[HIGH COURT OF AUSTRALIA.]

PATTERSON . . . . . APPELLANT;
PLAINTIFF,

AND

FARRELL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1912.

MELBOURNE, *June* 18, 19.

Griffith C.J., Barton and Isaacs JJ.

Vendor and Purchaser—Contract of Sale—Provision for apportionment of federal land tax—Validity—Interpretation—Land Tax Assessment Act 1910 (*No.* 22 *of* 1910) *secs.* 37, 63.

The owner of certain land, sold it shortly before the coming into operation of the *Land Tax Assessment Act* 1910, and the purchaser entered into possession shortly after that date. One of the conditions of the contract of sale provided that the purchaser should be liable for "all rates and taxes and insurance premiums accruing or falling due from and after the date of possession" but that "all annual outgoings and insurance premiums in respect of the property sold "should be" apportioned between the vendor and purchaser up to such date. The vendor, who also owned other land, having paid the federal land tax in respect of the whole of his land including the land so sold for the year during which the purchaser went into possession,

Held, that the federal land tax was an annual outgoing within the meaning of the condition; that the agreement that the land tax for that year should be apportioned was not affected by sec. 63 of the Act; and, therefore, that the vendor was entitled to recover from the purchaser a sum which would represent a portion of the federal land tax payable in respect of land whose unimproved value was equivalent to that of the land sold proportionate to the period of the year during which the purchaser had been in possession.

Held, further, that the purchaser was not liable to pay at the higher rate at which the vendor was liable to pay because of his owning other land.

Decision of the Supreme Court of Victoria (*Madden* C.J.), (1912) V.L.R., 17 ; 33 A.L.T., 149, reversed.

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APPEAL from the Supreme Court of Victoria.

On 12th October 1910 Daniel Whittle Harvey Patterson and John Farrell entered into a written contract for the sale by Patterson to Farrell of a certain freehold property called Melton Park containing 4,125 acres. By the conditions it was provided that the purchaser should pay £2,000 on the signing of the contract, £6,500 on any day between 1st and 8th December 1910, and £35,000, the balance of the purchase money, on 8th June 1911, with interest thereon or on so much as from time to time might be unpaid at 6 per cent. per annum payable half-yearly until payment, subject to a proviso that, so long as interest should be paid within seven days after becoming due, the balance should not be called in as to £1,000 before 12th October 1911, as to another £1,000 before 12th October 1912, and as to the residue before 12th October 1920. It was also provided that the purchaser should be entitled to possession on payment of the said sum of £6,500. Clause 13 of the conditions then provided that "the purchaser shall be liable for all rates taxes and insurance premiums accruing or falling due from and after the date of possession but all annual outgoings and insurance premiums in respect of the property sold shall be apportioned between the vendor and purchaser up to such date."

Farrell duly paid the deposit of £2,000, and on 8th December 1910 paid the further sum of £6,500, and thereupon took possession of the property sold.

Patterson made a return under the Commonwealth *Land Tax Act* 1910 of all the land owned by him on 30th June 1910 and included in such return Melton Park, the unimproved value of which was correctly set forth as £29,870, and the unimproved value of all other land of which he was then owner was correctly set forth as £15,950.

On 18th May 1911 the Commissioner of Land Tax assessed the taxable value of Patterson's land at £40,820, and the amount of land tax due in respect thereof at £401 10s. 1d., which sum was paid by Patterson on 21st June 1911. Patterson now brought an action against Farrell claiming that, under clause 13 of the con-

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ditions, Farrell was liable to pay to him £293 16s., being the same proportion of the sum of £401 10s. 1d. as £29,870, being the unimproved value of Melton Park, bears to £40,820, being the taxable value of the whole of Patterson's land. A special case was, by consent of the parties, stated for the opinion of the Court as to the following questions:—

1. Is the said sum of £293 16s. or any and what portion thereof included in the words "rates" or "taxes" in clause 13 of the conditions of the contract?

2. Is the defendant liable to the plaintiff for the said sum of £293 16s. or any and what portion thereof?

3. Is the plaintiff entitled to recover from the defendant the said sum of £293 16s. or any and what portion thereof?

The action was heard before *Madden* C.J., who held that the agreement in clause 13 was void by reason of sec. 63 of the *Land Tax Assessment Act* 1910, and he therefore answered the first question "Yes," and the second and third questions "No," and gave judgment for the defendant with costs: *Patterson* v. *Farrell* (1).

From this decision the plaintiff now by special leave appealed to the High Court.

Irvine K.C. (with him *Arthur*), for the appellant. The agreement in clause 13 is not affected by sec. 63 of the *Land Tax Assessment Act* 1910. An agreement that the purchaser of land shall pay that portion of the land tax for the year during which he takes possession which is attributable to that portion of the year during which he is in possession does not affect the incidence of the land tax. A contract cannot be said to affect the incidence of the land tax unless it affects either the obligation of the subject to pay it or the means of the Government to obtain it.

[GRIFFITH C.J.—The Act does not make the vendor primarily liable for the tax after he has sold. Sec. 37 shows that the purchaser is the person primarily liable for it.]

He referred to *Harris* v. *Sydney Glass and Tile Co.* (2). The federal land tax is a tax within the meaning of the condition which accrued or fell due from and after the date when the pur-

(1) (1912) V.L.R., 17; 33 A.L.T., 149. (2) 2 C.L.R., 227, at p. 241.

chaser went into possession and is not an "annual outgoing" within the meaning of the condition. That latter term refers to payments which were made or should have been made before the purchaser went into possession. The amount payable by the purchaser is the whole amount actually paid in respect of the land sold. If sec. 63 means that a contract whereby as between themselves one person agrees with another to pay land tax which that other still remains liable to the Crown to pay is a contract altering the incidence of taxation, then that section is *ultra vires*.

Mitchell K.C. (with him *Winneke*), for the respondent. The condition in the contract does not apply to federal land tax at all. The federal land tax is a tax upon the appellant in respect not merely of this particular land but in respect of all the other land he owned, and the proportion of that tax which is attributable to the particular land sold is not a tax in respect of that land. Nor is it a tax which accrues or falls due from and after the date when the purchaser went into possession. Under the Act the tax is a charge on the land from the previous 30th June. For the purpose of liability to the tax the Act only regards ownership on the 30th June, and sec. 37 is only directed to ownership on that date. If clause 13 means that under the conditions the purchaser is liable to pay the whole of the land tax which is due after he takes possession, that agreement undoubtedly alters the incidence of the tax and is directly hit by sec. 63: *Elder* v. *Dennis* (1); *Lord Ludlow* v. *Pike* (2).

[GRIFFITH C.J. referred to *Foulger* v. *Arding* (3); *Surtees* v. *Woodhouse* (4).

ISAACS J. referred to *Attorney-General* v. *Shield* (5); *Davies* v. *Fitton* (6); *Colbron* v. *Travers* (7).]

If there is to be apportionment, then the sum that under the condition is to be apportioned is the sum which would be payable for land tax in respect of the unimproved value of the land which was sold.

Irvine K.C., in reply.

(1) 22 V.L.R., 125; 18 A.L.T., 25.
(2) (1904) 1 K.B., 531.
(3) (1902) 1 K.B., 700.
(4) (1903) 1 K.B., 396.
(5) 3 H. & N., 834.
(6) 2 Dr. & War., 225.
(7) 12 C.B.N.S., 181, at p. 188.

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Griffith C.J.

GRIFFITH C.J. As this case now presents itself to the Court it resolves itself into a question of the interpretation of clause 13 of the conditions of the contract. The contract was made on 12th October 1910, before the passing of the *Land Tax Assessment Act* 1910, and possession of the land was given on 8th December 1910, shortly after the passing of that Act. The first payment of land tax became due in the following May. Clause 13 of the conditions provided that:—"The purchaser shall be liable for all rates taxes and insurance premiums accruing or falling due from and after the date of possession but all annual outgoings and insurance premiums in respect of the property sold shall be apportioned between the vendor and purchaser up to such date." The clause is not very clear, but some things seem tolerably plain. After the purchaser goes into possession all rates and taxes accruing or falling due upon the property are to be paid by him in the first instance. That leaves it uncertain whether as to any such charges payable in respect of the period antecedent to possession being taken he is to bear the burden absolutely. Then the second part of the clause provides that all "annual outgoings" in respect of the property "shall be apportioned between the vendor and purchaser up to such date." A fair bargain to make in the case of an annual outgoing which is payable in respect of a period during one part of which the vendor has the enjoyment of the property, and during the other part the purchaser, would be that the burden should be shared in proportion to their times of enjoyment. That would be a fair bargain, and I think that it is consistent with the language of the clause, and does not lead to so many difficulties as any other construction.

Then the only question is, is land tax an "annual outgoing"? There is no doubt that if an ordinary person were asked whether land tax is an annual outgoing he would say "Yes." Nobody disputes that. I have come to the conclusion, therefore, that the term "annual outgoings" applies to land tax. The purchaser is bound to pay the amount of the land tax in one sense, but he is to be relieved of that burden as between himself and the vendor, so far as the burden is attributable to the period antecedent to delivery of possession. So construed, it is impossible to say that the contract is obnoxious to sec. 63 of the Act as altering the

incidence of land tax. The whole scheme of the Act is that the burden of land tax shall fall upon the beneficial owner. That is clearly shown by sec. 37. The matter then works out in this way:—The land was taxed in the hands of the vendor at the rate of 1d. $+\frac{40820}{30000}$d., because the total unimproved value of all his land property was £45,820; but the property sold has an unimproved value of £29,870 only. Then, can clause 13 be contrued to mean that the purchaser shall be liable to pay his share of the land tax at the higher rate which the vendor had to pay in respect of the land sold because of his ownership of other land? I think not. Such a contract might be made, but it would require very clear words to express such an intention. The fair construction is that the purchaser agreed to bear his share of the land tax then in contemplation, calculated on the value of the land he was buying, that is, £29,870, subject to a deduction of £5,000. That, then, is the amount to be apportioned, and the apportionment should be made in proportion to the length of enjoyment of possession. Thus, the appellant must bear the apportioned share up to 8th December, and the respondent must bear the apportioned share for the remainder of the twelve months ending on 30th June 1911. And the latter amount is the sum which the appellant, who has paid the whole, is entitled to recover from the respondent.

As to the interesting questions sought to be raised, whether sec. 63 of the *Land Tax Assessment Act* 1910 is *ultra vires* of the Constitution, and whether a contract made for valuable consideration by a person liable to pay land tax with another person that that other shall pay the tax is a contract which alters the incidence of the land tax, it is not necessary to express any opinion, and I offer none.

BARTON J. I am of the same opinion. There is an ambiguity in clause 13, and I think the more reasonable construction is that which the Chief Justice has stated. The final words of the clause mean that the date of delivery of possession is to be the dividing line of apportionment.

ISAACS J. I agree.

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Appeal allowed. Judgment appealed from discharged. Judgment for the plaintiff for proportion of land tax payable on land of an assessable value of £24,870 *attributable to the period from 8th December* 1910 *to 30th June* 1911 *with costs of action.*

Solicitors, for the appellant, *Darvall & Horsfall.*
Solicitors, for the respondent, *Brahe & Gair.*

B. L.

[HIGH COURT OF AUSTRALIA.]

NIELSEN . . . . . APPELLANT;
PLAINTIFF,

AND

THE BRISBANE TRAMWAYS CO. LIMITED RESPONDENTS.
DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1912.

BRISBANE, *May* 7, 8, 9.

Griffith C.J., Barton and Isaacs JJ.

Corporation—Nuisance—Non-repair of road—Negligence—Tramways Acts 1882-1890, *Qd.* (46 *Vict. No.* 10, 54 *Vict. No.* 16), *secs.* 50, 78—*Suspension of provisions by Governor in Council.*

By sec. 50 of the Queensland *Tramways Acts* 1882-1890 the respondent Company were bound to maintain and keep in good repair (subject to the direction of the Municipal Council) such portion of the roads on which their rails were laid as lay between the rails and for a space of eighteen inches on either side. Power was, however, given to the Governor in Council by sec. 78 to suspend the operation of all or any of the provisions of certain sections, among which was sec. 50. By a Proclamation dated 4th June 1902, the provisions of sec. 50 were suspended—