there defined as "A very light sweet cake made with flour, milk, eggs, and sugar." I think that the goods described by the appellant as "sponge" are covered by the term "cakes."

The appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Hedderwick, Fookes & Alston.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.

[HIGH COURT OF AUSTRALIA.]

KESSELL . . . . . APPELLANT;
NOMINAL DEFENDANT,

AND

LEECH . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Lien on Crop—Landlord and Tenant—Agricultural land—Advances by department of State to lessee—Crown's lien—Undertaking by lessor—Claim for one year's rent—Effect of undertaking—Waiver of statutory rights—Liens on Crops and Wool and Stock Mortgages Act 1898 (*N.S.W.*) (*No.* 7 *of* 1898), *sec.* 6.*

In order to obtain an advance of money from the Department of Agriculture the lessee of certain agricultural land gave to the Minister a preferable lien

* The *Liens on Crops and Wool and Stock Mortgages Act* 1898 (N.S.W.) provides, by sec. 6, as follows: "If the lienor be a leaseholder then the lienee shall, before selling any . . . crop" which is the subject of a lien registered under the Act "pay to the landlord of the land whereon such crop is growing such sum of money not exceeding one year's rent as may be due to him for rent at the time of carrying away such crop, and the lienee may repay himself the sum so paid out of the proceeds of the sale of such crop before paying over the balance to the lienor."

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over crops growing and to grow on certain land leased to him by the owner of the land. An undertaking was given to the Minister by the owner to the effect that he admitted the Minister to a first claim on the lessee's share of the crops grown on the land during the season covered by the lien and that, in the event of his dispossessing the lessee or hindering him from harvesting the crops, he would be responsible for the repayment of the moneys advanced. The crops were harvested and delivered by the lessee to an agent, appointed by the Minister, by whom they were sold and the proceeds remitted to the Minister. After the amount secured by the lien had been deducted therefrom the balance was tendered to the owner of the land, but was refused. At the time of the sale there was owing by the lessee to the owner one year's rent under the lease. The owner claimed payment of the amount of the rent from the Minister under the provisions of sec. 6 of the *Liens on Crops and Wool and Stock Mortgages Act* 1898 (N.S.W.).

Held, by *Dixon*, *Evatt* and *McTiernan* JJ. (*Gavan Duffy* C.J. and *Starke* J. dissenting), that the undertaking was intended to, and did, postpone the statutory right of the owner of the land under sec. 6 of the *Liens on Crops and Wool and Stock Mortgages Act* 1898 in favour of the Minister's right under the preferential lien.

Decision of the Supreme Court of New South Wales (Full Court): *Leech* v. *Kessell*, (1932) 32 S.R. (N.S.W.) 207, reversed.

APPEAL from the Supreme Court of New South Wales.

Certain agricultural land situate near Parkes, New South Wales, was leased by the owner, John Leech, to one Edwin Kersley. On 20th March 1930 Kersley gave a lien on his interest in the crops growing and to grow on such land to the Minister for Agriculture to secure the repayment of advances made and to be made by the Rural Industries Branch of the Department of Agriculture to Kersley, who was in necessitous circumstances.

The lien was registered under the *Liens on Crops and Wool and Stock Mortgages Act* 1898 (N.S.W.), and created a preferential lien in favour of the Minister. During December 1930 and January 1931 Kersley harvested the crop growing on the land, and delivered it to agents named by the Department, who sold the same and paid the proceeds, £277 5s. 6d., to the Department, which recouped itself £265 12s. 10d. due to it in respect of the assistance granted to Kersley, and offered the balance of £11 13s. 8d., to Leech, who refused to accept it. At the time the crop was delivered to the agents, Kersley owed Leech £469 14s., being a year's rent of the land, as reserved in the lease, and Leech claimed that, pursuant to sec. 6

of the *Liens on Crops and Wool and Stock Mortgages Act*, the proceeds of the crop should not have been paid to the Department, that is, to the Minister for Agriculture, under the lien, but should have been paid to Leech in satisfaction, as far as possible, of the rent outstanding. Leech brought an action in the District Court against William James Kessell, as nominal defendant appointed under the provisions of the *Claims against the Government and Crown Suits Act* 1897 (N.S.W.), claiming the sum of £400 and abandoning his claim to the balance of £69 14s. which was in excess of the jurisdiction of the District Court. The Department's answer to the claim was based upon an undertaking which had been given by Leech to it on 4th February 1930, at and about the time the assistance was granted to Kersley. The undertaking, which was on a printed form supplied by the Department, was as follows:—"I, John Leech, of Bondi, owner of the land particulars of which are stated in the application of Mr. Edwin Kersley, do hereby admit the Minister for Agriculture to a first claim on his share of the crops that may be obtained from such land during the 1930-31 season notwithstanding anything to the contrary contained in the lease or share-farming agreement between the parties; and in consideration of assistance rendered him by the Rural Industries Branch; also in consideration of his cultivating and cropping my property should he at any time before 31st January 1931 be dispossessed of the land by me or hindered by me or with my concurrence from fallowing and cropping the said land and harvesting the resultant crop, I hereby promise and agree that I will be responsible for the repayment of and will repay to the said Branch the full amount of the assistance so rendered, and interest."

Facts substantially as set out above were admitted by the parties at the hearing before Judge *Curlewis*. By consent, his Honor, without hearing argument upon the questions arising in the action, entered a verdict for the defendant and granted a stay of proceedings to the plaintiff to permit of the questions being determined upon appeal.

The Full Court of the Supreme Court set aside the verdict of the District Court Judge, and held that Leech was entitled to recover the £400, as his undertaking was limited to conferring on the Minister a first claim on Kersley's share in the crops and did not cut down

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or waive his right under sec. 6 of the Act to recover up to one year's rent: *Leech* v. *Kessell* (1).

From this decision the nominal defendant now appealed to the High Court.

Other material facts appear in the judgments hereunder.

Berne, for the appellant. The undertaking given by the respondent has the effect of excluding by waiver his rights under sec. 6 of the *Liens on Crops and Wool and Stock Mortgages Act*, and subordinates his claim in favour of the lien given to the Minister, which, being preferential, is superior to every other claim (*Attorney-General (N.S.W.)* v. *Hill & Halls Ltd.* (2)). By virtue of the lien the property in the crops became vested in the Crown, and therefore cannot be taken in satisfaction of rent (*Secretary of State for War* v. *Wynne* (3), followed in *Repatriation Commission* v. *Kirkland* (4)). In the cases coming within its scope the Act impliedly abolishes the landlord's right of distress, and gives him instead a specific right only with regard to one year's rent. Although the undertaking was on a form printed for general use, it must be construed as a document between two particular parties, and be given a meaning according to the circumstances between those parties. It is suggested that the words " admit . . . to a first claim " in the undertaking are limited by the words " notwithstanding anything to the contrary contained in the lease," and it is pointed out that the covenant in the lease to pay rent in money is a contrary provision, and such payment in money is the very fact which brings sec. 6 into operation.

Bavin, for the respondent. Apart from the lease the landlord could not have any claim on any part of the crop whatever. The words " notwithstanding anything to the contrary . . . in the lease " limit the effect of the undertaking because the words " first claim on his share of the crops " could only have reference to something arising out of such lease. The undertaking does not refer in any way to sec. 6 of the Act, and, therefore, cannot be taken as waiving the respondent's rights under that section. The respondent

(1) (1932) 32 S.R. (N.S.W.) 207.
(2) (1923) 32 C.L.R. 112.
(3) (1905) 2 K.B. 845.
(4) (1923) 32 C.L.R. 1.

is not asserting a claim against a crop but an action on a simple debt (*Booth* v. *Trail* (1)). In any event the undertaking was not given in respect of the whole of the crop, but only as to Kersley's share therein, and was given for the protection of the Minister's interests should Kersley be dispossessed.

Berne, in reply.

Cur. adv. vult.

Aug. 15.

The following written judgments were delivered :—

GAVAN DUFFY C.J. AND STARKE J. In 1929 Leech, the respondent to this appeal, demised to one Kersley certain conditionally purchased lands in the district of Parkes in the State of New South Wales for the term of two years, at a yearly rental of £469 14s. In 1930 the Rural Industries Branch of the Department of Agriculture of New South Wales granted assistance to Kersley, who was in necessitous circumstances, and took from him, in the name of the Minister for Agriculture, a lien on the crops of wheat and other cereals and hay growing and to grow on the land demised to him by Leech. This lien was registered, and the *Liens on Crops and Wool and Stock Mortgages Act* of 1898 created a preferable lien in favour of the Minister upon such crops, cereals and hay. But the Act (sec. 6) enacted : " If the lienor be a leaseholder then the lienee shall, before selling any such crop, pay to the landlord of the land whereon such crop is growing such sum of money not exceeding one year's rent as may be due to him for rent at the time of carrying away such crop, and the lienee may repay himself the sum so paid out of the proceeds of the sale of such crop before paying over the balance to the lienor." The object of the section is to compensate the landlord for his loss of a remedy by distraint or otherwise for the recovery of his rent. A provision on somewhat similar lines is made in sec. 7 as to interest due to a mortgagee in occupation of the land whereon the crop is growing.

In and about the months of December 1930 and January 1931, Kersley harvested the crop growing on the land, and delivered it to agents, named by the Department, who sold the same, and paid the proceeds (some £277) to the Department, which recouped itself

(1) (1883) 12 Q.B.D. 8.

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Gavan Duffy C.J. Starke J.

£265 due to it in respect of the assistance granted to Kersley, and offered the balance to Leech. But, at the time of the delivery of the crop to the agents named by the Department, Kersley owed Leech £469 14s., a year's rent of the land, and Leech claimed that the Department should, pursuant to the provisions of sec. 6 of the Act, pay him that sum or, to be precise, £400, to which he reduced his claim, to keep, as we were told, within the jurisdiction of the District Court.

The Department's answer to this claim was based upon an undertaking given by Leech to it at the time assistance was granted to Kersley. It was as follows: "I, John Leech, of Bondi, owner of the land particulars of which are stated in the application of Mr. Edwin Kersley, do hereby admit the Minister for Agriculture to a first claim on his share of the crops that may be obtained from such land during the 1930-31 season notwithstanding anything to the contrary contained in the lease or share-farming agreement between the parties; and in consideration of assistance rendered him by the Rural Industries Branch; also in consideration of his cultivating and cropping my property should he at any time before 31st January 1931 be dispossessed of the land by me or hindered by me or with my concurrence from fallowing and cropping the said land and harvesting the resultant crop, I hereby promise and agree that I will be responsible for the repayment of and will repay to the said Branch the full amount of assistance so rendered, and interest." Now the claim to which the Minister is admitted by this undertaking is a first claim on Kersley's share of the crops, which we take to include the proceeds thereof. It contemplates the possibility of Leech having some claim on the crops or their proceeds. Such a claim might arise, as the undertaking suggests, from the provisions of the lease itself, or it might arise from some agreement wholly outside the lease. Thus, the lease or some collateral agreement might give a lien over the crop, and if it were registered a preferable lien might be created. Or the lease might provide for the payment of rent in kind—wheat equivalent in value to the rent—and doubtless other arrangements might be made affecting the delivery, destination or application of the crop. The undertaking is in a common printed form supplied by the Department in any case where the lienor is

a share-farmer or lessee. Its object is to determine any conflict of claims to the crops or their proceeds arising out of agreements or arrangements made by Kersley with regard thereto, and its language points, and points only, we think, to the Minister's priority in competing claims of this character. Distress for rent would not involve any such claim on Kersley's share of the crops, and is, indeed, but a remedy given by the law, without any particular reservation or provision being made by the party; nor does a reliance on the provisions of sec. 6, which is not a mere substitute for the right of distress, but a special and statutory right given to a landlord to protect his rent against the operation of sec. 4, which vests the crop and the possession thereof in the preferable lienee.

In our opinion, the Supreme Court was right, and its decision should be affirmed.

DIXON J. This appeal depends upon the meaning and application of a written undertaking to the Crown given by a landlord when his tenant obtained assistance from the Rural Industries Branch of the Department of Agriculture by way of loan upon the security of a preferable lien over the crops growing upon the leased land.

Sec. 6 of the *Liens on Crops and Wool and Stock Mortgages Act* 1898 makes the following provision: "If the lienor be a leaseholder then the lienee shall, before selling any such crop, pay to the landlord of the land whereon such crop is growing such sum of money not exceeding one year's rent as may be due to him for rent at the time of carrying away such crop, and the lienee may repay himself the sum so paid out of the proceeds of the sale of such crop before paying over the balance to the lienor."

The question is whether the landlord has by the undertaking renounced in favour of the Crown the right or advantage conferred upon him by this provision. The undertaking is in a common form prepared on behalf of the Crown for use when an applicant for assistance is a tenant or a share-farmer. It describes the landlord as the owner of the land mentioned in the application for assistance. The document then states that he thereby admits the Minister for Agriculture to a first claim on the applicant's share of the crops

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that may be obtained from such land during the season, notwithstanding anything to the contrary contained in the lease or share-farming agreement between the parties. It then proceeds to express a promise by the owner in consideration of assistance rendered to the applicant by the Rural Industries Branch and also of the applicant's cultivating and cropping the land that, if before a specified date he should be dispossessed by the owner or hindered from fallowing and cropping the land and harvesting the resultant crop, the owner would repay the Branch the full amount of the assistance rendered.

The rights of a lessor in respect of a crop growing upon the demised land are not the same in every case. His rights vary according to the terms of the lease, but, before the *Landlord and Tenant Amendment (Distress Abolition) Act* 1930, usually upon non-payment of rent a lessor was entitled to distrain upon the crop or to re-enter. Apart from the effect of secs. 5 and 6 of the *Liens on Crops and Wool and Stock Mortgages Act* 1898, these rights would not be substantially affected by the existence of a preferable lien upon a crop given by a tenant to a subject. But the removal and sale of the crop by the lienee would, of course, disable the lessor from levying upon the crop or obtaining any benefit from it upon exercising a power of re-entry. The owner of land held by a share-farmer, a case to which the form of undertaking is meant to apply, would have against the farmer's share of the crop such rights only as the special terms of their agreement conferred upon him. The Crown now claims that the undertaking operates to give a priority to its right as lienee to satisfy the tenant's debt out of the crop. The meaning ascribed to the document is that the Crown's right of recourse to the crop should rank in front of any right, which, otherwise, the landlord might have, to obtain payment of his rent from the same source. The contention then is that the rights given to him by sec. 6 are inconsistent with that priority and must therefore be excluded by the undertaking.

The landlord, on the other hand, interprets the document as doing no more than protecting the Crown's property in the crop and its possession under the preferable lien from defeat or impairment as a result of any exercise by the landlord of his rights whether in virtue of the lease or of his ownership. Upon this interpretation,

the Crown would be bound to conform to sec. 6, because the advantages which it gives to the landlord arise from the position of the Crown as lienee. The obligation to pay up to a year's rent to the landlord before selling the crop is a condition attached to the rights which the lien confers and not a prior right of the landlord existing apart from the lien. Upon this view, the landlord, in requiring payment of twelve months' rent, would not be defeating, impairing or postponing the claim of the Crown as lienee, but would be merely exacting performance of the obligation imposed upon it by or in consequence of the lien.

I have come to the conclusion that the undertaking does operate as a relinquishment by the landlord of the benefit of sec. 6. The concern of the Crown was the repayment of the loan. When the landlord says that he admits the Crown to a first claim on the applicant's share of the crops, he means that his rights as landlord shall be subject to a right of recourse by the Crown to the crop for the satisfaction of its debt. The purpose of the lien given by the tenant is to confer upon the Crown that right of recourse. The purpose of the undertaking given by the landlord is to put that right of recourse before his rights. His rights in respect of the crop are not proprietary. Indeed, when a lien is given to the Crown, his rights are virtually confined to that given under sec. 6 and to re-entry; for the property of the Crown is not liable to distress (*Secretary of State for War* v. *Wynne* (1)).

The second part of the undertaking is directed to preventing or discouraging re-entry, and to throwing the liability of the tenant upon the landlord in case of forfeiture. The first part must relate to the landlord's rights before the determination of the lease. The undertaking is given in contemplation of the giving of a lien by the tenant. When a proposing lienee is admitted by the landlord to a first claim against the crop the postponement of some rival claim or possible claim by the landlord must be the purpose of the concession. No other exists than that given by sec. 6, except the forfeiture of the lease which is dealt with separately by the instrument. It is true that sec. 6 does not entitle the landlord to payment directly out of the proceeds of the crop. But what it

(1) (1905) 2 K.B. 845.

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does is to compel the lienee to pay him as a condition of realizing the security and to enable him to add the payment to the debt secured over the crop. Moreover, the section gives the landlord, while twelve months' rent is unpaid, a right to prevent the exercise of the lienee's power of sale, and thus to make the security less effective. This interpretation may mean that the landlord has not merely deferred, but has completely abandoned, his rights under sec. 6. For it is difficult to see how upon its terms a lienee's rights can be put before those given to the landlord by that provision, unless the landlord's right is extinguished. Perhaps, if the crop proved of sufficient value to produce both rent and Crown debt, an implication might be found in the undertaking requiring the Crown to pay after sale what the section requires it to pay before sale. But, even if there is no such implication, this consideration does no more than suggest that it is unlikely that the landlord intended the instrument to have a result so disadvantageous to him. Speculation upon the likelihood of a contracting party assenting in advance to the consequences which in the result ensue from the contract are seldom an aid to construction. When the question is whether a printed form prepared by the Crown for its protection against some rights of landlords has a wider or narrower application, conjecture is useless upon the direction in which the interests and motives would operate, especially those of a landlord of a necessitous tenant seeking State aid. Applying the language of the instrument to the circumstances upon which it was intended to operate, I think it must be understood as expressing the landlord's renunciation in favour of the Crown of his rights to obtain rent mediately or immediately out of the crop before the Crown's debt was satisfied. This meaning necessarily involves a postponement or relinquishment by the landlord of the benefit of sec. 6 of the *Liens on Crops and Wool and Stock Mortgages Act* 1898.

For these reasons, I am of opinion that the judgment of the majority of the Supreme Court was wrong, and ought to be reversed.

EVATT J. For good consideration, the respondent, as landowner, agreed to repay the Minister for Agriculture the full amount of the assistance granted to his tenant Kersley, if Kersley was " dispossessed

of the land by me or hindered by me or with my concurrence from fallowing and cropping the said land and harvesting the resultant crop." This part of the undertaking was given by way of further protection to the Minister against any action by the landowner which would impair the Minister's real security for the advance made to Kersley—the crop. In this way, very special care was taken to ensure that the crop of Kersley should be cultivated into a saleable condition upon the respondent's land. It would be very curious if the enforcement in ordinary course by the Minister of his security, by actual sale of the crop, were to make the Minister liable to pay to the landowner a sum greatly in excess of the total value of the security.

The main part of the landowner's undertaking admitted the Minister "to a first claim" on Kersley's share of the crop. The undertaking was attached to an application by Kersley whereby he promised to give the Minister "a first (preferential) crop lien over the crops." Kersley's subsequent execution of the crop lien in favour of the Minister was contemplated by the landowner, and it was to improve and perfect the rights of the Minister in relation to such crop lien, that the undertaking was extracted.

By sec. 6 of the Act of 1898, the lienee is not entitled to exercise his right of selling a crop subject to the lien, unless he pays to the landlord the amount of rent due by the lienor "at the time of carrying away" the crop, such sum not to exceed one year's rent. The statute thus creates in the landlord's favour a good claim against a stranger—the lienee—for the amount of his rent. The claim not only springs into existence as and when the lienee is about to enforce his security by sale, but its amount is measurable by the rent due when the crop is removed from the land. I think that the claim of the landlord can fairly be described as a claim "on or over" the crop.

When the respondent admitted the Minister to a "first claim on" Kersley's share of the crop, what he agreed to do was to postpone his own statutory claim under sec. 6 to the security of the Minister, to be embodied in a crop lien. In due course there arose a competition between the two claims. That competition, the special agreement resolves in favour of the Minister and against the landowner.

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The balance of the proceeds of the sale of the crop, after the Minister's advance was satisfied, was tendered, before action brought, to the landowner, but refused.

In the circumstances, the verdict of his Honor Judge *Curlewis* should be restored and the appeal allowed.

McTIERNAN J. The question which arises for decision is whether the undertaking or agreement of the 4th February, upon its true construction, affects the rights conferred on the respondent as landlord by sec. 6 of the *Liens on Crops and Wool and Stock Mortgages Act* 1898 of New South Wales. It is true that the undertaking does not in plain terms refer to the respondent's rights under that section. The question whether it does overreach those rights must be determined by construing the undertaking in the light of all the circumstances surrounding its making. The respondent was, as the undertaking itself says, the owner of certain land of which Edwin Kersley was leaseholder. By the indenture of lease under which he held the land he covenanted to pay rent to the respondent. The undertaking was signed by the respondent pursuant to the direction at the foot of the application. This application is mentioned in the undertaking. It was made by Kersley, the respondent's lessee, to the Rural Industries Branch of the Department of Agriculture, from which he sought assistance for cropping purposes for the season 1930. The direction was in these terms :—" In the case of a share-farmer or lessee the agreement or lease must be forwarded with this application, and the following undertaking signed by the landowner." As appears by the application, assistance was given by the Department to farmers in necessitous circumstances, who were unable to obtain supplies on after-harvest credit. The respondent's lessee applied for assistance as a member of that class. The application referred to in the respondent's undertaking required the applicant to answer questions designed to elicit whether a right existed in any other person which would conflict with the right of the Minister to gather and sell the crop, if it became necessary to do so, in order to obtain payment of the advance (see secs. 5 and 6). Hence the applicant was asked " Are you a share-farmer or lessee; if so give name and address of owner ? " The applicant gave the

name of the respondent as the owner of the land. As the applicant was a necessitous farmer, who was unable to get credit elsewhere, the Department would have to rely upon the efficacy of its security, not the solvency of the applicant, in order to recover any moneys which it advanced. It is quite consistent with the circumstances that the object of the undertaking was to eliminate the possibility of any restriction arising on its right to sell the crop, the outcome of the advance, in the event of default. If the landlord's right under sec. 6 were allowed to stand, the Department might be involved in the loss of the whole or part of the moneys which it advanced to assist the tenant. If the tenant in this case did not receive assistance from the Department, he may not have been able to grow any crops upon which the respondent could distrain for rent. Has the result of the advance been that, despite his undertaking, the landlord obtained the right to recover from the Department rent, to an amount not exceeding that mentioned in sec. 6, and that the moneys recoverable by the Department under its security must be reduced by that amount?

The part of the undertaking, which the appellant contends affects the rights of the landlord under sec. 6, is in these terms: "I, John Leech, of Bondi, owner of the land particulars of which are stated in the application of Mr. Edwin Kersley, do hereby admit the Minister for Agriculture to a first claim on his share of the crops that may be obtained from such land during the 1930-31 season notwithstanding anything to the contrary contained in the lease or share-farming agreement between the parties." The purpose and object of the Minister in requiring that undertaking and of the respondent in giving it, can only be ascertained from the language of the undertaking itself, viewed in the light of the circumstances with reference to which that language was used. In my opinion these words are capable of giving the rights of the Minister under his security, complete priority over the rights of the landlord under sec. 6, and the intention of the parties was that they should have that operation. The undertaking should be construed as a whole. In the latter part of it the intention is clearly expressed that the Minister should not incur the loss of the whole or any part of the moneys advanced to the tenant by the re-entry of the landlord

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and the exercise of his rights under the lease. The tenant, Kersley, was not, at the time the undertaking was given, bound by any agreement under which he was entitled only to a share of the crop. The words "his share of the crop," though prima facie importing a division of the crop, can, in the circumstances of this case, serve merely to describe the crop to be grown by the leaseholder on the respondent's land. If a lienor neglects or refuses to pay off the whole of any advance with interest, which is secured by a crop lien, sec. 5 empowers the lienee to enter into possession of the crop, the subject of the lien, and to gather, carry away and sell it and apply the proceeds in payment of the advance and the expenses mentioned in the section. The balance is to be paid to the lienor. Should the lienor be a leaseholder, sec. 6 provides that before selling the crop, the lienee shall pay to the landlord such sum, not exceeding one year's rent, as may be due to him for rent at the time of carrying away such crop. "By sec. 6 the lien is made 'preferable' even to a landlord's claim, except as to one year's rent" (per *Isaacs* and *Rich* JJ. in *Attorney-General* (*N.S.W.*) v. *Hill & Halls Ltd.* (1)). The words of the undertaking, namely, "admit to a first claim on . . . the crops," were, in my opinion, used to describe the position of absolute priority to which it was intended to admit the Minister in exercising his rights, e.g., sale, against the crop. He would be admitted to a first claim on the crop if he could gather and sell it without being under any obligation, between the gathering and selling of the crop, to pay any rent to the landlord on account of what was due from the leaseholder. The intention of the undertaking was, in my opinion, to admit the lienee to a first claim in that sense. If the obligation to pay rent to the landlord, according to the provisions of sec. 6, stood, the right of the lienee to sell the crop would be fettered by that obligation. The difficulty of relating the words of the undertaking to sec. 6 may have been somewhat diminished if, to the phrase, "notwithstanding anything to the contrary contained in the lease or share-farming agreement between the parties," there had been added "or in sec. 6 of the *Liens on Crops and Wool and Stock Mortgages Act* 1898." But a view of those words is open which seems to assist the contention that the undertaking does relate to

(1) (1923) 32 C.L.R., at p. 129.

sec. 6. The rent, which sec. 6 requires to be paid before the crop is sold, falls due under the lease, entered into between the respondent and the lienor, mentioned in the undertaking. The liability of the tenant under the lease to pay rent is the foundation of the claim which the respondent is making under sec. 6. The effect of the clause is, I think, that the lienee should have the right to sell the crop and satisfy his claim out of it, notwithstanding that rent is payable to the landlord, which, in the absence of the undertaking, would have to be paid by the lienee before he could proceed to the sale of the crop. The result is that the respondent cannot, in face of the undertaking which he has given in this case, enforce his right under sec. 6 as a landlord against the lienee.

The appeal should be allowed with costs, and a verdict entered for the appellant with costs of the proceedings in the Supreme Court.

Appeal allowed with costs in the High Court and in the Supreme Court. Verdict of the District Court restored.

Solicitor for the appellant, *J. E. Clark*, Crown Solicitor for New South Wales.

Solicitor for the respondent, *R. M. Duncan*.

J. B.