painful one, and much, in my opinion, ought to be forgiven the unfortunate woman. But a decree nisi for the dissolution of the marriage must nevertheless be granted.

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JOHNSON v. JOHNSON.

Appeal allowed. Decree nisi for dissolution of marriage. Petitioner to pay costs of respondent (including costs of her guardian ad litem) in Supreme Court and in High Court. Co-respondent to pay costs of suit and of appeal including costs paid by petitioner to respondent.

Solicitor for the appellant, *R. W. Fraser.*

Solicitors for the respondent, *A. H. Holdship & Son.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE SYDNEY HARBOUR TRUST COMMISSIONERS . . . . . PLAINTIFFS, } APPELLANTS;

AND

HARRIOTT . . . . . DEFENDANT, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 19, 20; *May* 3.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Wharves—Charges for berthing—Wharves "vested" in Sydney Harbour Trust Commissioners—Wharf leased to tenant—Sydney Harbour Rates Act 1904 (*N.S.W.*) (*No.* 26 *of* 1904), *secs.* 1, 6—*Sydney Harbour Trust Act* 1900 (*N.S.W.*) (*No.* 1 *of* 1901), *secs.* 27, 29, 39, 59.

Sec. 6 of the *Sydney Harbour Rates Act* 1904 (N.S.W.) provides that "(1) Tonnage rates shall be levied by and paid to the" Sydney Harbour Trust "Commissioners upon every vessel (except vessels under two hundred and forty tons of register tonnage and lighters) while berthed at any wharf . . . vested in the Commissioners. (2) On vessels in respect of which

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tonnage rates are not payable, the Commissioners may, by regulations, impose and provide for the collection of tolls or charges for berthing at any wharf . . . vested in them. . . . (3) Nothing in this section shall affect any lease or agreement for a lease of any wharf . . . granted or entered into by the Commissioners."

Held, that a wharf of which the Commissioners are owners in fee simple is "vested" in them, within the meaning of the section, notwithstanding that it is leased by the Commissioners to a tenant; that the effect of sub-sec. 3 is merely to protect the rights of a lessee under his lease; and therefore that the Commissioners have power under sub-sec. 2 to impose charges for berthing at a leased wharf in respect of a vessel which under the lease is not entitled to be berthed there.

Decision of the Supreme Court of New South Wales: *Sydney Harbour Trust Commissioners* v. *Harriott*, (1923) 23 S.R. (N.S.W.), 141, reversed.

APPEAL from the Supreme Court of New South Wales to the High Court.

In an action brought in the Supreme Court by the Sydney Harbour Trust Commissioners against Harold Prescot Harriott a case, which was substantially as follows, was stated by consent of the parties under sec. 55 of the *Common Law Procedure Act* 1899 :—

1. The plaintiffs herein are a corporation duly incorporated under the *Sydney Harbour Trust Act* 1900 and amending Acts.

2. The defendant at all material times was the owner of a vessel of 162 tons gross tonnage (such vessel not being engaged in picnic or excursion or passenger or horse ferry traffic, and not being a lighter, water boat floating plant, punt, waterman's skiff, private launch, or rowing or sailing craft not being used for hire, and not being a tug or coal hulk not loading or discharging cargo or coal).

3. Regulations duly made, approved by the Governor and notified in the *Government Gazette* under the said Acts provide that in respect of every such vessel as that owned by the defendant there should be paid by the owner or the agent of the owner thereof or the master of such vessel to the plaintiffs within seven days after demand the sum of 7s. 6d. for each day or portion of a day (exclusive of Sundays and days observed in public offices in Sydney as holidays) during which such vessel was berthed at any wharf vested in the plaintiffs.

4. Since 11th February 1901 (being the date of the Governor's assent to the *Sydney Harbour Trust Act* 1900) the plaintiffs have

erected or have permitted to be erected (*inter alia*) two wharves, one hereinafter called the Japanese Company's wharf, and the other hereinafter called Stewart's wharf.

5. The land upon which the Japanese Company's wharf was erected was almost wholly included in Schedule 2 to the said Act. The balance of the said land was resumed under the provisions of the *Public Works Act* 1900 by proclamation in the *Government Gazette* of 29th March 1911, and was by proclamation in the *Government Gazette* of 26th April 1911 duly vested in the plaintiffs for the purposes of the *Sydney Harbour Trust Act* 1900.

6. That portion of the land mentioned in par. 5 hereof as being included in Schedule 2 to the said Act was registered under the provisions of the *Real Property Act* 1900 on the application of the plaintiffs under the *Sydney Harbour Trust Land Titles Act* 1909, and is comprised in certificate of title dated 18th April 1910, registered vol. 2050, fol. 103, in which the plaintiffs are described as the registered proprietors for an estate in fee simple of the said land.

7. The balance of the land mentioned in par. 5 hereof was also registered under the provisions of the *Real Property Act* 1900 on the application of the plaintiffs under the *Sydney Harbour Trust Land Titles Act* 1909, and is comprised in certificate of title dated 12th May 1917, registered vol. 2757, fol. 63, in which the plaintiffs are described as the registered proprietors for an estate in fee simple of the said land.

8. The whole of the land upon which Stewart's wharf was erected is included in Schedule 2 of the *Sydney Harbour Trust Act* 1900, and was registered under the provisions of the *Real Property Act* 1900 on the application of the plaintiffs under the *Sydney Harbour Trust Land Titles Act* 1909, and is comprised in the said certificate of title dated 18th April 1910, registered vol. 2050, fol. 103, in which the plaintiffs are described as the registered proprietors for an estate in fee simple of the said land.

9. By a document, described as memorandum of lease in the form prescribed by the *Real Property Act* 1900 but not registered thereunder, the plaintiffs purported to lease unto Osaka Shosen Kabushiki Kaisha the wharf hereinbefore referred to as the Japanese Company's wharf for a term of three years from 1st July 1919 at the yearly

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rental of £7,250 payable as therein mentioned. The said Osaka Shosen Kabushiki Kaisha entered into possession of the said wharf and paid the rent reserved under the said unregistered memorandum of lease.

10. By memorandum of agreement dated 29th December 1920 the plaintiffs agreed to grant and one Alexander Stewart agreed to accept a tenancy of the wharf herein referred to as Stewart's wharf, the term of such tenancy to be for one year from 1st January 1921, at a rental of £30 for the term. The said Alexander Stewart entered into possession of the said wharf and paid the said rent.

11. Between 24th February 1921 and 30th September 1921 the defendant's said vessel was berthed at the said wharves for divers days and times.

12. The plaintiffs duly demanded payment from the defendant, and claim that there is now due from the defendant and unpaid the sum of £57 7s. 6d. in respect of the said berthing.

13. The defendant, after actions brought by the said lessees of the said wharves, paid to the said several lessees amounts equal to or exceeding the amounts claimed by the plaintiffs in respect of the berthing of his vessel during the divers days and times in par. 11 hereof mentioned.

14. The said vessel was not between 24th February 1921 and 30th September 1921 owned or chartered by the said Osaka Shosen Kabushiki Kaisha, or by any firm or company for which the said lessee was sole agent.

15. The defendant contends that at the time of and during the said berthing the said wharves were not nor was either of them vested in the plaintiffs under the provisions of the *Sydney Harbour Trust Act* 1900 and amending Acts.

16 (as amended by consent at the hearing of the appeal to the High Court). The question for the decision of the Court is as follows :—

> Is the defendant, upon the facts stated in the case submitted and upon the true construction of the said Acts, liable to the plaintiffs for the amount sued for ?

If the answer is in the affirmative, judgment is to be entered for the plaintiffs for £57 7s. 6d. and costs ; if in the negative, judgment is to be entered for the defendant with costs.

The material provisions of the leases mentioned in pars. 9 and 10 are stated in the judgments hereunder.

The case was argued before the Full Court, which, by a majority (*Cullen* C.J. and *James* J., *Gordon* J. dissenting), ordered that judgment be entered for the defendant: *Sydney Harbour Trust Commissioners* v. *Harriott* (1).

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

Bavin, A.-G. for N.S.W. (with him *Brissenden* K.C. and *Hammond*), for the appellants. The answer to the question depends solely upon whether the wharves in question were " vested " in the appellants within the meaning of sec. 6 of the *Sydney Harbour Rates Act* 1904 (N.S.W.). That word has the same meaning in that section as it has in the *Sydney Harbour Trust Act* 1900 (N.S.W.). Throughout the latter Act the word " vested " has, in reference to land, the same meaning, namely, that any land acquired by the Commissioners in any of the methods indicated in the Act is " vested " in them and remains " vested " in them until divested by one of the methods prescribed by the Act. (See secs. 27, 29, 32, 37 (3), 39, 41, 42, 59 (1), 68, 73, 76.) In other words, it means land which belongs to the Commissioners by force of the Act. (See *Rockhampton Municipality* v. *Ingham* (2).) The vesting is not affected by the fact that the land is leased by the Commissioners to a tenant. Sub-sec. 3 of sec. 6 of the *Sydney Harbour Rates Act* 1904 means that in a lease by the Commissioners of a wharf they may make any arrangement they choose as to rates and charges for berthing. [Counsel also referred to *Josephson* v. *Mason* (3).]

[RICH J. referred to *Arnold* v. *Wallwork* (4).]

Loxton K.C. (with him *Markell* and *W. B. Simpson*), for the respondent. The word " vested " in sec. 6 of the *Sydney Harbour Rates Act* 1904 means vested so that the whole interest in the wharf is in the Commissioners, and does not include a vesting which is subject to some interest. If that view is wrong, then the effect of

(1) (1923) 23 S.R. (N.S.W.), 141.
(2) (1895) 6 Q.L.J., 256.
(3) (1912) 12 S.R. (N.S.W.), 249.
(4) (1899) 20 N.S.W.L.R. (L.), 368.

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sub-sec. 3 of sec. 6 is that where a wharf is leased by the Commissioners the provisions of sub-secs. 1 and 2 do not apply, and the lessee's interest has all the incidents of a chattel interest; that is, the lessee has the right of full occupation and enjoyment, including the full right to the rents and profits. The covenants in the two leases in question are immaterial. The intention of the section was to give the Commissioners alternative rights of raising revenue, on the one hand, by tonnage rates or charges and, on the other hand, by leasing; and not cumulative rights. The Commissioners have not thought fit to enforce the covenants of the leases, and there is no privity between the Commissioners and the respondent.

Bavin, A.-G. for N.S.W., in reply.

Cur. adv. vult.

The following written judgments were delivered :—

May 3.

KNOX C.J. The appellants sued the respondent in the Supreme Court to recover £57 7s. 6d., representing berthing charges alleged to be payable in respect of the berthing of a vessel owned by him at certain wharves in Sydney Harbour. A special case was stated under the *Common Law Procedure Act* for the opinion of the Supreme Court; the question submitted being, in effect, whether, on the facts stated in the case and on the true construction of the Acts referred to therein, the defendant was liable to pay the amount claimed. The facts are clearly stated in the special case, and need not be repeated here. The Supreme Court decided by majority (*Cullen* C.J. and *James* J., *Gordon* J. dissenting) in favour of the defendant, and the Commissioners bring this appeal by special leave.

The question for decision turns on the construction of sec. 6 of the *Sydney Harbour Rates Act* 1904, which is in the following words :— "6. (1) Tonnage rates shall be levied by and paid to the Commissioners upon every vessel (except vessels under two hundred and forty tons of register tonnage and lighters) while berthed at any wharf, dock, pier, jetty, landing-stage, slip, or platform vested in the Commissioners. (2) On vessels in respect of which tonnage rates are not payable, the Commissioners may, by regulations,

impose and provide for the collection of tolls or charges for berthing at any wharf, dock, pier, jetty, landing-stage, slip, or platform vested in them. Such tolls and charges may be fixed charges for berthing, or may be in the form of licences for a fixed period. (3) Nothing in this section shall affect any lease or agreement for a lease of any wharf, dock, pier, jetty, landing-stage, slip, or platform granted or entered into by the Commissioners."

The argument before us was directed to two points, namely, (1) Is a wharf which is under lease from the Commissioners a wharf vested in them within the meaning of sub-sec. 2 of sec. 6 ? and (2) Does sub-sec. 3 of sec. 6 prevent the Commissioners from recovering from the respondent charges for berthing his vessel at the wharves in question ?

On the first question I am of opinion that a wharf which is subject to a lease granted by the Commissioners is none the less a wharf vested in the Commissioners within the meaning of the section. Apart from any assistance to be derived from the context of this Act or of the *Sydney Harbour Trust Act* of 1900, with which, by sec. 1, it is to be construed, I should have thought that the word " vested " should be construed as meaning that the legal ownership of the land or of some estate in it was in the Commissioners, or, in other words, that the person who owns an estate in fee simple in land is the person in whom it is " vested " even while it is subject to a lease granted by him. But a consideration of the provisions of the Principal Act in my opinion makes it clear that the phrase " vested in the Commissioners " in these Acts should be construed as extending to land the legal ownership of which is in the Commissioners even while that land is subject to a lease granted by them. I refer particularly to secs. 39 and 59 of the Act of 1901, which appear to be inconsistent with the contention put forward on behalf of the respondent that land or wharves while under lease by the Commissioners are not " vested in the Commissioners."

On the second question I am of opinion that sub-sec. 3 of sec. 6 means no more than that the rights of a lessee under his lease shall not be affected by the provisions of sub-secs. 1 and 2. As was said by my brother *Higgins* during the argument, the sub-section is designed to protect the lease and not the wharf leased. It was not

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disputed by Mr. *Loxton* that, as between the appellants and the lessees of the wharves now in question, the demand made by the appellants on the respondent was consistent with the terms of the lease. I think it follows that the claim made by the appellants cannot be regarded as affecting these leases within the meaning of sub-sec. 3.

For these reasons I am of opinion that the appeal should be allowed, and judgment entered for the appellants, with costs of the action.

The costs of this appeal will be paid by the appellants pursuant to the undertaking given as a condition of obtaining special leave to appeal.

ISAACS J. With great respect to the learned Judges who composed the majority in the Supreme Court, I think the conclusion arrived at by *Gordon* J. is clearly right.

The case turns on the proper meaning of the word " vested " in sub-sec. 2 of sec. 6 of the *Sydney Harbour Rates Act* 1904. The contention on the part of the Trust is that it means " vested " in the sense of general ownership—of course, for the purposes of the Act; the respondent's contention, which was upheld by the Supreme Court, is that it means vested while free from any lease or agreement for lease—in other words, it means vested not only in interest but also in possession. It seems to me impossible to maintain the respondent's contention. If the land when leased is not " vested " within the meaning of the Act, it is not vested in the Trust at all. And if not vested in the Trust, in whom is it vested ? The position as put by the respondent is unthinkable.

The Sydney Harbour Trust was constituted in 1901 by Act No. 1 of that year. Sec. 27 declared that there should be " vested " in the Commissioners upon trust for the purposes of the Act (1) the bed and shores of the port; (2) all land then vested in the Government within the boundaries of the port, and (3) all lands resumed, purchased or reclaimed by the Crown in connection with wharfage purposes as described in Schedule Two, with appliances, &c.; and added " subject to the interest of any persons in such land existing at the time of the passing of this Act." Then it was added that the Government may

vest further Crown lands necessary, and may divest lands unnecessary. Sec. 29 says : " No lease or licence in force at the commencement of this Act of, or relating to, any Crown land hereby *vested* in the Commissioners, shall be in any manner *affected* by this Act." Now, the manifest construction of those provisions is that the lands above referred to are " vested " in general ownership, though upon trust, in the corporation, whether leased or licensed or not, that is, whether in possession of lessees or licensees or not. And no existing " lease " or " licence " of Crown lands " vested " is to be affected. In other words, whatever rights have already been created by lease or licence are to be respected and are paramount, but subject only to those rights the vesting is as complete as if there were no lease or licence. Words could hardly be plainer. I would only add that express power is given to lease in certain cases including renewal of existing leases. Three years afterwards the Act now in question was passed, No. 26 of 1904. Sec. 6, the enactment in controversy, provides, in terms quite unambiguous, that (1) tonnage rates shall be levied by the Commissioners on every vessel (not under 240 tons) while berthed at any wharf, &c., vested in the Commissioners ; (2) on vessels 240 tons or less, the Commissioners may impose charges for berthing at any wharf, &c., vested in them ; (3) the above provisions are not to affect any lease or agreement for a lease of any wharf, and granted or entered into by the Commissioners. Sec. 1 of the Act says : " This Act . . . shall be construed with the *Sydney Harbour Trust Act* 1900." Construing those two Acts together, as we are directed, the word " vested " in sec. 6 means the same as " vested " in the earlier Act. In other words, it means " vested " whether leased by the Commissioners or not, but, if leased, then by force of sub-sec. 3 the rights of the lessees are to be respected. The respondent's contention actually is that within the view of that section lands belonging to the Commissioners and leased by them are not " vested " in them at all. To my mind, if anything were needed to demonstrate the contrary beyond the possibility of question, it is sub-sec. 3, which is relied on to support the contention. If by leasing a wharf it at once ceased to be " vested " within the meaning of the Act, what was the necessity of inserting sub-sec. 3 at all ? But precisely because a wharf leased by the Commissioners

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is, nevertheless, a wharf " vested " in them, just as is a wharf leased at the time the Principal Act was passed, special provision for the Commissioners' leases, corresponding to sec. 29 in relation to Government leases, had to be made. And the meaning and effect of the provision is that the full general powers of the Trust may be exerted over all property vested in them, subject in this instance to observing the rights created by the Commissioners by any lease or agreement for a lease. Of course that means any rights validly created. In this case we have not to consider the validity of any provision in either the lease or the agreement for lease. Clause 11 in each of them, by reference to the Act of 1904, provides specifically that the tonnage and berthage rates under that Act are to be paid subject only (in the case of the lease) to a proviso that does not include the present respondent. Clause 28, which was thought to be repugnant to the appellants' claim, is not so. In fact, its effect is the other way. It contains a specific provision : " That the Commissioners in order to facilitate the business of the Port may upon such occasions as they shall require so to do berth any vessel at the demised premises." Then follow two qualifications : (1) that they are not to do so if the lessees require the berthing space, and (2) that when it is done whatever " tonnage " rates are payable shall be paid to the lessee.

But from first to last learned counsel did not rely, and repeatedly refused to rely, on the provisions of the documents. He rested wholly and solely on the construction of the word " vested " in the Act, and said that the provisions of the lease and agreement for lease were absolutely immaterial. The essence of the argument, as I understood, was that a lease connoted exclusive possession, and that was irreconcilable with the landlord permitting others to occupy, and no special terms in the lease could affect that fundamental right. The answer as I have given it is that the enactment of Parliament is plain and unambiguous, and the wharf answers the statutory description in sec. 6, and the public Trust, the lessees and the general public must all be bound by the enactment.

The appeal should therefore, in my opinion, be allowed.

HIGGINS J. I am of opinion that the appeal must be allowed. Mr. *Loxton* has led us by devious paths through the complex history of

legislation as to this Harbour Trust; but the question is ultimately that to which the learned Judges of the Supreme Court have addressed themselves—What is the meaning of the Act No. 26 of 1904, sec. 6?

The power to make regulations imposing berthing charges has been exercised by the Trust by reg. 19 of 30th May 1918. Under this regulation, charges in accordance with a scale set out shall be paid in respect of *every* vessel (with certain exceptions which are irrelevant) of less than 240 tons register, while berthed at a wharf. It appears from the special case (par. 11) that between 24th February and 30th September 1921 the defendant's vessel was berthed at the two wharves mentioned, at divers days and times; and for this berthing the Trust claims payment of the appropriate charges (as I understand, 7s. 6d. per day). But the defendant says, and says rightly, that sec. 6 (2), which authorizes such a regulation, applies only to wharves "vested in" the Trust; and he contends that these two wharves were not vested in the Trust at the time of the berthing. For one wharf, the Japanese Company's wharf, was, during all the period of berthing, under lease to the Company for three years at a yearly rent; and the other wharf—Stewart's wharf—was under agreement for lease for one year to Stewart. The defendant relies also on the words of sub-sec. 3 of sec. 6: "Nothing in this section shall affect any lease or agreement for a lease of any wharf, dock," &c., "granted or entered into by the Commissioners." There are therefore two questions: (1) Are the wharves vested in the Trust while under lease? and (2) Does the regulation prescribing charges for berthing "affect" the lease? The defendant is a stranger to the lease.

The Supreme Court has taken the wharf leased to the Japanese Company as affording the simpler test; and I shall adopt the same course.

1. The Trust holds a certificate of title for an estate in fee simple in the wharf. Part was "vested in the Commissioners" by sec. 27 of the Act of 1900, Schedule Two, and part was "vested" by proclamation under the same section (*Gazette*, 26th April 1911). Certificates of title were granted subsequently. The defendant contends that because the Trust granted the lease to the Japanese Company, the wharf is no longer "vested" in the Trust within the meaning of

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the Act of 1904, sec. 6 (2). Apart from the Act, it is of course trite law that, if one having an estate in fee simple grant a lease to another person for a term, he in no respect divests himself of any of that estate. Though the estate becomes subject to a term, there is no diminution of that estate; the lease is usually a means of enjoying the estate, of receiving rents therefrom. The possession of the lessee is the possession of the owner of the estate; it supports the possession of the lessor (or, rather, as the lessor has a freehold estate, I should say the "seisin" of the lessor). The usual expression is, as between the lessor and strangers to the estate, that the Trust is in possession by its tenants. If there were need of authority on a subject so elementary, I could refer to *Coke on Littleton*, 15a, *Bushby* v. *Dixon* (1), *Lyell* v. *Kennedy* (2) and other cases. It is clear that apart from Act of Parliament the wharf still remains vested in the Trust for an estate in fee simple in possession, notwithstanding the lease. Then, looking at the Acts of Parliament, there are no words to which we have been referred, or that I can find, tending to qualify the position at common law. On the contrary, in all the references to leases, it is implied that a lease is not inconsistent with the vesting in the Trust. For instance, the same Act that vests the land (sec. 27) says (sec. 29) that no lease or licence in force at the commencement of this Act of or relating "to any Crown land hereby vested in the Commissioners shall be in any manner affected by this Act." The land is vested, and the lease is vested—and there is no conflict. Perhaps I might add that, if application were made to bring land under the *Real Property Act* (sec. 14) "by any person claiming to be the person in whom the fee simple is *vested* in possession," it would be obviously absurd for an objector to attempt to defeat the application by showing that there is an existing lease. In my opinion, *Gordon* J. took the right view of the word "vested" in sec. 6 (2) of the Act of 1904.

2. But berthing charges are invalid if they "affect" the lease (sec. 6 (3)). How does it affect the lease to the Japanese Company if the Trust impose berthing charges on a stranger to the lease? The defendant here was berthed at the wharf, not by assignment or sub-lease or any permit from the Japanese Company; so far as

(1) (1824) 3 B. & C., 298.

(2) (1889) 14 App. Cas., 437, at p. 456.

appears from the case, he was a stranger to the lease. Par. 13 of the case, indeed, states: "The defendant, after action brought by the said lessees of the said wharves, paid to the said several lessees amounts equal to or exceeding the amounts claimed by the plaintiffs in respect of the berthing of his vessel." But the circumstances under which the defendant made that payment do not appear; and such a payment, voluntary or involuntary, does not affect the Trust in enforcing its rights. The question at present is, does the imposing of the berthing charge by the Trust "affect the lease," within the meaning of the Act. The lease is a lease by the Trust to the Japanese Company, including its "permitted assigns," for three years from 1st July 1919, at a yearly rent. The lessee covenants (*inter alia*) not to assign, transfer, sublet or set over to any person without the consent in writing of the Trust first had and obtained. It provides (*inter alia*) that all vessels owned or chartered by the lessee or by firms for which the lessee is sole agent shall be exempt from the payment of tonnage rates and berthing charges whilst berthed at the demised premises (cl. 11); that the Trust and its officers may at all times enter the premises to collect dues and rates, &c. (cl. 12); that the premises shall be used by the lessee solely in connection with the business of the lessee, and the lessee shall not berth or permit to be berthed at the premises any vessels other than those owned or chartered by the lessee or by firms for which the lessee is agent (cl. 15); that the Trust may upon such occasions as they shall require berth any vessel at the premises but not if the premises be required for the berthing of any vessel which the lessee is entitled to berth thereat, provided that "upon any such berthing as aforesaid any tonnage rates payable in respect of the vessel so berthed shall be paid to the said lessee" (cl. 28 (b)); and that the Trust upon giving forty-eight hours' notice to the lessee, may berth such vessels at the premises as may be required for the purpose of loading meat "provided that upon any such berthing as aforesaid any tonnage rates payable in respect of the vessel so berthed shall be paid to the lessee" (cl. 28 (d)). It will be noticed that these latter clauses (b) and (d) refer to tonnage rates only, and tonnage rates are not payable in respect of the small vessels for which berthing charges are payable; but even if berthing charges were omitted by mistake

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from the clauses, it seems plain, from the context and from the nature of the case, that the Trust was to collect the charges and to pay them to the lessee. The lessee is not given power by the Act to demand or to collect either tonnage rates or berthing charges; and there is no privity between the lessee and the owners of the vessel berthed without the lessee's consent. A contract between lessor and lessee cannot impose an obligation on a stranger to pay the lessee.

But, whatever the effect of these clauses in the lease, the regulation imposing berthing charges on certain vessels of which the lessee is neither owner nor agent does not in any way "affect the lease," within the meaning of sec. 6 (3) of the Act of 1904. The rights of the lessee are left untouched by the regulations; and the lease in all its provisions remains unaffected by the regulation and by the collection of charges thereunder. Sub-sec. 6 (3) does not say that nothing in the section shall affect or apply to *land* that is subject to a lease, or wharves that are subject to a lease; it merely means that the section is subject to the rights of lessees, whatever those rights are. There is no exemption of leased wharves as such from the provisions of sec. 6.

I am assuming, in favour of the defendant, that the lease is valid, within the powers of the Trust to grant; and valid in all its provisions. But I desire not to be understood as deciding that the lease is valid, or that the Trust has power to exempt specific wharves from the charge. The point is not necessary to decide for the purpose of doing justice in this case.

In my opinion, the question (as amended) should be answered in the affirmative; and judgment should be entered for the plaintiff for £57 7s. 6d. with costs.

RICH J. I agree that the appeal should be allowed.

The Commissioners granted a lease of what is called the Japanese Company's wharf and entered into an agreement to lease what is called Stewart's wharf. It is sufficient to say that in neither of these instruments is there any provision under which, on proper construction, the respondent's vessel would be exempt from berthing rates. He, however, maintains, and the majority judgment in the Supreme Court of New South Wales agreed with him, that the Trust's

berthing rates do not apply to the wharf where his vessel was berthed, because, being leased, it was no longer " vested " in the Trust. When the legislation is read, it is clear, at all events to me, that Parliament means by " vested " placed in the ownership of the Trust in fee simple, and the fact that a leasehold estate has been carved out of it creating certain rights in the lessee does not destroy the " vesting " in the Trust.

The powers of the Trust are general, and extend over all the property " vested " in it; but by various sections, such as sec. 29 in the Act of 1901 and sec. 6 of the Act of 1904, lessees' rights, whatever they are in fact and law, are protected. That is the only effect of sub-sec. 3 of sec. 6, and apart from that protection sub-secs. 1 and 2 of sec. 6 are unlimited except so far as the language of those subsections limits their operation.

When the lease and the agreement for lease for the Japanese Company's wharf and Stewart's wharf are looked at, they afford no defence to the claim. Mr. *Loxton* did not contend they did, and declined to consider them. But they have to be considered according to sub-sec. 3; and, when they are, they are found to be of no avail for the present purpose.

I, therefore, agree with *Gordon* J., and think the appeal ought to be allowed.

STARKE J. I also agree that this appeal must be allowed. The reasons for this conclusion are sufficiently expressed in the opinion of my brother *Isaacs*.

Appeal allowed. Question answered in affirmative. Judgment to be entered for plaintiffs with costs of action. Appellants to pay costs of appeal.

Solicitor for the appellants, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *Harriott & Solomon*.

B. L.