[HIGH COURT OF AUSTRALIA.]

B. BEBARFALD & CO. LTD. . . . APPELLANTS;
DEFENDANTS,

AND

CHRISTINA MACINTOSH AND HENRY CORNER . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 14, 15. 1911, *April* 20.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

Sydney Corporation (Amendment) Act 1908, (*N.S.W.*) (*No.* 27), *sec.* 11—*Landlord and tenant—Incidence of land tax—Agreement by lessee prior to November* 1908 *—Lease executed in January* 1909*—Alteration of law—Reservation of existing rights—Construction of remedial Act.*

By secs. 4 and 11 of the *Sydney Corporation (Amendment) Act* 1908, which came into operation on 22nd December 1908, a tax on unimproved capital value is payable by the owner of rateable property. But by sub-sec. (2) of sec. 11 where the lessee before 1st November 1908 has agreed with the owner or mesne lessee from whom he holds to pay municipal taxes, notwithstanding such agreement and during its currency an adjustment of the rate may be made by the Commissioner as between the owner and the lessee.

In April 1908 an agreement was made between the plaintiffs, who were owners of rateable land, and R., by which it was agreed that R. should erect a shop on the land before 1st January 1909, that, upon the shop being erected within the time limited, the plaintiffs should grant and R. should accept a lease of the land for 30 years from 1st January 1909, that the lease should contain a covenant by the tenant to pay all existing and future taxes of every description payable by the landlord or tenant in respect of the premises, and that the plaintiffs, if requested by R., would execute the lease to the defendants. It was also provided that the document was intended to operate as an agreement only, and not as an actual demise, or to give R. any legal interest therein until the lease should be executed. The shop being completed within the time specified, the plaintiffs, on 12th January 1909, at R.'s, request,

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executed a lease of the land to the defendants for 30 years from 1st January 1909. The lease was made between the plaintiffs, R., and the defendants. It recited the agreement of 24th April between the plaintiffs and R., the request by R. to the plaintiffs to grant the lease to the defendants, and witnessed that in pursuance of the agreement and in consideration of the covenants by the lessee thereinafter contained the plaintiffs at the request of R. demised the land to the defendants. The covenant to pay taxes followed the words of the agreement of 24th April. A rate was subsequently imposed and the Commissioners of Taxation upon the application of the defendants made an adjustment.

Held, by *Griffith* C.J., *Barton* and *O'Connor* JJ. (*Isaacs* J. dissenting), that it was the intention of the parties that, if R. required a lease to be granted to the defendants, they should succeed to all the benefits to which R. was entitled under the agreement of 24th April; that the words "where the lessee has agreed with the owner before 1st November 1908" include the case of a lessee to whom a lease has been granted after 1st November 1908 in pursuance of an agreement made prior to 1st November 1908 by the owner to grant it either to the actual contracting party or his nominee specially mentioned; and that the defendants were entitled to an adjustment of the rate under sec. 11 of 1908, No. 27.

Per Isaacs J.—That as the defendants' only contractual relation with the plaintiffs was by the deed of 12th January 1909, and consequently outside the provisions of sec. 11 (2) of the Act, and as the defendants by that deed by their express and unqualified covenant agreed to pay all existing and future taxes of every description payable by the landlord or tenant in respect of the premises, they were on the principles affirmed by *Leggott* v. *Barrett*, 15 Ch. D., 306, at p. 309, and *Mackenzie* v. *Duke of Devonshire*, (1896) A.C., 400, at pp. 405, 409, bound to pay the municipal tax without adjustment.

Decision of the Supreme Court, *Macintosh* v. *Bebarfald, & Co.*, 10 S.R. (N.S.W.), 575, reversed.

APPEAL by the defendants by special leave from the decision of the Supreme Court upon the hearing of a special case.

The action was brought by the respondents to recover £41 13s. 4d. for one month's rent of premises known as 538 George Street, Sydney, in pursuance of a covenant contained in a lease dated 12th January 1909 made between the respondents of the first part, one Rich of the second part, and the appellants of the third part. On 24th April 1908 the respondents entered into a written agreement with Rich by which Rich agreed to erect a shop on the premises in question on or before 1st January 1909, at a cost of not less than £3,000. On condition of the shop being erected in accordance with the agreement the respondents agreed

to grant and Rich agreed to accept a lease of the shop for 30 years from 1st January 1909. It was provided that the lease should contain a covenant by the tenant to pay rent and all existing and future rates, taxes, assessments and outgoings of every description for the time being payable either by landlord or tenant in respect of the premises, and that if requested by Rich the respondents would grant the lease to the appellants. It further provided that the agreement was intended to operate as an agreement only, and not as an actual demise, or to give Rich any legal interest in the property until the lease should be executed.

The shop was completed in December 1908, and on 12th January 1909 the respondents at the request of Rich executed a lease of the premises to the appellants for 30 years from 1st January 1909. The lease was made between the respondents, Rich, and the appellants, and recited the agreement of 24th April 1908 by which the respondents agreed to grant a lease to Rich or, if requested by him, to the appellants, and the request by Rich, and witnessed that in pursuance of the said agreements and in consideration of the rent thereinafter reserved and of the covenants by the lessee thereinafter contained the respondents at the request of Rich demised the premises to the appellants. The appellants covenanted to pay the rent, and also during the said term to "pay and discharge all existing and future taxes rates assessments and outgoings of every description for the time being payable by landlord or tenant in respect of the premises."

The lease was signed by Rich as director of the appellant company and also in his individual capacity.

The respondents received a notice of assessment in respect of the premises under sec. 4 of the *Sydney Corporation (Amendment) Act* 1908, No. 27, which they forwarded to the appellants, as payable by them under the terms of their lease. The tax was paid by the appellants, who then applied for an adjustment of the tax under sec. 11 (2) of 1908, No. 27.

The Commissioners of Taxation certified that the amount deductible by the appellants, as lessees, after payment of rates, was £37 16s. 3d. The respondents had no notice or knowledge of the above application and were not represented thereon. On

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receipt of the notice the appellants forwarded a cheque to the respondents for £3 17s. 1d. on 1st February 1910, being one month's rent less the sum of £37 16s. 3d. The respondents refused to accept this sum, but agreed to consider it as a valid tender.

The question submitted to the Supreme Court was whether the appellants were entitled to recover as a debt the sum of £37 16s. 3d. or to deduct the same from the sum of £41 13s. 4d., the monthly rent payable to the respondents.

The Supreme Court entered judgment for the respondents for £41 13s. 4d (1).

The appellants were granted special leave to appeal from this decision, upon giving an undertaking to abide by any order the Court might make as to costs. The material sections of the Acts referred to are stated in the judgment of *Griffith* C.J.

Owen K.C. and *Rolin*, for the appellants. Where any agreement has been made before 1st November 1908 with the owner of rateable land whereby liability is imposed to pay municipal taxes, the lessee under that agreement is entitled to the benefit of the proviso to sec. 11 of 1908 (No 27). By the agreement of 24th April 1908 Rich agreed to pay future taxes, and he was bound to take a lease of the property, or to have a lease taken by his nominee. The person who for the time being is a lessee can take advantage of the proviso provided that he holds his lease by virtue of an agreement made prior to November 1908. In *Sydney Municipal Council* v. *Terry* (2) it was held that "owner" meant "owner for the time being," and in *Mason* v. *Fulham Corporation* (3) a similar principle of construction was adopted. The object of the proviso was that agreements made on the basis of the law as it existed prior to the Act should have the effect intended by the parties at the time the agreements were made. It was intended to confer a benefit upon the person who was lessee at the time the tax was imposed. The operation of the proviso is not limited to persons who were lessees prior to 1st November 1908. It does not contemplate only the original parties to the agreement. Before November 1908 Rich bound himself to

(1) 10 S.R. (N.S.W.), 575.
(2) (1907) A.C., 308.
(3) (1910) 1 K.B., 631.

become lessee at a future date and the appellants are, in effect, his assignees. The intention of the parties was that, if a lease were granted to the appellants, they should stand in the place of Rich, and should succeed to all the benefits to which he was entitled under his agreement with the respondents. The case is brought within the proviso if there is an agreement prior to November 1908, and a subsequent lease granted in pursuance of that agreement, by which a lessee mentioned in the agreement is substituted for the person who is a party to the agreement. The Act did not intend to distinguish between legal and equitable rights, but extends to cases where there is an identity of interest between the person who agrees with the owner and the person who, in pursuance of the agreement, subsequently becomes a lessee.

[They also referred to *Harris* v. *Sydney Glass and Tile Co.* (1)].

Shand K.C. and *Blacket*, for the respondents. The agreement between Rich and the respondents was not an agreement to pay taxes, and therefore not within sec. 11 (2). It was merely an agreement to enter into a lease with covenants to pay taxes. Until the lease was entered into there was no agreement to pay taxes. The proviso refers to liability "during the currency of the agreement." After the execution of the lease to the appellants the agreement was no longer current. Here the lease has superseded the prior agreement. If the words "during the currency of the agreement" include an agreement which has expired before the person claiming the benefit of the proviso becomes a tenant, then a lessee might be liable to pay the tax for a period anterior to the lease. To entitle the appellants to the benefit of the proviso they must show that they were legal lessees of the property before November 1908. Rich never was a lessee. Assuming he was, the appellants have never agreed with the owner to pay taxes. Rich was in no sense a trustee for the appellants. He entered into the agreement with the respondents on his own behalf, and the appellants were not parties to the agreement, and take no rights under it. Prior to the execution

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

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of the lease there was no contract to pay taxes, express or implied, between the appellants and the respondents or Rich. Where there is an express covenant, no constructive covenant inconsistent with it can be implied. Both the documents and the words of the Statute are clear and unambiguous in their terms, and the appellants have not shown that they come within the terms of the proviso to sec. 11.

Owen K.C., in reply.

Cur. adv. vult.

April 20.

The following judgments were read:—

GRIFFITH C.J. By the *Land and Income Tax Act* (No. 15 of 1895) a land tax was imposed upon owners of land. Sec. 63 provided that any contract which if valid would have the effect of altering the incidence of the tax should be wholly void. The result was that a covenant by a lessee with an owner to pay land tax was inoperative, and the tax was payable by the owner notwithstanding the covenant.

By the *Land Tax (Leases) Act* (No. 115 of 1902), which applied only to land subject to lease for not less than 30 years, it was provided (sec. 4) that a tax of one penny in the pound on the unimproved value of any land to which the Act applied should be paid by the owner and the lessee of the land. The Commissioners of Taxation were required to adjust the tax between the owner and lessee according to their respective interests in the land "as unimproved," which adjustment was to be final. The tax thus imposed was declared by sec. 3 to be "in lieu of land tax or any contribution thereto." No contract made after the Act was to affect the incidence of any tax imposed by the Act (sec. 5).

The *Local Government Act* 1906, which made general provision for local government throughout the State of New South Wales, introduced a new system. Sec. 151 provided that the council of every municipality should in every year make a general rate of one penny in the pound (reducible under certain circumstances) upon the unimproved value of all rateable land in its district, and that upon such rate being made the operation of the Acts mentioned in the Third Schedule, which included so much of the

Land and Income Tax Act 1895 as related to land tax, and the *Land Tax (Leases) Act*, should be suspended by Proclamation. This new municipal tax on unimproved value was thus substituted for the tax "in lieu of land tax" payable under the *Land Tax (Leases) Act*. Sec. 144 provided (sub-sec. 1) that all rates under the Act should be payable by the owner, but (sub-sec. 5) that nothing in the Act should, (with one exception not relevant to the present case), affect any private agreement with respect to the ultimate liability to pay any specified rates. This Act did not apply to Sydney, which was governed by the *Sydney Corporation Act* 1902.

By the *Sydney Corporation Amendment Act*, No. 27 of 1908, assented to on 22nd December of that year, the new system was applied to Sydney with modifications. Sec. 4 required the council to make an annual rate of not less than one penny in the pound on the unimproved capital value of all rateable property in the city in addition to any other rates made under the provisions of the Statute governing the city. Sec. 5 provided that upon this new rate on unimproved capital value being made the operation of the enactments mentioned in the Third Schedule of the *Local Government Act* 1906 should be suspended, the new tax thus, as in other municipal districts, taking the place of the tax "in lieu of land tax."

Sec. 11 provided that the amount of "any rate under this Part" of the Act, *i.e.*, any rate on unimproved capital value, should be paid to the council by the owner of the property in respect of which it was levied, except in certain cases not relevant to the present question. Then followed an enactment in these words: "Provided that where the lessee of rateable property has before the 1st day of November 1908 agreed with the owner, or with the mesne lessee from whom he immediately holds, to pay municipal or local government taxes, whether under those designations or under any words of description which would include municipal or local government taxes, the owner and all the lessees, including mesne lessees, shall, notwithstanding such agreement and during the currency of such agreement, be respectively liable, as between themselves, for so much of the rate under this Part as is equal to the amount of the land tax, or tax in lieu of land tax, on the land

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which they respectively would have been liable to pay under the Acts mentioned in Schedule Three to the *Local Government Act* 1906." The adjustment of the Commissioners of Taxation under the 4th Section of the *Land Tax (Leases) Act* was to be made on the application of any person interested in such an agreement, and might be made notwithstanding the suspension of the Act, and was to be final. The provisions of sub-sec. 5 of sec. 144 of the *Local Government Act* were declared to be applicable to the new rate.

The general intention of the legislature in making this enactment is apparent. Before the Act a lessee was not liable in respect of land tax at all, and was only liable to the tax in lieu of land tax in the cases and to the extent prescribed in the *Land Tax (Leases) Act.* Any covenant or agreement, therefore, made by him to pay municipal rates or taxes would not, however explicit in terms, include the land tax or tax in lieu of land tax. But when the new municipal tax was substituted for the land tax or tax in lieu of land tax, such a covenant or agreement would in terms include the new tax, and would be valid. This result would have been manifestly unjust to persons who had, before notice of the intention to pass the new law, entered into such covenants or agreements. The 1st of November is presumably the date of the introduction of the proposed law to Parliament. The general effect of sec. 11 was that agreements by lessees or intending lessees to pay municipal taxes which had been entered into on the faith of the old law should continue to have the operation intended by the parties when they were made.

On 24th April 1908 the respondents entered into an agreement with one Louis Rich, by which it was stipulated, amongst other things, that on or before 1st January 1909 Rich should erect a shop and warehouse upon certain land at a cost of not less than £3,000, that upon the building being erected within the time limited the respondents should grant and Rich should accept a lease of the land for a term of 30 years computed from 1st January 1909, that the lease should contain, amongst other covenants, a covenant by the tenant to pay "all existing and future taxes rates assessments and outgoings of every description for the time being payable either by the landlord or tenant in

respect of the premises," and that the lessors, if requested by Rich to do so, would execute the lease to the appellants. It was also declared that the document was intended to operate as an agreement only, and " not as an actual demise or to give Rich any legal interest therein " until the lease should be executed. I cannot doubt that this was an agreement within the Act.

The building was completed in December 1908, and on 12th January 1909 the respondents at Rich's request executed a lease of the land to the appellant company for 30 years from 1st January 1909. The lease was made between the respondents of the first part, Rich of the second part, and the appellant company of the third part, and contained a recital in the following terms: " Whereas by an agreement bearing date the twenty-fourth day of April one thousand nine hundred and eight and made between the said lessors of the one part and the said Louis Rich of the other part the said lessors agreed to grant unto the said Louis Rich a lease of the premises hereinafter described at the rent for the term and subject to the covenants hereinafter mentioned and contained and if required so to do by the said Louis Rich the said lessors would grant the said lease to the said company. And whereas the said Louis Rich has requested the said lessors to grant the said lease unto the said company accordingly." It then witnessed that " in pursuance of the said agreements " and in consideration of the rent thereinafter reserved and of the covenants by the lessee thereinafter contained the lessors at the request and by the direction of Rich thereby testified demised the land to the appellant company, &c. The covenant to pay taxes followed the words of the agreement of 24th April. This deed was executed by Rich both as a director of the appellant company and as an individual party.

The Act of 1908 was then in force, and the parties in executing the lease must be taken to have contracted with reference to it.

In the year 1909 the municipal council of Sydney made a rate of one penny in the pound on the unimproved value of land in the city, and the provisions of the *Land Tax (Leases) Act* were accordingly suspended by Proclamation. The appellants, having received notice of the assessment, and claiming to be entitled to

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the benefit of sec. 11 of the Act of 1908, applied to the Commissioners of Taxation for an adjustment of the rate between them and the lessors, the respondents. The Commissioners made an adjustment, and certified the lessors' share of the rate at £37 16s. 3d., which amount the appellants, who have paid the whole rate, claim to be entitled to deduct from the amount payable to the respondents. The question is whether they are entitled to do so. No question is raised as to the validity or finality of the adjustment.

The respondents contend that the case is not within the Act of 1908, since the appellants had not before 1st November of that year "agreed with them." This is, of course, literally true in the sense that they had not before that date been parties to a formal agreement to which the respondents were also formal parties. But I do not think that this concludes the matter.

The appellants' lease is the direct fruit of an agreement which was made before 1st November 1908 between Rich and the owners. If the lease had been granted to Rich and assigned to the appellants the case would have been within the literal terms of sec. 11. If the respondents had refused to perform the agreement after completion of the building, the Court would at the suit of Rich and the appellants have compelled the execution of a lease to the appellants. And I think that if in such a suit the plaintiffs had asked for a modification of the language of the stipulated covenant so as to make it plain that the appellants were entitled to the benefit of sec. 11 the Court would have granted their request, unless, indeed, it thought that the language was sufficiently clear and that no modification was necessary. The manifest intention of the parties was that, in the event of Rich requiring the lease to be granted to the appellants, they should succeed to all the benefits to which Rich was entitled and to all the obligations which he was bound to assume under the agreement of April, without addition or diminution.

The appellants contend that the facts bring them within the very words of the Act. They point out that the benefit of the provision is not limited to the original lessee, but enures to the benefit of any one who succeeds to his estate in the land—this was not indeed controverted—and argue that it follows that the

words "when the lessee has agreed with the owner" do not necessarily import that the person claiming the benefit is the person who made the original agreement, but are satisfied if there is an identity of interest between that person and the actual lessee.

If the transaction had been carried out by a lease to Rich and an assignment to the company the case would have been abundantly clear.

In construing an Act of Parliament such as this, passed to prevent what would have been an apparent injustice, the Court is not astute to apply to its construction mere technical rules. Nor do I think that the language of the Statute calls for any such construction. In my opinion the legislature did not intend to draw any distinction between legal and equitable estates, or between legal and equitable assignments, or between ordinary agreements and agreements to make a future agreement, or to provide that the same transaction should have one effect if carried out by two documents and another effect if carried out by one only.

The technical doctrine of merger which was set up in argument has no application.

In my judgment the phrase "where the lessee has agreed with the owner" includes the case of a lessee to whom a lease has been granted in pursuance of an agreement to grant it either to the actual contracting party or his nominee specially mentioned, whether it would or would not extend to other cases of assignment of the benefit of a contract to grant a lease. The recital already quoted proves conclusively that the appellants are such a person.

I am disposed to think also that the appellants might be content to rest their case upon the words of the lease itself, which plainly expresses the intention of the parties that they should be subrogated to all the rights of Rich under the agreement of April 1908. As to the meaning of the term "subrogation" I respectfully adopt the language of *Farwell* L.J. in *King* v. *Phœnix Assurance Co.* (1), where he says:—"If I desired to find an explanation of the meaning of the word 'subrogation' I do

(1) (1910) 2 K.B., 666, at p. 671.

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not think I could do better than read the words in sec 5" (of the *Workmen's Compensation Act* 1906) (6 Edw. VII., c. 58). These are as follows:—"The insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so however that the insurers shall not be under any greater liability to the workman than they would have been under to the employer."

An agreement, whether under seal or not, need not be expressed in the formal language of contract. In either case the agreement may be implied from any words in the writing showing the plain intention of the parties to enter into a contractual obligation.

In my opinion, the lease itself, properly construed, contains on its face a statement of intention just as clearly indicated as if the *habendum* had been followed by the express words "to the intent that the lessees shall stand in the place of Rich, and so that the lessors shall have the same rights against, and bear the same liability towards, the company in all respects as they would have had and borne with regard to Rich if he had been the lessee."

One of those liabilities would, as the parties must be taken to have known, have been to give Rich the benefit of sec. 11 of the Statute of 1908.

As a matter of construction, therefore, I am disposed to think that the respondents are bound by contract to pay to the appellants any sum in respect of land tax, or tax in lieu of land tax, which they would have been bound to pay to Rich if the lease had been granted to him. This may be called a constructive covenant or an implied covenant according to the sense in which those terms are used. Then it is said that you cannot imply a covenant in contradiction to an express covenant. That is, of course, true, but, with all respect, an epithet is not an argument, though it is often made to do duty for one.

Whatever rule might be applied to a case of a deed between lessor and lessee only containing an express covenant by the lessee to pay municipal taxes, the deed now in question is between three parties, and there is no contradiction in such a case between such a covenant and a stipulation, by whatever name it is called, in the same document that the lease shall be construed as conferring upon the substituted lessee the same rights as if the lease

had been to the person originally intended to be lessee. If the covenant had been entered into by Rich in the same terms his liability under it would have been qualified to the extent that he would have been entitled to contribution from the lessors. The parties agreed that the company should have the benefit of that qualification.

For the reasons I have given I think that the appellants are entitled to recover the amount claimed.

I am glad that I can thus arrive in accordance with law at a decision which is not inconsistent with the principles of honesty and fair dealing.

BARTON J. By clauses 3 and 7 of the agreement of 24th April 1908 the respondents contracted that if the shop and warehouse were completed by Rich, according to clause 1, within the stipulated time they would grant to Rich, or at his direction to the appellants, a lease for 30 years to be computed from 1st January 1909 with the covenants and provisions set forth in clauses 4, 5 and 6. The work was completed according to contract and Rich, being entitled to such a lease, directed that it should be issued, and it was issued, to the appellants.

Whatever rights and liabilities flowed from the agreement between the immediate parties were in my opinion claimable and enforceable as between the respondents and the appellants from the time that the appellants became the lessees. From that time Rich disappeared from all contractual relation with the respondents, and the appellants with the consent of the respondents stood in his place. The parties to the agreement could not have intended that any provision to be incorporated in a lease to Rich should be absent from a lease to the appellants. They were to succeed to the fruits of the agreement as well as to any burdens left undischarged by Rich. That was the contract with Rich, and it was in fulfilment of it that, on his directing a lease to be granted to the appellants, the grant put the appellants in his place to all intents and purposes. This I take to have been the true and clear intention of the parties, as evinced in the agreement and in the lease, which incorporates every provision previously agreed to. The appellants became and are the lessees,

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and are entitled to every benefit which the agreement carried with it, whether by its express terms standing alone or by those terms as affected by sec. 11.

I am of opinion that the agreement with Rich was within the terms of the Act, and that the appellants are entitled and liable to be put in his place, in relation to the respondents, to the full extent of the benefits and obligations to which Rich was entitled or liable. As Rich could have claimed the benefit of the proviso to sec. 11 of the Act of 1908, so also can the appellants claim it as against the respondents so as to be entitled to deduct the contribution paid for them. I think therefore that the question in the special case should have been answered in the affirmative, and that the appeal should be allowed.

O'CONNOR J. The appellant company are tenants to the respondents under a lease whereby they have covenanted, amongst other things, that they will during the term pay and discharge all existing and future taxes and rates for the time being payable either by landlord or tenant in respect of the premises. The lease was made after the passing of the *Sydney Corporation Amendment Act* 1908, and the appellants, seeking to avail themselves of sub-sec. 2 of sec. 11 of that Act, obtained under the sub-section an adjustment by the Commissioners of Taxation of the proportion of tax payable by the landlord and that payable by the tenant.

The appellants having paid the whole amount of tax due in respect of the premises, deducted the landlord's share in making their next payment of rent. The landlord objected to the deduction, on the ground that sub-sec. 2 was not applicable to the appellant company, inasmuch as the lease, under which they held and by which they had undertaken to pay taxes, was not made before 1st November 1908.

The question for determination is whether on the proper construction of the sub-section, as applied to the circumstances set forth in the special case, the objection is tenable.

The respondents contended that the Statute required the agreement referred to in the sub-section to be in the lease itself,

and that consequently it applies only to lessees holding under leases made before November 1908.

It is quite clear that in one respect at least that interpretation is not justified by the language of the legislature. There are no words used which make it necessary that the agreement and the lease shall be one document. If the agreement was made before 1st November 1908, and is in force when the lessee claims the apportionment, it is of no moment whether it was a term of the lease or a separate agreement. The really difficult question of construction is whether the sub-section is applicable only to those cases in which the lessee, who claims the right to have the tax apportioned, did himself or by his agent agree with the owner before 1st November 1908 to pay taxes, &c., or whether its provisions will also enure to the benefit of the lessee who, though not lessee at the time of the agreement, and not a party to it, stands in the shoes of the then lessee, and has vested in him all the rights and obligations of the original party. If the language of the legislature is read literally, the Act is no doubt open to the narrow interpretation which the Supreme Court have placed upon the sub-section. But that interpretation does not in my opinion give sufficient effect to the object of this particular enactment, having regard to its legislative history. Its object is very plain. A lessee of land under a lease for not less than thirty years who, at the time when the land tax was a Government tax, undertook to pay all taxes &c., had in respect of that tax a right to apportionment by Commissioners under the *Land Tax Leases Act* 1902. When later on the tax became a municipal tax, administered under a different law, the lessee would lose the benefit of apportionment unless some legislative provision such as that now under consideration were made. It is obvious, however, that the relief would fall far short of the requirements of natural justice if it did not include the assignees of parties who had made the original agreement. The language used is certainly wide enough to include assignees, and must I think be construed so as to include them. But a still wider interpretation is necessary to cover the whole class of cases which the Act aimed at relieving from the hardship arising out of the new legislation. Let me illustrate by the facts of this case.

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Assume that Rich, instead of nominating the company, had himself become the lessee, and that the lease had been executed to him in terms of the agreement. What was the real nature of the transaction between him and the respondents? The agreement made before November 1908 and the lease executed after that date marked merely different stages of the one transaction, namely, the letting of the respondents' land on a building lease. The right to have a lease embodying the terms agreed on was part of the consideration for which the lessee undertook to expend his money on his landlord's land. On the other hand, one of the considerations for which the landlord gave up possession of his land for the purposes of the building was that the proposed tenant had bound himself to take a lease at a certain rental, and on certain conditions. The rights of both parties flowed from the agreement, and, if either were obliged to resort to a Court of Equity for specific performance, the Court would have had to find in the agreement itself all the covenants and conditions of the lease, execution of which would be decreed.

On the facts I have assumed, it is, I think, quite clear that Rich would have come within the benefit of the section, though the document, which, on the assumption I have made, vested the property in him as lessee, was not executed until after the date named in the sub-section. Rich, however, did not become the lessee, but availed himself of a right which the agreement gave him to put the company in his position, and it now remains to consider whether the company, having regard to the real nature of the transaction, may not be included in the class of lessees who agreed with the owner of the land, before the date named, to pay all taxes &c. within the meaning of the sub-section. What was the substance of the agreement? Rich was entitled, on completion of the building, to have all his rights in respect of the transaction vested in his nominees, the company. The respondents were bound to issue to the latter at his request a lease identical in terms with that which they had promised to issue to him. The company's title is contained in the lease, but the source of all the conditions and covenants which were to be embodied in the lease was the agreement.

Whether the operation by which Rich's rights have become

vested in the company should be described as assignment or novation, or whether some other term of technical description is more appropriate, seems to me immaterial to the construction of the sub-section. The actual result of the transaction is that the company now stands exactly in Rich's shoes, and that their rights and obligations under the lease are derived from the agreement, and are vested in them solely by virtue of its stipulations. In other words, the condition of the tenancy, by which the company are bound to pay all rates and taxes, was necessarily fixed at the time of the agreement as one of the original bases of the transaction. Looking at the business from its commencement as a whole, it is plain that the obligation of the tenant, whether Rich or his nominee, to pay all the taxes &c., had become an inseparable part of it at the time when the company became parties to the lease. The transaction must, it seems to me, be taken to be one and indivisible from its initiation by agreement before November 1908 until the execution of the lease. Indeed it is plain from the recitals in the latter document that both the respondents and the company have so treated it. That being the substance of the matter, the case certainly comes within the mischief of the sub-section. The covenant which it is now sought to enforce against the company was in reality made at a time when lessees were entitled to apportionment of land tax notwithstanding the general words of their undertaking. The sub-section should therefore, in my opinion, be construed so as to include such cases if the words of the section can be fairly given that meaning. In a remedial section such as this, the legislature will not be taken to have used the words "agreement" or "agree" in any narrow sense. They ought, in my opinion, to be read as including every promise or undertaking compliance with which a Court of Equity as well as a Court of Law could enforce. Taking that view of the sub-section, I am of opinion that Rich's agreement, made before the date named in the Act, enured for the benefit of the lessee under the formal lease issued after that date, whether it was issued to himself or to his nominee. The agreement must therefore be regarded as the agreement of the lessee for the purposes of the section, just as if Rich had been the appellants' agent to make it,

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or had assigned to them the benefit of it in nominating them to stand as lessees in his place.

It follows that, in my opinion, the appellants were entitled to obtain an apportionment of the tax by the Commissioners of Taxation, and afterwards to make the deduction from the rent which they have claimed to make. The appeal must therefore be allowed, and judgment must be entered in accordance with the last paragraph of the special case.

ISAACS J. In my opinion this appeal should be dismissed. The lease between the parties was made on 12th January 1909, and according to its terms operates back to 1st January of that year. The day when it was executed was the first actual date, and the date from which it operates retrospectively is the earliest conventional date of the only contractual relations that ever subsisted between these parties. It was nevertheless contended for the appellants that they must either be taken to have contracted with the respondents before 1st November 1908 to pay rates and taxes within the meaning of the Act, or else to have contracted for the relief claimed notwithstanding the lease is held to be subsequent to that date. I am unable to accept either contention.

The first argument presented was in two steps, namely, that in legal effect Rich was the original lessee within the meaning of the Act, and that the appellants were his assignees and succeed to his rights under the Statute. Neither step is, in my opinion, maintainable. Rich never was a lessee. The agreement of 24th April 1908 was not a demise. It would, of course, have been competent for the parties to that agreement to have entered into a present demise by the owner with the corresponding present covenants by Rich, the lease containing an undertaking to build by 1st January and a clause of forfeiture in the event of his default. In that case he would have answered the description in sub-sec. (2) of sec. 11 of the Act. But that course was studiously avoided. The 10th clause of the agreement declares:—"These presents are intended as an agreement only and not as an actual demise or to give the said Louis Rich any legal interest therein until the said lease shall be executed."

It is a very doubtful question whether the contingent agreement he made to take a lease with the rates and taxes clause answers the term "agreement" in the section; but even conceding that it does, still the person to whom the immunity is given must answer the description of "lessee," or the enactment has no operation: See the cases in *Beal on Intepretation*, 2nd ed., pp. 319 and 320.

The presumption that the law creates, that technical words have their technical signification, is not weakened but is strengthened by the other language of the section. Appropriate and corresponding terms are used in conjunction with "lessee" which could not be properly applied if that word were to be understood in any but its true sense. Thus the expressions "hold," "title" and "lessor" are all made parts of the scheme. And the scheme itself would be unworkable.

The second paragraph of sub-sec. 3 *compels* the council in the absence of notification to proceed for the recovery of all the rates "from the lessee who is the last lessee within the knowledge of the council bound by any such agreement."

A person who had merely agreed for a lease could, I apprehend, never have been included in that paragraph, or the succeeding one, so as to *restrict* the council in the first place to mere contractors for a lease, or an assignment of a lease, or so as to make such persons *primarily liable* for all the rates, though a regular lessee in the strict sense was in actual occupation of the land and paying rent for it. And yet that must in future be the position, as it appears to me, if the appellants' view be right.

The concluding words of the section also point most strongly to the technical meaning of the terms used.

And Rich never became a lessee at any time. In the face of the 10th clause of his agreement he could not be considered as such, and neither party could as against the other have been heard to the contrary, even if the *Judicature Act* were in force, making *Walsh* v. *Lonsdale* (1) applicable: see *per* Lord *Eldon* L.C., in *Browne* v. *Warner* (2); according with common law, *Brashier* v. *Jackson* (3). And that Act is not in force in New

(1) 21 Ch.D., 9.

(2) 14 Ves., 409, at p. 413.

(3) 6 M. & W., 549, at p. 557.

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South Wales. The first step therefore fails; no immunity ever attached to Rich, because he never was in a position to need it. The second is likewise also untenable. Its validity depends on well recognized rules of the common law relating to property.

If Rich could be regarded as a lessee who had agreed before 1st November 1908, his assignee of any lease which Rich had taken would of course be as free as himself. This would arise not from any provision of the Statute, nor from any contract between the assignee and the landlord, but by reason of the common law doctrine which brings an assignee into privity of estate, not of contract, with the lessor, leaving the obligations as they were. But Rich never took a lease. He exercised his option of not taking one, and was therefore incapable of transmitting any rights or obligations as lessee. All the parties acted so as to exclude Rich from any estate in the land, and so as to bring the lessors and the appellants as lessees directly and exclusively into contractual relations from the very beginning of the lease. Therefore no assignment of the lease took place, and to say that virtually, though not legally, the appellants are the assignees, is equivalent to saying that from the standpoint of law, which is what we have to consider, they are not to be regarded as assignees at all. And nothing but the position of assignees would carry over to the appellants Rich's immunity if it existed, except a relevant statutory provision which does not exist, or some stipulation express or implied to that effect between the parties to this appeal.

It must be remembered throughout that it is not a question of Rich's rights, but of the appellants' rights. The contention seeking to apply the Statute of its own inherent force is consequently unavailing.

Then the appellants' second argument was directed to establishing a contractual immunity for them, by reason of a novation of the original contract as distinguished from the lease. The facts do not sustain it. If they did it would be immaterial so far as the Statute is concerned, because it would only operate as from its date. When Rich went out, and not before, the appellants would come in, and that was 12th January 1909, which would not satisfy the terms of the Act. While dealing with this

point it is to be observed that it was admitted Rich was not a trustee or agent for the company in making the original agreement. He made it for himself as principal, and so the case has been argued. But the company as an independent third person, having no right to enforce the contract (*Gandy* v. *Gandy* (1)), and under no obligation to take a lease, is said to have come in afterwards, and to have adopted Rich's position *ab initio*. That does not appear. The recitals in the lease merely evidence that the lease was granted to the appellants by direction of Rich, who had the option, and so exercised it.

Taking by direction is a very common method in cases of land purchase with subsequent re-sales before transfer or conveyance. But the sub-purchaser does not become thereby the original contractor. His contract is with the original purchaser, just as the appellants here made their bargain with Rich to take the lease from the respondents, and did so, becoming contractor with the respondents solely upon the terms of the lease itself. There is no provision equivalent to the statutory provision in *King* v. *Phœnix Assurance Co.* (2). That case, however, exemplifies the care which a Court exerts to avoid carrying a Statute beyond the limits Parliament has fixed, and to avoid interfering with the express provisions of contracts.

But my learned brethren, though by somewhat different words, ultimately arrive at a view in appellants' favour that the parties, without expressly saying so, have impliedly contracted to give the appellants the benefit of the Statute. The ground, as I understand it, is that the parties, knowing the effect of sub-sec. 2 of sec. 11 on Rich's position, had he personally taken the lease, and reciting that position and showing the derivation of the appellants' rights, must be taken to have agreed that as between themselves the same obligation and no more should exist. That might or might not have been a reasonable thing to do; it is not in my province to discuss that. But as a matter of legal construction of the contract they entered into, I am of opinion, with the utmost deference to the views from which I regret to differ, that it is not admissible. The conclusion appears to me contrary to the very explicit words of the appellants' express covenant.

(1) 30 Ch. D., 57.

(2) (1910) 2 K.B., 666.

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That covenant is that the lessee " will during the said term pay and discharge *all* existing and future taxes rates assessments and outgoings of every description for the time being payable either by the landlord or tenant in right of the premises." If that covenant had been modified in the direction now contended for, if an agreement had been made between the parties whereby the appellants promised to pay, not *all* rates and taxes, but only such as would have been payable by a lessee agreeing previously to 1st November 1908, some proportion being fixed, or that, notwithstanding anything in the lease, the appellants should have the same benefit of the section as a lessee within its provisions, that would have protected the appellants. It would have protected the appellants, not because the lease fell within sub-sec. (2) of sec. 11, but because the stipulation would have operated contractually outside the enactment. It would have been a different agreement from the existing lease, and would be worked out in quite a different way, the council and Commissioners have nothing whatever to do with it. But to imply such an agreement contrary to the express and unequivocal and unqualified words of the covenant to pay all taxes &c., seems to me to subvert the firmly established rule of law applicable to all contracts, viz.: *Expressum facit cessare tacitum.*

This is not a technical rule. It is a necessary precaution against allowing the Court to disregard the actual agreements of the parties, to modify specific stipulations by extrinsic circumstances, and to substitute what the Court thinks a fair bargain for what the parties have deliberately set down as their own.

Lord *Eldon* L.C., observes in *Browne* v. *Warner* (1): " The Court cannot safely proceed in any other way than by acting on the written contracts of men, as they are framed."

That is the unvarying view in equity as well as at law; and unless it is firmly adhered to it appears to me to shake the stability of all contracts. In the present case I see no room for an implied covenant that in the words of the Act " the owner and all the lessees . . . shall, notwithstanding such agreement, and during the currency of such agreement, be respectively liable, as between themselves, for so much of the rate," &c.

(1) 14 Ves., 409, at p. 415.

Whether such an implied covenant is called by that name, or its effect is termed subrogation is immaterial, the substance of the matter is the same.

Now, an implied covenant exists only where the parties *must*, not *reasonably may* have meant it: *Douglas* v. *Baynes* (1), and *Lord Halsbury's Laws of England*, vol. VII., pp. 512 and 513. Where as here they expressly contract to the contrary, they could not have meant it: see Lord *Halsbury's* Work, vol. X., paragraph 779.

And they could not have meant it here because the covenant as to rates and taxes says the very opposite. The covenant is not only to require the tenants to pay the taxes and rates which by law fall upon them, but it also, as between themselves, indemnifies the landlord from all such taxes and rates of every description, and whether existing or future, which by law may fall in the first instance upon him in respect to the premises. Being an indemnity by the tenants to the landlord, over and above any primary legal liability of the latter, the obligation sought to be implied by the landlord to indemnify the tenants seems to me hopelessly repugnant to the covenant. In effect it reverses it. (See cases cited in *Norton on Deeds*, 2nd ed., at p. 116). The question is governed by the principle applied to *Boraston* v. *Green* (2).

Now, what is there to qualify this or introduce any modification of the rule? The only extrinsic circumstances and the only portion of the instrument that could possibly have relevance or be looked at for a different intention are the circumstances that Rich had made the original agreement before 1st November 1908, and the recitals in the lease, and therefore the question comes to this: how far can that circumstance and those recitals as a matter of law be permitted to affect the construction of clear operative words? The case of *Leggott* v. *Barrett* (3) is in point. *James* L.J. said:—"I cannot help saying that I think it is very important, according to my view of the law of contracts, both at common law and in equity, that if parties have made an executory contract which is to be carried out by a deed after-

(1) (1908) A.C., 477, at p. 482. (2) 16 East., 71.
(3) 15 Ch. D., 306, at p. 309.

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wards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself. A recital of the agreement in such deed would have the same effect as an ordinary preamble to an Act of Parliament, or any other instrument, as showing what the object of the parties was, and what they were about to do, so as to afford a guide in the construction of their words; but you have no right for any other purpose to look at anything but the deed itself, unless there be a suit for rescinding the deed on the ground of fraud, or for altering it on the ground of mistake." And *Brett* L.J. says (1): "If there is any doubt about the construction of the governing words of that document" (*i.e.*, a final written contract or a deed), "the recital may be looked at in order to determine what is the true construction; but if there is no doubt about the construction, the rights of the parties are governed entirely by the operative part of the writing or the deed." No amount of recital can convert the unambiguous word "all" into "part."

In *Mackenzie* v. *Duke of Devonshire* (2) Lord *Davey* said:— "I take it to be a settled principle of law that the operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down, or qualified by a recital or narrative of intention." Lord Chancellor *Halsbury* observed (3) that if the language of the instrument itself is sufficiently clear it seems to him absolutely unarguable that the true meaning of the words could be in any way controlled, qualified or modified by the initial statement of what the intention of the author of the deed was. He added:—"It would to my mind be disastrous to introduce such a system of construing a deed." His Lordship continues: "I never in my life heard of the language of a deed which contained a perfectly unambiguous provision being twisted from the natural ordinary meaning of the words

(1) 15 Ch. D., 306, at p. 311. (2) (1896) A.C., 400, at p. 408.
(3) (1896) A.C., 400, at pp. 405-6.

by a preliminary statement of what the maker of the deed intended should be the effect and purpose of the whole deed when made."

As the view urged for the appellants in this branch cannot, in my opinion, be adopted without breaking the settled rules of general construction of written instruments, I am constrained to reject the contention, and to construe the document as I find it.

The agreement set out in the case relied on would therefore have to be reformed, a process unsuggested, and, in a proceeding such as the present, impossible ; and for that purpose there would have to be taken into account facts and considerations quite other than or additional to those agreed on in the special case ; so long as it stands in its present form, no implied obligation outside the deed, and covenant within it, varying the express one can be admitted.

Apart from the fundamental principle just referred to, the question falls back into whether this particular lease, framed as it is, falls within sub-sec. (2) of sec. 11. It seems to me really impossible to maintain that it does. The Statute was not framed to protect a person who chose after 1st November 1908—assumed to be the date when the bill was introduced into Parliament—much less after 22nd December 1908—when the Act became law —to agree to pay *all* taxes. And yet that is what the appellants did. The sub-section does not alter the meaning of any contract. It assumes every contract to mean exactly what it says. It assumes that the lessees, whenever their agreement was made, would be bound to pay the new municipal tax, and then in certain limited cases, namely, where the lessees did not become bound on or after 1st November 1908, relieves them from their full contractual obligation, which since its acceptance by them was added to by the law. But in the case of the appellants who voluntarily came forward after the law was passed and not only explicitly agreed to pay *all* municipal taxes, but also expressly stated the earliest date back to which the agreement should revert, viz., 1st January 1909, neither the language of the enactment, nor its reason applies, and consequently from every point of view the appeal ought in my opinion to fail, and the judgment of the Supreme Court be affirmed.

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I should like to add that I can see nothing dishonest or oppressive in the contention of the respondents. Rich originally contracted as between him and the respondents he would pay all future rates and taxes whatever they might be, and whether the law required them of him or the landlord. It was, as I have said, essentially an agreement of indemnity to the landlord in respect of all such taxes. Then came a Statute which overrode such an agreement in a lease, provided the parties contracted before 1st November 1908. But the legislature having fixed their own limits to the setting aside of actual bargains, it is not for the Court to extend them. Parties must take care of themselves in making their contracts. No claim has ever been made to rectify the agreement, and so it must be taken to represent the true intention of the parties; and if on a lawful construction of that instrument as it stands the respondents are in the right, I can see no reason for considering their claim unfair.

Appeal allowed.

Solicitors, for appellants, *Sly & Russell.*
Solicitor, for respondents, *E. R. Cohen.*

C. E. W.