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HORSFALL v. COMMISSIONER OF TAXES (VICT.)

I agree with the order proposed by *Barton* J.

Appeal allowed. Question answered as stated above.

Solicitors for the appellants, *Malleson, Stewart, Stawell & Nankivell.*

Solicitor for the respondent, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.

[HIGH COURT OF AUSTRALIA.]

PETERSON . . . . . APPELLANT; DEFENDANT,

AND

KELLY AND OTHERS . . . . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 9, 25.

Barton, Gavan Duffy and Rich JJ.

Local Government—Rates—Apportionment between lessor and lessee—Covenant to pay "municipal or city rates"—Sydney Corporation Act 1902 (N.S.W.) (*No.* 35 *of* 1902), *secs.* 110, 120—*Sydney Corporation* (*Amendment*) *Act* 1908 (*N.S.W.*) (*No.* 27 *of* 1908), *secs.* 4, 4A, 11A, 12—*Sydney Corporation* (*Amendment*) (*No.* 2) *Act* 1916 (*N.S.W.*) (*No.* 12 *of* 1916), *secs.* 5, 7—*Sydney Corporation* (*Declaratory*) *Act* 1918 (*N.S.W.*) (*No.* 6 *of* 1918), *sec.* 2—*Local Government Act* 1906 (*N.S.W.*) (*No.* 56 *of* 1906), *sec.* 144 (5).

Sec. 110 of the *Sydney Corporation Act* 1902 (N.S.W.) directs the Council of the City of Sydney from time to time to make an assessment of all ratable property "according to the fair average annual value of such property," and sec. 120 directs them on the assessment so made to cause a rate to be made which is to be designated the "city rate."

Sec. 4 of the *Sydney Corporation* (*Amendment*) *Act* 1908 (passed on 22nd December 1908) provides that the Council shall, 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 or any other rate under this Act." Sec. 12 provides that certain sections of the *Local Government Act* 1906 are to apply to rates under the Act, among them sec. 144 (5), which provides that " Nothing in this Act shall . . . affect any private agreement with respect to the ultimate liability to pay any specified rates or arrears of rates."

Sec. 5 of the *Sydney Corporation (Amendment) (No. 2) Act* 1916 provides for the insertion after sec. 4 of the *Sydney Corporation (Amendment) Act* 1908 of a section which is as follows :—" 4A. The Council may in and for any year make and levy a general rate upon the unimproved capital value of all ratable property in the City not exceeding sixpence in the pound on such value. Where any such rate is so made, no other general rate on the unimproved capital value under sec. 4 of this Act and no city rate shall be made." Sec. 7 of the Act of 1916 provides for the insertion after sec. 11 of the Act of 1908 of a section which is as follows :—" 11A. In any year in which the Council makes and levies a rate on the unimproved capital value of land under section 4A of this Act, the method to be adopted in ascertaining the several amounts payable as between lessor and lessee in respect of such rate in cases where the lease was made after the first day of November, one thousand nine hundred and eight, and before the passing of this Act, and in such lease the lessee has covenanted to pay municipal or city rates, shall be as follows :—The amount of such rate on the unimproved capital value in excess of three halfpence and not exceeding fourpence one farthing in the pound shall be considered and taken to be for the purposes of adjustment and interpretation of such covenant the amount of the city rate under the Principal Act."

Sec. 2 of the *Sydney Corporation (Declaratory) Act* 1918, which came into force on 12th March 1918, provides that in sec. 11A above mentioned for the words " the passing of this Act " there shall be substituted the words " the thirteenth day of April, one thousand nine hundred and sixteen," and goes on to provide that " This amendment shall take effect as from the said day."

A lease of land in the City of Sydney was made in 1910, when the land was subject to a " city rate " made and levied under secs. 110 and 120 of the *Sydney Corporation Act* 1902 and a rate on the unimproved capital value of the land made and levied under sec. 4 of the *Sydney Corporation (Amendment) Act* 1908. By the lease the lessee covenanted to pay all rates, taxes, &c., then or at any time during the term imposed upon the land, except the rate then chargeable on the unimproved capital value of the land or any other rate or tax that might thereafter be levied in the nature of a land tax or a tax upon the unimproved value of the land. For the year 1917 the Council pursuant to sec. 4A of the *Sydney Corporation (Amendment) Act* 1908 made and levied a rate of threepence halfpenny on the unimproved value of the land. The lessor paid that rate, and brought an action in the Supreme Court to recover from the lessee the proportion of the rate estimated in accordance with sec. 11A

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and recovered judgment for the amount claimed before the *Sydney Corporation (Declaratory) Act* 1918 was passed. On appeal to the High Court,

Held, by *Gavan Duffy* and *Rich* JJ. (*Barton* J. dissenting), that the covenant by the lessee was a covenant to pay "city rates" within the terms of sec. 11A as amended by sec. 2 of the *Sydney Corporation (Declaratory) Act* 1918, and that the lessee was bound to pay to the lessor the proportion of the rate estimated in accordance with that section.

Decision of the Supreme Court of New South Wales: *Kelly* v. *Petersen*, 17 S.R. (N.S.W.), 585, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Mary Ann Kelly, Catherine Frost and Mary Jane Kelly to recover from John Oscar Peterson the sum of £87 10s., being portion of the general rate imposed by the Municipal Council of the City of Sydney for the year 1917 upon certain land whereof the plaintiffs were lessors and the defendant was lessee by assignment, and claimed by the plaintiffs to be payable under the provisions of the lease. By consent of the parties and by order of *Pring* J. a case, which was substantially as follows, was stated for the opinion of the Supreme Court:—

1. By memorandum of lease under the provisions of the *Real Property Act* 1900 dated 16th June 1910 and duly registered, the plaintiffs leased to one Herman Samuel Wessel, thereinafter designated "the said lessee," for the term of eighteen years and thirty-four weeks from 20th June 1910 a piece of land situated at the corner of Bourke and Oxford Streets, Sydney, in the State of New South Wales, having erected thereon certain buildings including a building known as the Court House Hotel, and the said Herman Samuel Wessel accepted and signed the said memorandum of lease as lessee.

2. By the said memorandum of lease it was provided that the said lease was subject as to the whole of the land comprised therein to the following, amongst other covenants, conditions and restrictions: "(1) The covenants and powers conferred by sections 78 and 79 of the *Real Property Act* 1900 are hereby expressly negatived but so that the covenants powers conditions and restrictions hereinafter contained shall govern this lease And it is hereby agreed and declared that the expression 'the said lessee' whenever

herein used shall in addition to including the heirs executors administrators and permitted assigns of the said lessee also include the person who for the time being stands in that relation to the said lessors"; and to the following special additional provision (*inter alia*): "(3) That the said lessee shall and will from time to time during the said term hereby created pay and discharge all rates taxes dues duties charges improvements fees assessments outgoings payments and impositions of every nature whatsoever now or at any time during the said term charged or imposed upon the said premises or any part thereof except the rate now chargeable on the unimproved capital value of the land comprised in this lease or any other rate or tax that may be hereafter levied in the nature of a land tax or a tax upon the unimproved capital value of the said land."

3. By a memorandum of transfer of lease under the provisions of the *Real Property Act* 1900 dated on or about 11th June 1914 and duly registered, the said Herman Samuel Wessel, with the consent of the plaintiffs given in terms of the said memorandum of lease, transferred the said lease to the defendant and the defendant accepted and signed the said memorandum of transfer as transferee.

4. The land comprised in the said memorandum of lease is within the City of Sydney, and liable to the rates imposed by virtue of the *Sydney Corporation Act* 1902 and the Acts amending the same.

5. At the date of the said memorandum of lease the following rates were imposed upon the said land by the Municipal Council of the City of Sydney, namely:—(*a*) A rate designated the "city rate" based upon an assessment of the said land made according to the average annual value thereof and imposed by virtue of secs. 110 and 120 of the *Sydney Corporation Act* 1902 (No. 35). (*b*) A rate based upon the unimproved capital value of the said land and imposed by virtue of sec. 4 of the *Sydney Corporation (Amendment) Act* 1908 (No. 27).

6. After the passing of the *Sydney Corporation (Amendment) (No. 2) Act* 1916 (No. 12) the said Municipal Council in virtue of sec. 5 of the said Act made and levied for the year 1917 a general rate of threepence halfpenny in the pound upon the unimproved capital value of the said land, and did not for the said year impose

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upon the said land any other general rate on the unimproved capital value thereof or any city rate.

7. The valuation made by the said Municipal Council of the unimproved capital value of the said land for the purposes of the said general rate of threepence halfpenny in the pound was £10,500, and the amount of the said general rate imposed upon the said land for the year 1917 is £153 2s. 6d.

8. The amount of the said general rate upon the said land at the rate of twopence in the pound, being the amount by which the said general rate for the year 1917 exceeds three halfpence in the pound, is £87 10s.

9. The plaintiffs are the owners of the said land within the meaning of sec. 11 of the *Sydney Corporation (Amendment) Act* 1908 (No. 27), and as such have, in pursuance of a demand made upon them by the said Municipal Council, duly paid to the said Municipal Council the sum of £153 2s. 6d., being the whole amount of the said general rate imposed upon the said land for the year 1917.

10. The plaintiffs claim that the sum of £87 10s., parcel of the amount of the said general rate for the year 1917, is payable by the defendant as assignee of the said lease under and by virtue of the provisions hereinbefore set out of the said memorandum of lease and the said memorandum of transfer and of the operation of sec. 7 of the said *Sydney Corporation (Amendment) (No. 2) Act* 1916 (No. 12), and have demanded payment thereof by the defendant.

11. The defendant claims that no portion of the said general rate for the year 1917 is payable by him, and refuses to comply with the said demand.

The question for the opinion of the Court is:

Whether as between the plaintiffs and the defendant the sum of £87 10s., parcel of the amount of the said general rate for the year 1917, is payable by the defendant as transferee of the said lease under and by virtue of the provisions hereinbefore set out in the said memorandum of lease, the said transfer and sec. 7 of the *Sydney Corporation (Amendment) (No. 2) Act* 1916 (No. 12).

If the Court shall be of opinion in the affirmative, then judgment

shall be entered for the plaintiffs for £87 10s. with costs on the highest scale.

If the Court shall be of opinion in the negative, then judgment shall be entered for the defendant with costs on the highest scale.

The Full Court by a majority (*Sly* and *Ferguson* JJ., *Cullen* C.J. dissenting) answered the question in the affirmative, and ordered judgment to be entered for the plaintiffs with costs: *Kelly* v. *Petersen* (1).

From that decision the defendant now, by special leave, appealed to the High Court.

Campbell K.C. (with him *Mocatta*), for the appellant. Sec. 11A of the *Sydney Corporation (Amendment) Act* 1908 is limited in its operation to a covenant to pay municipal or city rates generally and without any qualification, and has no application to an agreement by which the parties have in any way divided the burden of taxation between them, specifying the burden which each undertakes. In order to give due effect to sec. 144 (5) of the *Local Government Act* 1906 (which is incorporated in the *Sydney Corporation (Amendment) Act* 1908, by sec. 12 thereof) sec. 11A cannot be given any other meaning. Sec. 2 of the *Sydney Corporation (Declaratory) Act* 1918 should not, in the absence of express words, be interpreted as retrospective to the extent of affecting the rights of parties to litigation pending at the time the Act was passed. If that section does not apply to this case, then sec. 11A is limited to a lease made between 1st November 1908 and 22nd December 1908, the date when the *Sydney Corporation (Amendment) Act* 1908 was passed, and this lease is not within it. [Counsel referred to *Solomon* v. *New South Wales Sports Club Ltd.* (2).]

Leverrier K.C. (with him *Jordan*), for the respondents. If sec. 11A has the meaning contended for on behalf of the appellant, it has no effect, for it would only apply to a lease in which there is a covenant to pay all the rates. The object of the section was to give relief to landlords where a lessee had covenanted to pay city rates and none were imposed. In whatever way sec. 11A is read, it

(1) 17 S.R. (N.S.W.), 585.

(2) 19 C.L.R., 698.

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infringes upon sec. 144 (5) of the *Local Government Act* 1906. Sec. 144 (5) leaves the parties free to make any agreement they please, but sec. 11A provides how that agreement is to be interpreted if it is made in a certain form. If there is an inconsistency between secs. 11A and 144 (5) the former should prevail, because it is a particular provision whereas sec. 144 (5) is a general provision. Sec. 2 of the *Sydney Corporation (Declaratory) Act* 1918 applies to this lease. By the express words the amendment is to be read as if it had been made on 13th April 1916. See *Craies on Statute Law*, 2nd ed., p. 357.

[BARTON J. referred to *Hedderwick* v. *Federal Commissioner of Land Tax* (1).

[RICH J. referred to *In re Joseph Suche & Co. Ltd.* (2); *Attorney-General* v. *Theobald* (3).]

Campbell K.C., in reply, referred to *R.* v. *Justices of Cambridgeshire* (4).

Cur. adv. vult.

April 25.

The following judgments were read :—

BARTON J. The plaintiffs, now respondents, on 16th June 1910 let certain premises within the City of Sydney, and liable to the rates imposed by virtue of the *Sydney Corporation Act* 1902 and the amending Acts, to one Wessel for a term still current. The lease contained a special provision or covenant that the lessee should pay "all rates taxes," &c., of every nature "now or at any time during the said term charged or imposed upon the said premises or any part thereof except the rate now chargeable on the unimproved capital value of the land comprised in this lease or any other rate or tax that may be hereafter levied in the nature of a land tax or a tax upon the unimproved capital value of the said land."

At the date of the lease there had been imposed on the land two rates. The first was designated the "city rate." It was assessed under sec. 110 of the *Sydney Corporation Act* (No. 35 of 1902)

(1) 16 C.L.R., 27.
(2) 1 Ch. D., 48.
(3) 24 Q.B.D., 557.
(4) 7 Ad. & E., 480, at p. 491.

"according to the fair average annual value" of the property, and was imposed under sec. 120 of the same Act. The second was imposed under sec. 4 of the amending Act No. 27 of 1908, and was therefore levied on the unimproved capital value. Under that section it stood in addition to the rate under the Principal Act. On its imposition the Governor, under sec. 5 of the Act of 1908, proclaimed that the operation of the enactments mentioned in Schedule 3 to the *Local Government Act* 1906 should be suspended in the City. It is clear that the covenant had reference to this state of things, and that the lessee was exempted by it from the payment of the unimproved capital value rate then chargeable.

In June 1914 Wessel, with the consent of the plaintiffs, transferred the lease to the defendant, who is the present appellant. There is no question that the appellant is in the same position as Wessel under the covenant. The *Sydney Corporation (Amendment) (No. 2) Act* 1916 (No. 12) was passed on 13th April of that year. It amended the Act of 1908 by inserting after sec. 4 a section numbered 4A. That section empowered the Council to make for any year an unimproved capital value rate not exceeding sixpence in the pound on that value. It prohibited the making of any other unimproved capital value rate under sec. 4 of the Act of 1908, or of any city rate, if the power in sec. 4A were exercised. It also suspended sec. 4 for the year of rating. The Council exercised its power under sec. 4A by levying for 1917 an unimproved capital value rate of threepence halfpenny in the pound, and of course no other unimproved capital value rate nor any city rate was imposed. The respondents, on the valuation by the Council of the unimproved capital value for the purposes of this 1917 rate, paid £153 2s. 6d., the whole amount of the rate imposed for 1917. They now claim as plaintiffs £87 10s. from the appellant, on the ground that on the construction of the covenant and by the operation of sec. 7 of the Act of 1916 the appellant is liable to pay them that amount.

But for sec. 7 this case would probably not have arisen, for it is clear that unless it renders the appellant liable there is no cause of action.

Now sec. 7 inserts after sec. 11 of the 1908 Act a section numbered 11A, which it is necessary to quote in full. It reads as follows:—

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Barton J.

"In any year in which the Council makes and levies a rate on the unimproved capital value of land under section 4A of this Act, the method to be adopted in ascertaining the several amounts payable as between lessor and lessee in respect of such rate in cases where the lease was made after the first day of November, one thousand nine hundred and eight, and before the passing of this Act, and in such lease the lessee has covenanted to pay municipal or city rates, shall be as follows:—The amount of such rate on the unimproved capital value in excess of three halfpence and not exceeding fourpence one farthing in the pound shall be considered and taken to be for the purposes of adjustment and interpretation of such covenant the amount of the city rate under the Principal Act."

It may be noted in passing that the judgments of the learned Judges of the Supreme Court deal with sec. 11A as if the words "the passing of this Act" necessarily referred to 13th April 1916. Literally they referred, probably by mistake, to 22nd December 1908. The question is not now very material. The order of the Supreme Court is dated 15th November 1917, and on 12th March 1918 there came into force the *Sydney Corporation (Declaratory) Act* (No. 6 of 1918), by which sec. 11A of the Act of 1908, inserted in that Act by sec. 7 of the Act of 1916, is amended by substituting for "the passing of this Act" the words "the thirteenth day of April, one thousand nine hundred and sixteen." The Act went on to say: "This amendment shall take effect as from the said day." It is absolutely clear that this enactment is retrospective, and that sec. 11A must be read as if that were the date originally expressed in it.

It should also be mentioned that sec. 12 of the Act of 1908 applies to rates on unimproved capital value under the Act of 1908 certain provisions of the *Local Government Act* of 1906. The only provision material to the present question is sec. 144 (5), viz., "Nothing in this Act shall . . . affect any private agreement with respect to the ultimate liability to pay any specified rates or arrears of rates." As secs. 4A and 11A are virtually made part of the Act of 1908, the sub-section just quoted may well be held to apply, so as to preserve the effect of the covenant. But I do not dwell on that, because I think that the covenant is unaffected by sec. 11A, on which

the respondents rely. That section applies only to leases within the specified dates where and so far as the lessee has covenanted to pay municipal or city rates. Here the covenant expressly excepts unimproved capital value rates. It is not an unqualified covenant to pay municipal or city rates, but only a covenant to pay such as are not rates on the unimproved capital value. In my opinion the section cannot be read to include such a case. Here the lessee has expressly protected himself with the consent of the lessor against such rates, and I do not think the section was intended to interfere with or to destroy any such protection. If I had any doubt on that subject, I should be the more inclined to this construction because sec. 11A deals only with "the method to be adopted in ascertaining the several amounts payable as between lessor and lessee." It seems to deal only with cases in which the question is as to the proportions to be assigned to the respective parties where there is an existing but not an allocated liability of both. If the section finds a state of things in which before its enactment one party or the other was free from liability, I do not think it can be read so as to impose a new liability.

If the covenant had protected the lessee from annual value rates instead of from unimproved value rates, no doubt the respondents could rightly have asserted his liability to the rate now in question, and no doubt they would have done so. The present case, however, is just the converse.

I think the appeal should be allowed and the consequent orders made.

GAVAN DUFFY AND RICH JJ. The memorandum of lease which we are considering in this case is dated 16th June 1910, and provides "that the said lessee shall and will from time to time during the said term hereby created pay and discharge all rates taxes dues duties charges improvements fees assessments outgoings payments and impositions of every nature whatsoever now or at any time during the said term charged or imposed upon the said premises or any part thereof except the rate now chargeable on the unimproved capital value of the land comprised in this lease or any other rate

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Gavan Duffy J. Rich J.

or tax that may be hereafter levied in the nature of a land tax upon the unimproved capital value of the said land."

Sec. 11A of the *Sydney Corporation (Amendment) Act* 1908 as it now stands runs thus :—" In any year in which the Council makes and levies a rate on the unimproved capital value of land under sec. 4A of this Act, the method to be adopted in ascertaining the several amounts payable as between lessor and lessee in respect of such rate in cases where the lease was made after the first day of November, one thousand nine hundred and eight, and before the thirteenth day of April, one thousand nine hundred and sixteen, and in such lease the lessee has covenanted to pay municipal or city rates, shall be as follows :—The amount of such rate on the unimproved capital value in excess of three halfpence and not exceeding fourpence one farthing in the pound shall be considered and taken to be for the purposes of adjustment and interpretation of such covenant the amount of the city rate under the Principal Act."

The case was argued before us as if sec. 11A imposed on lessees a liability to pay part of the general rate imposed for the year 1917 under the provisions of sec. 4A of the same Act. If that were so, the defendant could not escape his statutory liability by appealing to the exception in his lease which merely limits the contractual obligation of the lessee and does not impose on the lessor a contractual obligation to pay any rate or tax whatever; the burden of the excepted rates and taxes would rest where the Legislature chose to place it. But in our opinion sec. 11A does not impose any such statutory liability on lessees. Where a general rate is made under the provisions of sec. 4A no city rate can be made, and sec. 11A provides for a contingency that must then arise. It enacts that, where a lessee is under an obligation to pay the city rate because of a covenant to pay municipal or city rates, the amount payable as city rate under such covenant shall be the amount of the general rate under sec. 4A which is in excess of three halfpence and not exceeding fourpence one farthing in the pound. The provision in his lease clearly imposes on the defendant the obligation of paying the city rate. There is no longer a city rate to pay, but sec. 11A preserves the obligation and provides a new method of computing the amount payable in fulfilment of such obligation. The sum sued

for here (£87 10s.) is calculated in compliance with the provisions of sec. 11A, and the defendant must pay it in fulfilment of his obligation to pay the city rate under the provision in his lease.

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Appeal dismissed with costs.

Solicitors for the appellant, *Biddulph & Salenger.*
Solicitors for the respondents, *Murphy & Moloney.*

B. L.

[HIGH COURT OF AUSTRALIA.]

GUMLEY . . . . . APPELLANT;
INFORMANT,

AND

BREEN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 3.

Barton, Gavan Duffy, Powers and Rich JJ.

Police Offences—Insulting words—Use in public street—Words referring to persons not present—Special leave to appeal to the High Court—Police Offences (Amendment) Act 1908 (*N.S.W.*) (*No.* 12 *of* 1908), *sec.* 6.

Sec. 6 of the *Police Offences (Amendment) Act* 1908 (N.S.W.) imposes a penalty on "every person who, in or near any public street, thoroughfare, or place, or within the view or hearing of any person passing therein—(*a*) behaves in a riotous, indecent, offensive, threatening, or insulting manner; or (*b*) uses any threatening, abusive, or insulting words."

The Full Court of the Supreme Court having held that a statement made at a meeting of over two hundred people that there were thirty thousand British