[HIGH COURT OF AUSTRALIA.]

WINGADEE SHIRE COUNCIL . . APPELLANTS;
PLAINTIFFS,

AND

MARY WILLIS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 8, 9, 10, 11, 15.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Local Government Act 1906 (*N.S.W.*), (*No.* 56), *sec.* 144—*Crown Lands Act* 1889, (53 *Vict. No.* 21), *sec.* 47—*Rates—Holder of lease or licence from Crown—Person registered as holder—Married woman living with her husband—Right to lease Crown lands—Transfer intended to take effect as security only—Form of rate notice.*

The respondent, a married woman living with her husband, was registered in the books of the Crown Lands Department as the lessee by transfer of Crown lands, the words "by way of mortgage only" being inserted in the register under the respondent's name. In an action against the respondent, as the holder of a lease of Crown lands, to recover municipal rates under sec. 144 of the *Local Government Act* 1906, the defence was set up that under sec. 47 of the *Crown Lands Act* 1889 the respondent could not become the holder of a lease from the Crown.

Held, that "holder" meant "registered holder," and that the respondent, having procured herself to be registered as lessee, could not set up the alleged

*Sec. 144 (1) is as follows:—"The amount of any rate under this Act shall be paid to the Council by the owner of the land in respect of which the rate is levied (including the Crown) except where the land is held under lease or licence from the Crown, in which case the rate shall be so paid by the holder of such lease or licence, and except where land vested in the Chief Commissioner for Railways and Tramways is occupied by a tenant under lease, oral or written, in which case the rate shall be so paid by such tenant.

Sub-sec. (3). Such amount shall be due and payable on the expiration of the time fixed in a notice of such rate served on such owner or holder or tenant or licensee as prescribed, not being less than thirty days after such service.

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invalidity of the lease against the Crown, or the municipal authority, to whom, *pro tanto*, the Crown's right to impose taxation had been delegated by the *Local Government Act*.

Held, also, that the respondent's liability was not affected by the existence of equitable rights as between herself and her transferror.

Semble, per Higgins J.—Sec. 47 of the *Crown Lands Act* 1889 applies only to dealings direct with the Crown, and does not make a married woman incapable of holding a lease by transfer.

A rate notice issued under sec. 144 (3) of the *Local Government Act* 1906, and served on 28th September, stated that at the expiration of thirty days from service the rates would be payable, and added "the day on which such rates will be due and payable will be therefore 28th October."

Held, that the fact that the rates were not payable until 29th October did not render the notice invalid.

Decision of the Supreme Court: *Wingadee Shire Council* v. *Willis*, 9 S.R. (N.S.W.), 492; 26 W.N. (N.S.W.), 95, reversed.

APPEAL by the plaintiffs from the decision of the Supreme Court, upon a new trial motion by which a verdict in the action for the plaintiffs was set aside and a verdict entered for the defendant, upon the ground that the Supreme Court were in error in holding that the defendant was not the holder of a lease or licence from the Crown under sec. 144 (1) of the *Local Government Act* 1906, No. 56.

The action was brought by the appellants to recover rates imposed upon certain improvement leases, of which the respondent was alleged to be the holder under lease or licence from the Crown. The leases in question had been granted by the Crown in 1903 to two persons named Hayes and Rea, who mortgaged them to the respondent. The respondent is a married woman living with her husband, and the moneys advanced by the respondent under the mortgages were part of her separate estate. These leases were subsequently transferred to the respondent as prescribed by form 79 in pursuance of the regulations under the Crown Lands Acts. The transfers were accepted by the respondent and lodged by her with the Department. The respondent was described as Mary Willis, Randwick, in the books of the Lands Department, in which she was registered as lessee of the lands in question, but the words, "by way of

mortgage only," were written in red ink under the respondent's name in the column headed " name of lessee."

At the trial a formal verdict was entered for the plaintiffs with leave reserved to the defendant to move the Court to set the verdict aside.

Upon the new trial motion the Supreme Court held that as the defendant was a married woman living with her husband, she was precluded by sec. 47 of the *Crown Lands Act* of 1889 from being the holder of Crown lands under lease or licence by transfer, and therefore could not be liable for rates under sec. 144 (1) of the *Local Government Act* 1906, No. 56, as the holder of a lease or licence from the Crown, and entered a verdict for the defendant (1).

This contention was also adopted by the respondent on the hearing of this appeal, but as the Court held that it was unnecessary to determine it, the arguments on this point have been omitted.

Piddington and *Pike*, for the appellants. The word " holder " in sec. 144 (1) of 1906, No. 56, means the person recognized by the Crown as holder. A person who has procured himself to be registered as the holder of lands under lease or licence in the books of the Lands Department cannot be heard to say that he is not the holder. The term " holder " is not defined in the interpretation section of the Act as "owner" is, because it had previously acquired the meaning of registered holder. It means holder *de facto*: *Tebbutt* v. *Anderson* (2). The contention of the respondent is that, although a person's name appears in the books of the Crown Lands Department as lessee, it is incumbent upon the Council to make an exhaustive search, as in the case of investigation of title, to see whether the person registered was under any legal disability at the time of his acquisition of the lands or subsequently. Many disabilities could not be discovered by a search, as, for instance, if an applicant had been married in another State. If the lease in this case were invalid, the lands would still be Crown lands. But under the decision in *Osborne* v. *Morgan* (3) the Council could not ignore a lease *de facto* and rate the Crown.

(1) 9 S.R. (N.S.W.), 492; 26 W.N. (N.S.W.), 95.

(2) 1 S.R. (N.S.W.) Eq., 223.

(3) 13 App. Cas., 227, at p. 234.

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[HIGGINS J. referred to *Ayers* v. *South Australian Banking Co.* (1).

ISAACS J. referred to *Assets Co.* v. *Mere Roihi* (2).]

Re Green (3) and *Re Moore* (4) show that in 1906 "holder" was a well known term, meaning registered holder. The entry in the register that the transfer is by way of mortgage only does not affect the legal rights of the transferee. In law he is the absolute owner of the land: *McFadden* v. *Allt* (5).

The transfer is absolute in form: Form 79. All that the local government authorities know is that Mary Willis is registered in the books of the Department. There is no statement that she is married. It is the holder *de facto* who receives the benefit of municipal government. Suppose that the respondent had informed the Council that she was the holder and they had acted upon that statement; she could not then be heard to say it was untrue. Here by her conduct she has represented that Hayes is not the holder, but that she is, and she is now estopped from asserting that she is not liable to be rated.

Harriott and *Pickburn*, for the respondent. The meaning which the word "holder" is alleged to have acquired under the Crown Lands Acts cannot be imported into sec. 144 of the *Local Government Act*. The respondent is not the holder of a lease, because the register shows she is the holder by way of mortgage only. The actual rights of the person sought to be rated, whether legal or equitable, must be considered by the Council. Under sec. 137 the valuer may put questions to any owner or person in occupation or charge of the land upon any matters required to be stated in the valuation. The Council have notice of outstanding equitable rights, and are therefore put upon inquiry.

Further, by sec. 146 the Council must prove that the prescribed notice has been duly given. Sec. 144 (3) provides that the amount of the rate shall be due and payable on the expiration of the time fixed in the notice served, not being less than thirty days after such service. The notice was served on 28th September and stated that the rates would be payable on 28th October: *In re*

(1) L.R. 3 P.C., 548.
(2) (1905) A.C., 176, at p. 202.
(3) 1 L.C.C., 77.
(4) 3 L.C.C., 18.
(5) 4 W.N. (N.S.W.), 174.

Railway Sleepers Supply Co. (1). They were not in fact payable until the 29th October. The valuations were also irregular as each parcel of land was not separately valued as required by sec. 136.

Piddington, in reply.

Cur. adv. vult.

The following judgments were read:—

August 15

GRIFFITH C.J. This was an action brought by the appellants against the respondent for the recovery of municipal rates for the year 1907 in respect of land within the appellants' municipal area. The land in question is Crown land comprised in four improvement leases issued in the year 1903 to two persons named Hayes and Rea respectively, and transferred to the respondent in 1904 by instruments registered at her instance in the Lands Department. The transfers were in form absolute, but were, it is alleged, intended to take effect by way of mortgage only. In February 1907 the leases were by virtue of Act 42 of 1906 converted into perpetual occupation licences. The respondent is a married woman having separate estate and living with her husband.

Sec. 144 of the *Local Government Act* 1906 provides that the amount of any rate under the Act shall be paid to the Council by the owner of the land (including the Crown) except when the land is held under lease or licence from the Crown, in which case it shall be paid by the holder of the lease or licence, and in another excepted case not material to be stated. The appellants' right to recover is resisted on several grounds. First, it is said that when a transfer of a lease is intended to take effect as a security only the transferee does not become the "holder" within the meaning of the *Local Government Act*. Without discussing this objection in detail, it is sufficient to say that the transfer of leases of Crown lands is governed by the regulations, which prescribe a form of transfer, to be executed by the transferror and accepted in writing by the transferee. The transfer must be lodged with the designated officer of the Department (in the case

(1) 29 Ch. D., 204.

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of improvement leases the Under Secretary for Lands). The form of transfer is "I . . . hereby transfer to . . . (the holding in question)." Registers are kept of leases and licences, in which all transfers are recorded.

With regard to some tenures, as to which the consent of the Minister to a transfer is required, provision is made that if the transfer is by way of mortgage a document embodying the whole transaction shall be sent to him, but there is no such provision with regard to improvement leases. It appears, however, to be the practice in the case of transfers by way of mortgage to enter on the register a note to that effect. I cannot doubt that the person to whom a Crown lease is in fact transferred becomes the holder of it as regards the Crown and the public, whatever may be the nature of any collateral agreement between himself and the transferror. The term "holder" is frequently used in the Crown Lands Acts in this sense.

The next objection taken was that the Crown Lands Acts forbid a married woman living with her husband to become the holder of an improvement lease. This was the only point dealt with by the learned Judges in the Full Court, who thought the objection fatal to the plaintiffs' case.

The enactment relied upon in support of it is sec. 47 of the *Crown Land Act* 1889, which first provides that a married woman living apart from her husband under an order for judicial separation may out of moneys belonging to her for her separate use "purchase or lease land conditionally or otherwise," and then proceeds: "Except as aforesaid a married woman shall not be entitled to lease or conditionally purchase Crown lands under the Principal Act or this Act." Then follows a proviso which has been much discussed in the Courts, but to which I need not now particularly refer.

In *Ex parte Luke* (1), approved in *Phillips* v. *Lynch* (2), it was held that, so far as regards the acquisition of land by a married woman by way of conditional purchase, this enactment referred only to acquisition by direct dealing with the Crown, and not to acquisition by transfer from a former holder. The learned Judges of the Supreme Court thought the present case

(1) 1 S.R. (N.S.W.), 322. (2) 5 C.L.R., 12.

distinguishable on the ground that land conditionally purchased is no longer Crown land within the interpretation clause of the Act of 1884, whereas land comprised in an improvement lease is still for certain purposes Crown land. It would seem, however, that the same reasoning which led the Court in *Luke's Case* (1) to the conclusion that the words "not entitled to conditionally purchase Crown lands" mean "not entitled to enter into a direct dealing with the Crown for the acquisition of land not already subject to that tenure" would lead to a similar conclusion with regard to the words "not entitled to lease Crown lands." Again: it is not at all clear to me that the words "shall not be entitled to lease" &c. are equivalent to "shall not be capable of holding a lease" &c., words used in a similar connection in sec. 124 of the Principal Act, or whether they merely deny to a married woman not judicially separated the right to insist upon a grant of a lease or licence. See the observations of the Judicial Committee in *O'Shanassy* v. *Joachim* (2). A further difficulty arises from the words "under the Principal Act or this Act." The tenure of improvement lease was first created by the Act of 1895, which also created two other new tenures called homestead selections and settlement leases. That Act provides (sec. 1) that it is to be read with the previous Acts including that of 1889, and "shall form part of the said Acts." On these words a doubt at once suggests itself whether the disability created by secs. 47 of the Act of 1889, whatever it means, was intended to be made applicable to the new tenures, and the doubt is strengthened when we find that in the case of homestead selections (sec. 14) married women not living apart from their husbands under a decree for judicial separation are expressly disqualified from being applicants, and in the case of settlement leases (sec. 24) only persons "not disqualified by the Crown Lands Acts" may take advantage of the law, while in the case of improvement leases (sec. 26) no disqualification is mentioned. The doubt becomes still stronger when the nature and purpose of an improvement lease are considered.

All these are in my opinion questions of importance, and not free from difficulty, and the inconvenience of deciding them in

(1) 1 S.R. (N.S.W.), 322. (2) 1 App. Cas., 82.

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the absence of any person to represent the Crown is obvious. It is a general rule that the validity of a Crown grant cannot be impeached except at the instance of the Crown, or at any rate in a suit to which the Crown is a party: *Assets Co.* v. *Mere Roihi* (1). See also *Osborne* v. *Morgan* (2). And for reasons which I will proceed to give I think that they cannot be raised in the present action. I therefore refrain from expressing any opinion upon them.

The *Local Government Act*, so far as it authorizes the imposition of rates, operates (as pointed out by this Court in *The Municipal Council of Sydney* v. *The Commonwealth* (3)) as a delegation *pro tanto* of the sovereign right of the State to impose taxation upon its subjects. In my judgment a person sought to be taxed by the delegated authority cannot (apart of course from statutory provision) set up against that authority any fact which he would not be allowed to set up if the claim were made by the delegating authority, *i.e.*, the State itself. And I think that, in a suit brought by the Crown against the respondent to enforce obligations imposed on her as transferee of the leases in question, she would not be allowed to impeach their validity by way of direct defence to the suit. She might, of course, institute a substantive suit to be relieved from those obligations—whether the suit would be successful is another matter.

Again: the scheme of the *Local Government Act* is intended to be a practical scheme, to be put in force by the local authorities in a practical way. They are to deal with things as they find them. If they find a man in possession of land they are not concerned with his title or want of title. So, if they find that a man is registered in the proper government department as the holder of a lease from the Crown, they are not concerned to inquire whether the lease is voidable at the suit of the Crown, or whether the transfer of it to the present holder is voidable at the suit of the Crown or of a subject. Any other view would allow the most fantastic points to be set up as defences to an action for rates, which in most cases are heard before Justices. I think

(1) (1905) A.C., 176, at p. 203. (2) 13 App. Cas., 227.
(3) 1 C.L.R., 208, at p. 230.

that for this purpose "*Is tenens est quem charta demonstrat.*" If the "*charta*," the register, which is the source naturally available to the local authority for acquiring information as to the holders of Crown lands under lease, showed on its face that the apparent holder was not the holder by reason of some positive law forbidding him to be a holder, the case might be different. But in any view of the relevant provisions of the Lands Acts there is nothing to prevent a married woman from being the holder of an improvement lease under some circumstances. The disclosure, therefore, on the register of the fact that the holder is a married woman does not show that she is forbidden to be the holder of the lease.

For these reasons I am of opinion that the respondent cannot be heard to say that as between herself and the appellants she is not the holder of the leases in question.

A further point was taken as to the form of the rate notice served on the respondent. Sec. 144 of the *Local Government Act* provides that the rates shall be due and payable on the expiration of the time fixed in a notice to be served on the owner or holder as prescribed, not being less than 30 days after service. The notice in question, which was served on 28th September 1907, stated that at the expiration of 30 days from service the amount of the rates would be due and payable, and added : "The day on which such rates will be due and payable will therefore be 28th October 1907." This, it is said, was wrong, since they were not payable till the 29th. But even in the days of the strictest rules of special pleading an error in a date laid under a *videlicet* was not fatal, even on special demurrer. See, for instance *Bynner* v. *Russell* (1), where the date mentioned as the due date of a bill of exchange fell on a Sunday. In my opinion the error in the added note (which appears to have been inserted in conformity with a form prescribed by an Ordinance then in force) did not vitiate the preceding part of the notice, which was a sufficient compliance with the Statute.

An objection was also sought to be taken as to the regularity of the valuation, but it did not arise on the pleadings and need not be considered.

(1) 1 Bing., 23.

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For these reasons I think that the appeal must be allowed.

BARTON J. This was an action for rates and interest thereon due to the plaintiff shire for 1907 in respect of improvement lease areas Nos. 1227, 1228, 1279 and 1280. In the declaration the first count claimed against defendant as "the holder under lease from the Crown," the second count claimed against her as "the holder under licence from the Crown." Each of these counts alleged prescribed valuation duly made, rate duly made, and service of prescribed notice of valuation and notice to pay. The third count was for interest on rates due and remaining unpaid for six months. The pleas put in issue (1) that the defendant was the holder under lease as alleged, (2) that she was the holder under licence as alleged, (3) service of the prescribed notices as alleged, and (4) that the rates become due as alleged.

At the trial, after a Crown lands official had given formal evidence for the plaintiff shire, the remaining facts were set out in a writing to which the documents were attached, and which was signed by counsel for each party. Then a formal verdict was entered by consent for the plaintiff shire in the sum claimed, with leave reserved to the defendant to move to enter a verdict for her, to reduce the amount of the verdict, or to enter a nonsuit. The defendant obtained a rule *nisi* in pursuance of the leave reserved and the Full Court of this State made the rule absolute, and a verdict was entered for the defendant. The plaintiff shire now appeals.

It has become unnecessary to make extended reference to the facts. The defendant, now respondent, is a married woman living with her husband, and has separate estate. Improvement leases Nos. 1279 and 1280 were first granted by the Crown under the Crown Lands Acts to one Hayes, who mortgaged them to the respondent, and afterwards, in January 1905, executed a transfer of them to her, which she accepted and lodged with the Department of Lands. In the following March she obtained a foreclosure decree. Leases Nos. 1227 and 1228 were originally granted to one Rea, who mortgaged to the above-mentioned Hayes, who as trustee for the respondent advanced the mortgage moneys out of her separate estate. Hayes afterwards transferred the mortgage

to the respondent. Then, in February 1905, Rea executed a transfer of these two leases to Hayes, who in turn executed a transfer to the respondent. This she accepted and lodged with the Department. These transactions were completed in 1905. In June of that year the respondent applied to be registered in the Department as the absolute owner of Leases Nos. 1279 and 1280. The Department declined to comply with this request. It was at that time refusing to register any transaction with respect to improvement leases that were, as these four leases were, the subject of inquiry by Mr. Justice *Owen* as a Royal Commission. Also the Department declined to register at the respondent's request a transfer by her and Hayes, lodged in January 1906, of the two other leases to the N. Z. and A. Land Co. Under sec. 2 of the *Improvement Leases Cancellation Act*, assented to in December 1906, the Commissioner, Mr. Justice *Owen*, in February 1907, certified that these four, among a number of improvement leases in the hands of various holders, had been granted or had purported to be granted under circumstances evidencing improper acts or serious irregularity, and that such leases should be dealt with under the Act. This certificate having been notified in the *Government Gazette* of 27th February 1907, the leases thereupon became cancelled and forfeited to the Crown under the section mentioned. The same Act, in sec. 3, provides that on the cancellation of the lease "the former lessee" shall become the holder of a preferential occupation licence of the land. At the trial the Crown lands official already mentioned, being the officer in charge of the branch which dealt with improvement leases, produced the office register of such leases containing the registration of those now in question in the name of the respondent. The register contained also the date of the cancellation of the leases, which constituted the former lessee the holder of preferential occupation licences of the land which had become forfeited. Extracts from the valuation and rate book of the appellant shire, and the notices of the valuation and rate for 1907 were also exhibits at the trial.

The Full Court held that the respondent, as a married woman living with her husband, could not become the holder of an improvement lease. The taking of a transfer could not make

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her the holder. This was held to be the effect of sec. 47 of the *Crown Lands Act* 1889. As a consequence, she could not, in the view of their Honors, become by Statute the licensee under sec. 3 of the *Improvement Leases Cancellation Act*, as without having been entitled to hold a lease before the cancellation she could not be "the former lessee" within that section. Hence they thought she could not be liable for the rates. The question whether the respondent could set up in this action that she was not the holder of a lease or a licence was not dealt with by their Honors, and the construction which they placed on sec. 47 of the Act of 1889 rendered it unnecessary to decide any of the further points on which the respondent now relies in denial of liability.

In the case of *Ex parte Luke* (1) the Supreme Court of this State had held that a married woman living with her husband might out of her separate estate buy and hold a conditional purchase originally made by another person. In that instance the land was bought from the sheriff at a sale in the bankruptcy of the conditional purchaser. But the decision extends to any purchase of lands originally conditionally purchased if paid for out of her separate estate by a married woman, even though living with her husband. That decision was arrived at upon the construction of sec. 47 of the *Lands Act* 1889. *Simpson*, A.-C.J., in the case now under review, stated (2) that the decision was based on the principle "that a vested right cannot be taken away from a person unless the intention to do so is clearly expressed" by the Supreme Court. It had been decided in the case of *In re Melvil* (3), which arose before the passing of the Act of 1889, that a married woman could (subject to the performance of the conditions) acquire by transfer and hold a conditional purchase, and in *Luke's Case* (1) the Court deemed the power so to acquire it a vested right, which the language of sec. 47 of the Act of 1889 had not taken away. That section has been fully quoted already. The words immediately in controversy were those of the exception, that "a married woman shall *not be entitled to lease or conditionally purchase* Crown land under the Principal Act or this Act." The provision on which this exception was made was that "any

(1) 1 S.R. (N.S.W.), 322.
(2) 9 S.R. (N.S.W.), 492, at p. 496.
(3) 10 N.S.W. L.R., 286.

married woman who shall, under an order for judicial separation . . . be living apart from her husband, may, out of moneys belonging to her for her separate use, *purchase or lease land*, conditionally or otherwise; and such land shall form part of her separate estate," &c. It was forcibly argued before us that the words "lease or conditionally purchase" in the exception imposed the restriction only on the act of applying to the Crown for a lease or a conditional purchase in the first instance, and that the words in the prior branch, "purchase or lease land, conditionally or otherwise," were of similarly limited import; and further that the first part of the first proviso, following the exception in this singularly involved section, had evidently been inserted for more abundant caution, and not as an exception on the previous exception, and that its terms were not sufficient, of themselves or in connection with the remainder of the section, to enlarge the otherwise plain meaning of the words in the exception itself. It was further argued that the words "shall not be entitled," in the exception, are not words of voidance *per se*, so that even if the exception were held to prohibit a married woman from acquiring an existing lease or conditional purchase by transfer, yet if such an acquisition were made it would at the most be only voidable. It is doubtful if the question so raised between the respondent and the Crown, in an attempt to show the nullity of the title she has forfeited, could be determined in such a controversy as the present.

The judgment under appeal points out that in *Luke's Case* (1) the lands when purchased by the married woman had ceased to be Crown lands, and the transfer therefore did not make or purport to make her the holder of Crown lands, while lands leased from the Crown, even if transferred, remain Crown lands. I do not think the distinction a very effective one, for the exception seems to place the two classes of tenure on the same footing, so that if the words were held to prohibit transfer as well as original dealing with the Crown, the prohibition would extend to the one tenure as well as the other. There is nothing to warrant us in attributing a change of meaning to the legislature in passing from one tenure to the other by the same form of words.

(1) 1 S.R. (N.S.W.), Eq., 322.

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If the matter rested on sec. 47 alone I should find it difficult to adopt the reasoning of their Honors. It is not however necessary to decide at present these and other interesting and somewhat difficult questions raised in the argument under that section; and, indeed, as the Crown has not been represented, it would have been undesirable to determine those questions. But in my opinion the defence fails for reasons independent of the section mentioned. The respondent has so held herself out as the person to be rated that I do not think she can now deny the liability. In *The Municipal Council of Sydney* v. *The Commonwealth* (1), the Chief Justice pointed out, with the concurrence of the other members of this Court, that municipal taxation springs from the sovereign right of the State to tax, and is an exercise of it by delegation to the municipality: that "no other origin for it can be suggested." And my brother *O'Connor* put the matter with great clearness when he said (2):—"The State, being the repository of the whole executive and legislative powers of the community, may create subordinate bodies, such as municipalities, hand over to them the care of local interests, and give them such powers of raising money by rates or taxes as may be necessary for the proper care of these interests. But in all such cases these powers are exercised by the subordinate body as agent of the power that created it. *Field* J., in his judgment in *Meriwether* v. *Garrett* (3), says:—'Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn, at its pleasure.'"

The appellant Council is thus the agent of this State for local government within the Wingadee Shire, and all its powers are such as the State might have exercised directly instead of by this derivative body. It is true that by its legislation the State has made provisions under which those who are aggrieved by the conduct of a shire may assert their legal rights against it and not against the State; but this does not affect the principle under which the State gives the derivative authority its origin and its

(1) 1 C.L.R., 208, at p. 230. (2) 1 C.L.R., 208, at p. 240.
(3) 102 U.S., 472, at p. 511.

powers. If then the respondent has held herself out to the State in one of its governing Departments, such as the Department of Lands, as a person holding land which by legislation of the State is rateable, and rateable in the hands of a holder by the tenure she has so asserted, I do not think she can be heard afterwards in denial of her consequent liability as such a holder under the legislation which gives the subordinate authority of the State power to exact the rate. In enabling a shire to exercise its powers of rating, the legislature has provided that all land, with certain exemptions which are not material here, shall be rateable, whether the property of His Majesty or not: *Local Government Act* (No. 56 of 1906), sec. 131 (1). The rate is to "be made and levied in and for each year, commencing the first day of January": sec. 150, sub-sec. (3). The Statute requires by sec. 144 (1) that "The amount of any rate under this Act shall be paid to the Council by the owner of the land in respect of which the rate is levied (including the Crown) except where the land is held under lease or licence from the Crown, in which case the rate shall be paid by the holder of such lease or licence," &c. Was Mary Willis the "holder of a lease or licence" from the Crown? She has procured herself to be registered as transferee of these leases in the proper book of the Lands Department. I say the proper book because it is, as the entries produceed indeed show, the book which the Department keeps for the registration or record of improvement leases and of transfers thereof: a record without which the Department could not administer the law in this regard. When the regulations prescribe the lodging of transfers, with the local land agent in respect of some tenures, and with the Under Secretary in respect of others, the purpose is clearly to enable the leases and the dealings with the leased lands by way of transfer to be traced by the record of them: see regulations 305 to 320. The last-named regulation implies that transfers regular within its terms will be registered and recognized, and by reg. 321 the Minister is empowered to refuse to admit any transfer to registration unless satisfied of its validity.

The respondent, then, has herself caused the registration of her transfers, and if the transferee is the "holder" within the meaning of the Act, she must be taken to have been the holder

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of the leases when the registration was made, and the holder of licences from the Crown when the leases were cancelled.

It cannot reasonably be contended that the term "holder" does not include subsequent as well as original holders of leases or licences from the Crown. True, the word "lessee" includes an original or derivative lessee and an under-lessee, and any person deriving title under or from a lessee or under-lessee, and therefore sec. 144 might have used the word "lessee" instead of the term "holder of a lease." But the word "lease" includes an original or derivative lease or under-lease or contract or agreement for the same. And though the word "holder" is not defined, the term "holder of a lease" must include the holder of a lease by transfer by force of the interpretation of "lease." It is objected, however, that no one is the "holder" of a lease within the meaning of the *Local Government Act* unless the transfer be absolute in effect as well as in terms; that transfers by way of mortgage are not included; and as the register (so described by the officer who gave evidence) contains a red-ink note in the words "by way of mortgage only" under the entry of the transfer to the respondent, it is said that the shire authorities knew, if they took the register for their guide, that she was the "holder" only to that extent. There is nothing in the Act to show that such a restriction was intended, nor do the Crown Lands Acts or the regulations thereunder support the view. The Lands Acts do not deal, so far as I can discover, with mortgages of improvement leases, and the regulations deal only with transfers of that class of lease, though, like the Acts, they abound with provisions as to mortgages of other classes of holdings. The *Local Government Act* indeed includes within the several meanings it gives to the word "owner" every person who is at law or in equity the owner of any estate or interest in land by way of mortgage, charge or incumbrance. This might justify an argument—even if the Lands Office register of improvement leases is not to be a guide to the rating authority—that the respondent is an "owner" within the definition, and consequently liable to rates under sec. 144. But then the respondent would be, if I may use the term, "out of the frying pan into the fire," because the success

of the argument would only prove her liability under a different designation.

I am clearly of opinion that the words "holder of a lease or licence from the Crown" have been used in the sense in which the Lands Acts have so often used them, namely, that of the holder of the lease or licence either by original application or by transfer, or indeed by operation of law, as in the case of a preferential occupation licence awarded by force of the *Improvement Leases Cancellation Act*. Further, I am of opinion, though not entirely without doubt, that, for the purposes of the *Local Government Act*, a person whose name is entered as that of the holder of a lease or licence in such a register as was produced, kept for the purpose of record in the Lands Department, whether he appears to be the holder by reason of an original application to the Department or by reason of the acceptance of a transfer, is liable to pay the rate if his identity is established (see section 146 (3)), if the assessment and notices are otherwise in order, and if he has himself procured the registration. Whether there are or may be circumstances under which such a person would be entitled to recover the rates paid from a third party we are not called on to determine in such a case as this.

The Statute cannot have intended to impose on these local authorities the duty of searching out titles through all their ramifications. Such a work would land them in a maze of baffling investigation. Especially would this be the case where holdings under the Lands Acts are concerned, if they are not entitled to rely on the records of the nature and sources of their holdings made by the Department at the instance of the holders themselves. It would be absurd that they should be expected to decide for rating purposes questions of nullity or voidance arising between the Crown and the subject.

The point raised by Mr. *Harriott* under sec. 136 of the *Local Government Act*, as to the absence of separate valuations, is disposed of by the fact that it does not arise on the pleadings. There is no issue within which it can be brought.

Finally, there is the point raised under the 4th plea, that the shire did not cause the prescribed notices to be served on the respondent. The notice of valuation and rate states correctly

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enough that the specified amount of the rates will be due and payable "at the expiration of thirty days from service" of the notice. The notice was served on 28th of September as it sets forth. But it goes on to say, "the day on which rates will be due will *therefore* be 28th October 1907." It is argued that this amounts to a notice to pay on 28th October, a date at which thirty days from the date of service had not expired. The material sections are 144 (3) and 146 (1) (*c*). I am clearly of opinion that the evident error in inserting 28th October does not make the notice void. *Utile per inutile non vitiatur.* The mention of the 28th is a mere *videlicet*, heralded by the word "therefore." It is a mere statement of a computation made by the officer, palpably in error, as is demonstrated by the prior part of the notice. It is obvious that a failure to pay on the actual expiration of the thirty days from service cannot be justified on such a ground. The express mention of the time available to the ratepayer governs the notice and counteracts what is plain to any observer as a mere slip in counting the days. It might and would have been another matter if the thirty days had not been specified and the "therefore" had been omitted. The principle is in effect that stated by *Bacon* in his maxim, "*præsentia corporis tollit errorem nonimis.*"

On the whole case then I am of opinion that the appeal must succeed.

ISAACS J. I am also of opinion that this appeal should succeed. The ground of my opinion is that in sec. 144 (1) the words, "lease or licence from the Crown" mean a lease or licence in fact, purporting to be regularly issued in the ordinary course of administration of the Crown Lands Acts. The section does not mean to leave open to challenge on a claim for rates, of possibly trifling amount, and in the absence of the Crown where the lessee is sued, or of the lessee where the Crown is sued, the validity of the exercise of public powers by the Executive.

The *Local Government Act* 1906 casts upon shires and municipalities very important obligations of a plain and practical nature, and at the same time bestows upon them the necessary means

of providing for the discharge of their functions, by granting the power of rating land.

All land, public and private, is made rateable, with certain specified exceptions which do not include any of the land the subject of this appeal. In sec. 131 (3) occurs a phrase of some importance. Rateable Crown land though improved, is nevertheless to be rated on its unimproved value unless "held under lease, licence, or tenancy."

Sec. 132 (2) provides in paragraph (*b*) for the valuation of of a mine on Crown land "held from the Crown under a gold mining, gold dredging, or other mineral or mining lease or licence."

Sub-sec. (3) refers to the valuation of Crown land "held under any other description or lease from the Crown," &c.

A general examination of Parts XVIII. and XIX. headed respectively "Rateable Land," and "Values and Valuations" leads me to the conclusion that, so far as relates to the liability of the land itself, and to the measure of that liability, it is the actual character in fact of the holding that is the determining consideration. I cannot believe that if, for instance, the shire valuator found on Crown land a gold mine being worked, and ascertained that it was being worked under a lease apparently validly issued, he was expected by the legislature before valuing it to investigate the circumstances of the issue, and determine whether the lease was validly granted or not, and then value either under sub-sec. (1) or sub-sec. (2) (*b*) of sec. 132, according to his opinion of the facts and the law. Nor is he expected to scrutinize every ordinary Crown grant of land in fee simple, and determine, no matter what distance of time exists since its date, whether the provisions of the Crown Lands Acts were strictly complied with. Nor, again is it possible to believe, consistently with the reasonable and practicable working of the *Local Government Act*, that the valuator is called upon at his peril to challenge or risk the validity of an apparently regular lease under the Crown Lands Acts, and proceed accordingly to value the land comprised in it either under sub-sec. (1) or sub-sec. (3) of sec. 132

The valuation must be made, and promptly, so as to provide for municipal necessities, and notice of the valuation must be given, so as to allow for appeals if required. Section 135 (5) provides

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that the notice of valuation shall be given in the case of Crown land *held* under lease or licence to the *holder* of such lease or or licence. That must mean, in accordance with the ordinary acceptation of the words and the practical requirements of the situation, to the person who in fact controls the possession and use of the land as the lessee or the licensee under a lease or licence apparently regular.

Mrs. Willis was the transferee from the original lessees, and the Crown accepted and registered her as transferee. Her name thereafter stood recorded as lessee, until by operation of the *Land Act* 1906 and proceedings thereunder the lease was cancelled, and her tenure became by operation of law that of an occupation licensee. So far as appears that tenure has never been terminated; nor except by this defence was it ever challenged.

Learned counsel for the respondent however has argued that the phraseology of sub-sec. (3) of sec. 146 expressly allows this defence, and bears out his interpretation of sec. 144. I think it points the other way. The frame of the statutory provisions so far as material is, liability of the land (sec. 131); valuation according to actualities (secs. 132 and 134); duration of the valuation for three years, subject to possible alteration in certain circumstances (sec. 135), (1), (2), (3) and (4); notice of the valuation to owner or holder of lease or licence, &c.; and right of appeal against valuation (secs. 138, 140); and lastly, recovery of the rate (secs. 144, 149). Sec. 146 requires the Council to prove, in such a case as the present where a defence is raised, three things, (*a*) the amount of the rate, (*b*) notice of valuation, (*c*) notice to pay the rate. These of course involve proof of notice of payment served on the defendant. The defendant is by words of significant import expressly prohibited from raising any question of law or fact except in refutation of the matters which the plaintiff is required to prove, and one other matter, namely, that "he is not the owner, lessee, licensee or tenant, as the case may be, of the land subject to the rate:"

The land is explicitly assumed by that phrase to be "land subject to the rate," in other words, the rate sued for is assumed to be properly claimable in respect of that land, whatever may be the personal responsibility of the particular defendant to pay it.

That assumption could not invariably exist if the respondent's argument were right. If a defendant were sued as original lessee of the Crown, it could not be known whether the land was or was not subject to the rate until the legality of the lease was determined. So if the land were a public park held under a lease or licence, its liability to the rate or its absolute exemption from rateability under sec. 131 (1) (*a*) would be undetermined until the defendant proved he was not the lessee. Consequently, so far from supporting the respondent's view, it appears to me the language of sub-sec. (3) of sec. 146 tells strongly in favour of the opposite construction. The defendant may under its terms prove that at the material time (perhaps the time when notice to pay was served, which it is not necessary to decide now) he had ceased to be owner, lessee or licensee, or that he is not the person named in the lease or licence, or that the tenement in question is not included in the instrument.

But in none of these contentions is there involved the impeachment of the lease under which the defendant purports to hold. Put shortly, the additional matter permitted raises the question of identity. Is the right man before the Court?

That a defendant should rely for his defence on the illegality of the muniment of title which he himself has asked for and obtained is an attitude so singular as to be properly outside the most extreme contemplation of the legislature. The amount claimed in a given case might bring the matter within the jurisdiction of justices, and it cannot reasonably be supposed that Parliament intended the legality of the action of the Governor in Council administering the Crown Lands Acts to be challenged in such an action, probably in the absence of the Crown and possibly to as here in the absence of any one of the class interested in such titles and desirous of supporting them.

The fact that the respondent took the transfer, and the Crown recognized it by way of mortgage, is nothing to the point. That, of course, created an equitable relation between herself and her mortgagors; but that was a personal relation only, which could be terminated by personal dealings between them, quite outside the transfer, and if so terminated her position as lessee would be unfettered by any equity whatever. The collateral change of

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personal relations however would in no wise affect her legal position with respect to the Crown. She would be, thereafter, as she was before, the lessee for the time being, though not the original lessee.

What I have already said indicates why in my view it is both unnecessary and undesirable to express any opinion as to the right of a married woman not judicially separated and living apart from her husband to take up or hold any improvement lease. I have not formed any definite conclusion on the point, and before doing so would desire to hear arguments in a cause properly constituted for that purpose. But certainly the view taken by the Supreme Court ought not to be regarded as settled law.

I think the notice given was substantially accurate. The reference to 28th October was self-explanatory as a mere calculation which, though perhaps one day short of accuracy, did not vitiate the main and mandatory portion of the notice. The mistake was evident, and could safely be ignored and corrected by the recipient. As in the analogous rating cases of *Ormerod* v. *Chadwick* (1) and *R.* v. *Stretfield* (2), in which very similar questions were raised, it is a case of *falsa demonstratio quae non nocet.*

As to the objection that the valuations were not separate I am against it for two reasons: first, because it is not pleaded; and next, because it would not be maintainable in such an action if it were.

HIGGINS J. I concur in the view that the appeal should be allowed. The question is, is the respondent, a married woman, liable for the shire rates of 1907?

Under sec. 144 (1) of the *Local Government Act* 1906, where the land is held under lease or licence from the Crown, the rate is to be paid by the "holder" of the lease or licence.

On 1st January 1907 the respondent, if her coverture did not incapacitate her, was the "lessee" of the land in question, within the meaning of "lessee" as defined in sec. 3; for, as assignee of the improvement lease, she was a "derivative lessee"—

(1) 16 M. & W., 367.

(2) 32 L.J.M.C., 236.

she was a "person deriving title under or from a lessee." In the ordinary vernacular, she was the "holder" of the improvement lease. On 27th February 1907 the lease was forfeited under the *Improvement Leases Cancellation Act* 1896; but thereupon the lessee became the "holder" of a preferential occupation licence of the land, and the land became reserved from sale or lease until the reservation should be revoked by notice in the *Gazette*.

It is urged, however, that the respondent was not the "holder," either of the improvement lease or of the preferential occupation licence, because it appears that, though she executed the transfer as transferee, and appeared in the books of the Lands Department as "lessee," the transfer of the lease to her, though absolute in form, was really by way of mortgage. This seems to me an extraordinary contention. Under the ordinary law, if a lender of money take from the borrower an assignment of the lease as security, the lender becomes the "holder" of the lease. He has the legal title to the lease, and he is even liable for the rent to the landowner while he is assignee. If trustees under the will get the shares of a testator into their name, they are the shareholders, although the beneficial interest belongs to others. If on a sale of land they take promissory notes from the purchaser, or if they take a transfer of any such notes, they are the "holders" of the notes: No doubt, the ordinary meaning of "holder" would yield to a contrary meaning disclosed in the Act; but the Act rather favours, if it does not establish, the ordinary meaning. The words "lessee" and "licensee" are used to represent the same idea as "holder of lease" or "licence" in secs. 145, 146, and see secs. 64, 135 (5). In the *Crown Rents Act* 1890, which deals with the amounts payable as rents and licence fees under the *Crown Lands Act* 1884, the word "holder" means "the person registered in the books of the Department of Lands as the holder of the lease or licence in question." The defendant was so registered, and she was informed of the fact by letter from the Lands Department, 13th January 1905.

But it is next argued that under the Crown Lands Acts the defendant, being a married woman, was incapable of being an assignee of a lease—that her coverture incapacitated her from

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being assignee of a lease. The defendant took two of the leases as security; signed the transfer as transferee; and obtained an order of foreclosure. The other two leases granted to Rea were mortgaged and transferred by him to Hayes (as trustee for the defendant); and were transferred by Hayes to the defendant. But now, for the purpose of avoiding the payment of rates, the defendant insists that the transfers were inoperative—that the leases did not become vested in her. For this contention, reliance is placed on sec. 47 of the *Crown Lands Act* 1889. This is one of the Acts which provide for the management and disposal of the public lands—Crown lands—of New South Wales. It relates —primarily, at all events—to dealings on the part of the Crown with subjects. It provides, in sec. 47, that any married woman who has an order for judicial separation, may, out of any separate property "purchase or lease land, conditionally or otherwise." This clearly refers to dealings direct with the Crown. Then follow these words: "Except as aforesaid a married woman shall not be entitled to lease or conditionally purchase Crown land under the Principal Act (the Act of 1884) or this Act." These words, so far, obviously refer also to dealings direct with the Crown. The proviso which follows certainly lends colour to the argument that the mere holding of a lease was also forbidden; for it says that "nothing herein contained shall disentitle a married woman from holding any purchase or lease which may have devolved upon her under the will or intestacy of any deceased holder." But inasmuch as the whole section is inartificially and clumsily drawn, and the proviso may have been inserted for abundant caution at the instance of persons not confident as to the effect of the previous words in Courts of law, it cannot be said to be a *necessary* inference that the words "not be entitled to lease" (from the Crown) meant also "not be entitled to take a transfer of a lease" (from other persons). We cannot interpret by conjecture. We cannot add to the meaning of words which are clear merely because of a proviso which seems to be a redundancy. In *Ex parte Luke* (1) it was held by the Supreme Court of New South Wales that a married woman could take a transfer of a conditional purchase notwithstanding sec. 47; and

(1) 1 S.R. (N.S.W.), 322.

this construction was adopted by this Court in *Phillips* v. *Lynch* (1).

I shall add that the use of the word "entitled" in this section, and the reference to "Crown lands," and the expression "under the Principal Act or this Act," strongly indicate the intention to confine the prohibition to direct dealings with the Crown. Other persons are "entitled" to apply for a lease to the Crown's officers, and to get the lease on compliance with conditions; but a married woman is not. Then what happens if by some oversight or fraud a married woman should purchase or lease Crown land? It by no means follows that she—or her transferees—take no title for any purpose (see *e.g. Ayers* v. *South Australian Banking Co.* (2). The arguments for the respondent assume that the words "not be entitled to lease" are equivalent to "incapable of leasing"—as if the married woman were a door or a dog. Such is not the meaning. When the legislature intends such a result, it has expressed it; as in sec. 23 of the *Crown lands Amendment Act* 1905. There, no married woman can acquire by transfer or otherwise a conditional purchase &c. under that Act; and no transfer or assignment in contravention of these provisions "shall be valid for any purpose whatever." This section seems, indeed, to treat *Ex parte Luke* (3) as established law (and see sec. 17 *Crown Lands Amendment Act* 1903).

I need not now discuss the difficult question whether the words in sec. 47—"under the Principal Act or this Act"—apply to improvement leases granted under the subsequent Act of 1895, by virtue of the incorporating sec. 1 (*c*) of that Act.

As for the point that the amount of the rates is not due because the notice did not fix a day for payment more than 30 days after service, I am of opinion that the notice did err in saying "The day on which such rates will be due will therefore be the 28th October 1907." For the notice was served on the 28th September; and the rate did not become due under the Act until the 29th October, after 30 days from the day of service (sec. 144 (3)). But the notice said truly that "on the expiration of 30 days from service of this notice" the amount will be due;

(1) 5 C.L.R., 12.

(2) L.R. 3 P.C., 548.

(3) 1 S.R. (N.S.W.), 322.

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and the statement as to the 28th October was a mere *videlicet*; and even if the *videlicet* is wrong, the statement is right. The prescribed notice has been duly given to pay—the notice in the form and with the particulars prescribed (see sec. 146 (1)). Errors such as this are not fatal to the rights of the Council. The maxims *utile per inutile non vitiatur, falsa demonstratio non nocet, quicquid demonstratae rei additur satis demonstratae frustra est* (see *Broom's Legal Maxims*, 7th ed., pp. 468, 470, 471), all seem to apply. The error is such as the ratepayer could detect by an examination of the Act, or of the notice itself. Probably, if an action had been brought on 28th October, the plaintiff could not have shown that any rate was due on that date; but in this case the writ was issued on 30th July 1908.

Appeal allowed.

Solicitor, for appellants, *J. D. Y. Button*, Coonamble; by *Ellis & Button.*

Solicitors, for respondent, *Wilson & Harriott.*

[HIGH COURT OF AUSTRALIA.]

HENRY CHARLES SMITH . . . . APPELLANT;
DEFENDANT,

AND

THE PERPETUAL TRUSTEE CO. LTD. AND ALFRED HENRY DELOHERY . . } RESPONDENTS.
PLAINTIFFS,

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SYDNEY, *August* 22, 23, 25.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Will—Forfeiture clause—Equitable assignment—Direction to trustees to pay future income to creditor—Power of attorney given to creditor—Assignment for benefit