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determination contemplated in sub-sec. 5 of sec. 183, but in the present case we are not called upon to determine them.

In my opinion, it is not the law that all prohibition of user is unlawful in respect of unlicensed premises, and therefore the second point also fails, and the appeal should be dismissed.

RICH J. I agree that the majority of the Supreme Court were right in discharging the order *nisi*, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Atthow & McGregor.*

Solicitors for the respondent, *Chambers, McNab & McNab.*

[HIGH COURT OF AUSTRALIA.]

Appl *Project Blue Sky Inc* v *Australian Broadcasting Authority* (1998) 153 ALR 490

Appl *Project Blue Sky Inc* v *Australian Broadcasting Authority* (1998) 153 ALR 490

THE MINISTER FOR LANDS (NEW SOUTH WALES) . . . . . APPELLANT;

AND

JEREMIAS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 23, 24: *Sept.* 3.

Barton, Isaacs and Rich JJ.

Crown Lands—Conditional purchase—Mortgage—Condition of residence—Performance by mortgagee—"Holder"—Crown Lands Consolidation Act 1913 *(N.S.W.)* (*No.* 7 *of* 1913), *secs.* 5, 47, 181, 272.*

* Sec. 47 (1) of the *Crown Lands Consolidation Act* 1913 (N.S.W.) provides that "The holder of a conditional purchase or conditional lease shall hold the same subject to a condition of residence for a term which . . . shall expire ten years after the date of the application therefor, and residence shall commence within three months after the confirmation of the application: Provided always that—(*a*) where the conditional purchase or conditional lease has been transferred *bonâ fide* by way of mortgage, the condition of residence may be performed by the owner subject to such mortgage—and (*b*) where the beneficial owner of a conditional purchase or conditional lease dies or becomes of unsound mind, the performance of the condition of residence shall be waived until the conditional purchase or lease has been

A mortgagee of an original conditional purchase to whom the holding has been transferred by way of mortgage pursuant to sec. 272 of the *Crown Lands Consolidation Act* 1913 is not a "holder" within the meaning of sec. 47, and, having entered into possession under the mortgage, is not required to perform the condition of residence.

Decision of the Supreme Court of New South Wales: *Minister for Lands* v. *Jeremias*, 17 S.R. (N.S.W.), 127, affirmed.

APPEAL from the Supreme Court of New South Wales.

The Land Appeal Court pursuant to sec. 22 (5) of the *Crown Lands Consolidation Act* 1913 stated the following case for the decision of the Supreme Court:—

1. On 16th February 1909 John Frederick Fuller, being then the holder of a special lease, applied to convert the same into an original conditional purchase, and the said application was duly granted on 21st December 1909, the conditional purchase being numbered as 1909/4, Gundagai.

2. On 5th September 1911 the said John Frederick Fuller mortgaged his said conditional purchase, 1909/4, to the respondent William Jeremias, to whom such conditional purchase was on 18th

transferred or conveyed and no longer." Sec. 181 provides that "Save as otherwise in this Act provided, the conditions attaching to conditional purchases . . . as set forth in this Act, shall bind not only the persons who in the first instance applied for the same, but also all persons deriving title through or under them and all persons upon whom title shall devolve or be cast by operation of law." Sec. 272 provides that "(1) Holdings of the kinds hereunder specified, that is to say—(*a*) original conditional purchases— . . . shall . . . not be transferable except by way of mortgage only—to" certain persons. "(2) Application for permission to transfer by way of . . . mortgage . . . any such holding as is hereinbefore mentioned shall be made to the Minister . . . and such transfer shall not be effected, or if effected shall not be valid, unless the Minister's consent thereto has been obtained . . . (3) If any such holding as aforesaid is mortgaged and the mortgagee enters into possession of the same under his mortgage, he may hold the same for a period of three years after the date of his entering into possession as aforesaid, or for such further period as the Minister may permit. But the mortgagee shall not, notwithstanding the terms of his mortgage, so enter into possession of the mortgaged land more than once, except by permission of the Minister. Such mortgagee shall not foreclose the mortgage except with the consent of the Minister. . . . Such mortgagee shall not transfer the land except in accordance with this section. If within such period the mortgagee does not obtain the certificate of the Minister to a foreclosure, or does not transfer the holding in accordance with this section, the same shall be liable to forfeiture, and on notification by the Minister in the *Gazette* may be forfeited, and thereupon shall revert to the Crown. A foreclosure or transfer in contravention of this section shall be void. The fact that the mortgagee or some person by his authority occupies or uses any part of the mortgaged land shall be *primâ facie* evidence that the mortgagee has entered into possession of the land under the mortgage."

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September 1914 transferred by the said John Frederick Fuller by way of mortgage with the consent of the Minister for Lands.

3. In or about the month of April 1915 the said John Frederick Fuller ceased to perform the condition of residence in respect of the said conditional purchase, and at about the same time the respondent entered into possession of the same under his mortgage, and since the respondent so entered into possession no residence condition has been performed in respect of the said conditional purchase.

4. On 11th October 1916 the local Land Board held an inquiry as to the fulfilment of the conditions in respect of conditional purchase 1909/4, and, without giving any decision on the matter, referred to the Land Appeal Court the question whether the residence condition attached to the said conditional purchase was either suspended or waived absolutely during the period the mortgagee remained in possession under sec. 272 (3) of the *Crown Lands Consolidation Act* 1913.

5. The Land Appeal Court heard the said reference, and on 14th November 1916 decided that residence by the mortgagee during the period allowed by sec. 272 (3) of the aforesaid Act was not suspended, but waived, and that the original term of residence attaching to the conditional purchase was not extended.

The questions for the decision of the Supreme Court were as follows:—

(1) Whether the performance of the condition of residence attaching to the aforesaid original conditional purchase is waived during the period the mortgagee is in possession and holding the same under the provisions of sec. 272 (3) of the *Crown Lands Consolidation Act* 1913.

(2) If the performance of the condition of residence attaching to the aforesaid original conditional purchase is not waived, is it suspended during the period the mortgagee is in possession and holding the same under the provisions of sec. 272 (3) of the *Crown Lands Consolidation Act* 1913?

The Full Court answered the first question as follows: "The mortgagee while in possession and holding the aforesaid original conditional purchase under the provisions of sec. 272 (3) of the

Crown Lands Consolidation Act 1913 is not required to fulfil the condition of residence in respect thereof." They further held that it was unnecessary to answer the second question: *Minister for Lands* v. *Jeremias* (1).

From that decision the Minister for Lands now, by special leave, appealed to the High Court.

The nature of the arguments appears in the judgments hereunder.

Knox K.C. (with him *Pike*), for the appellant.

Abrahams, for the respondent.

During argument reference was made to *McFadden* v. *Allt* (2); *Hayward* v. *Smith* (3); *Bull* v. *Attorney-General for New South Wales* (4); *In re Lewis* (5); *In re Watson* (6); *In re Jeremias* (7); *Wingadee Shire Council* v. *Willis* (8).

Cur. adv. vult.

Sept. 3.

The following judgments were read :—

BARTON J. The holder of a special lease, Fuller by name, applied to convert it into an original conditional purchase. His application was granted in 1909. In 1911 he mortgaged this conditional purchase to the respondent, to whom it was, with the consent of the Minister, transferred by way of mortgage in 1914. About April 1915 the respondent entered into possession under his mortgage. Since then no residence condition has been performed on the conditional purchase. The local Land Board held an inquiry in 1916 as to the fulfilment of the conditions. They decided nothing, but referred to the Land Appeal Court the question whether the residence condition was either suspended or waived during the mortgagee's possession, which appears to continue. The Land Appeal Court, later in 1916, decided that residence by the mortgagee during the three years mentioned in sec. 272 (3) of the Act was not suspended,

(1) 17 S.R. (N.S.W.), 127.
(2) 4 N.S.W.W.N., 174.
(3) 9 N.S.W.L.R. (Eq.), 11.
(4) (1916) 2 A.C., 564.
(5) 13 N.S.W.L.R., 225.
(6) 1 L.C.C. (N.S.W.), 150.
(7) 26 L.C.C. (N.S.W.), 322.
(8) 11 C.L.R., 123, at p. 128.

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but waived, and that the original term of residence attaching to the conditional purchase had not been extended.

Under sec. 22 (5) of the Consolidated Act the Land Appeal Court stated these facts by way of special case for the decision of the Supreme Court on the questions (1) whether the performance of the residence condition is waived while the mortgagee is in possession under the provision mentioned; and (2) whether the performance of the condition, if not waived, is suspended during that possession. The Supreme Court answered the first question thus: "The mortgagee is not required to reside while he is in possession," and of course did not answer the second question. The present appeal is from that answer.

The Act of 1913 purports merely to consolidate the provisions of the previous Crown Lands Acts, and makes no attempt to remedy defects in the previous legislation on the subject, however obvious. Like its predecessors, therefore, it makes no express provision either enforcing residence upon the mortgagee, or relieving him of the necessity of residence. The right to mortgage was affirmed by the Supreme Court in the case of *Hayward* v. *Smith* (1), which case decided that a *bonâ fide* mortgage by a conditional purchaser during his performance of the condition of residence is a valid security. Of course, if it had been entered into "with the intent or having the effect of enabling any person other than the applicant to acquire by purchase or otherwise the land applied for," it would have been illegal and void (Act of 1884, sec. 121). The right of mortgage, when exercised *bonâ fide*, has not since been challenged, but it has been hedged round by many provisions, which are now to be found in sec. 272 of the Act of 1913. Thirty years have elapsed since the decision of *Hayward* v. *Smith*, and, of course, large numbers of mortgages have since been entered into by conditional purchasers and other classes of holders of Crown lands. It is common knowledge that very many persons and corporations have had a number of such securities running at the same time. Personal residence by the mortgagee on more than one mortgaged property at the same time is obviously out of the question, and if the mortgagee were obliged by law to reside on one of them, leaving the other or others without

(1) 9 N.S.W.L.R. (Eq.), 11.

such residence, the result would be liability to wholesale forfeiture. The present case thus becomes one of extreme moment, not only because of such liability if sustained by the Courts, but because of the very great difficulty which would in consequence be placed in the way of settlers who desire to obtain monetary assistance for the performance of their conditions and the acquisition of final title to their lands.

The liability to residence asserted by the appellant, or the absence of such liability, can only be established by inference from the provisions of the Consolidated Act.

Sec. 5 defines many terms used in the Act, "unless the context necessarily requires a different meaning." Under it "'reside and residence' mean a residing by the person referred to in the context continuously and *bonâ fide* on the land or in the place indicated by the context as his usual home, *without any other habitual residence.*"

Turning to Part IV., we find the term "holder," in the proviso to sec. 38 applied to the person, obviously at that stage neither a mortgagor nor a mortgagee, taking up a conditional purchase and conditional lease, who is allowed, subject to certain provisions, to convert all or part of his conditional lease into an additional conditional purchase or purchases. The word "holder," however, is not defined in the Act. But a person may be the holder without being the applicant, as sec. 41 (2) and (3) show. When we come to sec. 44, which prescribes methods by which original and additional conditional purchases and conditional leases may be acquired from the Crown, we find in sub-sec. 4 a proviso relating to applications for additional conditional purchases and conditional leases by original conditional purchasers or their transferees, apt words to distinguish "the owner subject to mortgage" and a transferee who "holds by way of mortgage," neither of whom is in this section called the "holder." Such an application may be registered in the name of the "transferee" "subject to the conditions of the additional conditional purchase or conditional lease being performed by the aforesaid owner." Now, an additional conditional purchase is held with the original, and with it is subject to the condition of residence, as also is a conditional lease (see sec. 47 (1)). If, then, the conditions in respect of the lands the subject of an application under sec. 44 (4) must be performed by

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"the aforesaid owner," meaning the owner subject to the mortgage, it seems difficult to suppose, in face of this provision, that the Act, without express requirement, subjects the transferee by way of mortgage also to the conditions. Sub-sec. 5 of the same sec. 44 allows an officer of a corporation or company or member of a partnership to make, on behalf of the corporation, company or firm, application for an additional conditional purchase or conditional lease or any prescribed declaration in respect thereof, where the conditional purchase is held "absolutely" by the corporation, &c. But there is no trace of similar liberty where the body or firm holds by way of mortgage, except under the terms of sub-sec. 4, which exacts the performance of the conditions by the owner who holds subject to mortgage.

Again, sec. 167 throws some light on the question. It provides for appraisement, on application, of conditionally purchased, conditionally leased, or homestead selection lands, and in sub-sec. 3, after provisions as to what the application shall comprise, and subject to certain exceptions, the method of making the application is laid down. It is to be made (*a*) in the prescribed form by "the holder of the land," and (*b*) if the land is subject to mortgage "the consent of the mortgagee in the prescribed form shall accompany the application." There is here another clear distinction between holder and mortgagee, and sec. 183 (1) gives certain rights of conversion to the holder and the owner, subject to mortgage, of a homestead selection, but in its first proviso shows that the Act distinguishes the mortgagee from the first as well as the second of them.

There are other sections of the Act in which like distinctions are drawn, as, for instance, secs. 184 (1) and par. (*e*) thereof, and 194 (2) and (3).

Coming to sec. 47, which was the subject of much argument, it is argued by the appellant that the term "holder" in sub-sec. 1 includes the mortgagee. I find myself unable to accede to that contention. Having regard to the distinctions drawn elsewhere in the Act, of which I have given some examples, I cannot think that the "holder" in this section, who is to perform the condition of residence, is other than the applicant or his absolute transferee, or, in other

words, the beneficial owner. That impression is strengthened not only by the words but by the whole tenor of sec. 51, which surely does not mean that a mortgagee is to be "the holder" so as to be liable to pay the instalments of purchase money, and may continue to pay them for many years after the date fixed for the repayment of his loan, and sec. 178 (1), which in its entirety is incompatible with the notion that the mortgagee is the person subject to the condition of residence. There too "the holder" can scarcely be a mortgagee. Stress was laid on proviso (*a*) to sub-sec. 1 of sec. 47. I do not think that this sub-section in any way has the effect of altering, for it would be altering, the meaning of the word "holder" and of including in it the mortgagee. Sometimes in this Act the mortgagee is said to "hold by way of mortgage," but I do not think he is anywhere called "the holder" *simpliciter*, unless Mr. *Knox* is right in saying that this section so calls him. Proviso (*a*) gives liberty to the mortgagor to continue residence, but that I think, as will presently appear, applies only where the mortgagee has not exercised the right of possession upon default. And proviso (*b*) of the same sub-section, in prescribing waiver of the condition of residence, in case of death or unsoundness of mind, until the conditional purchase or lease has been transferred or conveyed, applies this concession to the "beneficial owner." In so doing, the exception which it makes cannot, in my opinion, be read as an exception upon the liability to reside on the part of the mortgagee supposed to be raised by the body of sub-sec. 1; indeed, the use of the term "beneficial owner" makes it in my view impossible so to read it. On the contrary it goes to exclude the idea that the liability excepted upon is the liability of the mortgagee.

Another section which was the subject of very full argument is 272. It provides that (*inter alia*) original conditional purchases, applied for, as this was, since the 1st February 1909, shall not be transferable, except by way of mortgage, to certain persons. The second sub-section prescribes that certain applications to transfer such a holding, including applications to transfer by way of mortgage, shall be made to the Minister, whose consent is necessary to their validity. By the third sub-section, if the holding is mortgaged and the mortgagee enters into possession, he may hold it for three years or longer if the

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Minister permits. He is not to transfer the land except in accordance with this section. The sub-section goes on to say that if within the three years the mortgagee "does not obtain the certificate of the Minister to a foreclosure, or does not transfer the holding in accordance with this section, the same shall be liable to forfeiture, and on notification . . . may be forfeited, and thereupon shall revert to the Crown." Foreclosures or transfers in contravention of the section are made void. The sub-section further provides that the fact that the mortgagee or some person by his authority occupies or uses any part of the mortgaged land shall be *primâ facie* evidence that the mortgagee has entered into possession of the land under the mortgagee.

I do not find in sec. 272 as so far quoted, or in any other part of it, any provision which makes it necessary for the mortgagee to perform the condition of residence. Clearly he is permitted to enter into possession where so allowed by the terms of his mortgage, which would in general mean on default; but not otherwise. I do not think he is made the "holder" so as to be subject to the residence condition. It is true that when he lawfully enters his possession is exclusive, for this law, restrictive though it is, does not take away from him that part of a mortgagee's rights so long as it allows the possession to subsist. His entry into possession may be inferred from occupation by himself or his agent of any part of the mortgaged land, but that cannot be said to impose the condition upon him. But it does tend to show that he is not compelled to reside personally during his possession. He may continue his possession for three years, or, if the Minister allows, longer, for the protection or realization of his security. If he does not obtain a foreclosure certificate or does not transfer during his lawful possession, liability to forfeiture ensues. The Crown is, of course, not obliged to forfeit, and it may be that the Crown may permit the beneficial owner to complete his residence. We are not asked to pronounce as to that.

I do not think that sec. 181 carries the Minister's contention any further. The condition runs with the land, and its beneficial ownership.

There are other sections to which reference might be made as argumentatively strengthening the contention of the respondent,

but I rest content with indications which seem to me to suffice.

In my opinion the judgment of the Supreme Court is correct, and this appeal ought to be dismissed.

ISAACS J. The question is whether a registered mortgagee of a conditional purchase is bound to reside personally on the holding, unless the mortgagor consents to do so. "Residence" is defined in sec. 5 of the Act as a residing continuously and *bonâ fide* on the land by the person referred to as his usual home without any other habitual residence. No doubt, in most cases the mortgagor would do so, if alive and sane, until the mortgagee entered into possession, but the law is the same from the moment the mortgage is registered. The argument is that from that moment the mortgagee is the "holder" of the conditional purchase within the meaning of the Act, and that he is thenceforth bound to leave his then home definitely to go to personally reside on the holding, but that for his relief — the mortgagee's relief, and not for the sake of the settler to whom the holding was granted—the mortgagee may, if he can, vicariously perform his obligation of residence to the State by persuading the mortgagor to live there. If this be the correct view of the law, then a corporation mortgagee is liable to the same obligation, which is an absurdity; and further, since no man can personally reside on two holdings at the same time, no person can be mortgagee of more than one holding at a time; and in any case it would mean that a mortgagee whose normal business is not that of personally developing the land is supposed to abandon his business and his home, wherever that may be—Sydney, perhaps,—and take up his abode on the yet incompletely developed holding in the interior of the State, and perform whatever fencing and other improvement conditions remain unperformed. Unless the qualifications for a mortgagee are in fact as well as in law to be regarded as the same as the qualifications of a competent settler, it would also mean that the Legislature was careless who obtained the land so long as he had sufficient means to become a secured creditor of the approved settler.

This is so astonishing a result, so disastrous to all concerned, so opposed to the whole tradition of the Land Acts of New South

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Wales (see *In re Lewis* (1)), that before I can accept it as the will of Parliament a very careful scrutiny of their language must convince me of its accuracy. I must confess that to my mind the unanimous opinions of the learned Judges of the Supreme Court are correct. To their general reasoning it is difficult to add. Out of respect to the earnest argument addressed to the Court by Mr. *Knox*, I shall add some further considerations of detail founded on a close examination of the Statute which seem to me to place the matter beyond reasonable doubt.

There is no statutory definition of the word "holder." It is constantly used by the Legislature throughout the Statute, and therefore it is obeying the very first principle of construction to read the whole instrument before pronouncing upon the interpretation of any single section, and still more of any single word in that section. See per Lord *Herschell* in *Colquhoun* v. *Brooks* (2) and per Lord *Haldane* L.C. in *Toronto Suburban Railway Co.* v. *Toronto Corporation* (3). In the latter case it is said: "The document to be construed must be read as a whole, and in interpreting particular words these cannot be read without reference to what comes before and after."

It may be found, on examination, that a uniform meaning is attached to the word, or a varied sense in different places, or an exceptional sense given to it in the place under consideration. The word "holder" used with reference to a conditional purchase means primarily the person whose application for a conditional purchase has been confirmed under sec. 45. But by sec. 154 the application must be made by the applicant "in order that he may hold and use the land for his own exclusive benefit." There is no section which declares that henceforth he is to be styled the "holder," but, so long as there is no mortgage registered, he is spoken of as the "holder"—for instance, in sec. 38 and sec. 41. There may be a transfer by "way of mortgage" (sec. 272 (2)). And in that case the Act refers to the mortgagor either as the "holder" or the "owner (subject to the mortgage)." The mortgagee—except in one section so far as I have observed, viz., sec. 339, a very special

(1) 9 N.S.W.W.N., 44, at p. 45.
(2) 14 App. Cas., 493, at p. 506.
(3) (1915) A.C., 590, at p. 597.

section and not involving a residence condition—is always spoken of either as "mortgagee" or "transferee." The mortgagor is always recognized as the "owner," though "subject to the mortgage." And subject to the mortgagee's rights, it is the "owner" on whom are conferred the rights and privileges and are imposed the responsibilities in connection with the holding. Sec. 44 (4) is a striking instance. Sec. 47 declares that the "holder" shall subject to sec. 178 hold the conditional purchase under a condition of ten years' residence. Whose residence? The Crown contends that in case of a registered mortgage it is the mortgagee's personal residence. But *ex facie* it is to be subject to sec. 178. That section itself is informative. It speaks of "the holder" and "the owner (subject to mortgage)," and makes provision for a suspension or remission of the residence condition in case of his sickness, or the sickness of his family, other adverse circumstances, &c. Similar suspension of fencing or improvement conditions may be made. See the expression "holder or his family" towards the end of sub-sec. 2, which must include the mortgagor. But is it possible that "holder" in that section means or even includes a mortgagee? The very fact that "owner (subject to mortgage)" is inserted shows that a mortgagee is outside the section, though his existence is recognized. And it demonstrates what is a very important fact in this connection, namely, that the residence of the "owner (subject to mortgage)" is a primary liability and not vicarious for the mortgagee. It would be the very height of nonsense to permit a mortgagor to perform the mortgagee's condition of residence in a neighbouring village or town for the purpose of educating the mortgagor's children. This section, being expressly introduced into sub-sec. 1 of sec. 47 as an exception to the condition of residence affecting the "holder" prescribed by that sub-section, casts direct light on its meaning and shows that the appellant's argument as to par. (*a*) of the sub-section is not well founded. That sub-section says that where the conditional purchase is transferred *bonâ fide*, by way of mortgage, the condition of residence may be performed by the "owner subject to such mortgage." That is the provision which is afterwards dealt with by sec. 178. It appears to me to mean that though he has ceased to be the "holder" in the sense that he holds the legal

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title absolutely, that is, beneficially, the condition will be well performed if he as beneficial, that is, real owner does it. And sec. 178 provides for its possible suspension while he is "owner (subject to mortgage)" just as if he remained "holder." But it does not mean that the transferee by way of mortgage is holder in the sense of "holder absolutely," on whom normally the obligation of residence rests. Par. (*b*) says that "where the beneficial owner" dies or becomes of unsound mind, the performance of the residence condition "shall be waived" until the conditional purchase is transferred, and no longer. "Beneficial owner" clearly means the true "owner," whether the holding is mortgaged or not. Again, this paragraph is inconsistent with the obligation of residence being placed on the mortgagee. Sec. 179 is extremely strong in support of this view. "Holder" there perhaps more directly than elsewhere in the Act means the absolute owner of an unmortgaged holding, while "if the same has been transferred by way of mortgage," the same person is called the "owner thereof subject to such mortgage."

Sec. 181 was strongly relied on by the Crown, because it says that conditions attaching to conditional purchases shall bind not merely the applicants, but also "all persons deriving title through or under them." It was argued that, as a mortgagee derives title through or under the original holder, he was "bound" in the sense of being liable to reside personally. There are at least two answers to this. The first is that "bind" there means that the condition runs with the land, and successors in title cannot claim the land free of the condition. The second is that the same section "binds" in the same way not merely the successors mentioned, but also "all persons on whom title shall devolve or be cast by operation of law." So that if the argument of the Crown is sound, then every executor or administrator (see sec. 272 (4)) and every official assignee (see sec. 270) and every trustee for creditors (*ibid.*) must abandon his own home and reside personally on the holding. Sec. 181 really preserves the condition whatever it is in law, but does not profess to define or alter it.

There are various sections which are inconsistent with "holder" always including the mortgagee, because if the single circumstance

of the word "holder" is decisive, it must carry both responsibilities and privileges. Examples are secs. 51, 57, 136 (specially) and 176. Secs. 167, 183, 184 and 194 tell greatly against the respondent's contention. Sec. 167 differentiates between "holder" and "mortgagee." Sec. 183, following the line so distinctly marked out in sec. 179, differentiates between a "holder" as owner of an unmortgaged holding, and the "owner (subject to mortgage)" of a mortgaged holding. But though the application is to be made by the "holder" in the one case, and the "owner (subject to mortgage)" in the other, there is a proviso that "in any application made in respect of a homestead selection or grant which is subject to mortgage the mortgagee shall join." "Holder" there cannot include a mortgagee, not merely because mortgagee is specially mentioned, but also because no provision is made for the consent of the mortgagor should the mortgagee apply, which apparently is beyond contemplation. Sec. 184 is similar. Sec. 194 apparently goes further. The "holder" seems to include the beneficial owner, both when there is a mortgage and when there is none. But says the section (sub-sec. 2), "if the holding to be converted is subject to a mortgage, the unconditional concurrence of the person having such mortgage shall appear on the application." Sec. 231 provides that the "holder" of a conditional lease may with the consent of the Governor surrender the lease. This cannot include a mortgagee. Secs. 260 (3), 264, 265 and 267 are other cases of inconsistency with the argument for the Crown.

Reliance is placed on sec. 272. It provides for transfer by permission (*inter alia*) by way of mortgage. Now, the universal notion of a mortgage is as security only. The section *recognizes* (not creates) the mortgagee's right to enter into possession under the mortgage, but limits him to three years' possession unless the Minister extends the term. Up to that point, the "owner (subject to mortgage)" is permitted by the Act, though not the "holder" in the full sense, to satisfy the condition of residence, either on the land itself or, in certain cases, elsewhere, and in the event of his death or insanity the condition is waived till transfer. But the obligation

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being his, what is to happen when the mortgagee enters into possession as a remedy? He is no more and no less the "holder" than he was before entry; and therefore he is no more and no less bound to reside unless mere entry has that effect. But that is not stated. And it would be inconsistent with the limitation placed on his time. It would also be inconsistent with the provision for forfeiture, which could not be supposed to be inflicted if all the conditions were being fulfilled as the Act requires. In sub-sec. 3 the expression "hold the holding" means hold possession, just as it does in sub-sec. 4 of the same section.

Sec. 339 is, so far as I can discover, the solitary instance where a mortgagee is referred to as a "holder." That is exceptional as to a particular division, and cannot control the general provisions of the Act for the ordinary settlement of the State. In the next succeeding section "holder" cannot, as I think, properly include a mortgagee.

On the whole, I am of opinion that the decision appealed from was correct, and should be affirmed.

I am authorized by my learned brother *Rich* to say that he agrees with this judgment.

Appeal dismissed with costs.

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

Solicitor for the respondent, *E. E. Weekes,* Gundagai, by *W. E. Hawkins.*

B. L.