Privy Council Appeal No. 32 *of* 1929.

Morris Leventhal and others - - - - - - *Appellants*

v.

David Jones, Limited - - - - - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JANUARY, 1930.

Present at the Hearing:

VISCOUNT SUMNER.
LORD MERRIVALE.
LORD ATKIN.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.

[*Delivered by* LORD MERRIVALE.]

This appeal from a judgment of the Supreme Court of New South Wales raises questions as to the construction of a series of documents exchanged between lessors and lessees of business premises in George Street, Sydney, with the intention of ascertaining precisely their respective liabilities for the taxes payable in respect of the premises. The dispute between the parties has given rise to conflicting judicial opinions, expressed in a suit in equity instituted by the lessees and an ejectment action brought by the lessors, in each of which the lessors obtained judgment, and in an appeal of the lessees to the Supreme Court of New South Wales where the lessees were successful. The lessors are appellants against the judgment of the Supreme Court.

The lease of the premises, dated the 30th November, 1909, but sealed by the respondents pursuant to a resolution of the Board passed on the 1st March, 1910, demises the premises for

thirty-three years from the 1st August, 1909. Among the lessees' covenants is the following :—

> " And also will bear, pay and discharge all rates, taxes, charges and assessments and all outgoings whatsoever whether Parliamentary, Municipal, local or otherwise which now or hereafter shall be imposed, charged or assessed upon or in respect of the said premises hereby demised or any part thereof or the rent thereof or payable by the owner or occupier in respect thereof, landlord's property tax or land tax only excepted."

The lease contains the usual proviso empowering the lessors to re-enter in cases of breach of covenant.

At the time of execution of the lease by the lessors a memorandum was signed by them and to this as well as to the lease the seal of the defendant company was affixed pursuant to the resolution of the 1st March, 1910. This memorandum, so far as is material here, is in the words following :—

> " Memorandum . . . intended to be read as if endorsed on . . . lease of even date herewith . . . . whereby in order to make quite clear the covenants in such lease as to the incidence of the liability for payment of rates it is mutually agreed :—
>
> " The Lessors will pay and satisfy the landlord's property tax or land tax or any municipal tax on the unimproved capital value of the land by any competent authority rated, imposed or levied. Provided that if the present rates now assessed by the City Municipal Council of Sydney on the annual rental value and which under the said lease are to be borne and paid by the said lessees should hereafter be assessed by the Council in any other form or by any other name whatsoever than the same now are then the same shall still be borne and paid by the said lessees."

A second memorandum was signed by the lessors on the 31st March, 1910, and sealed on behalf of the defendant company pursuant to a Board Resolution of the 20th April, 1910, and is also expressed as an agreement to be read as if endorsed upon the lease. It provided for a small increase of the rent reserved in the lease, and witnessed *inter alia* this agreement of the parties : " The lessors shall pay the Land Tax at present assessed and any future Land Tax or Municipal Tax on the unimproved capital value."

The present controversy between the parties arose upon the coming into effect of a statute of the Parliament of New South Wales, the Sydney Harbour Bridge Act, 1922, whereby Parliament imposed upon the unimproved value of land in Sydney and in certain shires formed under the Local Government Acts in force in the State an annual impost of one-halfpenny in the pound. The appellants had become in 1916 assignees of the reversion of the premises ; they called on the respondents to pay the " Bridge Tax," as it was called, the respondents denied their liability under the lease and memoranda, and the litigation between the parties ensued.

Certain outstanding facts which are relevant to the matters at issue are not in dispute. There was not at the date of the lease and had not been any tax in New South Wales known as landlords' property tax. From 1895 onwards, until 1910, there

was in force, by virtue of the Land and Income Tax Assessment Act, 1895, and the Land Tax Acts of 1895 and subsequent years an annual impost upon owners of land—called in the statutes "land tax"—and on the 28th January, 1910, this tax, pursuant to statutory powers vested in the Governor by a statute of 1908, had been as regarded the city of Sydney, "suspended." The Land Tax Assessment Act, 1895, nevertheless, remained unrepealed. In November, 1910, by a Commonwealth statute, "land tax"—under this name—to be levied and paid upon the unimproved value of lands, came into being as a fiscal measure of the Commonwealth.

The relevant section of the Land and Income Tax Assessment Act of 1895, to which reference has been made, provided for assessment by Commissioners appointed by the Crown and the annual levy for the use of the Crown, at such rate as Parliament should from time to time enact per pound sterling of the assessed value of lands situate in New South Wales, of a "land tax" to be paid "by every owner of land in respect of all land of which he is such owner for every pound of the unimproved value," subject to an immaterial deduction.

The process of "suspension" of the land tax of 1895 in New South Wales is succinctly described in the case for the appellants to this effect :—

> "In 1906 and 1908 the Parliament of New South Wales adopted the policy of abandoning the State Land Tax in favour of a rate upon the unimproved capital value of land to be imposed by the local government for local government purposes. This was effected as to Sydney by the Sydney Corporation Amendment Act, 1908, which provided for the levying (starting with the year 1909) in addition to the municipal rates provided by the Act of 1902 of a rate upon unimproved capital value. Such rate was to be paid by the owner and nothing in the Act was to affect an agreement between landlord and tenant. Immediately upon the imposition of the said new rate the operation of the Land Tax Act was to be suspended. By the same Act further duties and liabilities were imposed upon and certain cash payments exacted from the Sydney Municipal Council."

The City Council accepted under the Sydney Corporation (Amendment) Act, 1908 (s. 11 (1)) the duty in and for the year 1909 and every succeeding year to make and levy "a general rate" of not less than one penny in the £ upon the unimproved capital value of all rateable property in the City . . . in addition to the rates otherwise leviable" in the City. The statute imposes this rate, also limits the maximum amount leviable in respect thereof. Later sections of the same Act vest in the Council designated lands held theretofore by trustees for public purposes and impose upon the Corporation liabilities for certain specified annual payments to the Treasury. It is noteworthy that in respect of one of the delimited areas of land power is reserved to the Executive of the State to resume possession without compensation of any necessary part thereof as "a site for piers for a bridge across Sydney Harbour."

The Sydney Harbour Bridge Act of 1922, enacted by the Parliament of New South Wales to provide for the erection of a high level bridge across Sydney Harbour, places the cost of the bridge upon the exchequer of the State as to two-thirds of the amount, and as to one-third provides for payment out of the proceeds of " a rate leviable yearly of one halfpenny in the pound upon the unimproved value," *inter alia*, of " all lands within the City of Sydney and rateable under the Sydney Corporation Act, 1902," or amending statutes. The Bridge Act provides that the rate thereunder shall not be included in calculating the maximum " amount that may be levied as rates under the Local Government Acts or the Sydney Corporation Acts." By section 10 of the Act the Sydney Council are required to collect the " rate " and pay the proceeds to a special account in the Treasury " to be applied by the Colonial Treasurer for the purposes of the Act."

The appellants, in their case, and by the arguments advanced at the hearing, have contended (*a*) that the yearly charge imposed by the Bridge Act is in its nature " neither a land tax nor *ejusdem generis* with land tax " ; (*b*) that—applying the language of the second memorandum—it does not come within the words " land tax at present assessed and any future land tax or municipal tax on the unimproved capital value ' ; and (*c*) " that the words ' land tax ' have acquired a settled meaning in New South Wales and mean a tax imposed by the State Land Acts upon all lands within the State or tax substituted therefore." The judgment of the Supreme Court, it was contended, would expose the lessors of the premises to peril of being held liable for local burdens unlimited in kind or amount regardless of the lessees' general acceptance of the obligations in respect of the same under the terms of the lease. Upon the latter topic reference was made to the fact, as stated in the appellants' case, that " in the year 1916 the basis of assessment for municipal rates in Sydney was by statute so changed that ordinary municipal rates became payable on the basis of unimproved capital value."

There is not in the case which the respondents have made upon the appeal any ground for apprehension that by some judicial process taken at their instance or otherwise, the lessees' obligations in respect of the local rates of the demised premises —emphasised by the second memorandum—may be abrogated. Nor is a contested suit on a narrow question of law an occasion for forecasting legislative measures of taxation or statutory changes in the incidence of local burdens. The one question presented for determination in the courts of New South Wales and now raised for decision at this Board is whether under the lease and memoranda in question the lessees are guilty of breach of covenant when they refuse to pay the " Bridge Tax."

There is no inherent impossibility in the contention made on the appellants' behalf that the words " land tax " had in New

South Wales in 1909 and 1910 a settled meaning ascertained in effect by reference to the state of things which came about under the Land and Income Tax Acts, 1895, and the Land Tax Acts of subsequent years. Further, if the remarkable series of facts in the fiscal development of the State which have been already summarised had never come into being, it might be persuasively argued that the agreements of the parties in 1910 provided for nothing more than the incidence of the New South Wales land tax of 1895 and the proposed substitutional "general rate" in Sydney on unimproved values. How definitely the designation of a long-established tax may become fixed as a term of art in law or a term of assured meaning in everyday speech is illustrated by common knowledge in England that although the land tax imposed as a tax in 1688 and reimposed annually as a tax during the succeeding century was by statute in 1798 converted from an annual parliamentary impost to a permanent rent charge saleable and redeemable this fixed burden on British landed property so far as it remains unredeemed continues to be described as "land tax" in statutes, legal instruments, and current speech.

What is to be done in this case is to ascertain two things: Firstly, did the parties, according to the fair construction of the terms they used, agree upon payment by the lessors of the specified tax and the specified general rate which have been identified, and no more, or did they agree that, subject to the provision in the lease and the first memorandum for payment of the City rates by the lessees, any land tax or municipal tax upon unimproved capital value should be borne by the lessors? Secondly, and if the latter view is correct, does the "Bridge Tax" fall within the ambit of the lessors' liability so defined?

Some evidence of fact is always admissible to assist in judicial determination of the true meaning of the language of parties to an agreement, though the parties may not testify as to their intention. Land tax in England could be defined by well known facts in the law, including various statutes. Land tax in New South Wales would no doubt be definable in a like mode in a wide range of cases. Here also there are facts in the law and matters apparent in the successive acts of the parties which cannot be excluded from consideration. While the fiscal changes of 1908–10 were being worked out the parties made three attempts to define the lessors' liabilities. The bare words in the lease:— "All rates, taxes . . . and all outgoings whatever, whether parliamentary, municipal, local or otherwise . . . now or hereafter . . . imposed . . . landlords, property tax or land tax only excepted" would probably have been construed to impose on the lessees the "general rate" and the "Bridge Tax." The first memorandum is plainly enough designed to fix on the lessors the burden of the general rate under the Act of 1908 which was then in course of being substituted for the land tax of 1895. By the 31st March, 1910, land tax in the

older significance of the terms was gone, and the substitutional general rate had taken effect, and lay upon the lessors. Nevertheless, the parties made a further agreement; an agreement as to "any future land tax or municipal tax upon the unimproved capital value."

The second memorandum appears on the face of it to be purposely framed in general terms with a natural regard to the recent materially relevant facts, and it places upon the lessors not only the liability for "the land tax at present assessed"—the land tax suspended under the Proclamation of the 28th January, 1910, but for any future land tax and any future municipal tax upon the unimproved capital value. This purposed enlargement of the scope of the lessors' liabilities appears to their Lordships to negative the first of the two main propositions of the appellants, viz., that the parties agreed only as to a tax in the standardised form of the Acts of 1895 and any municipal charge established in substitution for it. The words "any future land tax" remove the old limitations.

What then is a land tax? A yearly impost laid upon real property by parliamentary enactment for the provision of public revenue appears to be within the description. The appellants advanced in support of their case the judgment of the High Court of Australia in *Solomon* v. *New South Wales Sports Club, Ltd.*, 19 Com. L. Rep. 698, where the High Court was required to construe a covenant in a lease of property in Sydney made in 1909 whereby lessees had covenanted to pay taxes, rates, etc., both municipal and government which were or thereafter should be assessed or imposed "except land tax," and this exception was held not to extend to the general rate in substitution for land tax under the Sydney Corporation (Amendment) Act, 1908. Two concise phrases from the judgment of Griffith, C.J., were cited; where his Lordship says: "I am unable to see any reason for thinking that the term 'land tax' has ever been used in New South Wales . . . in any other sense than a tax on land directly imposed by the State," and again: "It seems to me that what the parties desired to express was that the covenant should extend to all taxes except taxes on land directly imposed by a legislature having power to impose them." Had the lease in the present case stood alone the judgment in *Solomon* v. *New South Wales Sports Club, Ltd.*, would have made any dispute between the parties improbable if not impossible. As matters are the definition of "a land tax" which is given by the learned Chief Justice may well be applied here. The Bridge Tax is "a tax on land directly imposed by the legislature of the State."

The appellants' contention, that though directly imposed by the legislature, the Bridge Tax is not a land tax, was supported by argument founded in particular on two manifest facts. The Bridge Tax does not extend to land generally throughout New South Wales but to a limited area comprising the City of Sydney

and certain specified shires, and the purpose of the tax is not that of providing the public revenue for the common purposes of the State but of providing funds for a particular scheme of betterment. No authority was vouched for the proposition that an impost laid by statute upon property within a defined area, or upon specified classes of property, or upon specified classes of persons, is not within the true significance of the term a tax. Nor so far as appears has it ever been successfully contended that revenue raised by statutory imposts for specific purposes is not taxation. No stress was laid in the argument before their Lordships on the fact that the Act of 1922 requires the City Council of Sydney to collect and pay over to the State the amount authorised to be charged. This fact in no way affects the nature of the burden. The last mentioned contention of the appellants fails.

Their Lordships will humbly advise His Majesty that the judgment of the Supreme Court should be affirmed. The appeal will be dismissed with costs to be paid by the appellants.

In the Privy Council.

MORRIS LEVENTHAL AND OTHERS

v.

DAVID JONES, LIMITED.

DELIVERED BY LORD MERRIVALE.

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