Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Canadian Pacific Railway Company v. *The Corporation of the City of Toronto, from the Court of Appeal for the Province of Ontario; delivered the* 11*th November* 1904.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

This is an Appeal from an unanimous Judgment of the Court of Appeal of Ontario confirming, except in one particular, a previous Judgment of Chancellor Boyd. The principal question between the parties is, whether a lease from the Corporation of the City of Toronto to the Canadian Pacific Railway Company ought to contain a covenant by the latter for the payment of taxes. There are two other questions, viz., at what date the payment of rent should commence, and whether interest is payable on arrears of rent, and, if so, from what date.

The lease in question is made in execution of an agreement dated the 26th July 1892, and a supplementary agreement dated the 4th February 1895. These agreements were entered into under the authority of an Act of the Legislature of Ontario, and were confirmed by the Dominion

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Legislature. Read together they provide for a lease by the Corporation to the Railway Company of a large tract of land for the purposes of their railway for a term of fifty years, commencing on the 1st January 1895, and renewable for ever at a rent to be increased on each renewal. There is nothing said as to the payment of taxes by the Railway Company. On the one hand, therefore, the agreements do not in express terms impose on the Railway Company any liability which it would not otherwise be subject to, but, on the other hand, there is nothing to exempt them from any existing liability. It should be observed that the Railway Company were in possession of the land from some date in the year 1893, and also that the Corporation did not complete their title to the land until the 28th May 1898.

The question whether the lease should contain a covenant for the payment of taxes was treated in the first instance as depending on the application of what was called the doctrine of usual covenants in an open agreement. And a vast amount of evidence was taken on the question whether this was an usual covenant. It may be doubted whether any such general consideration is applicable to an agreement of so special a character as the one in question. Their Lordships, however, think with the learned Judges in the Chancery Court and the Court of Appeal that the question involved depends mainly on other considerations, and is, in truth, comparatively simple and free from difficulty. The first and obvious step in the inquiry is to ascertain on whom the burdens fall by law as between these two parties, and the answer to this question is free from any serious doubt.

The Assessment Act in force at the date of the contract was that of 1892 (55 Vict. c. 48). By Section 7 of that Act all property in the

Province is liable to taxation, subject to certain exemptions, of which the 7th is in these words:—

"The property belonging to any county or local municipality, whether occupied for the purposes thereof or unoccupied, but not when occupied by any person as tenant or lessee, or otherwise than as a servant or officer of the corporation for the purposes thereof."

By Section 20 the taxes may be recovered from either the owner, tenant, or occupier saving his recourse against any other person, and by Section 24 it is provided that any occupant may deduct from his rent any taxes paid by him if the same could also have been recovered from the owner or previous occupant unless there is a special agreement between the occupant and the owner to the contrary. Their Lordships have no doubt that the effect of these sections is to impose the liability for taxes on the lessees of lands belonging to a municipality, without any recourse to the Municipal Corporation. It appears from the cases referred to in the Judgment of the learned Chancellor that the same view of these enactments has been taken by the Courts of the Province. The Appellants do not, in fact, contend that the liability for payment of the taxes ought to be imposed by the lease on the Corporation, but they wish the matter to be left at large with a view to future litigation. Their Lordships do not think this would be right, and they think that the Corporation are entitled to the covenant as a reasonable protection against the property which is the security for their rent being taken in execution for non-payment of taxes. The Corporation have a duty towards those for whose benefit they hold their land, and they would be guilty of something like negligence if they did not insist on the insertion of the covenant in question in their leases. The evidence, however, shows, as might be expected, that they invariably

See evidence of the City Solicitor, App. II., pp. 97, 98.

do so, and therefore the covenant is an usual one if the only relevant class of cases be looked at.

It cannot be and is not now disputed that the rent is payable from the 1st January 1895, the Railway Company having been in possession long before that date. But their Lordships do not agree wholly either with the Chancellor or the Court of Appeal as to the interest on the rent in arrear. The interest is payable only by way of damages for the delay in payment, and their Lordships think that the Appellants should not be considered in default until the 28th May 1898, when the Corporation first showed a good title to grant the lease.

Their Lordships will therefore humbly advise His Majesty that the Order of the Court of Appeal of the 14th April 1903 ought to be varied by a direction that interest be allowed only on the arrears of rent due to the Respondents on the 28th May 1898, as from that date, and on subsequent arrears from the several dates when they accrued due, and that *quoad ultra* the said Order ought to be affirmed. Their Lordships will not disturb the Orders for costs in the Court below, and as to the costs of this Appeal will adopt the same course as that taken by the learned Chancellor, and order the Appellants to pay to the Respondents four-fifths of their costs of this Appeal.