

[HIGH COURT OF AUSTRALIA.]

THE MAYOR, ALDERMEN, COUNCIL-
LORS AND CITIZENS OF THE CITY OF
MELBOURNE

}

APPELLANTS ;

RESPONDENTS,

AND

HOWARD SMITH COMPANY LTD.

RESPONDENTS.

APPELLANTS.

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

Local Government—Rates—Land “beneficially occupied in any manner what-
soever”—Wharves vested in Melbourne Harbour Trust Commissioners—Pre-
ferential right of occupancy granted by Commissioners—Melbourne and Geelong
Corporations Acts Amendment Act 1863 (Vict.) (27 Vict. No. 178), secs. 42,
43—Melbourne Harbor Trust Act 1890 (Vict.) (No. 1119), secs. 62, 85.

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Sec. 42 of the *Melbourne and Geelong Corporations Acts Amendment Act* 1863 gives authority to the Council of the City of Melbourne to make an assessment of “all land beneficially occupied in any manner whatsoever” within the limits of the City, and sec. 43 gives them authority upon the assessment so made to make rates.

Griffith C.J.,
Barton and
O'Connor JJ.

On lands vested in the Melbourne Harbor Trust Commissioners, and exempted from rating unless occupied for private purposes, were erected wharves, and sheds were built on the wharves.

Pursuant to authority given to them by the *Melbourne Harbor Trust Act* 1890, by an instrument under seal, therein called a “lease,” the Commissioners granted to the respondents “full and free privilege and liberty (subject to the provisions herein contained) to use and enjoy for the term mentioned in the schedule” a certain berth at a wharf “for the purpose of discharging passengers and cargo from and receiving passengers and cargo on board the steamers or vessels which may for the time being belong to the

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lessee together with the use of any shed which for the time being may be opposite to the said berth and used in connection therewith such use and enjoyment as aforesaid to be at all times subject to all the regulations of the Commissioners." It was also provided by the instrument that the respondents might not transfer the rights and privileges given to them without the prior consent of the Commissioners; that the harbor master should be at liberty to use or permit the use of the berth or part of it for the accommodation of other vessels when the berth was unoccupied and not actually required by the respondents for the purposes above mentioned, and might order the removal of the respondents' ships from the berth in the same way as in the case of any other ship lying at the wharves; that the business of the respondents should be conducted at the berth and shed the subject matter of the "lease"; and that the respondents would not be entitled to accommodation at the public berths without the written consent of the harbor master.

Held, that the wharf and shed referred to in the instrument were not "beneficially occupied in any manner whatsoever" by the respondents, and, therefore, that the respondents were not liable to be rated by the Council in respect of them.

Rochdale Canal Co. v. Brewster, (1894) 2 Q.B., 852, followed.

Decision of the Supreme Court of Victoria: *William Howard Smith Proprietary Co. Ltd. v. Mayor &c. of the City of Melbourne*, (1911) V.L.R., 142; 32 A.L.T., 146, affirmed.

APPEAL from the Supreme Court of Victoria.

The Council of the City of Melbourne made a rate upon Howard Smith Co. Ltd. in respect of certain wharves and sheds erected on such wharves. The wharves and sheds were vested in the Melbourne Harbor Trust Commissioners by the *Melbourne Harbor Trust Act* 1890, and were the subject of three similar agreements under seal, called therein "leases," between the Commissioners and the company, one of which was, so far as material, as follows:—

"This deed made the nineteenth day of March 1903 between The Melbourne Harbor Trust Commissioners (hereinafter styled the Commissioners) of the one part and the Howard Smith Company Limited (hereinafter called the lessee) of the other part Witnesseth that for the considerations hereinafter appearing the Commissioners hereby grant unto the lessee full and free right privilege and liberty (subject to the provisions hereinafter contained) to use and enjoy for the term mentioned in the Schedule hereunder written the berth at the Queen's wharf Melbourne also

mentioned or described in the said Schedule for the purpose of discharging passengers and cargo from and receiving passengers and cargo on board the steamers or vessels which may for the time being belong to the lessee together with the use of any shed which for the time being may be opposite to the said berth and may be used in connection therewith such use and enjoyment as aforesaid to be at all times subject to all the regulations of the Commissioners in force now or during the said term And the Commissioners so far as the agreements hereinafter contained are to be binding on them or to be observed by the harbor master and the lessee so far as such agreements are to be binding on them or to be observed by their vessels masters officers crews and servants respectively and all other persons employed by the lessee hereby mutually agree as follows:—

“1. The harbor master for the time being shall be at liberty to use or permit the use of the said berth or any part of it for the accommodation of other vessels at such times as it or any part of it may be unoccupied and not actually required for the purpose aforesaid and also to exercise his power and authority as such harbor master of removing or ordering the removal of any of the said steamers or vessels of the lessee from the said berth whenever he may deem the same necessary and also to order the removal of any of the lessee's steamers or vessels when not actually discharging or loading cargo from the said berth to any other berth at the expense of the lessee.

“2. The lessee shall not nor will transfer or attempt to transfer the rights and privileges hereby given and conferred to any other person or persons or permit any other person or persons to exercise or enjoy such rights and privileges or any of them without the prior written consent of the Commissioners through their Secretary for the time being; and the lessee shall pay to the Commissioners for every such consent the sum of £1 in addition to the cost of transfer.

“3. The lessee in the exercise of the rights and privileges aforesaid shall take the utmost care to prevent damage or injury to the said wharf or other property of the Commissioners and shall keep the said shed and all offices storerooms water closets and urinals enclosed in the said shed or used in connection there-

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with in a perfectly clean and sanitary condition to the satisfaction of the harbor master and their vessels masters officers crews and servants and other persons employed by them and under their control and shall observe and be subject to the said regulations; and the business of the lessee shall be conducted at the berth and shed aforesaid, and the lessee will not be entitled to accommodation at the public berths under the control of the Commissioners without the prior written consent of the harbor master; provided however that should dredging be at any time or times required in the said berth the dredge shall have priority of use of the berth as long as the harbor master shall think fit in order to effectuate such dredging; and that should the exigencies of the Port at any time or times demand it the harbor master shall be at liberty temporarily to encroach upon the said berth and the wharf thereat and occupy or use such part of it as he may think fit; and should repairs alterations or renewals be in the judgment of the harbor master at any time or times required to the wharf at the said berth the whole of such wharf or such part thereof as the harbor master may require may be fenced off and retained by him during the continuance of such works and should the whole of the said berth or any part thereof and of the said wharf exceeding one hundred feet in length be taken or encroached upon as aforesaid the Commissioners shall if possible find another berth for use by the lessee until the berth so taken is restored.

"4. The lessee shall in respect of the lease aforesaid pay to the said Commissioners the sums or sum particularly mentioned or referred to in the said Schedule on the day or several days and in manner in the said Schedule also mentioned.

"5. If the lessee at any time requires such additions or alterations made to or in the said shed as the Commissioners approve then upon such approval but not otherwise such additions or alterations shall be made by the Commissioners and immediately from the completion thereof the lessee shall pay to the Commissioners (in addition to the sum or sums mentioned in the last preceding clause) during the then residue of the said term such a sum per annum as shall be equivalent to seven per centum on the total outlay incurred in making such additions or alterations such

annual sum to be payable always quarterly in advance on the quarter days mentioned in the said Schedule.

"6. The lessee shall not be entitled to compensation of any kind in the event of this lease being determined from any cause whatsoever.

"7. If the lessee shall fail to pay the said sum or sums referred to in Clause 4 or any part thereof on the day or days and in manner mentioned and provided in and by the said Schedule or shall fail to observe or perform or commit or suffer any breach non-performance or non-observance of any of the other agreements and stipulations herein contained it shall be lawful for the Commissioners at any time by writing under the hand of their Secretary for the time being to determine these presents and notice of such determination shall forthwith thereafter be given to the lessee by leaving the same for them or posting the same through the General Post Office addressed to them at their office for the time being in the said State or by advertising the same in two daily newspapers published in the City of Melbourne and immediately on the giving of such notice as aforesaid the rights and privileges hereby given and conferred shall cease and determine without prejudice however to the rights of the Commissioners in respect of the breach by the lessee of any of the agreements herein contained.

"8. Unless sooner determined as hereinbefore mentioned all the rights and privileges aforesaid shall cease and determine on the first day of January 1904.

"9. The term "the harbor master" wheresoever used in these presents shall mean the present and every future harbor master for the time being appointed by the Commissioners whilst acting in such office.

"10. The lessee shall during the said term pay all taxes rates dues charges assessments and impositions whatsoever whether present or future and whether payable by landlord or tenant in respect of the wharf berth and premises aforesaid or any part or parts thereof, and the lessee shall on or before the execution of these presents lodge with the Commissioners twenty-five pounds as a guarantee for the due payment of such taxes rates charges assessments and impositions.

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"In witness whereof the said parties to these presents have executed the same the day and year first above written.

"The Schedule hereinbefore referred to.

"The term of the foregoing lease.

"From the 31st day of December 1902 to the 1st day of January 1904.

"Description of the said berth:

"Berth No. 1 at the Queen's Wharf, 200 feet long. Shed used in connection therewith, portion of which is enclosed.

"Payment.

"In addition to the quayage rate for the time being payable under the Regulations of the Commissioners the lessee will pay £25: being 2s. 6d. for each foot of wharf frontage of the said berth and £40:0:., being 7 per cent on cost of shed, such sums equalling £65:0:0, to be paid by equal quarterly payments on the first days of January April July and October in the year 1903 the first of such quarterly payments to be made on the first day of January 1903."

Against this rate the company appealed to the County Court on the grounds, *inter alia*, that the wharves and sheds were not rateable and that the company was not the occupier of the wharves and sheds. The Judge of the County Court dismissed the appeal, but reserved two questions in the form of a special case for the Full Court of the Supreme Court. The only material question was whether he was justified in concluding that during the period in question the company occupied for private purposes any rateable land within the meaning of sec. 62 of the *Melbourne Harbor Trust Act 1890*.

The Full Court held that the company was not rateable in respect of the wharves and sheds: *William Howard Smith Proprietary Co. Ltd. v. The Mayor, &c. of the City of Melbourne* (1).

Against this decision the corporation now by special leave appealed to the High Court.

Mitchell K.C. (with him *Bryant*), for the appellants. This property is beneficially occupied by the respondents within the meaning of sec. 42 of Act No. 178, and it is occupied for private

purposes by the respondents within the meaning of sec. 62 of the *Melbourne Harbor Trust Act 1890*. *Rochdale Canal Co. v. Brewster* (1), is distinguishable, for under the *Poor Relief Act 1601* (43 Eliz. c. 2), sec. 1, under which that case was decided, rates may be levied on all land "beneficially occupied" and under sec. 42 of the Act No. 178, the power is to levy rates on all land "beneficially occupied in any manner whatsoever." The intention in making that change in language must have been to make the power wider. The respondents have a beneficial occupation in some manner. It is as much beneficial occupation as that of tramway rails laid in a street.

[He also referred to *Allan v. Overseers of Liverpool* (2); *Holywell Union and Halkyn Parish v. Halkyn Drainage Co.* (3); *London and North Western Railway Co. v. Buckmaster* (4); *Mayor, &c. of Melbourne v. Melbourne Tramway and Omnibus Co. Ltd.* (5); *Melbourne and Metropolitan Board of Works v. Pyke* (6); *Melbourne Harbor Trust Act 1890*, s. 85.]

Mann (with him *Carse*), for the respondents. Even if the words "beneficially occupied in any manner whatsoever" are wider than "beneficially occupied," so that the respondents are within them, these wharves and sheds are exempt from rating unless they are "occupied for private purposes," as provided by sec. 62 of the *Melbourne Harbor Trust Act 1890*. All that the respondents have under their agreement is a first call on the berths. The words used are appropriate to a grant of a licence and not to a grant of occupation. *Rochdale Canal Co. v. Brewster* (1), covers this case.

Cur. adv. vult.

GRIFFITH C.J. The wharves in the Port of Melbourne are vested in the Melbourne Harbor Trust Commissioners. The respondents are shipowners and have a preferential right of occupancy of certain wharves belonging to the Commissioners. I use that neutral expression "right of occupancy" instead of the

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(1) (1894) 2 Q.B., 852.

(2) L.R., 9 Q.B., 180.

(3) (1895) A.C., 117.

(4) L.R., 10 Q.B. 70, 444.

(5) 20 V.L.R., 36; 15 A.L.T., 197.

(6) 25 V.L.R., 563; 21 A.L.T., 245.

H. C. OF A. word "occupation." The Statute under which the respondents
1911. enjoy that right, the documents conferring it and the nature of
 the occupancy, are not distinguishable in any respect from the
MELBOURNE Statute, the documents and the nature of the occupancy in the
CORPORATION case of *Rochdale Canal Co. v. Brewster* (1). In that case it was
v. held that under the circumstances the plaintiff company were
HOWARD not in exclusive occupation of the wharves and land, and were
SMITH CO. therefore not liable to be rated under the Poor Laws under which
LTD. exclusive occupation is necessary to impose liability. It is there-
Griffith C.J. fore not arguable in this case that the respondents are in exclu-
 sive occupation of the wharves, or berths, as they are called.

But another argument was set up in this Court—I do not quite know whether it was set up in the Supreme Court—it is not mentioned in the judgment—namely, that the rating powers of the appellants are larger than those under the Poor Laws in England. Sec. 42 of Act No. 178, which with sec. 43 confers rating power upon the Corporation of Melbourne, provides that the Corporation may "direct an assessment to be made of all land beneficially occupied in any manner whatsoever" &c., and it is suggested that the words "in any manner whatsoever" cover the case of the present respondents. It is therefore necessary to refer to the quality of their occupancy.

They have obtained from the Commissioners a document called a "lease," which is granted under the powers conferred by sec. 85 of the *Melbourne Harbor Trust Act* 1890, which provides that "The Commissioners may from time to time and upon such terms and conditions and upon payment of such rents or other sums of money and subject to such restrictions and regulations as they shall think proper set apart and appropriate any particular portion of any wharf dock pier jetty landing-stage or platform shed warehouse or other works with the appendages thereunto for the exclusive accommodation of any person engaged in carrying on any particular trade who shall be desirous of having such exclusive accommodation for the reception of the vessels and goods belonging to or employed and conveyed by them. All persons to whom such exclusive accommodation as aforesaid shall be afforded and their vessels crews and servants and other per-

(1) (1894) 2 Q B., 852.

sons employed by them or under their control shall be subject to regulations to be made by the Commissioners under this Act." Now the grant contained in the instrument called a "lease" is a grant of "full and free privilege and liberty (subject to the provisions hereinafter contained) to use and enjoy for the term mentioned in the Schedule hereunder written the berth at the Queen's Wharf . . . for the purpose of discharging passengers and cargo from and receiving passengers and cargo on board the steamers or vessels which may for the time being belong to the lessee together with the use of any shed which for the time being may be opposite to the said berth and used in connection therewith such use and enjoyment as aforesaid to be at all times subject to all the regulations of the Commissioners in force now or during the said term." Then it is provided that the respondents may not transfer the rights and privileges given to them without the prior written consent of the Commissioners; that the harbor master is to be at liberty to use or permit the use of the berth or part of it for the accommodation of other vessels when the berth is unoccupied and not actually required by the respondents for the purposes above mentioned, and may order the removal of the ships of the respondents from the berth in the same way as in the case of any other ship lying at the wharves; and that the business of the respondents is to be conducted at the berth and shed the subject matter of the lease, and that the respondent's will not be entitled to accommodation at the public berths without the prior written consent of the harbor master.

For these privileges the respondents pay £25 a year, being 2s. 6d. for each foot of wharf frontage of the berth, and £40, being 7 per cent. on the cost of the shed—that is in the case of one berth. There are two other leases of larger berths the payments for which amount to a little over £200 a year in each case. The respondents also pay to the Commissioners what is called a "quayage rate," that is a tonnage rate, which is paid by all ship-owners whose ships use the wharves. In that respect the respondents are in exactly the same position, and pay exactly the same rate, as any other shipowner who makes use of the wharves of the Commissioners.

The result of this appears to be that the respondents are

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entitled to use the wharf for mooring their ships and taking on board and discharging passengers and cargo, but that they are not entitled to use the wharf or the shed for the purpose of storing goods except in the process of loading and unloading their vessels. Under these circumstances I think the real nature of the respondents' right is that properly described by the words I used at the beginning of my judgment. They have a preferential right of occupancy of the wharves which cannot be said to be a beneficial occupation of land in any manner whatsoever in the sense in which that term is used in the rating Acts. It is not a right of occupation of land at all. It is a right more like that to a chair or stall at a place of entertainment which is in one sense occupied by the hirer while he is sitting in it, but as to which he cannot be said to in any manner occupy the land on which the chair is within the meaning of the rating Acts. For these reasons I think the decision of the Supreme Court is right and should be affirmed.

BARTON J. read the following judgment:—Mr. *Mitchell* very properly admitted that if the criterion were the same here as in England he could not distinguish this case in principle from *Rochdale Canal Co. v. Brewster* (1), and the two cases on which that decision chiefly rests, namely, *Allan v. Overseers of Liverpool* (2) and *London and North Western Railway Co. v. Buckmaster* (3). The test in England is whether there is an exclusive occupation. See the above cases and *Cory v. Bristow* (4). Even if it is only such an occupation as is necessary to the effective enjoyment of an easement, still, if it is exclusive, the holder of it is an "occupier" within the meaning of the *Statute of Elizabeth* and rateable, as in *Holywell Union and Halkyn Parish v. Halkyn Drainage Co.* (5); while if there is not an occupation in the sense of a right to exclude all others, including the grantor, there is no liability to the rate, for the case falls within the decisions first mentioned.

The 54th section of the *Melbourne Harbor Trust Act* 1830 vests in the Commissioners the exclusive management and control

(1) (1894) 2 Q.B., 852.

(2) L.R. 9 Q.B., 180.

(3) L.R. 10 Q.B., 70, 444.

(4) 2 App. Cas., 262.

(5) (1895) A.C., 117.

of the Port (except certain property mentioned in sec. 51) the shipping, moorings, wharves, &c., and the preservation and improvement of the Port generally, and their control is not to be interfered with by any persons whomsoever.

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The principal exhibit in the case is the document under which the respondents enjoy a preferent right to berth No. 1 and the wharf thereat—this being one of the three berths that they occupied at the time in respect of which their liability is asserted. Although the document speaks of a “lease” and a “lessee” and also of a “term,” it seems to avoid in other respects the use of expressions distinctive of the relation of landlord and tenant. The Commissioners grant the respondents “full and free right privilege and liberty (subject to the provisions hereinafter contained) to use and enjoy” the berth mentioned for the limited purpose of discharging passengers and cargo from and receiving passengers and cargo on board the respondents’ vessels, together with the “use” of any shed opposite to the berth: “such use and enjoyment . . . to be at all times subject to all the regulations of the Commissioners in force.” This is a very limited privilege, and apart from the regulations, which it will be seen place the berths, wharves and sheds under the complete control of the Commissioners or their harbor master, the notion of an exclusive occupation is difficult to maintain in face of the further provisions of the document. Whenever the berth or any part of it is “unoccupied and not actually required for the purpose aforesaid,” the harbor master is to be at liberty to accommodate other vessels at the berth; he may remove any of the respondents’ vessels from the berth whenever he thinks it necessary; and may order any of the respondents’ vessels, when not actually loading or discharging, from this berth to any other, at their expense. When dredging is required the dredge is to have priority in the use of the berth as long as the harbor master may think fit for that purpose; and “should the exigencies of the Port at any time demand it” the harbor master may “temporarily encroach upon the said berth and the wharf thereat and occupy or use such part of it as he may think fit.” In case of the wharf at the berth requiring repair, alteration or renewal in the harbor master’s judgment, he may fence off and retain the whole of the wharf or

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such part as he requires as long as the work lasts, though if he takes or encroaches on more than 100 feet of the wharf he is if possible to find the respondents another berth until this one is restored to them.

The respondents are to pay the quayage rates, just as the ship-owners making use of the other berths are to pay them; and in addition an annual amount calculated on the wharfage frontage of the berth and the cost of the shed is made payable quarterly.

Then a number of the regulations made under the authority of the *Melbourne Harbor Trust Act* 1890 were quoted on behalf of the respondents with a view of showing the completeness of the control which in pursuance of that Act and under the so-called "lease" was reserved to the Commissioners. Of these it is sufficient to mention three. Clause 220 provides that no goods except such as are imported or intended for export are to be left or allowed to remain on any wharf or road without the permission of the harbor master. Clause 221 requires that "all goods imported and landed upon any uncovered wharf or in any open shed, and all goods thereon or therein for the purpose of export, shall be removed within 24 hours . . . and unless . . . so removed they may be removed by the harbor master and stored in any bonded or other warehouse on behalf and at the risk and expense of the owners," &c., &c. Clause 257 requires that, with an exception mentioned in a subsequent regulation, all imported goods placed in an enclosed shed shall be removed, whether entered for transhipment or otherwise, within six days after they are landed from any steamer, or four days after they are landed from any sailing vessel, and no un-entered goods shall be permitted to remain in any of the transit sheds longer than these periods, after which they shall be removed by the harbor master, at the expense of the owner or consignee, to the King's warehouse or any warehouse approved by the Customs.

Many other clauses might be referred to, but these are enough to show that the regulations, subject to which the respondents hold their privilege, ensure to the Commissioners a control which is wholly incompatible with the notion of any exclusive possession or occupation on the part of the respondents. "An occupation of

land which is at all times subject to the control of the owner is not such an occupation as to render the occupier rateable to the poor," *per Lindley L.J.* in *Rochdale Canal Co. v. Brewster* (1). The respondents may have an exclusive benefit. I should rather call it a preferent right to the use of a berth when they have a vessel in port requiring berthage. At other times they have no rights at all. Subject to the control reserved to the Commissioners by the Act and regulations and by the so-called "lease," the Commissioners covenant to allow them to load and discharge their ships at a particular berth instead of having to take whatever berth may be allotted to them *pro re nata*; and for this privilege they give a consideration in addition to the quayage rate which they pay in common with other owners. This seems to me to be no more than a licence, for it gives them no estate or interest in any part of the lands vested in the Commissioners. Whether there is an easement it is not necessary to decide, because, if there is, it is not coupled with any exclusive occupation so as to bring the case within the authority of *Holywell Union and Halkyn Parish v. Halkyn Drainage Co.* (2), and the words of *Lopes L.J.* in *Rochdale Canal Co. v. Brewster* (1) are distinctly applicable: "In my judgment, what passed to the respondents was the licence to use the accommodation of the cranes, quays, land and water berths subordinated to the superintending control of the board—a mere incorporeal right. They could not exclude the board."

In this position counsel for the appellants relied on the difference between the words of the Act 43 Eliz., c. 2, sec. 1, authorizing the raising of rates on all land "beneficially occupied," and the terms of the power given to the City of Melbourne by sec. 42 of the incorporation Act, to order the assessment and rating of "all lands beneficially occupied in any manner whatsoever." He argued that as the local Act must have been drawn with full regard to the terms of the Statute of Elizabeth and the decisions under it, the expression "all land beneficially occupied in any manner whatsoever" must be held to mean something more than if the words had been merely "all land beneficially

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(1) (1894) 2 Q.B., 852, at p. 857.

(2) (1895) A.C., 117.

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occupied." The contention will deserve consideration when it becomes necessary to decide a case turning upon the words of the *Local Government Act*. But that necessity does not arise in the present case for the reason that the *Melbourne Harbor Trust Act* 1890 prescribes that all lands vested in the Commissioners (as the port, wharves, &c. are by sec. 46) shall be "deemed to be severed from the corporation of the city of Melbourne . . . and . . . exempt from any rate or tax which the council of the corporation . . . but for this section might have imposed or levied thereon; but nothing herein shall preclude the corporation . . . from levying and collecting rates upon tenements erected on such lands occupied for private purposes and by persons other than the Commissioners." Mr. *Mann* urged that there is at any rate no reason why the word "occupied" in this proviso should be construed in any sense differing from that in which the word "occupier" in the Statute of Elizabeth has been consistently interpreted in England. I confess that I am quite unable to see any reason for making the difference, and none was pointed out to us. If then the words are construed alike, as I think they must be, the present case cannot be distinguished from the English authorities, and the respondents are not rateable in respect of their licence.

The appellants relied somewhat on sec. 85 of the *Harbor Trust Act*. But if the Commissioners "set apart and appropriate any particular portion of any wharf . . . or . . . shed . . . for the exclusive accommodation of any person engaged in carrying on any particular trade" it does not follow that the appropriation, for accommodation merely, gives an exclusive occupation. And it can scarcely do so in view of the concluding words of the section, which subject the persons to whom the accommodation is afforded, and their vessels, crews and servants, to the Commissioners' Regulations.

I am of opinion that the learned Judges of the Supreme Court came to the correct conclusion, and that this appeal must be dismissed.

O'CONNOR J. I am of the same opinion. It is quite clear that

the decision of the Supreme Court is right and I have nothing further to add.

Appeal dismissed with costs.

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

Solicitors for the respondents, *Croker & Croker*.

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ANNIE MOULE APPELLANT ;

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ARTHUR MOULE RESPONDENT.

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Infant, custody of—Parent and child—Child in custody of mother—Habeas corpus H. C. OF A.
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secs. 31, 33.

On a question of who should have the custody of a child the dominant matter is the welfare of the child.

A husband and wife had lived apart for over a year, and the only child of the marriage, a girl of three years of age, had always lived with her mother. There was no evidence to show that the mother was not a fit person to have the custody of the child. On a writ of *habeas corpus* issued by the father to obtain from his wife the custody of the child,

Held, that it was for the welfare of the child that she remain with her mother.

Goldsmith v. Sands, 4 C.L.R., 1648, applied.

Decision of the Supreme Court of Victoria (*Hodges J.*) reversed.

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Griffith C.J.,
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