[HIGH COURT OF AUSTRALIA.]

MEREDITH . . . . . APPELLANT;
PLAINTIFF,

AND

FITZGERALD . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1948.

MELBOURNE, *June* 15, 16; SYDNEY, *Aug.* 18.

Latham C.J., Rich, Starke, Dixon and Williams JJ.

Liquor—Licensing—Licence fee—Right of licensee who is not owner of licensed premises to recover proportion of fee from owner notwithstanding agreement "to the contrary"—Fixed annual rent reserved by lease—Covenant for "further rent"—Amount of further rent equal to owner's proportion of licence fee—Licensing Acts 1928-1946 (*No.* 3717—*No.* 5197) (*Vict.*), *s.* 19—*Licensing* (*Fees*) *Act* 1931 (*No.* 4001) (*Vict.*), *s.* 2.

The *Licensing Act* 1928 (Vict.) provided, by s. 19 (1) (*a*) (as amended by the *Licensing* (*Fees*) *Act* 1931, s. 2), that the annual fee for a victualler's licence "shall be equal to the sum of four per centum of the gross amount (including any duties thereon) paid or payable for all liquor which during the twelve months ended on the last day of June preceding the date of the application for the grant or renewal of the licence was purchased for the premises" in respect of which the licence was granted; and, by s. 19 (3): "Notwithstanding anything to the contrary in any agreement . . . (*a*) any licensed victualler who holds a victualler's licence for any premises of which he is not the owner and who pays the annual licence fee for such licence fixed on a percentage basis may without suffering any penalty imposed by any such agreement deduct from any rent payable by him for the premises for any year in respect of which such fee is paid a sum equal to three-eighths of the amount of such fee or may recover the said sum in any court of competent jurisdiction from the owner of the premises . . . (*c*) in this sub-section 'rent' includes any rent reduced or commuted under any such agreement."

The holder of a victualler's licence under the Act held the licensed premises under a lease from the owner by which the lessee covenanted to pay, firstly, a fixed annual rent and, secondly, by way of further rent, an annual sum

H. C. OF A. 1948. MEREDITH v. FITZGERALD.

payable on 31st December in each year equal to an amount computed at the rate of £1 10s. for every £100 or fraction thereof of the gross amount (including any duties thereon) paid or payable for all liquors which during each period of twelve months ending 30th June immediately preceding 31st December in each year of the term were purchased for the premises. The lessee claimed that the provision for further rent was void as being an agreement " to the contrary " within the meaning of s. 19 (3) (*a*) of the Act because it provided for payment to the lessor of an amount equal to the proportion of the licence fee which should be borne by him.

Held, by *Latham* C.J., *Rich*, *Starke* and *Williams* JJ. (*Dixon* J. dissenting), that the provision for further rent was not an agreement " to the contrary " within the meaning of the section.

Decision of the Supreme Court of Victoria (Full Court): *Meredith* v. *Fitzgerald*, (1948) V.L.R. 161, affirmed.

APPEAL from the Supreme Court of Victoria.

Adelaide Agnes Henrietta Meredith held a victualler's licence under the *Licensing Acts* 1928-1946 (Vict.) in respect of licensed premises of which John Desmond Fitzgerald was the owner. She held the premises under a lease from Fitzgerald by which she covenanted to pay, firstly, an annual rent of £4,953 12s., and " secondly by way of further rent an annual sum payable on the thirty-first day of December in each year during the said term equal to an amount computed at the rate of one pound ten shillings for every one hundred pounds or fraction thereof of the gross amount (including any duties thereon) paid or payable for all wines spirits ale beer porter stout cider perry or other spirituous or fermented liquors of an intoxicating nature which during each period of twelve months ending the thirtieth day of June immediately preceding the thirty-first day of December in each year during the said term were purchased for the said hotel and premises by the lessee or other the holder for the time being of the victualler's licence appertaining thereto the first of such annual sums to be paid on the thirty-first day of December one thousand nine hundred and forty-four notwithstanding that the period of twelve months ended the thirtieth day of June one thousand nine hundred and forty-four in respect of which such first annual sum shall be paid or payable is or may not be included in the said term." In her statement of claim in an action against Fitzgerald in the Supreme Court of Victoria the lessee claimed to be entitled to recover from him, under s. 19 (3) (*a*) of the *Licensing Act*, the sums of £335 7s. 7d. and £332 11s. as the owner's proportion of the annual licence fee assessed under the Act in respect of the premises for the years 1945 and 1946 respectively,

which she had paid. In his defence the defendant alleged that the plaintiff, pursuant to s. 19 (3) (*a*) of the Act, had duly deducted from the rent payable under the lease a sum equal to the whole of the sums claimed; alternatively, he claimed to set off the sum of £667 18s. 7d. as the balance of rent due and payable under the lease. In her reply the plaintiff alleged that the covenant for further rent was void and of no effect as being contrary to s. 19 (3) (*a*) of the Act and that any deductions made from the rent alleged to be due did not constitute a defence to the action.

At the trial of the action before *O'Bryan* J. it appeared that in respect of each of the years 1945 and 1946 the plaintiff had paid the annual rent of £4,953 12s., but nothing more by way of rent, and also the full annual licence fee. It was contended on her behalf that she had paid the whole of the rent validly reserved by the lease, and, not having deducted the owner's proportion of the licence fee, she was entitled to recover it by action.

O'Bryan J. was of opinion that the provision for further rent was an agreement "to the contrary" within the meaning of s. 19 (3) (*a*) and, even if it was not void *ab initio*, it could not be relied on as a defence to the action; but, as this opinion was in conflict with the decision in *Elsternwick Hotel Pty. Ltd.* v. *Trustees, Executors and Agency Co. Ltd.* (1), he, at the request of the plaintiff, reserved for the Full Court of the Supreme Court the question whether the defendant was entitled to set off against the plaintiff's claim the further rent which the plaintiff had not paid. The Full Court (*Herring* C.J., *Lowe* and *Fullagar* JJ.) answered the question in the affirmative (*Meredith* v. *Fitzgerald* (2)) and *O'Bryan* J. gave judgment for the defendant accordingly.

From this judgment the plaintiff appealed to the High Court.

Tait K.C. (with him *J. P. Bourke*), for the appellant. It is no answer to the appellant's claim to say that the lessor is at liberty to fix any rent he chooses. Any agreement which is directed to imposing on the lessee the whole of the burden of the licence fee and thereby defeating the right of the lessee to have three-eighths of the burden borne by the landlord is an agreement "to the contrary" within the meaning of s. 19 (3) (*a*) of the *Licensing Acts* 1928-1946 (Vict.). Such an agreement is void. [He referred to *Harris* v. *Sydney Glass and Tile Co.* (3); *Lord Ludlow* v. *Pike* (4); *Tuff* v. *Guild of Drapers of London* (5).] The question is one of the intention

(1) (1932) Unreported (Supreme Court of Victoria—*Mann* C.J.).
(2) (1948) V.L.R. 161.
(3) (1904) 2 C.L.R. 227.
(4) (1904) 1 K.B. 531.
(5) (1913) 1 K.B. 40.

H. C. OF A. 1948.

MEREDITH v. FITZGERALD.

to be discovered in the agreement. If a lease contains any provision disclosing the intention which has been described, it is to the contrary of s. 19 (3) (*a*). It does not matter where, in the lease, the provision appears. There might be a clause expressly purporting to impose the burden on the lessee; obviously this would be bad. In the present case, it is submitted, the intention is to be found in the provision for further rent. The submission is not that a provision for further rent is bad simply because it does provide for additional rent. Here, however, the amount of the further rent is calculated on the same basis as the licence fee and is precisely the amount of the three-eighths which the Act says the lessor is to bear. It is clear, therefore, that the intention was to defeat the Act. It is not to the point that the law might be altered so that the amount of the further rent would cease to be three-eighths of the fee fixed by the section. The material time is the time when the lease was executed. At that time the percentage fixed by s. 19 (1) (*a*) was four per cent, as it is now. Originally it was six per cent, but it was altered to four by s. 2 of the *Licensing (Fees) Act* 1931.

Reynolds K.C. (with him *Campbell* K.C.), for the respondent. The provision for further rent contains nothing which is to the contrary of what is provided in s. 19 (3) (*a*). This can be tested by supposing that the lease contained a provision expressly providing that, if the tenant paid the whole of the annual licence fee payable under s. 19 (1), he should be at liberty to deduct three-eighths of the amount thereof from the rent payable under the lease. Such a provision would be in no way inconsistent with the provision for further rent. It is, of course, rendered unnecessary by s. 19 (3) (*a*), but the point is that the provision for further rent does not purport to prevent the lessee from exercising the right conferred by s. 19 (3) (*a*); it does not impinge on the right or clog its exercise. It leaves the lessee entirely free to deduct the lessor's proportion of the fee from the rent or (if she has paid the full rent) to recover that proportion in any court of competent jurisdiction. It is wrong to regard the provision (as *O'Bryan* J. seems to have regarded it) as designed to evade s. 19 (3) (*a*). The fact is that it is designed to ensure that the lessor will receive a certain minimum rental for the premises. It is an attempt, assented to by both parties, to arrive at a true and fair rental; indeed, it is the only way, in a case such as the present, to arrive at the fair rental. There is nothing in the law to preclude the fixing of a rental by a computation which may produce varying results from time to time (*Woodfall, Law of Landlord and Tenant*, 24th ed. (1939), p. 308), nor is a lessor precluded

from taking into account prospective outgoings when fixing the rent. This is not challenged by the appellant, whose case depends entirely on the assumption (which is quite unjustified) that the provision has an improper purpose. Further, s. 19 (3) (*a*) does not expressly prohibit or make illegal an agreement which is " to the contrary " ; it merely renders the agreement inoperative to the extent to which it is inconsistent with the section. This is important because it distinguishes the present case from the reported cases relied on by the appellant in which provisions for further rent or covenants purporting to alter the incidence of a charge have been held void under statutes. In all these cases the liability (for land tax in *Harris's Case* (1), for a tithe rent charge in the other cases) was imposed on the landlord and contracts purporting to pass on the liability to the tenant were declared to be void. In the case last mentioned there was an agreement that the tenant should pay a part of the land tax imposed on the landlord ; in one of the tithe cases (*Tuff's Case* (2)) there was a similar agreement as to the whole of the tithe rent charge ; in *Lord Ludlow's Case* (3) there was a provision that the tenant should pay by way of additional rent a sum equal to the amount of the tithe. Thus, they were all cases in which there was an *express* agreement of the very kind which the statute declared to be void.

Cur. adv. vult.

Aug. 18.

The following written judgments were delivered :—

LATHAM C.J. Section 19 of the *Licensing Acts* 1928-1946 as amended in 1931 by Act No. 4001, s. 2, provides for the payment of an annual licence fee in the case of a licensed victualler of four per cent of the gross amount paid or payable for all liquor which, during the twelve months ended on the last day of June preceding the date of application for the grant or refusal of the licence, was purchased for the premises.

Section 19 (3) (*a*) is as follows :—" Notwithstanding anything to the contrary in any agreement whether made before or after the coming into operation of this Act—(*a*) any licensed victualler who holds a victualler's licence for any premises of which he is not the owner and who pays the annual licence fee for such licence fixed on a percentage basis may without suffering any penalty imposed by any such agreement deduct from any rent payable by him for the premises for any year in respect of which such fee is paid a sum equal to three-eighths of the amount of such fee or may recover the

(1) (1904) 2 C.L.R. 227.
(2) (1913) 1 K.B. 40.
(3) (1904) 1 K.B. 531.

H. C. OF A. 1948.

MEREDITH v. FITZGERALD.

Latham C.J.

said sum in any court of competent jurisdiction from the owner of the premises."

The plaintiff in this action (the appellant) was the tenant of the Village Belle Hotel, St. Kilda. The respondent is the owner of the hotel and was the landlord of the appellant. The lease provided, firstly, for the payment of a yearly rent of £4,953 12s., and :—" Secondly by way of further rent an annual sum payable on the thirty-first day of December in each year during the said term equal to an amount computed at the rate of one pound ten shillings for every one hundred pounds or fraction thereof of the gross amount (including any duties thereon) paid or payable for all wines spirits ale beer porter stout cider perry or other spirituous or fermented liquors of an intoxicating nature which during each period of twelve months ending the thirtieth day of June immediately preceding the thirty-first day of December in each year during the said term were purchased for the said hotel and premises by the lessee or other the holder for the time being of the victualler's licence appertaining thereto." Section 19 (3) of the *Licensing Act* provides that the tenant may deduct or recover three-eighths of the licence fee from the landlord. The licence fee is £4 per cent.— £1 10s. is three-eighths of £4. Thus the further rent would be the same sum as the licence fee except that a sum of £1 10s. would be payable as rent in respect of a fraction of £100 over even figures of hundreds of pounds, whereas the licence fee payments would be calculated on the actual purchase of liquor.

The tenant paid the yearly rent of £4,953 12s., but did not pay during the two years of occupation any of the "further rent." The tenant paid the full amount of licence fees for the years ending 30th June 1945 and 1946. Three-eighths of the amount so paid by the tenant is £667 16s. 9d. In this action the tenant sought to recover from the landlord this sum, relying upon s. 19 (3). The tenant contends that the effect of that provision is, first, to make the provision for further rent void, and secondly to entitle her to deduct from the balance of the rent three-eighths of the licence fee or, if she does not deduct it, to recover it from the landlord. As she has not deducted it, she seeks to recover it in pursuance of the section. The landlord does not dispute the right of the tenant to recover three-eighths of the licence fee from him, but relies upon a set-off of the amount of the further rent which the tenant has not paid. The question, therefore, is whether the provision for paying further rent is void. If it is valid, then, though the tenant can recover the three-eighths of the licence fee, the landlord can set off the further rent and will have a good defence to the action.

O'Bryan J., who tried the action, recognized that any landlord would certainly take into account, and could properly take into account, his liability in respect of the licence fee in determining what rent he would agree to take. He held, however, that the provision for further rent was an agreement to the contrary within the meaning of s. 19 (3), and that it was void because, his Honour said, it was " designed to relieve the lessor of his statutory obligation under s. 19 (3) (*a*), and the only true rent payable under the lease is that first reserved, namely the sum of £4,953 12s., payable monthly." *Mann* J., however, had taken a different view of s. 19 (3) in an earlier case and *O'Bryan* J., instead of acting on his own view, referred the following question to the Full Court :—" Is the defendant entitled to set off against the plaintiff's claim for the landlord's portion of the licence fee paid by her, which claim is made under s. 19 (3) (*a*) of the *Licensing Act*, the ' further rent ' provided for in the lease, the plaintiff not having paid to the defendant such further rent and not having deducted from any rent payable in respect of the premises the landlord's portion of the licence fee ? " The Full Court answered the question in the affirmative (1) and accordingly judgment was given for the defendant, the landlord. The tenant now appeals to this Court.

It was not disputed that the further rent (s. 19 (3)) was well reserved as a rent. An amount, in order to be " rent," must be certain or must be ascertainable with certainty : *Ex parte Voisey* ; *In re Knight* (2), per *Brett* L.J. (3) :—" Now it is true that, if that which is agreed upon as the payment is uncertain, it is not a rent. It must be certain. But the rent is certain if, by calculation and upon the happening of certain events, it becomes certain, and . . . the mere fact of rent being fluctuating does not make it uncertain."

The lease provided in clauses 22 and 24 that the tenant should renew the licence and pay the licence fee to the Treasury of the State or the Receiver of Revenue. This provision, however, is not contrary to s. 19 (3), which expressly contemplates original payment of the licence fee by the tenant and subsequent deduction from rent or recovery of three-eighths of the fee from the landlord.

It is argued for the tenant that the effect of the provision for further rent is really to throw upon the tenant a liability which the statute intends that the landlord should bear. It is conceded that the statute does not prevent the rent being fixed at an amount which in fact is determined by an estimate of the amount of licence fee for which the landlord will be liable. Any owner of premises

(1) (1948) V.L.R. 161.
(2) (1882) 21 Ch. D. 442.
(3) (1882) 21 Ch. D., at p. 458.

H. C. OF A. 1948.

MEREDITH v. FITZGERALD.

Latham C.J.

who was letting them would naturally and quite properly, in agreeing upon a rent, take into account the liabilities which he would have to meet. But, it is contended, if the words of a lease show that the rent is increased in amount—though it still may be "rent"—by the amount of the licence fee, such a provision is not only contrary to the section so that it cannot prevent the exercise of the rights to deduct and recover which the section creates, but is also void as a reservation of rent.

Reference was made to cases where interest or rent payable under a mortgage or a lease was increased expressly in order to meet a charge which was imposed by law upon a mortgagee or a landlord. It was held that an agreement of this character was not saved from avoidance by reason of the fact that the payment required was described as interest or rent. The statutes in the cases upon which the appellant relied contained provisions expressly avoiding agreements for the payment of a tax, e.g., tithe rent charge, by a landlord or affecting the incidence of tax, e.g., land tax, as between mortgagor and mortgagee. In *Harris* v. *Sydney Glass & Tile Co.* (1) the Court considered a taxation statute which provided that every contract having or purporting to have or which might have the effect of in any way affecting the incidence of tax should be void. A lease provided that the lessee should pay such further sums as should represent one-third of the sum payable as land tax under the Act. It was held that this covenant was void. The covenant was plainly a covenant binding the tenant to pay land tax, and there was no difficulty in holding that it was avoided by the statute. But *Griffith* C.J. (2) pointed out that 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." He added: "Nor, although the land tax varies in proportion to the value" (that is, the value of the land), "would there be any objection to making the rent vary in the same proportion." This reasoning shows that there could be no objection to a rent on the ground that it actually included an amount calculated as probably representing the amount of land tax that would become payable. Further, it would be no objection that the rent (as in the present case) included a sum representing the tax payable at the time when the lease was entered into or that it varied with the amount paid for liquor—which is a measure of the amount of business done by the licensee. There is no agreement to pay three-eighths of the licence fee as it may vary from time to time. The

(1) (1904) 2 C.L.R. 227.

(2) (1904) 2 C.L.R., at p. 243.

further rent is fixed at £1 10s. per £100 of purchases of liquor, and would remain so fixed if the percentage determining the licence fee were altered. Accordingly, in my opinion *Harris' Case* (1) is of no assistance to the appellant.

In *Tuff* v. *Guild of Drapers of the City of London* (2) the Court of Appeal considered a contract which provided that the occupier of land should pay to the owner such sums as the owner should pay in respect of tithe rent charge. The *Tithe Act* 1891, s. 1 (1), provided that " any contract made between an occupier and owner of lands, after the passing of this Act, for the payment of the tithe rent charge by the occupier shall be void." The contract in question expressly provided for the payment by the occupier of the tithe rent charge as such, and it was held to be void. *Vaughan Williams* L.J. (3) referred to what *Willes* J. said in *Colbron* v. *Travers* (4) :—" A landlord is entitled to all the rent which he can induce any person to pay ; and if he does not in terms provide for the payment of the tax by a person by whom the Act of Parliament says it shall not be paid, but only provides for an increase of rent upon the increase of the burdens on his property, we think that this is not eluding the provisions of the Act." *Vaughan Williams* L.J. continued :— " If I may say so, I entirely agree with that observation. The landlord is entitled to increase his rent, but he must not increase his rent expressly by the amount that has been paid by him in the shape of tithe rent charge." According to this view, if the rent in the present case included a sum expressly described as representing three-eighths of the licence fee, that provision would be void, but it would also be void if an amount (as in the present case) is added to the rent which in fact is the amount of the licence fee at the time when the lease is executed, though it is not actually described as such. In my opinion, as *Lowe* J. points out, it would be very difficult to maintain this distinction. If in one year the amount of added rent happened to be the same as three-eighths of the licence fee, a provision for added rent would be void ; if in another year it happened to be quite different, as might be the case, the provision would be valid.

In *Lord Ludlow* v. *Pike* (5) the provision of the *Tithe Act* 1891 to which reference has already been made was further considered, and it was held that it avoided, not only a contract by the occupier to pay the tithe rent charge directly to the tithe owner, but also an agreement to reimburse the landlord such sums as should be paid

(1) (1904) 2 C.L.R. 227.
(2) (1913) 1 K.B. 40.
(3) (1913) 1 K.B., at p. 47.
(4) (1862) 31 L.J. (C.P.) 257.
(5) (1904) 1 K.B. 531.

H. C. OF A. 1948.

MEREDITH v. FITZGERALD.

Latham C.J.

by him for a tithe rent charge. *Channell* J. said (1) :—" The agreement here is to pay by way of rent a sum equal to the amount of the tithe. The effect of that is to put the burden of the tithe upon the tenant, giving him upon the one hand the benefit of any reduction in the amount if the price of corn should fall, and on the other hand imposing on him an increased burden if the price of corn should rise." Thus the rent payable by the tenant was the actual amount, as it varied from time to time, of the tithe. *Channell* J. referred to *Davies* v. *Fitton* (2), where Lord *St. Leonards* distinguished between a lease with a rent with a collateral covenant by the tenant to pay the tithe rent charge (which would be void), and an agreement to enter into a lease with a rent which would include a sum added in consideration of the rent charge. Such an agreement could be carried into effect by providing for a lump sum rent, and such an agreement, Lord *St. Leonards* said, would be quite valid. Upon this view an agreement for a lump sum rent would be valid, though in fact it provided for an increase of the amount of rent by reason of the fact that the statute provides that the landlord has to bear three-eighths of the licence fee.

Section 19 (3) must be construed according to its terms, and not in the light of some assumption as to the policy of the Act or the objective sought to be obtained by the Act. It is plain enough that the legislature wished to bring about the result that the licence fee should be paid, at least as to three-eighths, by the landlord. But the Court has to consider only the specific means which the legislature adopted in s. 19 (3) in order to secure this objective.

Section 19 (3) does not in terms provide that any agreement is void. But the section confers upon a tenant certain rights, notwithstanding any agreement to the contrary. The section provides that, notwithstanding any agreement to the contrary, the tenant can :—(1) deduct three-eighths of the licence fee from the rent ; or (2) recover three-eighths of the fee from the landlord.

An agreement that the tenant should not deduct the landlord's part of the licence fee from the rent or that he should not seek to recover from a landlord the three-eighths of a fee paid by him would be contrary to the section. The statutory rights given to the tenant by the section would make such an agreement of no effect. An " agreement to the contrary " is an agreement which denies to a tenant either of the rights given by the section. But there is no such provision in the lease in this case. There is nothing in the lease which prevents the tenant from deducting from the

(1) (1904) 1 K.B., at p. 533. (2) (1842) 2 Dr. & War. 225.

rent or recovering from the landlord the three-eighths of the licence fee.

The " further rent " is payable independently of the actual payment of the licence fee by the tenant and independently of the amount of any licence fee which the tenant pays. If the tenant did not pay the fee or paid only part of it, or if the amount of the fee were reduced or increased, the " further rent " would remain unchanged. Thus, the reservation of the further rent fixed an amount of rent payable in addition to the other rent by a provision which is independent of the amount of the licence fee which happens to be actually paid, though the further rent is calculated in substantially the same way as the licence fee under existing legislative provisions. In my opinion, for the reasons stated, this provision is not an agreement to the contrary within the meaning of s. 19 (3).

The provision for further rent does not interfere with the right of the tenant to recover three-eighths of the licence fee from the landlord and the tenant, therefore, is entitled to recover the sum claimed by her in the action. But the tenant is under an obligation to pay the whole of the rent, including the " further rent," and therefore the landlord can set off his claim for further rent against the tenant's claim for the recovery of three-eighths of the fee.

In my opinion the decision of the Full Court upon the question submitted was right, judgment has rightly been given for the defendant in the action, and the appeal should be dismissed.

RICH J. I agree that the question propounded should be answered in the affirmative and that the appeal should be dismissed.

STARKE J. Appeal from a judgment of the Supreme Court of Victoria in an action in which the appellant here was plaintiff and the respondent here was defendant.

The judgment was for the defendant.

It followed upon the determination of a question of law referred by the primary judge to the Full Court. The question was :—" Is the defendant " (the respondent here) " entitled to set off against the plaintiff's claim " (the appellant here) " for the landlord's portion of the licence fee paid by her, which claim is made under s. 19 (3) (*a*) of the *Licensing Act*, the 'further rent' provided for in the lease, the plaintiff not having paid to the defendant such further rent and not having deducted from any rent payable in respect of the premises the landlord's portion of the licence fee ? "

That question was answered : Yes.

H. C. OF A. 1948.

MEREDITH v. FITZGERALD.

Starke J.

The respondent had leased to the appellant certain hotel premises for a term of years reserving a rent and also a "further rent" reserved in these terms :—"Secondly by way of further rent an annual sum payable on the thirty-first day of December in each year during the said term equal to an amount computed at the rate of one pound ten shillings for every one hundred pounds or fraction thereof of the gross amount (including any duties thereon) paid or payable for all wines spirits ale beer porter stout cider perry or other spirituous or fermented liquors of an intoxicating nature which during each period of twelve months ending the thirtieth day of June immediately preceding the thirty-first day of December in each year during the said term were purchased for the said hotel and premises by the lessee or other the holder for the time being of the victualler's licence appertaining thereto the first of such annual sums to be paid on the thirty-first day of December one thousand nine hundred and forty-four notwithstanding that the period of twelve months ended the thirtieth day of June one thousand nine hundred and forty-four in respect of which such first annual sum shall be paid or payable is or may not be included in the said term." The lease also contained the following covenant :—"That the lessee will during the said term pay unto the lessor the said yearly rents hereinbefore reserved at the times by the payments and in the manner hereinbefore appointed for payment thereof clear of all exchange deductions or abatements whatsoever."

It is not disputed that the annual sum so secondly reserved was well reserved as rent.

The appellant was a licensed victualler and held the victualler's licence for the premises of which the respondent was the owner.

The *Licensing Acts* 1928-1946 of Victoria provide for the issue of victuallers' licences. They are in force to the end of the year for which they are granted and are renewable as of right. The fees payable in respect of such licences are fixed upon a percentage having reference to the amount of liquor purchased for the licensed premises. In cases in which the Licensing Court grants an application for a victualler's licence it issues a certificate authorizing the issue of a licence. Upon presentation of the certificate and payment of the prescribed fees a licence as authorized by the certificate is issued.

And s. 19 (3) of the Act provides :—"Notwithstanding anything to the contrary in any agreement whether made before or after the coming into operation of this Act :—(*a*) any licensed victualler who holds a victualler's licence for any premises of which he is not the

owner and who pays the annual licence-fee for such licence fixed on a percentage basis may without suffering any penalty imposed by any such agreement deduct from any rent payable by him for the premises for any year in respect of which such fee is paid a sum equal to three-eighths of the amount of such fee or may recover the said sum in any court of competent jurisdiction from the owner of the premises." "A landlord," it has been said, "is entitled to all the rent which he can induce any person to pay" (*Colbron* v. *Travers* (1)). And there is nothing in s. 19 (3) which precludes landlords and tenants agreeing upon the amount of rent or additional rent payable in respect of the premises demised. But it authorizes a certain proportion of the annual licence fee to be deducted from the agreed rent or to be recovered from the owner of the premises. It is contended, however, that any provision in a lease or agreement, whether by way of additional rent or otherwise, which operates to throw upon the licensed victualler the burden of a sum equal to three-eighths of the amount of the victualler's licence fee paid in any year conflicts with the provisions of the section and is therefore ineffective (cf. *Lord Ludlow* v. *Pike* (2); *Tuff* v. *Guild of Drapers of the City of London* (3)). That construction of the section does not accord with the ordinary and natural meaning of the words actually used. The section is not dealing with the ultimate incidence of the sum mentioned in it but with the sum that the licensed victualler may deduct from rent or recover from the owner of the premises if that sum has not been deducted from rent. Even the English decisions concede the landlord's right to increase his rent but hold that he could not increase it expressly by the amount of the tithe rent charge there in question. Those decisions are not compelling in this case for the Acts under which they were decided, though bearing a general resemblance to the provisions in the *Licensing Act*, are not in identical terms. Under the *Tithe Act* 1836 (6 & 7 Will. 4, c. 71), s. 80, a tenant or occupier paying tithe rent charge upon the premises demised to him was entitled to deduct the amount from his rent but the *Tithe Act* 1891, under which the English cases were decided provided that tithe rent charge issuing out of any lands should be payable by the owner of the lands and in substance that any contract to the contrary should be void. According to the English cases that provision dealt with the incidence of the charge and not merely with the mode of collection as was argued.

The provisions of s. 19 (3) of the *Licensing Act* envisage a deduction from rent that has been fixed and agreed upon or the recovery

(1) (1862) 31 L.J. C.P. 257, at p. 259.
(2) (1904) 1 K.B. 531.
(3) (1913) 1 K.B. 40.

H. C. OF A. 1948.

MEREDITH v. FITZGERALD.

Starke J.

of the allowable amount if it has not been so deducted. That in itself distinguishes the present case from the English decisions.

Moreover, the stipulation in the lease in this case does not increase the rent expressly by any amount that has been paid in respect of the licence fee. The "further rent" varies in proportion to the gross amount paid or payable in each year for liquor purchased for the hotel and premises but that is only fixing rent by reference to an ascertainable sum. More or less it is true that the "further rent" is calculated in the same "manner in which what may be called the landlord's proportion of the annual licence fee is to be calculated under s. 19 (1) and (3)." Still the stipulation does not increase the rent expressly or at all by any amount that has been paid in respect of the licence fee (cf. *Harris* v. *Sydney Glass and Tile Co.* (1); *Brett* v. *Barr Smith* (2)).

The judgment entered for the defendant—the respondent here—in the Supreme Court was therefore right and this appeal should be dismissed.

DIXON J. The licence fee payable under s. 19 (1) (*a*) of the *Licensing Acts* 1928-1946 of Victoria is exacted upon the renewal of the licence and is paid in respect of the twelve months for which it is renewed.

The amount of the fee, however, is calculated upon the amount paid or payable for the liquor purchased in the twelve months ending upon the preceding 30th June. The fee is four per cent of that amount. Licences are renewed as at 31st December in each year. So at the end of the year a fee for the next year is paid consisting of four per cent of the cost of liquor bought during a year expiring six months earlier.

Section 19 (3) (*a*) authorizes a licensee who is not the owner to recover three-eighths of the fee from the owner or to deduct the three-eighths from "any rent payable by him for the premises for any year in respect of which such fee is paid." The words "for any year in respect of which such fee is paid" must refer to the year covered by the renewal of the licence, that is, the year following the payment of the fee.

It would seem that it would not be open to the licensee to make the deduction from rent payable in respect of a previous year which was made payable in arrear or happened to be unpaid and was so in arrear. If the lease does not extend over the full year "in respect of which such fee is paid," that is, the year covered by the

(1) (1904) 2 C.L.R. 227, at pp. 245, 246.

(2) (1919) 26 C.L.R. 87, at p. 98.

renewal of the licence, a difficulty arises from the words " rent payable . . . for any year." Literally the expression means rent payable for a full period of twelve months. But the policy of the provision strongly supports the view that the words were intended to include rent for any part of the year in respect of which the licence fee is paid, and I think that the sub-section should be so construed. The consequence of this construction is that although a lease expires during the year for which the fee is paid the tenant may deduct three-eighths of the fee from the rent payable for the balance of the term.

The lease in the present case contains covenants by the tenant with the landlord that the former will do all things to obtain a renewal of the licence and will pay the annual licence fee. It is a lease for two years from 16th March 1944. During the term what are described as " the following rentals " are reserved. First, there is a " yearly rent " of a fixed sum payable by monthly instalments in advance. Secondly, " by way of further rent an annual sum payable on the thirty-first of December in each year computed " in a manner the lease proceeds to direct. It directs that an amount of one pound ten shillings per cent, that is three-eighths of four per cent, of the liquor purchased be calculated in a way exactly according with the formula in ss. 19 (1) (*a*) and 19 (3) (*a*) of the *Licensing Act*, with one slight variation. The variation is that the lease speaks of one pound ten shillings for every one hundred pounds or fraction thereof, which is not quite the same as one and one-half per cent. The section makes the fee four per cent and the landlord's part three-eighths of that, which means one and one-half per cent.

The lease proceeds to provide that the first annual sum (i.e., further rent) shall be payable on 31st December 1944 " notwithstanding that the period of twelve months ended 30th June 1944 in respect of which such first annual sum shall be paid or payable is or may not be included in the said term." This makes it clear that the " further rent " reserved is payable in respect of the periods exactly corresponding with the liquor purchases and not in respect of the period for which the licence is renewed, that is, the twelve months following the payment of the fee.

It follows that the authority given by s. 19 (3) (*a*) to the tenant to deduct his three-eighths from the rent payable for the year in respect of which the fee is paid could not enable him to make the deduction from the " further rent " reserved. He must deduct it from the first or " yearly rent " or not at all. In fact the tenant withheld payment of the further rent, as no doubt it was the

H. C. OF A. 1948.

MEREDITH v. FITZGERALD.

Dixon J.

purpose of the device embodied in the lease that he should do. *O'Bryan* J. considered that to withhold payment was not to deduct, and for this reason he treated the landlord as entitled to sue for the "further rent," subject to the tenant establishing under the statute his right to recover the like amount and so to set it off. I am not prepared to distinguish between withholding payment and deducting the amount, but for the reasons I have given I think the conclusion was right that the tenant could not make the deduction by withholding payment of the "further rent." He could only do so by withholding part of the fixed yearly rent.

Accordingly, the case presents itself as one in which the tenant, not having lawfully deducted the three-eighths of the licence fee, sues to recover it from the landlord, while the landlord relies upon the tenant's liability for the further rent as a set-off barring recovery. The amounts are, of course, identical.

The question is whether the tenant is under a liability for the further rent.

Sub-section (3) of s. 19 begins with a *non obstante* clause, viz.: "Notwithstanding anything to the contrary in any agreement whether made before or after the coming into operation of this Act." Paragraph (*c*) of the sub-section, which, like the other paragraphs, is governed by this introductory clause, provides that in the sub-section "rent" includes any rent reduced or commuted under the agreement. The reference to reduced rent means, as I understand it, that if there is a higher rent which payment of a reduced amount will satisfy if certain contingencies are fulfilled, the deduction may be made from the reduced amount. The contingencies upon which such a reduction is commonly made to depend, when a rent and a reduced rent are reserved, include the payment to the landlord of all impositions and out-goings: see, for example, *Canny* v. *London House Pty. Ltd.* (1). It is obvious that the lease might be so drawn that the higher rent remained payable unless the tenant included the three-eighths of the licence fee among the impositions and outgoings for which he so became responsible. Such a device is met by the definition of "rent" in par. (*c*) of sub-s. (3).

The lease in the present case begins, so to speak, at the other end. It reserves as rent not only a fixed sum, but also an annual sum calculated so as to be the equivalent of the three-eighths of the licence fee that is deductible or recoverable. There is no objection to the reservation of a rent that depends upon calculation. It must of course be capable of certain computation before it becomes

(1) (1927) V.L.R. 576.

payable; but it is none the less rent because the elements upon which the calculation depends are not known beforehand. The maxim *id certum est quod certum reddi potest* applies to make the rent certain. The character of rent therefore belongs to the annual sum which the lease makes payable " by way of further rent."

The question upon which our decision must depend is whether to add a further rent so calculated is consistent with s. 19 (3) (*a*). In my opinion to do so is inconsistent with that provision. It is inconsistent with the provision because it is an addition of the very sum which s. 19 (3) (*a*) gives the tenant a right to deduct or recover notwithstanding anything to the contrary in any agreement. If a statute provides that a sum defined in a particular way shall be recovered by one party to a transaction from the other, notwithstanding any agreement to the contrary, a stipulation that makes the same sum payable by the first party to the second, from whom the statute says it is recoverable, appears to me to be repugnant to the provisions of the statute, and it does not matter whether the stipulation requires him to repay it or prepay it. In either case it is an attempt to create a cross-demand for the very thing that the statute says is recoverable. The same inconsistency exists between a statute authorizing a party liable to another to deduct a defined sum in discharging his liability and an agreement between the parties attempting to increase or add to the liability by that very sum. But, as I have said, the present is not a case of deduction. Whether it is a question of recovery or of deduction, such an agreement is inconsistent with the statute because the substance of the right which the statute gives is to retain or receive a sum of money defined by reference to characteristics which determine its nature and amount and the substance of the agreement is that the very sum identified in the same way must be restored. I cannot see that it matters that the cross-demand created to answer the statutory right to recover or deduct the amount takes the form of rent. Doubtless it is given that form, because it is only from rent that the deduction may be made. It remains the same sum identified by its characteristics and by them determined in amount. It happens here that, though rent, the " further sum " is not susceptible of the deduction, because of the period in respect of which the lease makes it payable. That is another reason why it cannot matter that it takes the form of rent.

The case appears to me to be exactly the same as one in which at the time of executing the lease a collateral obligation is undertaken by the tenant in consideration of the granting of the lease to pay to the landlord an amount consisting of one and one-half per

H. C. OF A. 1948.

MEREDITH v. FITZGERALD.

Dixon J.

cent of the liquor purchased calculated according to the formula set out in the lease and adopted from s. 19 (1) (*a*) and (3) (*a*). Surely that would be an agreement to the contrary of s. 19 (3) (*a*). In *Tuff* v. *Guild of Drapers of the City of London* (1) *Kennedy* L.J. treated the additional payments, reserved in the lease there in question, of "such further and other sums as they" (the landlords) "shall from time to time expend . . . for all tithe or tithe rent charge or modus or other payments in lieu of tithe" as not being part of the rent. But he considered them as contrary to the statute which made void a contract for the payment of the tithe rent charge by the occupier. *Vaughan Williams* L.J. (2), however, said:—"The rent may be increased—that is, increased in general terms. The landlord upon whom this burden has been thrown by this Act of Parliament is entitled to charge a higher rent; but, if he provides in the lease that there is to be added to the rent in each year the amount which the landlord has had to pay to the tithe owner in the shape of tithe rent charge, I am perfectly clear that that would come within the words of s. 1, sub-s. 1, 'and any contract made between an occupier and owner of lands, after the passing of this Act, for the payment of the tithe rent charge by the occupier shall be void.' If the contract provides for such payment, it does not the less do so because it says that the amount of the charge shall be payable as rent."

Notwithstanding the contrary view expressed by *Lowe* J. in the Supreme Court (3), I am unable to doubt the correctness of what his Lordship said. In my opinion the critical question in the case is that propounded, as I understand it, by *Herring* C.J. (4) and certainly by *Fullagar* J. (5). As stated by the latter, the question is: "Has the landlord expressly increased his rent by the amount which he is bound to pay to the tenant or permit the tenant to deduct?" I think that an affirmative answer should be given to this question because the increase is defined exactly or almost exactly as the statute defines the amount to be recovered or deducted by the tenant. Except for the difference between one and one-half per cent and one pound ten shillings for every one hundred pounds or fraction thereof they are the same sums defined in the same way. It is true that one is called three-eighths of four per cent and the other one and one-half per cent, or rather, one pound ten for every hundred pounds or fraction thereof. But the practical identity of these two formulas is seen at once. Otherwise the statute and the lease describe the same sum.

(1) (1913) 1 K.B. 40, at pp. 55, 56.
(2) (1913) 1 K.B., at p. 47.
(3) (1948) V.L.R., at p. 170.
(4) (1948) V.L.R., at p. 162.
(5) (1948) V.L.R., at p. 171.

To my mind it is nothing to the point to say that the landlord might have demanded a rent of some other sum, a round sum sufficient to cover the estimated compensation, and that he might have reserved it in the lease as rent. Be it so. That only means that the legislation has drawn a line which is inadequate to achieve the whole purpose ascribed to the legislature. But it does not show that it has drawn the line still further from fulfilment of its purpose. The statute has expressed an intention that no agreement shall stand in the way of the tenant's retaining or recovering three-eighths of the licence fee, and it appears to me to be clear that an agreement requiring the tenant to pay to the landlord the same sum he retains or recovers or is about to recover would stand in the way of the realization of the substance of the statutory provision.

The point at which I part company with the opinion adopted by *Herring* C.J. and *Fullagar* J. is in the identification of the sum. Their Honours both considered that the fact that the further rent would remain payable, notwithstanding that a change might be made in the legislation, differentiated the further rent from the landlord's portion of the licence fee. *Herring* C.J. also took into account the additional consideration that the further rent is described in the lease without reference to the statute and without reference to the licence fee as such or to the deduction. I have formed the opinion that these elements are not enough to differentiate the " further rent " from the landlord's portion of the licence fee.

The possibility of a change in the law ought not, I think, to be taken into account in determining what is contrary to law. The law now in force is that a sum defined by reference to a percentage of liquor purchases shall be retained or recovered from the landlord by the tenant. The lease says that nevertheless the same sum shall be paid by the tenant to the landlord. That is enough. They are opposing liabilities in reference to the same thing. If the law is changed by the legislature or the agreement by the parties, the opposition may cease. But while both the law and the lease remain unchanged the opposition between them remains and the reddendum in the lease must give way. Nor do I think it matters that there is no express reference to the Act, to the deduction, or to the fee, or the landlord's portion thereof. The identification is complete in all respects without that. The very formula is adopted with but the slightest variation.

Again, I do not think it matters that the further rent is made payable by the tenant without regard to the question whether he does or does not pay the licence fee, although the deduction or

H. C. OF A. 1948.

MEREDITH v. FITZGERALD.

Dixon J.

recovery of the landlord's portion is only authorized by s. 19 (3) (*a*) when the fee is paid.

The answer to that suggestion is twofold. First, the lease itself contains a covenant requiring the tenant to pay the licence fee. Secondly, the identification of the sum remains and even if a case were possible where the further rent was payable though the three-eighths of the licence fee could not be deducted or recovered, there could be no case in which the contrary was true. If the reservation of further rent were valid, whenever the three-eighths of the licence fee would be deductible or recoverable, "further rent" would be payable which would answer the deduction or recovery.

Thus there could be no case in which the three-eighths of the licence fee could be deducted or recovered under the statute but the further rent was not payable under the lease, that is assuming the reservation of the further rent to be valid.

The whole matter may be summed up by saying that the reservation of the further rent is an attempt to produce a cross-demand so that the maxim *frustra petis quod statim alteri reddere cogeris* will defeat s. 19 (3) (*a*) and that must be contrary to the statutory provision.

In my opinion the judgment of *O'Bryan* J. was right and ought to be restored.

I think the appeal should be allowed.

WILLIAMS J. The question that arises for decision on this appeal is whether the agreement for the payment of further rent contained in the reddendum of an indenture of lease of the Village Belle Hotel, St. Kilda, made between the appellant as lessee and the respondent as landlord on 3rd December 1944 was avoided by the provisions of s. 19 (3) (*a*) of the *Licensing Acts* 1928-1946 (Vict.).

The lease was expressed to be of a term of two years from 16th March 1944 and contained a covenant by the appellant to renew the licence on 1st January 1945 and 1st January 1946. The appellant performed this covenant and paid £894 7s. to renew the licence for the year 1945, and £886 16s. to renew the licence for the year 1946. After the expiry of the lease she brought an action to recover three-eighths of these sums from the plaintiff. Section 19 (3) (*a*) of the *Licensing Act* provides that: "Notwithstanding anything to the contrary in any agreement whether made before or after the coming into operation of this Act any licensed victualler who holds a victualler's licence for any premises of which he is not the owner and who pays the annual licence-fee for such licence fixed on a percentage basis may without suffering any penalty

imposed by any such agreement deduct from any rent payable by him for the premises for any year in respect of which such fee is paid a sum equal to three-eighths of the amount of such fee or may recover the said sum in any court of competent jurisdiction from the owner of the premises."

The reddendum of the lease provided for the payment of firstly the yearly rent of £4,953 12s. by monthly instalments always in advance, and secondly by way of further rent an annual sum payable on the thirty-first day of December in each year during the said term equal to an amount computed at the rate of one pound ten shillings for every one hundred pounds or fraction thereof of the gross amount (including any duties thereon) paid or payable for all wines spirits ale beer porter stout cider perry or other spirituous or fermented liquors of an intoxicating nature which during each period of twelve months ending the thirtieth day of June immediately preceding the thirty-first day of December in each year during the said term were purchased for the said hotel and premises by the lessee or other the holder for the time being of the victualler's licence appertaining thereto the first of such annual sums to be paid on the thirty-first day of December one thousand nine hundred and forty-four notwithstanding that the period of twelve months ended the thirtieth day of June one thousand nine hundred and forty-four in respect of which such first annual sum shall be paid or payable is or may not be included in the said term. The lease also contained a covenant that the lessee would during the said term pay unto the lessor the said yearly rents thereinbefore reserved at the times by the payments and in the manner thereinbefore appointed for payment thereof clear of all exchange deductions or abatements whatsoever.

At the date of the lease, s. 19 (1) of the *Licensing Act*, as amended by the *Licensing (Fees) Act* 1931, provided that from the first day of July 1932 the licence fee should be equal to four per centum of the gross amount (including any duties thereon) paid or payable for all liquor which during the twelve months ended on the last day of June preceding the date of the application for the grant or renewal of the licence was purchased for the premises in respect of which such grant or renewal was sought. It will be seen that the further rent provided for by the reddendum was a sum equivalent to three-eighths of the licence fee if that fee continued to be calculated throughout the lease on this basis. The appellant did not pay this further rent and the respondent claims that he is entitled to set off the amount unpaid against her claim to recover three-eighths of the licence fees.

H. C. OF A. 1948.

MEREDITH v. FITZGERALD.

Williams J.

The action came on for hearing before *O'Bryan* J. who expressed the opinion that the agreement to pay the further rent was avoided by the sub-section but referred the following question of law for the opinion of the Full Supreme Court of Victoria: "Is the defendant entitled to set off against the plaintiff's claim for the landlord's portion of the licence fee paid by her, which claim is made under s. 19 (3) (*a*) of the *Licensing Act*, the 'further rent' provided for in the lease, the plaintiff not having paid to the defendant such further rent and not having deducted from the rent payable in respect of the premises the landlord's portion of the licence fee?" The Full Court unanimously answered this question in the affirmative and remitted the case to *O'Bryan* J. who accordingly gave judgment for the defendant.

In my opinion the Full Court was right in answering the question in the affirmative. The purpose of s. 19 (3) (*a*) is to avoid any agreement between a landlord and a tenant by which the incidence of three-eighths of the licensing fee is shifted from the shoulders of the landlord to those of the tenant. The sub-section avoids any agreement the effect of which is to prevent the tenant deducting this portion of the licence fee from any rent payable for the premises for any year in respect of which such fee is paid or recovering it by action from the landlord. It would therefore operate upon an agreement by the tenant to bear the whole of the licence fee or an agreement on his part to pay the landlord by way of further rent or otherwise three-eighths of the licence fee which the tenant has actually to pay from time to time to renew the licence during the lease. Either form of agreement would be an agreement to the contrary within its meaning. Cf. *Lord Ludlow* v. *Pike* (1); *Tuff* v. *Guild of Drapers of the City of London* (2). But the sub-section does not place any restriction on the right of the landlord to let the premises at the highest rent that he can induce any person to pay. The obligation placed on the landlord to pay three-eighths of the licence fee means that as the liquor trade increases the net amount of rent is reduced, and the landlord is quite entitled to refuse to let the premises except at a rent in the computation of which this liability has been taken into account.

As the Chief Justice of the Supreme Court has pointed out, it was expected and no doubt hoped that the method of calculation adopted in the lease would fix the further rent at an amount to all intents and purposes equal to the sum the tenant would be entitled to deduct or recover. But the lease contained no provision for altering the formula in the event of an alteration of the formula in the

(1) (1904) 1 K.B. 531. (2) (1913) 1 K.B. 40.

statute. Nothing in the lease prevented the tenant deducting from the rent at which the landlord was willing to let the premises or recovering from the landlord three-eighths of the licence fee which he had actually to pay to renew the licence whether the statutory formula remained the same or was replaced by a new percentage.

The words of a statute must be construed according to their ordinary and natural meaning, and so construed the words of the sub-section do not appear to me to reach the agreement to pay the further rent. In my opinion it is appropriate to apply to the sub-section the words of Lord *Atkin* in *Moss' Empires Ltd.* v. *Olympia (Liverpool) Ltd.* (1), "if it does not apply in its ordinary and natural construction, I do not understand how there can be said to exist any principle of law which would avoid an agreement not in terms avoided by the statute sought to be applied."

For these reasons I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Brew & McGuinness.*
Solicitors for the respondent: *Doyle & Kerr.*

E. F. H.

(1) (1939) A.C. 544, at p. 551.