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ESSENDON CORPORATION v. McSWEENEY.

Isaacs J.

against the real actor. There is consequently no parallel between this case and *Kannuluik's Case* (1).

Here it is not the defendant who directly or indirectly has been repeatedly pouring water into a receptacle or channel proved over and over again to be insufficient to hold and pass it on.

Up to that point the action fails. But there remains the question of negligent maintenance, by which the drain was kept in a condition making it really a nuisance so as to fall within the principle stated by Lord *Hobhouse* in *Pictou Municipality* v. *Geldert* (2), and by Lord *Herschell* L.C. in *Sydney Municipal Council* v. *Bourke* (3).

For a breach of its obligation to cleanse the drain within its own territory, Essendon, on ordinary principles, must repair any damage arising by reason of the consequent overflow of water reasonably anticipated, up to the limit of the drain's capacity.

That there was such a breach the learned Judge found, and there is evidence to support his conclusion. The debris reduced the discharging capacity of the drain by about two-fifths.

There is also strong evidence that some of the damage would have been caused even if the 1882 limit of capacity had not been exceeded. The assessment of damages, however, cannot be upheld, because it included compensation for the excess beyond the 1882 limit—namely, for water brought down by the very extensive accretions since 1902, made by the Melbourne corporation, for which Essendon is not responsible.

In the absence of consent, a new trial would have been inevitable, but the parties have wisely agreed to the amount being fixed at £50.

I concur in the judgment proposed by the learned Chief Justice.

Appeal allowed in part. Damages reduced by consent to £50. *Appellants to pay costs of appeal.*

Solicitor, for the appellants, *C. J. McFarlane.*

Solicitors, for the respondent, *Reynolds & Larkin.*

B. L.

(1) (1906) A.C., 105.

(2) (1893) A.C., 524, at p. 531.

(3) (1895) A.C., 433, at p. 441.

[HIGH COURT OF AUSTRALIA.]

APPERLY (PUBLIC OFFICER OF THE AUSTRALIAN MUTUAL PROVIDENT SOCIETY) . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . } RESPONDENT.

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MELBOURNE, *March* 18, 19, 20.

Griffith C.J., Barton, Isaacs, Gavan Duffy, and Rich JJ.

Land Tax—Assessment—Land subject to lease—Building lease—Assessment of Lessee—Unimproved value of lease—Deductions—Rates and Taxes—Repairs—Land Tax Assessment Act 1910-1911 (*No.* 22 *of* 1910—*No.* 12 *of* 1911), *sec.* 28.

Unimproved land was leased before 1st July 1910 for a term of 46¾ years by a lease under which the lessee covenanted to pay an annual rent, to pay rates and taxes in respect of the premises, to erect at a certain cost buildings on the land, to keep such buildings in good repair, and to deliver them up to the lessor in good repair at the end of the term.

Held, that in apportioning the unimproved value of the land between the lessor and the lessee the lessee was not, under sec. 28 of the *Land Tax Assessment Act* 1910-1911, entitled to have either the amount expended for rates and taxes or for repairs added to the reserved rent or allowed as a deduction.

CASE stated for the opinion of the Court.

On the hearing of an appeal by Henry Wellsteed Apperly, the Public Officer of the Australian Mutual Provident Society, against an assessment for land tax for the year ending 30th June 1912, *Rich* J. stated the following case for the opinion of the Court:—

1. The appellant is the Public Officer of the Australian Mutual Provident Society, a mutual life assurance society

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incorporated by Act of Parliament of New South Wales, and duly registered in the various States of the Commonwealth.

2 By instrument of lease dated 1st June 1881, registered No. 1863, the lessors therein mentioned, as proprietors of an estate in fee simple of and in the land and premises thereinafter described, leased to the lessees therein mentioned the said land and premises, being part of Allotment Number Four of Crown Section Fifteen in the City of Melbourne 120 feet by 132 feet as more particularly described in the said lease, for a term of 46¾ years from 1st April 1881 at a clear yearly rental of £600. The lessees for themselves their successors and transferees covenanted with the lessors and their transferees *inter alia*—

"(1) To pay the rent at the times and in the manner hereinbefore appointed for the payment thereof and clear of all deductions except in respect of such proportion of property tax as shall have been paid by the lessees and be payable by the lessors as hereinafter mentioned and a proportionate part if the lease be determined by re-entry between any of the days of payment.

"(2) To pay during the term all existing and future taxes rates charges assessments and outgoings of every description for the time being payable either by landlord or tenant in respect of the said premises or of any building which hath been or shall hereafter be erected on the said pieces of land during the currency of the said term except the proportion of any property tax which may be hereafter imposed which shall be payable in respect of the rent hereby reserved and which proportion shall be paid by the lessors or their transferee."

(4) At their own expense and at the cost of not less than two thousand four hundred pounds upon the part of the said land in the transfer in par. 3 hereof hereinafter mentioned to erect complete and finish on or before the 1st October 1881 a building or buildings under the superintendence of the architect of the diocese of Melbourne in accordance with the conditions in the covenant in the said lease numbered 4 set forth.

"(6) At their own expense as occasion shall require throughout the said term well and sufficiently to maintain and keep the building or buildings so to be erected on the demised premises or any other buildings which have been or shall at any time be

erected thereon in good repair and condition and particularly to paint in a proper manner with three coats of good oil paint in every fourth year of the said term all the external wood iron and other work previously or usually painted or which ought to be painted.

"(7) To permit the lessors or their transferees and their agents or workmen twice or oftener in every year during the said term at reasonable times to enter upon the said premises to view the condition thereof and give or leave notice in writing of all defects and wants of repair there found and within three calendar months next after such notice well and sufficiently to repair and make good such defects and wants of repair.

"(8) At their own cost to insure the buildings already erected and hereby covenanted to be erected in some responsible fire insurance office or offices to be approved by the lessors in the joint names of the lessors or their transferees and of the lessees or their transferees for the sum of £8,000 at the least and to insure any additional buildings that shall hereafter be erected on the said land by the lessees or their transferees for a sum sufficient to cover the cost of the re-erection or restoration thereof in case of destruction thereof or damage thereto by fire and to keep the said buildings so insured throughout the said term and at all times on demand to produce to the lessors or their transferees or agents the policy or policies of insurance and the receipts for the premium duties and other sums payable for effecting and keeping on foot the said insurance or insurances.

"(9) To lay out all moneys received by or under or by virtue of any such policy or policies with all convenient speed in rebuilding or repairing such part of the said building or buildings as shall have been destroyed or damaged by fire.

"(10) At the end or sooner determination of the term quietly to deliver up to the lessors or their transferees the land hereby demised and all the buildings and erections which shall have been erected thereon during the said term together with all fixtures other than trade fixtures which during the last seven years of the said term shall have been fastened to the said buildings or erections in such good repair and condition as shall be consistent

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with the due performance of the several covenants hereinbefore contained."

And it was further provided that upon breach of any of the covenants the lessors might on certain conditions therein set forth re-enter and the term of the said lease should then absolutely cease and determine.

3. By instrument of transfer dated 25th October 1887, registered No. 29699, the registered proprietor of the leasehold estate in par. 2 mentioned in consideration of the sum of £6,000 transferred to William Pitt all its estate and interest in part of the land comprised in the said leasehold estate being 54 feet to Collins Street by 132 feet as more particularly described in the said instrument of transfer, and it was agreed and declared by and between the said registered proprietor and the said William Pitt that the said William Pitt should pay the yearly rent of £270 being the proportionate part of the rent of £600 in the said lease No. 1863 reserved.

4. By instrument of mortgage under the provisions of the *Transfer of Land Statute* of Victoria dated 21st March 1888, the said William Pitt in consideration of the sum of £11,000 lent by the Australian Mutual Provident Society mortgaged to the said Society all his estate and interest in the land included in the instrument of transfer in the last preceding paragraph mentioned; and by agreement of the same date the said William Pitt for the consideration therein mentioned, being the loan of the said sum of £11,000, for himself his executors administrators and transferees covenanted with the said Society to erect and finish with new materials a brick building in accordance with plans and specifications already submitted to the Society and to expend a sum of not less than £10,000 thereon.

5. The building upon the land in the last preceding paragraph mentioned was erected by the said William Pitt at a cost of £10,075. Default having been made subsequently by the mortgagor the said William Pitt, he as registered proprietor (subject to certain encumbrances) of the leasehold estate transferred to him by the said instrument of transfer in par. 3 mentioned, in consideration of the Australian Mutual Provident Society releasing him from certain debts owing by him to it and

secured by certain mortgages in such transfer mentioned, by instrument of transfer dated 20th February 1900 transferred to the said Society all his estate and interest in the said leasehold estate, and by such transfer the said Society became the owner of the said leasehold estate, and is now in possession of the land comprised therein, and is registered as proprietor of the said leasehold estate.

6. In accordance with the provisions of sec. 15 of the *Land Tax Assessment Act* 1910-1911 the said Society by its Public Officer, Henry Wellsteed Apperly, furnished a return for the year 1911-1912 in respect, *inter alia*, of the said land and its interest therein and in such return stated that the unimproved value of its said estate was nil.

7. The Commissioner of Land Tax was not satisfied with such return, and assessed the taxable value of the Society's said estate at the sum of £1,880.

8. The said Society paid in respect of the year in question the sum of £120 for rates and taxes (exclusive of federal and State land tax) and the sum of £30 for repairs in respect of the said land. The Commissioner of Land Tax has allowed as an addition to rent the sum of £78, being in his opinion the annual value of the sinking fund required to be provided during the period of the lease to recoup the unexhausted value as estimated by him of £8,564 at the termination of the lease.

9. In making such assessment the said Commissioner did not for the purpose of assessing the unimproved value of the Society's said estate add to the value of the rent the amounts so paid by the Society during the said year for rates and taxes and repairs, or any sum in respect thereof.

10. The Society by its Public Officer, by notice of objection dated 17th May 1912 and duly received by the said Commissioner, stated its objections to the said Commissioner's assessment as follows (omitting formal parts):—

"I hereby give notice that I appeal against the assessment of land tax under the above register number and contained in notice of assessment issued by the Deputy Federal Commissioner of Land Tax, Sydney, under date 20th April 1912 for the reasons that—

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"In respect of the parcel 51 leasehold property known as Pitt's Buildings, Collins Street, Melbourne, the outgo for rates taxes and repairs is not added to the reserved rent and allowed as a deduction in arriving at the value of the Society's interest in the property.

"And I require the assessment to be altered accordingly."

11. The said objections were not allowed by the said Commissioner, and the said assessment was not altered or amended accordingly, and the said Society did not accept the said assessment, and the said Society by its Public Officer duly asked that the said objections should be treated as an appeal, and the said Commissioner duly transmitted the said objections to the High Court at Melbourne for determination as a formal appeal.

12. The appeal came on for hearing before me on 26th May 1913, when the facts hereinbefore set forth were admitted, and at the request of the parties I consented to state a case for the opinion of the High Court upon the following questions arising in the appeal, which in my opinion are questions of law.

13. For the purposes of this case the Court may refer to all documents on the file in this Court in the appeal or mentioned or referred to in this case.

14. The questions of law for the opinion of the High Court are:

(1) Is the appellant entitled to have the amount or any and what part of the amount so expended for rates and taxes, or any and what sum in respect thereof, added to the reserved rent or allowed as a deduction for the purpose of assessing its taxable interest?

(2) Is the appellant entitled to have the amount or any and what part of the amount so expended for repairs, or any and what sum in respect thereof, added to the reserved rent or allowed as a deduction for the purpose of assessing its taxable interest?

Mitchell K.C. (with him *Lewers*), for the appellant, referred to *R.* v. *Westbrook* (1); *Sheffield Waterworks Co.* v. *Bennett* (2).

(1) 10 Q.B., 178.

(2) L.R. 7 Ex., 409.

Weigall K.C. (with him *Wanliss*), for the respondent.

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Mar. 20.

Cur. adv. vult.

GRIFFITH C.J. This case raises the question of the construction of the provisions of the *Land Tax Assessment Act* 1910-1911 relating to the taxation of leasehold property. The general scheme of the Act, as is well known, is to tax the owner—that is, the owner in fee. But in respect of land leased before the commencement of the Act an exception was introduced, no doubt on the ground that in the case of such leases it might be that the owner was not deriving such full benefit from his land as he would obtain if the lease had been made under the present altered circumstances. The legislature thought it fair that in such cases there should be an apportionment of the burden of land tax between owner and lessee, and the scheme adopted was to divide the burden as nearly as possible in proportion to the respective values of the interests of the freeholder and lessee. The rules for effecting that division are contained in sec. 28. The total amount of the land tax payable to the Crown is not increased. That depends on the unimproved value of the land. The apportionment of it between the owner and the lessee is the question dealt with. The first rule laid down is that the owner of a freehold estate in land which was leased before the commencement of the Act is to be entitled during the currency of the lease "to have the unimproved value (if any) of the lease deducted from the unimproved value of the land." The expression is not very felicitous; but I think it means, to have the value of the enjoyment of the land, regarded as unimproved land, for the term of the lease deducted from the total unimproved value of the land. The next rule is that the owner of a leasehold estate under a lease made before the commencement of the Act is to be deemed to be in respect of the land "the owner of land of an unimproved value equal to the unimproved value (if any) of his estate." Again the expression is not very felicitous; but it means, I think, the owner of the land, regarded as unimproved land, for an estate equal to his estate therein. There is, therefore, an apportionment to be made of the total unimproved value of the land between

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the owner and the lessee; the idea being that each shall bear what fairly falls to him—the lessee, so far as he enjoys the unimproved value of the land, paying land tax in respect of it, and the owner, so far as he is deprived of the enjoyment of that unimproved value, not being charged with land tax upon it.

Then comes a provision for the purpose of working out that idea. Sub-sec. 3 of sec. 28 provides that "For the purposes of this section—(*a*) the unimproved value of a lease or leasehold estate of land" (which should be read as I have suggested) "means the amount by which the part of the unimproved value of the land corresponding to the unexpired term of the lease exceeds the value of the rent reserved by the lease"—which I understand to mean the amount by which the proportion of the value of the land regarded as unimproved land for an estate corresponding to the unexpired term of the lease exceeds the value of the rent reserved by the lease,—"according to calculations based on the prescribed tables for the calculation of values." Two cases are therefore provided for. The land when let may have been improved or unimproved. One case is as between landlord and tenant of land which at the time the lease was made was unimproved; the other, when it was improved. The section goes on to say, "(*b*) rent, in the case of a lease of improved land, means so much of the whole rent as bears to the whole rent the proportion which the unimproved value of the land at the date of the lease bore to the improved value." It is to be remembered that the legislature is dealing with old leases. If when the land was originally leased there were no improvements upon it, then the proportion which the unimproved value of the land at the date of the lease would bear to the improved value would be the whole, so that in that case there would be no apportionment. But if at that time the land had been improved the rent would have to be apportioned, and it is only such proportion of the rent as is attributable on that basis to the unimproved value on the date of the lease that is to be deducted from the value of the rent reserved. In the present case the first apportionment need not be made, because the land when originally leased was unimproved.

That is the general scheme. But it appeared to the legislature

—and it will appear to every one who considers the matter impartially—that this arbitrary rule might operate unfairly by giving the landlord something more than he is really entitled to. So far as the lease deprives him of the benefit of the land it is fair that he should not be called upon to pay land tax upon that of which he has been deprived. But if under the lease itself he is to be compensated in the future for that temporary deprivation of benefit, it is reasonable that the lessee should *pro tanto* be relieved and the burden cast back upon the owner. That position would arise generally in cases where there were covenants in the lease by which the lessee is bound to give back to the landlord more than he got under the lease. That would really be in the nature of deferred payment for the use of the land during the term of the lease. Another instance would be where the lease imposed such conditions upon the lessee that he could not get the full value of the land leased. Those are two cases which might have occurred to the legislature in considering the matter, and it appears to me that they have dealt with them in the proviso to the section, which is: "Provided that, where onerous conditions for constructing buildings, works, or other improvements upon the land, or expending money thereon, are imposed upon the lessee, or where any fine, premium, or foregift, or consideration in the nature of fine, premium, or foregift, is payable by the lessee, the Commissioner may assess the amount (if any) which ought, for the purposes of this section, to be added to the value of the rent in respect thereof, and the value of the rent shall be deemed to be increased by that amount accordingly."

The addition to the value of the "rent reserved" increases the amount of the deduction to be made in assessing the unimproved value of the land for the term of the lease, and is therefore in relief of the lessee.

It is, however, only in the case of onerous conditions that the legislature has thought fit to make provision in favour of the lessee. The only question that can properly be asked is whether certain matters can be taken into consideration by the Commissioner. The questions formally asked are whether the lessee is entitled to have certain additions made to what is called the value of the reserved rent. The complaint is that the Commissioner

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has not allowed a deduction—that is, an addition to the value of the rent which operates as a deduction—in respect of improvements which, under the lease, the lessee is bound to hand over to the landlord at the expiration of the term. No question is raised as to the propriety of making that deduction. But it is contended on behalf of the appellant that the Commissioner ought to have added to the deduction two other amounts, viz., rates and taxes payable by the lessee under municipal laws, and the amount to be expended by him for repairs. So far as rates and taxes are concerned it is clear that they do not fall within the proviso. It is contended that the term "rent reserved" should be read in such a wide sense as to include liability for rates and taxes. The words are, by themselves, too plain to admit of that meaning, and there is no context to throw doubt upon their meaning. As to repairs, it appears to me that, in considering what benefit the landlord will get at the end of the lease by having handed over to him valuable buildings, the Commissioner would properly take into consideration whether those buildings are to be handed over in a state of repair or not. If the Commissioner has proceeded on the assumption that the buildings are to be in a state of repair, the lessee has already got the benefit of the claim. If the Commissioner has based his allowance on the contrary assumption, other considerations may arise. On the case as stated, it is impossible to answer either question in favour of the appellant.

The first question is whether the appellant is entitled to have the amount expended for rates and taxes added to the reserved rent or allowed as a deduction for the purpose of assessing the taxable interest. The answer to that must be: No. The Parliament has not provided for such a case.

The other question is whether the appellant is entitled to have the amount expended for repairs added to the reserved rent or allowed as a deduction for the purpose of assessing the taxable interest. That question in the abstract must also be answered in the negative, and there is nothing to justify an amendment of the case so as to raise a question as to which we do not know the relevant facts—whether the Commissioner has or has not taken into

consideration what it will cost the lessee to have the buildings in a proper state of repair when he hands them over to the lessor.

The appellant from every point of view fails.

BARTON J. I am of the same opinion on all points.

The judgment of ISAACS, GAVAN DUFFY and RICH JJ. was read by

ISAACS J. The questions at issue require some consideration of the scheme of sec. 28.

Isaacs J.
Gavan Duffy J.
Rich J.

The unimproved value of land, as a freehold, is defined by the Act as the capital sum which the fee simple of the land might be expected to realize if offered for sale on the terms mentioned.

That definition disregards all contractual arrangements which, however they affect the individuals concerned, do not alter the land itself or lessen its taxable value to the Crown.

And therefore, when sub-sec. 3 (*a*) speaks of "the part of the unimproved value of the land corresponding to the unexpired term of the lease," it refers to that part which is attributable to the unexpired term, in other words the capital sum that would be ascertained if the definition referred to were applied substituting for "fee simple" an "estate for so many years." It is to be noted in this connection that sub-sec. 2 prescribes that the leaseholder is in respect of his estate to be deemed to be the "owner of land."

Actual contractual arrangements are, of necessity, equally disregarded. All responsibilities attached by law to the ownership or possession of land, as rates and taxes so far as they relate to the land, and all prudential considerations affecting the mind of a reasonable man free to make his own bargains in relation to the use for which the land is valued, of course enter into the calculation.

When that "part" of the unimproved value of the fee simple of the land is ascertained, it is set down, and for convenience we would term it the gross leasehold value.

The leaseholder, however, is to be taxed only on the net value of his estate. So the next step in the process is to get at the "value" of the rent, a distinct expression. The value of the rent is its value to the owner, and not to the tenant; so that must be

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taken off the gross unimproved value of the leasehold estate to arrive at the tenant's real interest.

The rent is also capitalized in the prescribed method, which at present is a 4½ per cent. basis, and its capital value is deducted accordingly. The amount so deducted necessarily remains as part of the landlord's liability.

But all these operations are conducted on an unimproved basis, which leads to a further consideration. If the land was in fact let as unimproved land, the rent reserved by the lease is the proper rent to apply in the process. Here the actual contract as to rent received is proper to consider, because it depends upon that as to how much of the value the landlord has "reserved" to himself. If, however, the land was originally let as improved land, then before you can tell how much of it represents reservation of the land value, and how much represents improvement value, you have to separate it. The formula for doing this is stated in par. (*b*). The portion found to be attributable to the unimproved land is in substance the rent reserved for it in the lease. Mr. *Mitchell* contended in the first place that, for the purpose of the calculation indicated, there should be added to the yearly rent all sums expended during the year for repairs and for rates and taxes. The only sum mentioned in the Act is "rent reserved by the lease," and it is impossible to extend the meaning of that expression in the manner suggested. "Rent reserved" is a perfectly well defined expression and includes everything, however called, which is really rent in the true sense.

Royalties are true rent (*Daniel* v. *Gracie* (1)) and can be distrained for, which is a characteristic of rent, subject to agreement (*Giles* v. *Spencer* (2)), and rent is payable to the lessor and not to a third party (*Gilbertson* v. *Richards* (3)). It is impossible, as Mr. *Mitchell* invited us to do, to extend without express direction or its equivalent the expression "rent reserved by the lease" beyond true rent having the characteristics mentioned, to such covenants as those for payment of rates and taxes, and repairs, which possess neither of them. These are elements which the parties take into consideration in fixing the rent, but when it

(1) 6 Q.B., 145.
(2) 3 C.B.N.S., 244.
(3) 4 H. & N., 277, at p. 295.