[HIGH COURT OF AUSTRALIA.]

WILLCOCKS . . . . . APPELLANT;

AND

SHIRE OF WALLAROBBA . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1911.

SYDNEY, *Nov.* 22, 23, 24.

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

Local Government—Wharfage and tonnage rates—Power of council to levy wharfage and tonnage rates on public wharf—Local Government Act 1906 (*N.S.W.*) (*No.* 56), *secs.* 73, 94—*Ordinance* 81 — *Wharfage and Tonnage Rates Act* 1901 (*N.S.W.*), (1902 *No.* 16), *secs.* 5, 6, 10.

Under the *Wharfage and Tonnage Rates Act* 1901 the wharfage rates payable under that Act, not exceeding the rates mentioned in the schedule, are payable to the person for the time being entitled to lawful possession of the wharf. *Held*, that where, under the provisions of sec. 73 of the *Local Government Act* 1906, the control and management of a public wharf has been transferred to the Council of a Shire, together with the obligation of maintenance of the wharf, the right to receive the rates payable under the *Wharfage and Tonnage Rates Act* is also transferred to the Council.

Decision of *A. H. Simpson*, Ch. J. in Eq. : *Smith* v. *Shire of Wallarobba*, 11 S.R. (N.S.W.), 553, affirmed.

APPEAL from the decision of *A. H. Simpson*, Chief Judge in Equity.

The respondents had levied wharfage and tonnage rates upon goods landed by the appellant at Booral wharf, which was admitted to be a public wharf under the respondents' control, upon the Manning River. The appellant brought a suit against the respondents in which he claimed a declaration that the respondents had no power or authority under the *Local Govern-*

ment Act 1906 or under Ordinance 81, made under that Act, to levy wharfage or tonnage rates on goods landed at the wharf, and asked for an injunction restraining the respondents from preventing the appellant from landing goods without paying the rates.

Ordinance 81 deals with the regulation and control of public wharves and jetties, and, by clause 12, provides that "no goods subject to wharfage rates, inwards or outwards, shall be allowed to be removed from the wharf or shed by any person until the rates and dues thereon have been paid to the wharfinger."

Sec. 94 of the *Local Government Act* 1906 is as follows:—"With respect to any wharf, dock, pier, jetty, landing, stage, slip, or platform, the control and management of which is vested in a Council, such Council shall have the powers of the Governor under Division 3 of the *Wharfage and Tonnage Rates Act* 1901; and the provisions of the said Act, and any Acts amending the same, are, *mutatis mutandis*, hereby incorporated with this Act so far as they relate to any such wharf" &c.

By sec. 73 of this Act the care, control and maintenance of all public places (which by sec. 3 includes public wharves), are imposed upon the Council of a shire upon its constitution.

A. H. Simpson, Ch. J. in Eq., having dismissed the suit: *Smith* v. *Shire of Wallarobba* (1), the appellant now appealed to the High Court.

Owen K.C., and *Harvey*, for the appellant. The questions for determination are—(1) whether a shire has power to levy wharfage and tonnage rates on wharves within its area without an Ordinance; (2) if not, whether Ordinance 81 authorizes the charges made. The respondents rely upon the powers conferred upon them by sec. 94 of the *Local Government Act* 1906 which gives a Council the powers of the Governor under Division 3 of the *Wharfage and Tonnage Rates Act* 1901 with respect to any wharf the control and management of which is vested in a Council. Division 3 of Part II. of the *Wharfage and Tonnage Rates Act* applies to the leasing of rates payable at any public wharf, which rates are not to exceed the scales specified in the

(1) 11 S.R. (N.S.W.), 553.

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Schedule. Sec. 94 was only intended to give power to the Council to sublet rates, and the Council had then to provide what the rates should be. Power is given by sec. 187 (xi.) of the *Local Government Act* to fix rates on wharves under the control of the Council, but no such rates have been fixed. The object of the latter part of sec. 94 was to carry out the provisions of the earlier part of that section. It only incorporates the provisions of Division 3 of the *Wharfage and Tonnage Rates Act.* The "said Act" means "the above-mentioned provisions of the said Act," not the Act as a whole. The other provisions of the *Wharfage and Tonnage Rates Act* are separately provided for by the *Local Government Act.* If sec. 94 is ambiguous, and the wider construction is inconsistent with the other provisions of the Act, the more restricted meaning should be adopted. An intention to impose a tax must be clear and unambiguous: *Craies on Statutes,* (1911 ed.), p. 119. Until a rate has in some way been fixed, the Council cannot collect the maximum rates mentioned in the *Wharfage and Tonnage Rates Act.*

Knox, K.C. and *Maughan,* for the respondents. It is admitted that the Council have control of the Booral wharf, and that it is a public wharf. The effect of sec. 94 is to give the Council power to lease the rates payable under the *Wharfage and Tonnage Rates Act* on all public wharves within its management and control, and also to give the Council power to collect these rates if they are not leased. As the Council may lease the rates, and the lessee may collect them, it was clearly intended that the Council should have the beneficial ownership of the rates. It is said that, though the legislature intended that the Council should have the benefit of the rates if they farmed them out, and that the plaintiff in such a case should be compelled to pay them, yet the Act does not give the Council power to collect the rates without the intervention of a lessee. The latter part of sec. 94 incorporates all the provisions of the *Wharfage and Tonnage Rates Act,* with such alterations as are necesssary in so far as the provisions are appropriate to a wharf under the control of the Council. Sec. 5 of the *Wharfage and Tonnage Rates Act,* so read, means that upon the landing upon any wharf under the

control of a Council there may be levied, &c. The intention was that the rate should go to the person or body in control of the subject matter. In order to get over the difficulty of providing machinery sections, sec. 94 incorporates the whole of the relevant part of the *Wharfage and Tonnage Rates Act*, and puts the Council in the same position as the Governor under that Act. Section 17 of the latter Act shows that the rates prescribed by the Act were not merely *maxima*. The Council take over the wharves with the rates already prescribed, and these rates remain payable until other powers are exercised under the *Local Government Act*. Ordinance 81 is equivalent to the consent of the Governor to the collection of these rates by an officer of the Council. The Ordinance directs payment to the wharfinger of what is due. It is made on the hypothesis that wharfage dues are leviable on these wharves. It gets rid of any difficulty as to a servant of the Council collecting the rates. The literal and grammatical construction of sec. 94 should be adopted unless it leads to some absurdity, repugnancy or inconsistency.

Owen K.C. in reply.

Cur. adv. vult.

November 24.

GRIFFITH C.J. In this case we are called upon to interpret some of the most elliptical and cryptic legislation that has ever come under the notice of the Court.

The respondents, the Council of the Wallarobba Shire, claim to be entitled to levy wharfage and tonnage rates in respect of a wharf on the Manning River. The appellant denies their right, and the question is whether they have established it. Their argument is, in effect, that it is to be collected from the *Local Government Act* that the legislature, or the framers of the Act, took it for granted that a Council might collect such rates. The question for us to determine is whether, in the remarkable form in which we find the legislation, that right has been conferred. If it has, effect must be given to it; if it has not, it must be denied. The first of the relevant Statutes is the *Wharfage and Tonnage Rates Act*, passed in 1902, which is divided into three Parts. The first Part is formal; the second Part deals with rates, and is divided

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into three Divisions; the third Part deals with goods on wharves, and the fourth Part with miscellaneous matters. Sec. 5, in Division 1 of Part II., provides that upon the landing on any public wharf or private sufferance wharf of any goods or articles enumerated in the Second Schedule to the Act there may be levied rates to be termed inward wharfage rates not exceeding the respective rates contained in the Schedule. Sec. 6 provides that in respect of any goods laden from any public or private sufferance wharf rates called outward wharfage rates may be levied in accordance with a scale specified in the Second Schedule for outward wharfage rates. There is nothing in the Act to say by whom the rates are to be collected. The only provision is that upon the landing of goods upon these wharves, or in respect of goods laden from these wharves, rates may be levied. The term "public wharf" means the Circular Quay, the Queen's Wharf in Sydney, and any wharf in New South Wales appointed a public or legal wharf under any Act regulating the Customs. There is nothing more as to the person to whom the rates when collected are to belong. In the case of public wharves they may belong to the Government. Very likely they do. In the case of private sufferance wharves they may belong to the owner of the wharf. But it is suggested that this scanty provision means that the owner of the wharf is entitled to levy the rates, and having levied them, to keep them. There is nothing said as to what is to be done with rates collected on behalf of the Government—whether they are to be paid into the Consolidated Revenue or not. There is nothing said as to what is to happen if the person charged with the collection of the rates does not collect them. All the provisions which one would expect to find in an Act of this kind are absent, except the mere enactment that certain rates may be levied upon the landing or shipment of goods at and from these wharves. The only sanction for the non-payment of rates is contained in sec. 10, which provides that no clearance shall be granted for any vessel liable for tonnage rates unless a receipt for payment of the rates signed by the proper officer is presented to the collector or proper officer of Customs; but that only applies to tonnage rates in the case of the clearance of a vessel at the Customs. There is no similar sanction with respect to wharfage

rates. So that I do not think it is unfair to characterize such legislation as elliptical. Division 3 of Part II. provides that the Governor may demise wharfage and tonnage rates payable at any public wharf, and the lessee under the lease may demand such rates, which are not to exceed those specified in the Schedule; and that the lessee may nominate a person as collector of the rates who may use all lawful means for their recovery. In practice I believe the rates on public wharves were collected by an officer of the Government, and I presume that in the case of private sufferance wharves they were collected by the owners of the wharves.

Then came the *Local Government Act* of 1906, which provided, by sec. 73, that the Council of a shire on its constitution may within its area exercise the following powers and shall perform, *inter alia*, the following duties:—(1) The care, control, construction, formation, fencing, maintenance and management of all public places (with certain exceptions). "Public place" is defined to mean a public road, bridge, jetty, wharf, ferry or other place which the public are entitled to use. So that, apparently, on the constitution of the shire it became charged with the care, control, maintenance and management of the wharf in question. There is no direct transfer of the rights of the Crown to collect the rates. Sec. 94, however, provides that with respect to any wharf, dock, pier, jetty, landing-stage, slip or platform, the control and management of which is vested in a Council, such Council shall have the powers of the Governor under Division 3 of the *Wharfage and Tonnage Rates Act* 1901. There is no Division 3 of the Act, although there is a Division 3 in Part II. The powers of the Governor under Division 3 are simply to lease the tolls, that is all. The tolls in the present case have not been leased by the Council or the Governor, so that the section has no direct application. It goes on "And the provisions of the said Act, and any Acts amending the same, are, *mutatis mutandis*, hereby incorporated with this Act so far as they relate to any such wharf dock, pier," &c. It is contended that that in some way transfers to the Council all the rights which the Crown had under the *Wharfage and Tonnage Rates Act*. It was contended, on the other hand, that this provision is supplementary to the power to

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demise the rates. I do not think that it makes any difference which construction is adopted. What are the provisions incorporated? The only provision that can intelligibly be said to be incorporated is that upon the landing of goods upon any public wharf certain duties may be levied. But that did not require incorporation; it was already the law. The only other provisions which can be contended to be capable of incorporation under sec. 94 are the provisions of Part III., which are plainly inconsistent with the provisions of the *Local Government Act*. But that is only another puzzle set by the draughtsman of this remarkable legislation. Sec. 94, therefore, does not carry the case any further. Then sec. 187 provides that the Governor may make Ordinances for, amongst other things, fixing and collecting of tolls on wharves under the control of the Council. If the Governor does not make an Ordinance the Council may make one itself, subject to his approval (sec. 188). No such Ordinance has been made. Under these circumstances how does the matter stand? I have described the legislation as elliptical and cryptic. On the whole I think that by a very liberal application of the doctrine *quando lex aliquid concedit*, &c., it may be held that the Council have the power contended for. I think the *Wharfage and Tonnage Rates Act* must be taken to mean that the rates payable under that Act are payable to the person for the time being entitled to lawful possession of the wharf. If that is the Government, then the Government may collect them; if a private owner, he may collect them. And I think it follows, though perhaps *per longum saltum*, that when the control and management of the wharf were transferred to the Council with the obligation of maintenance, the right to receive the rates was also transferred to the Council. The obligation to pay the rates remains, and there is no suggestion of an interregnum during which they are not to be payable. There is no one else to receive them; therefore I think it must be intended that the Council are to receive them. It is, of course, intended that, if the Council fix rates under sec. 187, they shall have power to collect them. On the whole, although, I confess, with some doubt, I have come to the conclusion that the rates payable by virtue of the *Wharfage and Tonnage Rates Act* are payable to the person or body who or

which has the control and custody of the wharf, which in this case is the Council.

Another difficulty, however, was raised to which I should refer. The rates collected are not to exceed the rates mentioned in the Schedule. Ordinarily one would expect to find a provision that, until other rates are fixed, those mentioned shall be collected. There is no such provision. Other sections of the Act describe them as "the rates prescribed by the Act," as rates which may be levied "in accordance with the scale specified in the Second Schedule." On the whole, I think the better construction is that, if the rates demanded do not exceed those specified in the Schedule, the person from whom they are demanded can make no valid answer to the demand. For these reasons, which are not quite the same as those relied upon by the learned Chief Judge in Equity, I think that the Council are entitled to recover the rates in question. I think, therefore, that the appeal fails.

BARTON J. I have come to the same conclusion.

O'CONNOR J. I am of the same opinion.

Appeal dismissed.

Solicitors, for the appellant, *Bowman & MacKenzie* for *J. M. Hooke*, Dungog.

Solicitors, for the respondent, *McDowell & Moffitt* for *Elliott & Waller*, Dungog.

C. E. W.