possession of trading advantages over another State nor gives it the power to obtain any such advantages. In our opinion, it is not obnoxious to sec. 99 of the Constitution.

In our opinion the demurrer should be allowed.

Demurrer allowed. Action dismissed with costs.

Solicitors for the plaintiffs, *Edmunds, Jessop, Ward & Ohlstrom.*

Solicitor for the defendants, *W. H. Sharwood*, Crown Solicitor for the Commonwealth, by *Fisher, Powers, Jeffries & Brebner.*

C. C. B.

[HIGH COURT OF AUSTRALIA.]

GLACKEN . . . . . APPELLANT;
PLAINTIFF,

AND

TOOTH AND COMPANY LIMITED . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Landlord and Tenant—Lease—Rent—Covenant by lessee not to make claim for reduction—"Present legislation State or Federal"—Subsequent legislation—Application thereunder by lessee—Contracting out of benefit conferred by statute—Reduction of Rents Act 1931 (*N.S.W.*) (*No.* 45 *of* 1931), *secs.* 5, 6—*Landlord and Tenant* (*Amendment*) *Act* 1932-1935 (*N.S.W.*) (*No.* 67 *of* 1932—*No.* 33 *of* 1935), *secs.* 14, 16.

For the purpose of settling a dispute as to the amount of rent payable under a lease expiring in December 1937, the parties thereto, by indenture made on 4th April 1932, agreed upon a sum payable in respect of arrears, and the lessee covenanted that it would pay in full and without any diminution on the dates provided in the lease the sums therein provided to be paid by way of rent and would not "make any claim for the reduction of the same nor take

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advantage of nor endeavour to take advantage of any present legislation State or Federal relating to or having the effect of reducing rents and in favour of lessees." In December 1932 the *Landlord and Tenant (Amendment) Act* 1932 (N.S.W.) came into force. Sec. 16 of that Act provides that "any lessee or lessor may apply to the Court to have the annual rent of a lease to which this Part . . . applies determined for the balance of the term or during the period for which this Part . . . is in force, whichever is the shorter period."

Held that the lessee was not precluded by the covenant in the indenture from making an application under sec. 16 of the *Landlord and Tenant (Amendment) Act* 1932-1935 for a determination of the rent payable under the lease.

Decision of the Supreme Court of New South Wales (*Nicholas* J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

Ignatius Joseph Benedict Glacken, the plaintiff in a suit instituted by way of originating summons in the Supreme Court of New South Wales in its equitable jurisdiction, applied, by motion, to that Court for the continuation, until the hearing of the suit, of an injunction granted on 20th April 1935 restraining the defendant, Tooth & Co. Ltd., from applying to the Licences Reduction Board under the provisions of the *Landlord and Tenant (Amendment) Act* 1932-1935 (N.S.W.) for the determination of the annual rental payable by the defendant in respect of premises known as the "Union Inn" Hotel, North Sydney. The application for the injunction was based on three grounds: (*a*) that the defendant did not come within the class of lessees permitted to make application under the laws at present in force; (*b*) that the matter was *res judicata* in favour of the plaintiff; and (*c*) that by the negative stipulation contained in clause 2 of an indenture dated 4th April 1932, made between the plaintiff as sole surviving executor and trustee of the will of Denis Joseph Glacken, of the first part, two residuary beneficiaries of the second part, and the defendant of the third part the defendant had bound itself not to make the application sought to be restrained. After reciting that the defendant was the lessee of the premises known as the "Union Inn" Hotel, for a term to expire on 31st December 1937, and otherwise upon the covenants and conditions set out in the memorandum of lease, that a dispute had arisen between the plaintiff and the defendant as to the amount of rent then due and payable or to become due and payable under the provisions of the

memorandum of lease, and that the parties to the indenture, being anxious to avoid any proceedings in any Court with respect to that dispute, had entered into the arrangement thereinafter appearing, the indenture witnessed that in consideration of the premises the plaintiff, with the consent of the residuary beneficiaries, and the defendant mutually covenanted and agreed by clause 1, that the defendant should forthwith pay to the plaintiff the sum of £336 4s. 4d. and thereupon the plaintiff should not take any steps for the recovery of any arrears of rent due and payable up to 22nd February 1932 under the provisions of the memorandum of lease, by clause 2, that " Tooth & Co. Ltd. shall pay in full and without any diminution on the dates provided in the . . . memorandum of lease the sums therein provided to be paid by way of rent or otherwise and shall not make any claim for the reduction of the same nor take advantage of nor endeavour to take advantage of any present legislation State or Federal relating to or having the effect of reducing rents and in favour of lessees " ; and by clause 3, that the plaintiff, with the consent of the residuary beneficiaries, thereby granted an option to the defendant for a further lease of the premises for a term of three years to take effect as from the expiry of the term created by the then existing lease at a rental of £50 per week. The *Landlord and Tenant* (*Amendment*) *Act* 1932 was assented to on 30th December 1932. The operation of Part III. of that Act, under which the defendant proposed to make its application to the Licences Reduction Board, commenced on 31st December 1932, that is, about nine months after the date of the execution of the indenture.

Nicholas J. held that those statutory provisions did not come within the meaning of the expression " any present legislation State or Federal " used in clause 2 of the indenture. The motion having been turned into a motion for decree, the suit was dismissed.

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

Further material facts appear in the judgments hereunder.

Maughan K.C. (with him *Stuckey*), for the appellant. Clauses 1 and 2 of the indenture clearly set forth the intention of the parties,

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and effect should be given to that intention (*Gwyn* v. *Neath Canal Navigation Co.* (1)). The parties sought to settle the dispute between them, and to avoid a recurrence of the trouble. In clause 1 the parties dealt with past payments and made provision for the payment of arrears. The object of clause 2 was to make provision in respect of all future payments falling due under the lease. The word " present " in that clause refers to legislation of the nature described then in force, and to any similar legislation which might come into force during the balance of the term of the lease. That word was considered by the Court in *Doe d. Williams* v. *Smith* (2). As used here the word " present " should be interpreted as meaning " current or in force for the time being " or it should be rejected (see *Fisher* v. *Val Travers Asphalte Co.* (3)). That clause 2 was intended to have a future operation is shown by the fact that at the date of the execution of the indenture there was not in existence any Federal legislation of the nature indicated, and also by the fact that contracting out of the *Reduction of Rents Act* 1931 (N.S.W.) was prohibited. It, therefore, is obvious that the parties intended to contract themselves out of, that is to say, they agreed not to take advantage of, rights, or benefits, of this nature which might be conferred by future legislation. The reduction effected by the *Reduction of Rents Act* operated automatically by force of the statute. The effect of the provisions of that Act upon contractual obligations was considered in *City Freeholds Ltd.* v. *Woolworths Ltd.* (4). If clause 2 is not given the meaning contended for then, so far as the appellant is concerned, it is meaningless and barren of result. The respondent should be compelled by injunction to observe the negative covenant contained in clause 2 (*Trautwein* v. *Belfield* (5)).

Williams K.C. (with him *A. R. Taylor*), for the respondent. The respondent did not by the indenture contract out of the benefits conferred on lessees by the *Landlord and Tenant (Amendment) Act* 1932, as amended by the Act of 1935. That Act, by implication, forbids contracting out. There was only one dispute between the parties, namely, whether the 22½ per cent reduction imposed by the

(1) (1868) L.R. 3 Ex. 209, at p. 215.
(2) (1836) 5 A. & E. 350; 111 E.R. 1198.
(3) (1875) 1 C.P.D. 259.
(4) (1932) 33 S.R. (N.S.W.) 49; 50 W.N. (N.S.W.) 34.
(5) (1917) 17 S.R. (N.S.W.) 213; 34 W.N. (N.S.W.) 112.

Reduction of Rents Act 1931 was to be deducted from the rent payable under the lease granted in February 1931. The determination of that dispute determined not only the question as to arrears of rent, but also as to future rent the respondent would have to pay so long as the Act remained in force. The word " present " in clause 2 of the indenture refers only to the legislation then existing. The parties could not have intended to refer to future legislation of the nature and effect of which they were then unaware. Had they so intended, the words " or future " could, and doubtless, would have been inserted after the word " present." The expression " shall pay in full and without any diminution " is an expression frequently used by conveyancers (cf. *Conveyancing Act* 1919 (N.S.W.), Schedule IV., and *Encyclopædia of Forms and Precedents*, vol. 7, p. 164). The parties did not intend to, nor was it within their competence, to contract out of the benefits conferred by future legislation (*Equitable Life Assurance of the United States* v. *Bogie* (1); *In re Howard* (2)). On the ground that it would be against public policy, the respondent would not be permitted to contract out of the benefits of the *Landlord and Tenant (Amendment) Act* (*Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual Provident Society* (3)).

Maughan K.C., in reply. The expression " shall pay in full and without any diminution differs " in effect from the expression, " pay rent without any deduction," used by conveyancers and which appears in the conveyancing precedents. That difference is very material. The respondent agreed in clear and unambiguous words not to make any claim for a reduction in rent. For that agreement the respondent received very valuable consideration. Contracting out of future legislation is permitted (*Mayor of Berwick* v. *Oswald* (4)). In the absence of statutory provisions forbidding contracting out, an agreement not to apply to the Court under sec. 16 (1) of the Act is according to law and does not oust the jurisdiction of the Court.

(1) (1905) 3 C.L.R. 878, at pp. 891, 911.
(2) (1925) 25 S.R. (N.S.W.) 189, at pp. 191, 192; 42 W.N. (N.S.W.) 34, at p. 35.
(3) (1934) 50 C.L.R. 581, at p. 596.
(4) (1854) 3 E. & B. 653, at p. 665; 118 E.R. 1286, at p. 1291.

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The following judgments were delivered :—

RICH J. In this case I think *Nicholas* J. correctly construed clause 2 of the agreement in question. It is in these terms: "2. Tooth & Co. Limited shall pay in full and without any diminution on the dates provided in the said memorandum of lease the sums therein provided to be paid by way of rent or otherwise and shall not make any claim for the reduction of the same nor take advantage of nor endeavour to take advantage of any present legislation State or Federal relating to or having the effect of reducing rents and in favour of lessees." The word "present" as there used refers to existing, and not future, legislation. Tooth & Co. by this agreement did not intend to, and did not, contract themselves out of the rights which might accrue under future legislation. Even if the words in the agreement were capable of such an interpretation, it would not be competent I think for the parties to forestall or overrule future legislation of the character of the *Landlord and Tenant (Amendment) Act* 1932-1935 (see sec. 16), or prevent its operation.

I think the appeal should be dismissed with costs.

STARKE J. I agree with the judgment of *Nicholas* J.

DIXON J. This appeal is from a decretal order refusing to grant an injunction restraining the defendant from making an application under sec. 16 of the *Landlord and Tenant (Amendment) Act* 1932, as amended by the Act of 1935. The defendants are Tooth & Co. Ltd. and they are now lessees under a lease dated 19th February 1931, registered on 13th July 1931. They obtained the lease as a result of a security under which they entered as mortgagees. The mortgagor, one Smith, was the assignee of a lease for fourteen years expiring on 31st December 1937. Tooth & Co. Ltd. went into possession as mortgagees on 19th February 1930. On 19th June 1930 they made an agreement with the executors of the lessors. By that agreement they agreed first to pay the arrears of rent fixed at a sum of £500, next they agreed to pay future rent at £64 per week, then they agreed to procure a surrender of the existing lease. The fourth thing they agreed to do was to take, in lieu of the existing

lease to be surrendered, a new lease for a term commencing on 5th May 1930. That date was then past. The term was to be the same as the previous lease—a term expiring on 31st December 1937—but the rent was to be £45 per week for the first two years and £50 per week afterwards. A surrender of the lease was procured, dated 19th February 1931, and the present lease, as already stated, was granted on the same date. Its term commenced retrospectively on 5th May 1930 and is to expire on 31st December 1937.

At first Tooth & Co. Ltd. paid the rent reserved, £45 a week, and they did so until about 7th October 1931. On that date the *Reduction of Rents Act* 1931 was passed; it was proclaimed two days later. The Act applied to leases which were subsisting at its commencement, subject to exceptions, and one of the exceptions was the case of premises not leased on 30th June 1930, if the lease was entered into three months at least before the commencement of the Act.

After the passing of the Act, Tooth & Co. Ltd. appear to have paid only the reduced rent, but the lessors contended that the Act did not operate to reduce the rent. Conceivably the lessors attempted to rely on sec. 6 (1) (*c*) and claimed that the existing lease was not in force on 30th June and took effect only on registration shortly after, viz., 9th July 1931. More probably they relied on sec. 6 (1) (*b*) and said that it operated to make £64 and not £45 a week the sum liable to reduction by 22½ per cent. However that may be, Tooth & Co. Ltd. on 22nd February 1932 resumed full payment of the rent. Then, on 4th April 1932, they entered into an agreement which was designed to adjust the differences between the parties. It is that agreement which contains the provision that was the foundation of the suit for the injunction.

The first question for decision, and the question upon which the judgment below proceeded, is the construction of the clause which the plaintiff relied upon. The agreement recited differences between the parties, and, in the first place, contained an agreement on the part of Tooth & Co. Ltd. to pay a sum of money which in fact comprised the whole of the arrears arising from the underpayments. Next, Tooth & Co. Ltd. agreed that they would pay in full and without any diminution, on the dates provided in the memorandum of lease, the sums therein provided to be paid by way of rental or

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Dixon J.

otherwise and that Tooth & Co. Ltd. should not make any claim for the reduction of the same or take advantage of or endeavour to take advantage of any present legislation, State or Federal, relating to rents in favour of lessees.

At that date, the present legislation in force was the Act of 1931. *Nicholas* J. decided that the clause has no further operation than in relation to that Act. His decision depends ultimately upon the use of the word "present."

In considering the construction of the clause, we should take into account the considerations, which Mr. *Maughan* has emphasized, which do point towards the conclusion that the clause was intended to secure to the landlord the full rent of £45 per week, or £50 a week after the expiration of two years, and that it did not necessarily mean to restrict its operation in that respect to the period of currency of the Act of 1931, which would expire at the end of the year 1932. But those considerations, whilst they have a good deal of weight, are, in my opinion, quite insufficient to overcome the express language of the particular part of the clause requiring the tenant not to take advantage of, or endeavour to take advantage of, legislation, State or Federal. That part of the clause is expressly limited to "present" legislation. The word "present" cannot mean future or current, and it cannot be rejected as a mistake. On the other hand, the word "present" does not attach itself to so much of the clause as says that a tenant shall not make any claim for reduction of rent. Those words are capable of a general operation and I do not think the Court would be upon safe ground if it attached to them a restriction derived from the express limitation contained in the word "present" which is attached to the latter part of the clause. But this conclusion is not sufficient to carry the appellant's case.

The Act of 1932 was subsequent to the agreement relied upon and is directed at modifying rights contained in existing leases and agreements relating to leases. The right which might be conferred by the clause, as I have construed it, is a right to be paid in full the rent reserved and to enjoy an immunity from any claim by the tenant for a reduction of the full amount so reserved. Such a provision cannot be considered simply as a renunciation of rights which the law leaves the party at liberty to renounce. In the first place the

rights conferred by the Act of 1931, which was in force at the date of the agreement, were not capable of renunciation (sec. 5). Then, as I have construed the clause, it is of general operation and is not necessarily confined to rights arising under the then existing law. It might be capable of use in relation to future states of the law. Its intended operation is wide enough to include such an application as that now pending under sec. 16 (1) of the Act of 1932. That sub-section expressly says that any lessee or lessor may apply to the Court to have the annual rent of the lease, to which Part III. of that Act applies, determined for the balance of the term. It is legislation operating on all existing leases of the prescribed description. It confers upon lessees new rights inconsistent with the provisions of such leases. It is not easy to understand how a contract can effectually renounce rights under future legislation the purpose of which is to vary the rights given by the contract itself. In order to exclude the lease and the rights of the parties under it from the operation of sec. 16, it is not enough to construe that section or the statute as allowing a subsequent abandonment by contract of the rights it confers. For a contract antecedently made to exclude the section, it must be possible to construe sec. 16 itself as intending to give no right to apply for a determination of rent to persons who have in advance agreed that they will not make any claim. In my opinion such a construction of the section is impossible. It is not meant to be subject to any exception. It is universal in its character and is applicable to every lessee or lessor whose lease is of the description contained in sec. 14 as modified or amplified by the Act of 1935.

Whether this particular lease is of that description is not a matter which we are called upon to determine. It is a question which apparently was submitted to *Nicholas* J. for decision, but he considered that even if he should decide it in the plaintiff's favour, it would be no ground for an injunction, and he, therefore, did not decide it. It is, we are informed, a question raised for determination elsewhere. But assuming, if it were held to be the case, that the lease falls within those provisions, I should be of opinion that sec. 16 (1) gave an affirmative right to the tenant to make the application

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that it has in fact formulated, and that the clause relied upon could not prevent the exercise of that right.

For these reasons I think the appeal should be dismissed.

McTIERNAN J. I agree that the appeal should be dismissed. The whole of clause 2 of the indenture of 4th April 1932 does not, in my opinion, upon its true construction, affect any rights which the respondent may have under the *Landlord and Tenant (Amendment) Act* 1932-1935, subsequently enacted, to make the application to the licensing tribunal which it was sought to restrain. As regards the words " and shall not make any claim for the reduction of the same," which are part of clause 2, I think that the considerations relied upon by *O'Connor* J. in *Bogie's Case* (1) apply here : " I think it is plain, on the ordinary interpretation of language, that the insured has not contracted himself out of the rights which are given to him by sec. 22. The contract was made before the Act was passed. It was made on the form of contract which we understand is used in America. The words 'gives up all right or claim to temporary assurance,' is a phrase used in the American Acts, in respect of which this clause of the contract was intended to operate. It would certainly require very much stronger words than are used here to indicate an intention to give up, not only all rights already given by statutes in existence at the date of the policy, but rights that may be hereafter given by other statutes. On that ground also, I agree that there has been no contract made to give up the rights which sec. 22 has conferred on the assured under this *Life Insurance Companies Act*." In this view it is not necessary to discuss the question of contracting out of the operation of future legislation dealt with in the passages which Mr. *Maughan* quoted from the judgments of *Pollock* C.B. and *Maule* J. in *Mayor of Berwick* v. *Oswald* (2).

Appeal dismissed with costs.

Solicitor for the appellant, *V. J. Flynn.*

Solicitors for the respondent, *Smithers, Warren & Lyons.*

J. B.

(1) (1905) 3 C.L.R., at p. 911.
(2) (1854) 3 E. & B., at pp. 678, 665 ; 118 E.R., at pp. 1295, 1296, 1291.