

Privy Council Appeal No. 23 of 1918.

The South Australian Brewing Company, Limited - - - *Appellants*

v.

Herbert Hill - - - - - *Respondent*

FROM

THE SUPREME COURT OF SOUTH AUSTRALIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 21ST JANUARY, 1919.

Present at the Hearing :

LORD BUCKMASTER.

LORD PARMOOR.

LORD PHILLIMORE.

[*Delivered by* LORD PARMOOR.]

The appellants, a Limited Company, incorporated according to the law of South Australia, are lessees of certain land with buildings thereon known as the Red Lion Hotel, City of Adelaide. The lease, which is dated the 11th April, 1895, is for a term of 30 years from the 1st of August, 1897, at a clear weekly rental of £26 without any deduction or abatement whatever and subject to the covenants, stipulations, and provisos therein contained. Under the terms of the lease the lessee has an option of taking a renewed lease of the premises for the further period of twenty years.

The lease contains the covenant that the lessee—

“Shall and will pay all rates, taxes, charges, assessments, impositions and other outgoings whatsoever which at the commencement of the term hereby granted, or at any time thereafter during the said term,

shall or may be rated, taxed, charged, assessed or imposed on the premises hereby demised or any part thereof, or on the rent thereof or any part thereof, or on the lessor or the lessee in respect thereof except the land tax, and it is hereby declared and agreed that notwithstanding any law to the contrary all or any of such rates, taxes, charges, assessments, impositions and other outgoings (except the land tax) which the lessee shall neglect or refuse or fail to pay may be recovered by the lessor from the lessee as money paid by the lessor for the use of the lessee at the lessee's request or by distress on the premises as for rent in arrear."

At the date of the making of the lease, and also at the date when the term thereby created commenced, there was a State land tax, limited to lands in South Australia, payable in respect of the demised premises. The respondent makes no claim against the appellants in respect of this land tax, and does not question his liability to pay the amount charged on the demised premises in respect thereof.

In the year 1901 the Commonwealth of Australia was constituted. In the year 1910 a Federal land tax was imposed on land throughout Australia for the benefit of the Commonwealth Government. The question raised on the appeal is whether the appellants are liable to repay the Federal land tax paid by the respondent in respect of the demised premises. The respondent claims a declaration that according to the true construction of the said Memorandum of Lease the appellants are liable to pay so much for the Federal land tax assessed on the unimproved value of the land included in the said Memorandum of Lease by virtue of the Land Tax Assessment Act of 1910 and the Act amending the same as would have been payable by the appellants if the appellants had been owners of the said land and of no other land. The appellants in their defence objected that the Statement of Claim was bad in law and disclosed no cause of action, on the ground that they are in law by the covenants set forth in the Statement of Claim exempted from payment of land tax, whether Federal or State. It was ordered that the point of law so raised should be set down for hearing before the full Court and disposed of before the trial of the action. After argument the Court declared that the appellants are not in law exempted by the covenant set forth in the Statement of Claim from the payment of Federal land tax. Leave was granted to the appellants to appeal from the said judgment to His Majesty in Council.

It is unnecessary to restate at length the covenant in the lease of the 11th April, 1895. Subject to the terms of the exception, and to the effect of the State Taxation Acts, 1884 and 1894, and of the Commonwealth Land Tax Act, 1910, and the Commonwealth Land Tax Assessment Act, 1910-1914, it is sufficiently wide to impose on the lessee the liability to pay all taxes which at the commencement of the lease, or at any time thereafter, should be charged on the demised premises or on the lessee in respect thereof. It would therefore impose on the appellants the payment both of the State land tax and of the Federal land tax, so far as these taxes or either of them are not

within the exception, subject to the operation of the State Taxation Acts and the Commonwealth Acts of 1910 and 1910-1914.

The State Taxation Act of 1884 imposes under Part I a tax called "the Land Tax" on all lands in South Australia with certain specified exceptions, which do not affect the demised lands. Parts IV and V of the Act impose the burden of the tax on the taxpayer, who in the present case would be the respondent. Section 76 enacts that no future contract or covenant shall bind any party to relieve any other party of the burden or incidence of any tax for which such last-mentioned party is made liable under the Act, unless the tax in question is expressly mentioned in such contract or covenant. The State land tax imposed in South Australia, under the State Taxation Act of 1884, is not expressly mentioned in the covenant in the lease, and therefore the covenant does not operate to transfer the liability to pay such tax from the respondent to the appellants. The later State Taxation Act of 1894 is incorporated with, and, except so far as inconsistent therewith, is to be read with the State Taxation Act of 1884. It provides for increased land taxes, designated respectively as "an additional land tax" and "an absentee land tax," and enacts in Section 7 that all unrepealed provisions of all existing Acts and regulations relating to the taxes imposed by the Taxation Act, 1884, and assessment therefor, shall, so far as practicable, apply to the increased taxes thereby imposed, and the assessments therefor, except where other provisions are thereby made on the subject, and that the additional land tax and the absentee land tax shall be deemed land tax under the Taxation Act, 1884. At this date Section 76 of the Taxation Act, 1884, was not repealed, and there is nothing inconsistent in its operation on the taxes imposed under the Act of 1894. It therefore follows that no liability for a land tax imposed under the Taxation Amendment Act of 1894 would be transferred from the respondent to the appellants under the covenant in the lease of the 11th April, 1895, and that in respect of any such tax the respondent is not relieved from the liability which the Act imposes on him.

It will be convenient to consider in the next place the effect of the exception "Except the land tax." It was argued on behalf of the appellant that these words would include any Federal land tax subsequently imposed, although at the date of the lease the Commonwealth had not been constituted. Their Lordships cannot accept this contention, and are of opinion that it would be extravagant so to construe the language of the exception as to include a tax which could hardly have been in contemplation of the parties, seeing that the exception itself makes no reference to any tax which may be imposed subsequently to the date thereof. At the time when the covenant was entered into which contains the exception there was in operation a State land tax under the Taxation Act of 1884 which was known to the parties and which in the Act was called "the land tax," and the exception must be construed having regard to the conditions as they existed at

the time. Their Lordships are of opinion that the exception cannot be construed to include the Federal tax, and in this respect agree with the decision of the Supreme Court of Australia and with the judgment of the Chief Justice. If owing to the operation of the State Acts of 1884 and 1894 no obligation is placed upon the appellants to pay any State land tax imposed on the demised premises, it is not necessary to determine the exact limitation of the words in the exception, but in the opinion of their Lordships they would include any State land tax whether imposed under the Act of 1884 or of 1894 or under any future amendment or modification of these Acts within the State of South Australia.

It was argued on behalf of the appellants that to limit the exception to a State land tax, within the State of South Australia, would be to render it otiose and unnecessary, since it would then only purport to apply to the exception of a land tax not included in the obligation of the general covenant. Their Lordships do not attach weight to this argument. It is not improbable that a lessee might desire to have his exemption from land tax expressed on the face of the document, and such a course is not unusual in covenants of this character.

The only remaining matter for consideration is the effect of the Commonwealth Land Tax Act, 1910, and of the Commonwealth Land Tax Assessment Act, 1910-1914. Under these Acts a Federal land tax is imposed, payable by the owner of land upon the taxable value of all the land owned by him and not exempt from taxation under the Act. The demised premises would not be exempt under the Act, and therefore, subject to the terms of the covenant, the liability to pay the Federal tax would be charged on the respondent, the lessor. Section 63 of the Act renders absolutely void every contract, agreement or arrangement made or entered into, whether before or after the commencement of the Act, altering or purporting to alter, directly or indirectly, the incidence of any land tax, except as provided by Section 30 of the Act. The effect of this Section would be to render the covenant in the lease absolutely void so far as it purports to transfer the liability to pay the Federal land tax from the appellants to the respondent, except so far as may be provided in Section 30 of the Act. The question therefore arises what is the effect of Section 30 of the Act on the liability of the appellants. The subject matter of Section 30 is "a covenant or stipulation in a lease or agreement for a lease of land, which has or purports to have the purpose or effect of imposing on the lessee the obligation of paying taxes on the land." There is a different provision whether the lease or agreement has been made before or after the commencement of the Act. In the latter case it is absolutely void, but in the former "it shall not be valid to impose on the lessee the obligation of paying land tax to a greater amount than the amount (if any) which would have been payable by the lessee if he had been the owner of the land included in the lease and of no other land." The respondent in his Statement of Claim only claimed a declaration that the appellants were liable to pay so

much of the Federal land tax imposed under the Land Tax Assessment Act of 1910 and the Acts amending the same as would have been payable by the appellants if the appellants had been the owners of the said land and of no other land, thus bringing his claim within the limitation to be found in Section 30. The consequence is that the Commonwealth Land Tax Assessment Act of 1910-1914 does not relieve the appellants from the liability which the respondent seeks to enforce against them, and that they are liable in respect thereof under the terms of the covenant in the lease. Their Lordships, therefore, are of opinion that the Appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

THE SOUTH AUSTRALIAN BREWING COMPANY,
LIMITED,

o.

HERBERT HILL.

[DELIVERED BY LORD PARMOOR.]

Printed by Harrison & Sons, St. Martin's Lane, W.C.
1919.