[HIGH COURT OF AUSTRALIA.]

SOLOMON . . . . . APPELLANT;
DEFENDANT,

AND

THE NEW SOUTH WALES SPORTS CLUB LIMITED . . . . . } RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1915.

SYDNEY, *April* 19, 20, 22.

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

Covenant—Construction—Lease—Covenant by lessee to pay all rates, taxes, &c., "except land tax"—Rate on unimproved capital value—Rate in lieu of land tax—Sydney Corporation (Amendment) Act 1908 (*N.S. W.*) (*No.* 27 *of* 1908), *secs.* 4, 5, 11.*

*By sec. 4 of the *Sydney Corporation (Amendment) Act* 1908 it is provided that "The Council shall, in and for the year 1909, and in every succeeding year, make and levy a general rate of not less than one penny in the pound upon the unimproved capital value of all ratable property in the city. Such rate shall be in addition to any rate under the Principal Act," (*Sydney Corporation Act* 1902) "or any other rate under this Act: Provided that the total amount leviable under this Part, or under this Part and the Principal Act, as the case may be, shall not exceed the amount which would be yielded by a rate of threepence in the pound on the unimproved capital value, and two shillings in the pound on the average annual value taken together of all ratable property in the City." By sec. 5 it is provided that "The Governor shall forthwith, on the Council imposing such rate on such unimproved capital value, proclaim that the operation of" the enactments dealing with taxation of land values "are and the same shall thereupon be suspended in the City." Sec. 11 provides that the amount of any rate is to be paid by the owner of the property in respect of which the rate is levied, "(2) Provided that where a lessee of ratable property has before the first 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 rates, 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 which they respectively would have been liable to pay under the Acts" dealing with taxation of land values, "if the operation of the said Acts had not been suspended, based on the valuation of the unimproved capital value under this Part."

By a lease of land within the City of Sydney executed after the passing of the *Sydney Corporation (Amendment) Act* 1908 the lessees covenanted that they would pay all taxes, rates, charges, assessments, impositions, both municipal and Government, which then were or which should thereafter be assessed or imposed either upon the demised premises or upon the lessors in respect thereof, "except land tax."

Held, that the words "land tax" should not be construed so as to include a rate assessed upon the unimproved value of the land pursuant to sec. 4 of the *Sydney Corporation (Amendment) Act* 1908, and, therefore, that the lessees were bound under the covenant to pay the rate, and that their assignee, who had covenanted to perform all the covenants in the lease, was bound to indemnify them.

Decision of the Supreme Court of New South Wales: *New South Wales Sports Club Ltd.* v. *Solomon*, 14 S.R. (N.S.W.), 340, affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action in the Supreme Court brought by the New South Wales Sports Club Ltd. against Alfred M. Solomon, a special case was by consent of the parties stated for the opinion of the Court, which was substantially as follows:—

1. The plaintiffs are a company duly incorporated and registered under the Companies Acts in force in the State of New South Wales.

2. By an indenture of lease, dated 21st December 1909, Jane Graham, Florence Graham Carew Gibson, Mary Bell Newton and Anne Newton (hereinafter called the lessors) leased certain land and premises known as No. 173 Pitt Street, Sydney, to the plaintiffs for a term of seven years, at the rental and on the terms set forth in the said indenture.

3. By the said indenture the plaintiffs (*inter alia*) covenanted with the lessors that the plaintiffs and their assigns should and would pay the rent reserved by the said indenture, and also all taxes, rates, charges, assessments, impositions, both municipal and Government, which were then or which should at any time thereafter be assessed or imposed either upon the demised premises or upon the said lessors in respect thereof, except land tax.

4. By deed of assignment, dated 28th March 1912, the plaintiffs assigned all their right, title and interest under the said indenture of lease in the said land and premises No. 173 Pitt

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Street, Sydney, to the defendant on the terms set forth in the the said deed.

5. By the said deed of assignment the defendant covenanted with the plaintiffs that the defendant would at all times thereafter during the said term of seven years observe and perform all the covenants and conditions contained in the said indenture of lease and thenceforth on the part of the plaintiffs to be observed and performed, and would at all times thereafter keep indemnified the plaintiffs and their estates and effects from and against all actions, suits, proceedings, costs, damages, charges, claims and demands whatever, which should or might be incurred or sustained by reason of or on account of the breach, non-performance, or non-observance of the said covenants or conditions or any of them contained in the indenture of lease.

6. In pursuance of the said deed of assignment the defendant entered into possession of the said land and premises and has continued in possession thereof.

7. On 12th June 1913 the Sydney Municipal Council, under the provisions of the *Sydney Corporation (Amendment) Act* 1908 (No. 27 of 1908), issued a notice of assessment of rates payable in respect of the said land and premises, and served the same upon the plaintiffs.

8. The said assessment so made as aforesaid amounted to £231 12s., comprising rates assessed by the said Council in respect of the said land and premises for the years 1912 and 1913, with interest thereon.

9. On 12th June 1913 the plaintiffs gave the defendant the said notice of assessment with which the plaintiffs had been served.

10. On 7th April 1914 the plaintiffs gave the defendant notice that the plaintiffs required the defendant to pay the amount of the said assessment to the said Council.

11. The defendant thereupon refused to pay, and has not paid the amount of the said assessment to the said Council.

12. The plaintiffs on 20th May 1914 paid the amount of the said assessment, to wit, the sum of £231 12s. to the said Council.

13. The defendant has not paid the amount of the said assessment or any part thereof to the plaintiffs.

14. The plaintiffs have performed all conditions and done all things necessary to entitle them to succeed in this action in the event of the question hereinafter set out being decided in their favour.

15. This action was commenced by writ of summons, dated 23rd May 1914, to enforce payment of the said sum of £231 12s., and the parties after pleading and arriving at issue have agreed to state this case for the opinion of the Supreme Court.

The question for the opinion of the Court is whether in the events which have happened the plaintiffs are entitled, under the said deed of assignment dated 23rd March 1912, to recover the said sum of £231 12s. from the defendant.

By the notice of assessment of 12th June 1913 it was stated that the Council of the City of Sydney had ordered and directed the plaintiffs to be assessed in respect of the land in question, and that the rate was one of 1½d. in the pound upon the unimproved capital value thereof.

The Full Court answered the question in the affirmative: *New South Wales Sports Club Ltd.* v. *Solomon* (1).

From that decision the defendant now appealed to the High Court.

Knox K.C. (with him *Brissenden*), for the appellant.

Loxton K.C. (with him *Markell*), for the respondents.

During argument reference was made to *Municipal Council of Sydney* v. *The Commonwealth* (2); *Bebarfald & Co.* v. *Macintosh* (3); *Halsbury's Laws of England*, vol. x., p. 440; *Warde* v. *Warde* (4); *Barton* v. *Fitzgerald* (5); *Webb* v. *Plummer* (6); *Barrett* v. *Duke of Bedford* (7); *Tooth* v. *Kitto* (8).

Cur. adv. vult.

(1) 14 S.R. (N.S.W.), 340.
(2) 1 C.L.R., 208.
(3) 12 C.L.R., 139, at p. 146.
(4) 16 Beav., 103.
(5) 15 East, 530, at p. 546.
(6) 2 B. & Ald., 746.
(7) 8 T.R., 602.
(8) 17 C.L.R., 421.

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April 22. Griffith C.J.

The following judgments were read:—

GRIFFITH C.J. This is an action brought by the assignors of a lease against the assignee upon a covenant by which the assignee covenanted to observe and perform all the lessees' covenants contained in the lease and to indemnify the lessees, his assignors, against all claims in respect of them. By the covenant now in question, which is contained in a lease dated 21st December 1909, the lessees covenanted to pay all taxes, rates, charges, assessments, impositions, both municipal and Government, which were then or which might at any time thereafter be assessed or imposed either upon the demised premises or upon the lessors in respect thereof, except land tax. The point for determination is the meaning of this exception. The duty of the Court is, of course, merely to discover the intention of the parties as expressed by the language they used. In discovering that intention regard must be had to the subject matter of the contract, which was the liability of the owners of land to municipal or State imposts, and to the state of the law then in force relating to that subject matter. The land demised by the lease is in the City of Sydney.

The Municipal Council of Sydney was incorporated in the middle of last century, and its affairs have always been regulated by special Acts. In 1902 these Acts were consolidated by Act No. 35 of that year. Part IX of the Act deals with the subject of General Rates. Sec. 110 requires the Council to cause an assessment to be made from time to time of all ratable property, which term includes all land and all buildings within the city. The assessment is to be made according to the fair average annual value of the property, subject to certain prescribed rules. Sec. 120 directs that the Council shall "on the assessment so made . . . cause such rates to be raised as to them may seem proper for the general expenditure of the City . . . not exceeding two shillings in the pound upon the assessment." The rates are payable annually before 31st March.

By the *Land and Income Tax Assessment Act of* 1895 a land tax at such rate as Parliament should from time to time declare per pound sterling of the assessed value was imposed upon all land in the State not included in certain exemptions which are irrelevant to the present question. The tax was to be payable by

every owner of land for every pound of the unimproved value thereof, subject to a deduction of £240. By another Act of the same year the rate was fixed at one penny in the pound of the unimproved value.

Some other municipal corporations had been established in New South Wales before the end of the century, but the system of local government had not been made applicable to the whole territory. In 1905 an Act called the *Local Government (Shires) Act* 1905 was passed, which provided for the division of the whole of the State, exclusive of the City of Sydney and of existing municipalities and of the western division of the State and one or two other isolated localities, into shires, and for the administration of the local affairs of such shires by elective Councils. By sec. 33 each Council was required to make a levy in each year of a general rate of not less than one penny and not more that twopence in the pound upon the unimproved capital value of all ratable land in its shire. Upon the imposition of the rate, the Governor was required and empowered to suspend by proclamation the operation of the Land Tax Acts in the shire.

By sec. 65 of an Act called the *Local Government Extension Act* 1906 the provisions of sec. 33 of the *Shires Act* were made applicable to municipalities, but without the limit of twopence in the pound. A Council having levied a general rate of not less than one penny in the pound on the unimproved capital value was authorized, subject to certain conditions, to raise any additional sum that might be required by an additional general rate on either the unimproved or the improved capital value of land.

These Acts did not apply to Sydney.

By the *Sydney Corporation (Amendment) Act* 1908, which is to be construed with the Act of 1902, it was provided (sec. 4) that the Council should in and for the year 1909 and in every succeeding year make and levy a general rate of not less than one penny in the pound upon the unimproved capital value of all ratable property in the City. Such rate was to be in addition to any rate under the Principal Act or any other rate under that Act. But the total amount leviable under all the powers was not

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to exceed the amount which would be yielded by a rate of threepence in the pound on the unimproved capital value and two shillings in the pound on the average annual value, taken together, of all the ratable property in the City.

By sec. 5 the Governor was empowered and required "on the Council imposing such rate on such unimproved capital value" to suspend the operation of the Land Tax Acts in the City, with a proviso that the same exceptions and deductions in respect of income tax as were allowed by these Acts should be made "in relation to land, and the income derived from land subject to rates under this Part as in the case of land subject to land tax." Sec. 11 provided that the rate imposed under the Act should be paid by the owner (as was the rule under the Land Tax Acts), with a proviso, the effect of which was considered by this Court in the case of *Bebarfald & Co.* v. *Macintosh* (1), that where a lessee had before 1st November 1908 agreed with the owner to pay municipal or local government taxes, whether under that designation or under any words of description which would include municipal or local government taxes, the owner and lessees should nevertheless be respectively liable as between themselves for so much of the new rate as was equal to the amount of the land tax or tax in lieu of land tax (provided for by another Statute) on the land which they respectively would have been liable to pay if the operation of the suspended Act had not taken place. The Act did not, as the Land Tax Acts did, contain any prohibition of contracts by which a lessee might take the liability upon himself.

It appears, therefore, that under the laws in force in New South Wales at the date of the lease all local authorities were empowered to levy general rates upon the unimproved capital value of land, some were empowered to levy them also upon the improved capital value, and the Municipal Council of Sydney had power to levy them also upon the average annual value. It is too clear for argument that all the rates so leviable were alike municipal rates.

The appellant, however, contends that the term "land tax," as used in the covenant, was intended by the parties to include

(1) 12 C.L.R. 139.

the rate on unimproved capital value, or at any rate so much of it as was equivalent to the land tax of which it had taken the place. He maintains that the proviso to sec. 11 of the last cited Act shows that the legislature regarded the new rate as a substitute or equivalent for the suspended land tax. No doubt they thought that it should be so regarded as between persons one of whom had agreed to indemnify the other against municipal rates but not against land tax, and thought that it would be unfair to cast upon such a person a liability which was not in the contemplation of either party when the agreement was made. But the very fact of making the express provision shows, if that is material, that the legislature thought that without it the liability would attach, which could only be on the ground that the new liability was in respect of a municipal rate and not of land tax. This provision, so far from showing that the legislature regarded the new rate as land tax, shows that they recognized a clear distinction between municipal rates and land tax. The appellant cannot, therefore, derive any help from the Act.

If the matter is considered apart from it, I am unable to see any reason for thinking that the term "land tax" has ever been used in New South Wales, or indeed in any part of Australia, in any other sense than a tax on land directly imposed by the State. It is true that there was never, until the passing of the Commonwealth *Land Tax Act* in 1910, any occasion to use the term as relating to actual taxation in any other sense, but that fact does not even suggest that it bore any other meaning. The suggestion that a tax on unimproved capital value is in principle a land tax, while a tax on annual value is not, is quite untenable. It would not, I suppose, be maintained that a rate on improved capital value, which may be levied by all municipal councils except that of Sydney, is distinguishable in this respect from a rate on unimproved capital value.

To turn to the actual words of the covenant, it is to be noted that it relates to future as well as existing taxes, and that it makes a distinction between taxes imposed on the premises and taxes imposed on the lessors. The land tax was a liability imposed on the owner, the burden of which was not allowed to be shifted to the lessee, and was the only tax of that kind known

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to the law of New South Wales. The law was still on the Statute book, although its operation was suspended in Sydney. Under such circumstances the parties, while stipulating that the lessees should pay taxes imposed on the lessors, might well except a tax of which the law would not allow them to assume the burden.

I find it impossible to conceive that, if what the parties had in their mind was that the lessees should be relieved from obligation in respect of the new municipal rate as to which agreements might lawfully be made affecting its incidence, they would have adopted the term "land tax" to denote it. It seems to me, on the contrary, that what they desired to express was that the covenant should extend to all taxes except taxes on land directly imposed by a legislature having power to impose them.

The argument for the appellant, if it is valid, must extend to the whole amount of the rate on unimproved value, which must in every case form part, and may be the whole, of the general rates. It is impossible to suppose that this was the intention of the parties, and the attempt to divide the first penny from the rest is hopeless.

ISAACS J. I am of opinion that the judgment appealed from should be affirmed, though I do not follow the exact line of reasoning that commended itself to the Supreme Court.

Their Honors first, led by a consideration of various Acts, arrived at the position that a municipal rate based only on the unimproved value of land as distinguished from a municipal rate based on the annual value of the land could quite correctly be termed a "land tax," and then decided that, as it was doubtful whether by reason of what is called the conventional meaning of the term "land tax" the parties meant to extend the term so far, the covenantee should get the benefit of the doubt. With great deference, I am not able to assent to that being the proper line of approach.

I place myself in the position of the parties at the time of the contract, for the purpose of understanding the words they used. So far as the disputed clause is concerned, the subject matter of their agreement was various forms of taxation—using that term

in its largest sense—which were then or might in the future be assessed or imposed by or under some Statute upon, on or in respect of the premises. The terms they used are comprehensive, so as to include all the recognized statutory appellations, and whether they relate to general or local government, and whether they are assessed or imposed directly on the premises or on the lessors personally in respect of the premises. Then from this all-embracing generality is excepted what the parties simply call "land tax." What do those words, used in such a connection, import? In my opinion, when the parties have made specific reference to all the impositions mentioned they must be taken in thought to have reviewed them as they appear in various legal enactments, and then to have eliminated from this comprehensive classification that particular class which they find now, or expect to find in the future, designated "land tax." In this view the municipal rate could never be supposed to be included in the term.

The Act of 1895 (No. 16) calls itself the *Land Tax Act of* 1895. Act No. 15 has in Part II. a general heading "Land Tax." Sec. 17, sub-sec. VIII., uses the phrase "land tax." In 1902 the *Land Tax (Leases) Act* (No. 115) was passed, which removed from certain leased land the tax under the Act of 1895, and said "the taxes in this Act mentioned shall be in lieu of land tax" under certain Land Tax Acts mentioned. Sec. 4 calls it a "tax," and sec. 6 applies the Act of 1895 and amending Acts to the Act No. 115. Now, that is an Act which would properly be designated a "land tax," that is, a special leased-land tax, Act, and it not only calls the impost "tax" and says it is "in lieu of the land tax" under the ordinary Land Tax Acts, but calls itself the *Land Tax (Leases) Act* 1902.

The distinction of language between that and the Municipal Acts is striking. In the same year (1902), by an earlier Act (No. 35) the *Sydney Corporation Act* was passed. It was a consolidation. Part IX. is headed "General Rates," though one section (128) relates to special rates also.

By sec. 110 all ratable property is to be assessed, and ratable property is land whether built on or not. Sec. 120 requires the Council to make a rate on that assessment, the amount being

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such as they think proper for the general expenditure of the City. The assessment under sec. 110 is to be upon the annual value, with a maximum limit of six per cent on the capital value. In one sense the rate is a "tax," and a tax on the land. The method of computing the tax, whether on the capital value, or the annual value and whether either be on an improved or an unimproved basis, does not affect the nature of the imposition. The method is a matter of policy, and may be changed without altering the nature of the exaction. But in contrast with the Act No. 115, just referred to, the imposition is called a "rate" and is never referred to as a "land tax," and the Supreme Court even now considers that it would be incorrect to call a rate under Act No. 35 a land tax. Indeed, land tax and municipal rate were co-existent upon the same City property, and must have been regarded as separately recognizable by those names.

In 1906, by Act No. 56 (Local Government), municipalities (not Sydney) were directed to make and levy general "rates" of at least a penny in the pound on the unimproved capital value of all ratable land in the municipality except that the amount may in the Governor's discretion be less than one penny in the pound. And, said sec. 151, when that "rate" was imposed the Governor should suspend various "Land Tax" Acts. The effect of that I shall state presently.

In 1908, the *Sydney Corporation (Amendment) Act* (No. 27) was passed. In the long title, and elsewhere in the Act, the legislature distinguishes between the municipal rates and "land tax."

Sec. 4 prescribes that the Council shall make and levy a "general rate" of not less than one penny in the pound on the unimproved capital value of all ratable property in the City. This is in addition to any other rate the Council may impose up to the amount of an unimproved rate of threepence, and an annual value rate of two shillings.

This is an amendment of, and by sec. 1 is to be construed with, the earlier Act of 1902, and, in altering the basis of assessment, the enactment does not purport to convert the imposition from a municipal rate to a land tax. It leaves it, and still calls it a municipal rate. In sec. 11 it even, by using a generic term,

speaks of "municipal or local government taxes" as including rates, and probably because it was desired to embrace in a short expression also all municipal charges, &c., other than rates. But the section itself never refers to the municipal rate as "land tax," which is the all-important phrase; and, on the contrary, it proceeds to contrast "the rate under this Part" with the "land tax or tax in lieu of land tax" under the other Acts. This contrast is, I say with great deference, lost sight of in the judgment under appeal, a circumstance which has there led to the observation that it is not incorrect, in view of sec. 11, to speak of the unimproved rate as a land tax in contradistinction with the improved rate.

Sec. 5 of the 1908 Act provides for the suspension of the Land Tax Acts when the unimproved rate is made. That is, when the municipal unimproved rate operates, the land tax shall not operate. In other words, there shall in such case be no land tax.

And further, by the last proviso to sec. 5 exemptions and deductions are to be made as to land "subject to rates under this Part as in the case of land subject to land tax." Short of an explicit declaration that municipal rates are not land tax, nothing, I imagine, could be plainer than this recognition by the legislature that, in the event mentioned, the City land was not subject to land tax.

But "land tax" might be reimposed, and the word "suspended" might easily increase the desire for caution. Further, Federal land taxation was, to say the least, within the range of possibility.

In view of the inclusion of future taxation, it is not therefore proper to strain the ordinary legal import of the words "land tax" so as to include municipal rates on the ground that some substantial meaning and operation must be found for the expression.

I do not think it necessary to resort to any doctrine of making the covenantor bear the burden of ambiguity. The words are not in their ordinary signification ambiguous as used in a contract of this nature, and no circumstances appear to alter that signification.

The appeal should, in my opinion, be dismissed.

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Gavan Duffy J.

GAVAN DUFFY J. For the appellant it is contended that the phrase "land tax" appearing in the covenant in his lease includes a rate made and levied under the authority of sec. 4 of the New South Wales Act No. 27 of 1908 because that rate is expressly recognized as a tax by sec. 11 (2) of the Act, and if it be a tax it is a tax imposed on the "unimproved capital value of all ratable property in the City," and imposed in substitution for what was, and was called, a land tax. It is further said that on 21st December 1909, the date of the lease, there was no other impost payable in respect of property in Sydney which could properly be called a land tax. To this it is answered that sec. 11 recognizes every municipal property rate as a tax, and it must be conceded that every such rate is not a land tax within the meaning of the covenant, and it is pointed out that in the title of the Act, in sec. 11 (2), and elsewhere, the rate authorized by sec. 4 is distinguished from land tax as such, each being called by its appropriate name. It is also said that the expression "except land tax" in the covenant is intended to apply to land tax properly so called, which may be levied under the provisions of the *Land and Income Tax Assessment Act of* 1895 (No. 15 of 1895) if, and when, the suspension of that Act shall cease in the City of Sydney, or under the provisions of any other Act of Parliament to be passed in the future, and that these words constitute a proper, and indeed a necessary, exception to the liability of the tenant to pay future assessments and impositions.

The Chief Justice, in delivering the judgment of the Supreme Court, said that the expression "land tax" had acquired the "conventional meaning" of a State tax imposed under the Land and Income Tax Acts of 1895, by which I understand him to mean that at some unspecified time after 1895 that had come to be its accepted and ordinary meaning in New South Wales. I think he was not only entitled, but bound, in construing the covenant, to take judicial notice of the ordinary meaning of words and phrases in New South Wales, and I accept his statement on the subject. The statement leaves it an open question whether the expression still retains that limited meaning, notwithstanding the imposition of a Commonwealth land tax, but there is no suggestion that it has been extended to include all or

any municipal rates. A perusal of the covenant and a consideration of the object it is intended to attain show that what the Chief Justice called the "conventional meaning" was that which the parties intended to express.

The lessee covenanted to pay "all taxes, rates, charges, assessments, impositions, both municipal and Government, which now are or which shall at any time or times hereafter be assessed or imposed either upon the said demised premises or upon the lessors in respect thereof, except land tax." So far as these burdens had already been "assessed or imposed," each had been so assessed or imposed under an appropriate name, by which it was identified, and it might be assumed that the same course would be pursued in the future. Among the burdens already assessed or imposed was a tax authorized and imposed by Parliament under the name of "land tax," and a rate on the unimproved value of land authorized by Parliament and assessed under the name of "a general rate."

In the face of this legislative nomenclature, and with a knowledge of the law as it existed on the 21st December 1909 and of the liability to pay the rate under sec. 4, it is impossible to believe that the parties could have chosen the expression "except land tax" for the purpose of exempting the lessee from payment of that rate, or indeed of any municipal rate. But the truth is that the words "except land tax" were not inserted in the covenant for the purpose of exempting the lessee from a payment which he would otherwise have been bound to make under the terms of his covenant. The whole clause must have been a common form since 1895, and the phrase "except land tax" was originally used to show that the parties were aware that Act No. 15 of that year had regulated the incidence of the land tax which it imposed, and by sec. 63 had rendered invalid any contract which had or purported to have the effect of altering it, and to intimate that they did not intend their covenant to have any such effect. They could not by agreement compel the tenant to pay the land tax, but these words were used so that the covenant might not have the appearance of attempting to do so. How come these words into the lease we are considering? It is not permissible for us to inquire, but it is probable that the

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draftsman thought that the repudiation of illegality was prudent notwithstanding the suspension of the *Land and Income Tax Assessment Act of* 1895, or that he slavishly followed an existing precedent without inquiring whether any alteration in the law had rendered necessary or desirable a consequential alteration in the covenant.

Appeal dismissed with costs.

Solicitors, for the appellant, *Mark Mitchell & Forsyth.*
Solicitors, for the respondents, *Rawlinson & Hamilton.*

B. L.

[HIGH COURT OF AUSTRALIA.]

CHIDLEY . . . . . APPELLANT;

AND

SMITHERS AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 15, 16, 19.

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

Practice—High Court—Appeal from Supreme Court of State—Criminal matter—Rescinding special leave to appeal—Judiciary Act 1903-1912 (*No.* 6 *of* 1903—*No.* 31 *of* 1912), *sec.* 35 (1) (*b*)—*Obscene and Indecent Publications Act* 1901 (*N.S.W.*) (*No.* 12 *of* 1901), *secs.* 6, 9, 15.

Under sec. 9 of the *Obscene and Indecent Publications Act* 1901 (N.S.W.) an order was made for the destruction of copies of an obscene publication found in the possession of the appellant, and he was also convicted under sec. 15 of being the owner of the publication and sentenced to imprisonment. On orders *nisi* for prohibition, the Supreme Court held that the publication was obscene, and affirmed the conviction and the order. The appellant, by special leave, appealed to the High Court.

Held, by *Isaacs*, *Gavan Duffy* and *Rich* JJ. (*Griffith* C.J. dissenting), that in accordance with the rule laid down in *Eather* v. *The King*, 19 C.L.R., 409, the special leave to appeal should be rescinded.

Special leave to appeal from the Supreme Court of New South Wales: *Ex parte Chidley*, 14 S.R. (N.S.W.), 97, rescinded.