (2). The appellant was not a lessee from Wise and therefore could not have recovered from Wise. The appellant as mortgagee of Wise cannot recover from the respondent. By reason of the absence of those links the chain is incomplete and the appellant has no right of action against the respondent. A lease by a mortgagee to a tenant does not create a tenancy between the tenant and the mortgagor. It is not correct to say that a mortgagee who pays the rent in respect of a mortgaged lease pays as agent for and on behalf of the mortgagor.

Weston K.C., in reply. Section 64 of the *Real Property Act* is not limited to imposing a liability to pay rent. The appellant on the facts disclosed became liable on all the covenants in the lease (i.e. to insure, repair, &c.). Section 21 (2) of the *Liquor Act* should be given a broad and liberal construction to ensure that the intention of the Legislature that the specified proportion of the licence fee shall be borne by the owner in all cases, is effectuated.

Cur. adv. vult.

April 11.

The following written judgments were delivered:—

RICH J. This appeal comes by leave from the Supreme Court of New South Wales. Leave was granted because the order of the Supreme Court is interlocutory in form. It was pronounced upon the hearing of a demurrer to the declaration in an action but it did no more than order the declaration off the file, give the plaintiff appellant

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liberty, if so advised, to file a new one and award the defendant respondent the costs of the action from appearance to the date of the order.

The declaration, which contained nine counts, is based on the joint operation of two statutory provisions. The first is s. 21 (2) of the *Liquor Act* 1912 (N.S.W.) as amended, and the second is s. 64 of the *Real Property Act* 1900 (N.S.W.) as amended. The purpose of s. 21 of the *Liquor Act* is to " pass on " from a licensee who is a tenant to his landlord two-fifths of the licence fee and to pass on, further, that amount from a landlord who is himself a lessee to his lessor and so on *toties quoties* until the burden comes to rest on the full owner of the premises. The plaintiff appellant, Tooheys Ltd., by the common law action seeks to recover from the owner of licensed premises two-fifths of the licence fee for almost nine years. Hence the nine counts. Unfortunately for the plaintiff appellant it is not itself a lessee. The plaintiff appellant is only a mortgagee but it is a mortgagee of leaseholds and has gone into possession. To assimilate the position as mortgagee in possession to that of the lessee the plaintiff relies on s. 64 of the *Real Property Act*, which deals with mortgagees of leasehold interests in possession. Section 64 says that a mortgagee of leasehold land under the Act, after entering into possession or receipt of the rents and profits, shall become and be subject and liable to the lessor to the same extent as the lessee was subject to and liable prior to the mortgage. But there is a qualification to the liability imposed by the section ; the liability is limited to the extent of any benefit, rents and profits which may be received by the mortgagee in possession.

Before stating the facts more exactly, it is perhaps desirable to set out s. 21 (2), on the meaning of which the appeal, in the end, turns. The sub-section, apart from an immaterial proviso, is as follows :— " Any holder of a publican's license who is not the owner of the premises in respect of which the license fee is paid shall, notwithstanding any agreement to the contrary whether made before, on or after the commencement of the *Liquor Amendment* (*Fees*) *Act*, 1928, be entitled to deduct from any rent payable by him in respect of such premises, or to recover from his lessor in any court of competent jurisdiction, a sum equal to two-fifths of the license fee paid by him ; and notwithstanding any such agreement, where such sum is so deducted from such rent or paid by or recovered from such lessor, such lessor may in like manner deduct from any rent payable by him or may recover as aforesaid a sum equal to the amount so deducted or paid or recovered, and so on until the lessor to whom the rent is payable is not himself a lessee of another person."

The material facts were extracted by counsel from the first count of the declaration. The remaining counts deal only with successive years. From the first count it appears that, by memorandum of lease dated 30th January 1928, the defendant respondent leased the "Coronation" Hotel to one Wise for thirty years computed from 31st October 1927. On 1st March 1928 a sub-lease was granted by Wise to Coronation Hotel Ltd. for the balance of the term less one week. On 1st March 1928 Wise mortgaged the head-lease to the plaintiff appellant and Coronation Hotel Ltd. mortgaged the sub-lease also to the plaintiff appellant. Default was made by the mortgagors under each of the said mortgages. Thereupon, in December 1929, the plaintiff appellant as mortgagee of the head-lease entered into receipt of the rents and profits and as mortgagee of the sub-lease entered into possession. The plaintiff as mortgagee in possession received, by way of rents and profits, benefits greater in amount and value than the rent payable under the head-lease and the expenditure required to comply with the other obligations under the covenants and conditions thereof and became liable to pay and in fact paid to the defendant respondent the rent payable under the head-lease. From 1st July 1936 to 30th June 1937 the hotel was leased by the plaintiff appellant as mortgagee in possession to a tenant who was the holder of a publican's licence and carried on the hotel business. That licensee paid the licence fee payable under s. 21 (1) (*b*) of the *Liquor Act* and pursuant to s. 21 (2) deducted two-fifths thereof from the rent payable by him to the plaintiff appellant as his lessor.

In the Supreme Court the documents and facts upon which the declaration was based were asked for by the Court. The lease by the plaintiff appellant, Tooheys Ltd., as mortgagee of the sub-lease to a tenant was expressed to be for two years, calculated from a past day. Except inferentially, it did not appear what, if any, tenant had been in possession between the past day and the actual date of the lease. And the same thing was true of later intervals in the long period covered by the nine counts in the declaration. It now appears clearly enough that the respective tenants mentioned in the leases were in possession as tenants during the intervals. The counts in the declaration on these facts were correctly framed and capable of being supported by sufficient evidence. Unfortunately the Supreme Court had not the advantage of hearing the submissions of counsel, as the documents were transmitted to that Court after the close of the arguments. The Supreme Court took the view that the declaration, not the statement of facts, was insufficient or in some way deficient or inaccurate and ordered the

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declaration to be taken off the file. This view now appears to have been mistaken.

A number of difficulties come to the mind at once in the attempt to give s. 64 of the *Real Property Act* 1900, as amended, and s. 21 of the *Liquor Act* 1912, as amended, a combined operation which places the plaintiff appellant in exactly the same position as it would occupy if, instead of being "mortgagee in possession" of both leases, it had been proprietor of the head-lease, and in that capacity had repaid two-fifths of the licence fee to a sub-lessee from it or had undergone a deduction of such two-fifths from the rent payable to it. Mr. *Weston* valiantly addressed himself to each of these objections but as he proceeded it became increasingly apparent that unless in s. 21 (2) of the *Liquor Act* 1912 (as amended) we were prepared to give to the words "lessor" and "lessee" a very general and completely inartificial meaning so that they embraced people standing in the like case with the lessor or something of the sort, he could not succeed in overcoming all the various objections of Mr. *Kitto* upon the text of s. 21 (2) of the *Liquor Act* and of s. 64 of the *Real Property Act*. In dealing with provisions which in their operation comprehend so many transactions and affect such valuable property I feel it is particularly desirable to confine our decision to as precise a point as possible and to run no risk of prejudicing other cases capable of being determined on considerations which are independent of or additional to those in this case. I, therefore, propose to limit my decision to two propositions. The first is that without the aid of s. 64 of the *Real Property Act*, s. 21 (2) of the *Liquor Act* will not cover the case, because the plaintiff appellant as mortgagee in possession of the head-lease, and as such in receipt of the rents and profits derived from the sub-lease, cannot, in that character, be regarded as a lessor (viz. a sub-lessor) to whom rent is payable, and who may recover as aforesaid, viz. from the head-lessor, in a court of competent jurisdiction a sum equal to two-fifths of the licence fee paid by him. Also, the appellant, a mortgagee of the sub-lease, is not lessee under the sub-lease, and therefore does not stand in the relation of a lessee to a lessor. The second proposition is that s. 64 of the *Real Property Act* does not confer upon a mortgagee of a lease in possession rights of action which would belong to the lessee. These two propositions negative a cause of action enforceable at law in Tooheys Ltd. That company has brought an action at law and we are not called upon to consider whether any equities can be worked out.

For these reasons I think that the declaration discloses no cause of action, and the demurrer should have been allowed. The order of the Supreme Court should be set aside and the demurrer allowed.

STARKE J. The appellant by its declaration in this action (to which the respondent demurred) claimed to recover from the respondent certain moneys being a proportion of certain licence fees by virtue of the provisions of the *Liquor Act* 1912-1937, s. 21 (2).

The Supreme Court of New South Wales (in Full Court) on the argument of the demurrer before it, ordered that the declaration be taken off the file of the Court and gave leave to the appellant to file a new declaration if so advised. The Court was of opinion that allegations in the declaration as to tenancies granted by the appellant of certain premises as mortgagee in possession were seriously misleading. There seems to have been some misunderstanding for both parties assure this Court that the facts are accurately pleaded and that the rights of the parties can be effectively determined upon the declaration.

Leave to appeal was given by this Court.

The declaration alleges that the Municipal Council of Sydney was the registered proprietor of certain land in the State of New South Wales pursuant to the *Real Property Act* 1900-1938, that it leased the land to one Wise, who sub-let it less one week to the Coronation Hotel Ltd., that both Wise and the Coronation Hotel Ltd. mortgaged his and its estate and interest in the land to the appellant to secure payment of certain moneys, that default was made by both Wise and the Coronation Hotel Ltd. in payment of the moneys secured by the mortgages, that the appellant entered into possession of the land, collected the rents and profits thereof and for periods set forth in the various counts of the declaration leased the land as mortgagee in possession to a tenant who was the holder of a publican's licence under the *Liquor Act* 1912-1937 and who paid the licence fee pursuant to s. 21 (1) (*b*) of the *Liquor Act* 1912-1937 and pursuant to s. 21 (2) deducted two-fifths thereof from the rent payable by him to the appellant.

The case turns upon the provisions of the *Liquor Act* 1912-1937, s. 21 (2), and the *Real Property Act* 1900-1938, s. 64. The *Liquor Act* so far as material provides :—" Any holder of a publican's license who is not the owner of the premises in respect of which the license fee is paid shall . . . be entitled to deduct from any rent payable by him in respect of such premises, or to recover from his lessor in any court of competent jurisdiction, a sum equal to two-fifths of the license fee paid by him ; and . . . where such sum is so deducted from such rent or paid by or recovered from such lessor, such lessor may in like manner deduct from any rent payable by him or may recover as aforesaid a sum equal to the amount so deducted or paid or recovered, and so on until the lessor to whom the rent is payable is not himself a lessee of another person."

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A mortgage under the *Real Property Act* has effect as a security but does not operate as transfer of the land (*Real Property Act* 1900-1938, s. 57). Still the mortgagee has various rights and obligations under the Act. Thus s. 64 provides that:—"Any mortgagee or encumbrancee of leasehold land under the provisions of this Act, . . . after entering into possession of the said land or the receipt of the rents and profits thereof shall during such possession or receipt but only to the extent of any benefit, rents and profits which may be received by him, become and be subject and liable to the lessor of the said land . . . to the same extent as the lessee or tenant was subject to and liable for prior to such mortgagee or encumbrancee . . . entering into possession of the said land or the receipt of the rents and profits thereof."

Although a mortgagee in possession of leasehold land is by force of the provisions of s. 64 subject and liable to the lessor of the land in respect of rents and profits received by him during his possession to the same extent as the lessee or tenant was subject and liable prior to the mortgagee entering into possession, still the relation of landlord and tenant is not created between the mortgagee and the mortgagor nor between the mortgagee and any one under whom the mortgagor claims. All the section does or purports to do is to make the mortgagee subject and liable to the lessor of the land or the person for the time being claiming under him for the amount of the rents and profits received by him during his possession to the same extent as the lessee or tenant of the land was subject prior to the mortgagee entering into possession.

But the *Liquor Act* 1912-1937 only authorizes a sum which has been deducted from rent payable to a lessor or has been paid by or recovered from him equal to the amount so deducted or paid or recovered to be deducted from any rent payable by him or to be recovered from his lessor and so on until the lessor to whom the rent is payable is not himself a lessee of another person.

No person stands to the appellant, the mortgagee in possession, in the relation of a lessor nor does he stand in the relation of lessee to the mortgagors. And the respondent, the Municipal Council of Sydney, is not the lessor of the appellant whose mortgages operate merely as a security and not as a transfer of any estate or interest in the land charged.

The appeal should be allowed, the order of the Supreme Court set aside and the demurrer allowed.

DIXON J. The material parts of s. 21 (2) of the *Liquor Act* 1912-1937 (N.S.W.) provide that a holder of a publican's licence who is not the owner of the premises in respect of which the licence fee is

paid shall be entitled to deduct from any rent payable by him in respect of such premises, or to recover from his lessor in any court of competent jurisdiction, a sum equal to two-fifths of the licence fee paid by him; and where such sum is deducted from such rent or paid by or recovered from such lessor, such lessor may in like manner deduct from any rent payable by him or may recover as aforesaid a sum equal to the amount so deducted or paid or recovered, and so on until the lessor to whom the rent is payable is not himself a lessee of another person.

In the case before us the holder of the publican's licence was not the owner of the premises. He held under a lease granted to him by the mortgagee in possession, who is the plaintiff in the action. He made the deduction of two-fifths of the licence fee in paying his rent to his lessor, the mortgagee in possession. The latter was mortgagee of a sub-lease. The land is under the *Real Property Act* and the sub-lease and mortgage thereof were in the form prescribed by and were registered under the provisions of that statute. The mortgagee of the sub-lease, that is the plaintiff, was also mortgagee of the head-lease; and, again, the lease and the mortgage were instruments under the *Real Property Act* duly registered. The mortgagee had also entered into the receipt of the rents and profits of the head-lease under its mortgage thereof, but the lease to the licensee had been granted in pursuance of the mortgage of the sub-lease only. On the mortgagee seeking to deduct the two fifth parts of the licence fee from the rent payable to the head landlord, the latter appears to have objected, and, doubtless so that no question of forfeiting the lease for non-payment of rent should be raised, the mortgagee paid the full amount of the rent reserved without such deduction.

The mortgagee now seeks in a common law action to recover from the head-lessor two-fifths of the annual licence fees for each of eight consecutive years and for portion of the ninth year during which the foregoing state of things obtained.

A mortgage under the *Real Property Act* has effect as a security only and does not operate as a transfer of the estate or interest charged thereby. Apart from any special consequences of s. 64 of the *Real Property Act*, I am unable to see how the mortgagee can recover, at all events at law, under the provisions of s. 21 (2) of the *Liquor Act*.

The critical words in s. 21 (2) are "may recover as aforesaid a sum equal to the amount so deducted or paid or recovered, and so on until the lessor to whom the rent is payable is not himself a lessee of another person." The expression "as aforesaid" goes back to the

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earlier words " recover from his lessor in any court of competent jurisdiction."

The head-lessor cannot be described as " his," that is the " mortgagee's " lessor. Then, although the mortgagee, having granted a lease (or successive leases) to the licensee (or successive licensees) as mortgagee of the sub-lease in possession, is undoubtedly the lessor of the licensee, yet the mortgagee is not itself the lessee of another person, and accordingly the words which terminate the repeated operation of the provision upon successive lessors-lessees are satisfied at the first step. They are also satisfied at the second step : for at that point it is not the lessee under the head-lease that is to be considered but the mortgagee of that lease in possession.

There is a further difficulty in the direct operation of s. 21 (2) because under the two mortgages the same person, the plaintiff, is mortgagee and is in possession under both of them. It is not easy to regard the necessary accounting between the two capacities as amounting to or including a deduction by a sub-lessee from rent paid by the latter to the sub-lessor under whom the sub-lessor holds. There are no express allegations of fact in the declaration with respect to the requirement that there should be a deduction from the rent payable under the sub-lease or a repayment by or on account of the sub-lessor. This step is covered by a general allegation that thereupon the defendant became liable &c.

I am of opinion that the case depends on the effect upon s. 21 (2) of the *Liquor Act* of s. 64 of the *Real Property Act*. That section as amended is as follows :—" Any mortgagee or encumbrancee of leasehold land under the provisions of this Act, or any person claiming the said land as a purchaser or otherwise from or under such mortgagee or encumbrancee after entering into possession of the said land or the receipt of the rents and profits thereof shall, during such possession or receipt but only to the extent of any benefit rents and profits which may be received by him, become and be subject and liable to the lessor of the said land or the person for the time being entitled to the said lessor's estate or interest in the said land to the same extent as the lessee or tenant was subject to and liable for prior to such mortgagee, encumbrancee, or other person entering into possession of the said land or the rents and profits thereof."

Subject to the limitation made by the words " only to the extent of any benefit rents and profits which may be received by him " this provision appears to me to produce the following consequences in the present case :—

(1) As mortgagee of the sub-lease in possession, the mortgagee becomes subject and liable to the mesne or sub-lessor (the lessee

under the head-lease) to the same extent as the sub-lessee was liable to the mesne or sub-lessor before the mortgage, that is to say, the mortgagee became liable to pay the rent to the mesne or sub-lessor subject to a deduction of two-fifths of the licence fee on the footing that the sub-lessee had already suffered such a deduction from the rent payable to him.

(2) As mortgagee of the head-lease, the mortgagee becomes subject and liable to the head-lessor to the same extent as the lessee under the head-lease was liable to the head-lessor before the mortgage, that is to say, the mortgagee becomes liable to the head-lessor for the rent payable under the head-lease, but if and only if a deduction of two-fifths of the licence fee had been made from the rent payable on the sub-lease to the mesne lessor, subject to a deduction in his turn of two-fifths of the licence fee.

Although these two consequences appear to me to ensue from s. 64, it is, I think, difficult to find in s. 64 enough to satisfy the two hypotheses upon which their application to this case would depend. It is difficult to see how the suffering by the mortgagee in possession as lessor to the licensee of a deduction can be converted by s. 64 into the suffering by the sub-lessee (the mortgagor of the sub-lease) of a deduction of the two-fifths of the licence fee in a payment by a tenant holding under him of rent due to him or a repayment thereof by him. There are no words in s. 64 to bring about this result, and yet it is one which is necessary to satisfy the requirements of s. 21 (2).

Similarly it is difficult to see how the mortgagee in its capacity of mortgagee of the head-lease in receipt of the rents and profits can be treated as the same person as the lessee under that lease and as having as such lessee suffered a deduction on payment of rent to him or as having made a repayment. There are no words in s. 64 to effect this conversion and, it may be remarked, there are no words in the declaration alleging any deduction or repayment in fact.

But however that may be I can find nothing in s. 64 which confers on a mortgagee in possession any right: it deals only with burdens and liabilities. The words are "subject and liable." To recover from the head landlord two-fifths of the licence fee it is necessary for the mortgagee to obtain an affirmative right or cause of action.

Without deciding more concerning the operation of s. 64 and s. 21 (2) in combination, it is enough in this case to say that a transfer from the lessee-mortgagor to the mortgagee of the lease in possession of affirmative statutory rights of action is not made by s. 64. To state it another way, the mortgagee made a payment to the head landlord, apparently voluntary, of the full rent, and he is not the object of the grant of a statutory right of action to recover any part of it.

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But there is also the further point that the mortgagee, both as mortgagee of the sub-lease in possession and as mortgagee of the head-lease in receipt of the rents and profits, remains a person who "is not himself a lessee of another person." There is nothing, I think, in s. 64 to give the mortgagee the character of a lessee of another person, and yet only in virtue of that character can the mortgagee claim to deduct or recover the two-fifths of the licence fee.

I am therefore of opinion that the mortgagee as plaintiff in the action, an action at law, must fail.

In the Full Court the view was taken, and was expressed in the judgment of *Jordan* C.J., that the declaration misleadingly stated the transactions upon which it depended. His Honour obtained this impression from a perusal of the conveyancing documents mentioned in the declaration which, with a statement of some facts, the parties supplied to the Court at the request of the Court. I think that it is now clear that his Honour's criticisms of the pleading were based upon a misunderstanding. The pleading in respect of the matters upon which the criticism turned appears to be both accurate and sufficient. Perhaps the statement of facts supplied left a little too much to inference, but, however that may be, there is no reason for supposing that all questions upon which the fate of this action depends cannot be finally decided between the parties on sufficient information.

In my opinion the order of the Supreme Court should be set aside and in lieu thereof the demurrer to the declaration should be allowed.

The appellants should pay the costs of the appeal.

McTIERNAN J. I agree that this appeal should be dismissed and with the reasons for judgment of my brother *Dixon*.

WILLIAMS J. I have read the judgments of *Rich* J. and *Dixon* J. and I agree substantially with their reasons and the order which is proposed, and have nothing to add.

Order of the Supreme Court set aside. Demurrer allowed. Judgment in the action for the defendant. Appellant to pay costs of proceedings in the Supreme Court and of this appeal exclusive of the costs of the motion for leave to appeal as to which no order. Otherwise appeal dismissed.

Solicitors for the appellant, *Parish, Patience & McIntyre.*
Solicitor for the respondent, *M. W. D. McIntyre.*

J. B.