[HIGH COURT OF AUSTRALIA.]

BENTLEY . . . . . APPELLANT;
RESPONDENT,

AND

BENBOW AND ANOTHER . . . . RESPONDENTS.
APPLICANT AND RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1957.

SYDNEY, *Oct.* 1, 2; *Nov.* 2.

Dixon C.J., McTiernan, Williams, Kitto and Taylor JJ.

Landlord and Tenant—Recovery of possession—Prescribed Premises—"Premises . . . have been acquired for use as a parsonage" etc.—Intention as to user—Whether continuing and unfulfilled intention necessary—Landlord and Tenant (Amendment) Act 1948-1954 (*N.S.W.*), *s.* 62 (5) (*h*).

Section 62 of the *Landlord and Tenant (Amendment) Act* 1948-1954 provides:—"(5) The prescribed grounds shall be— . . . (h) that the premises are used as, or have been acquired for use as, a parsonage, vicarage, presbytery or other like premises and are reasonably required for the personal occupation of a minister of religion (including a person who, although not ordained, is performing all the duties of a minister of religion)."

Held, by *Dixon* C.J., *Kitto* and *Taylor* JJ., *McTiernan* and *Williams* JJ. dissenting, that the words "have been acquired for use as a parsonage" etc. refer to an intention as to user existing at the time of the acquisition and remaining as yet unfulfilled by reason of the lessor being out of possession and not to an intention formed at some earlier stage and thereafter abandoned.

In 1856 certain vacant land was conveyed to the then trustees of the Presbyterian Church "upon trust for the erection thereon of a church . . . a school house . . . and of other buildings if required in connection with the said church and school house and for no other purpose whatsoever". At some stage thereafter a church was erected on part of the land and upon another part was erected certain premises for use as a manse. These premises were so used for many years, but about 1936 this user was discontinued and they were let to a tenant and were thereafter used as a residential. The respondent became tenant of the premises about 1945 and continued using the same for the purpose of a residential. The appellant as agent for the Presbyterian Church (N.S.W.) Property Trust, the successor of the trustees to whom the

land had been originally conveyed, sought to determine the tenancy of the respondent by giving a notice to quit upon the grounds stated in par. (h) of s. 62 (5).

Held, by *Dixon* C.J., *Kitto* and *Taylor* JJ., *McTiernan* and *Williams* JJ. dissenting, (1) that in the circumstances par. (h) could not be invoked to determine the tenancy;

(2) that the vacant land so acquired in 1856 was not "premises" within the meaning of the *Landlord and Tenant (Amendment) Act* 1948-1954, and that upon the erection of the manse the trustees should not be regarded as having, within the meaning of the paragraph, acquired premises for the prescribed purpose.

Per Dixon C.J., *Kitto* and *Taylor* JJ.: Having regard to the fact that the land upon which the manse was erected was part of a larger parcel devoted by the terms of the trust to a number of objects, there is great difficulty in saying that such land was acquired for use as a parsonage etc. within s. 62 (5) (h).

Decision of the Supreme Court of New South Wales (Full Court): *Ex parte Benbow; Re The Presbyterian Church (N.S.W.) Property Trust* (1957) S.R. (N.S.W.) 547; 74 W.N. 292, in part affirmed.

APPEAL from the Supreme Court of New South Wales.

Richard John Bentley, as agent for The Presbyterian Church (N.S.W.) Property Trust, issued a notice to one Maude Benbow to quit and deliver up premises No. 186 Palmer Street, East Sydney, which she held as tenant of the Trust, upon the ground contained in par. (h) of s. 62 (5) of the *Landlord and Tenant (Amendment) Act* 1948-1954.

The tenant having failed to quit the premises as required by the notice, Bentley instituted proceedings against her to recover possession thereof. On the hearing of such proceedings before a stipendiary magistrate the ground in the notice to quit was found proved and on 8th November 1956 an order was made adjudging the Trust entitled to possession of the premises.

On 29th November 1956 the tenant obtained from the Supreme Court of New South Wales (*Walsh* J.) a rule nisi for a writ of prohibition directed to Bentley and the said stipendiary magistrate calling upon them to show cause why they and each of them should not be restrained from proceeding upon the said order upon the ground that there was no evidence to establish that the premises in question had been acquired within s. 62 (5) (h) of the *Landlord and Tenant (Amendment) Act* 1948-1954 by The Presbyterian Church (N.S.W.) Property Trust for use as a parsonage, vicarage, presbytery or other like premises.

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The matter came on for hearing on 20th March 1957 before the Full Court of the Supreme Court (*Owen* J., *Roper* C.J. in Eq. and *Ferguson* J.), which on 28th March 1957 made the rule absolute and directed the issue of a writ of prohibition as sought: *Ex parte Benbow*; *Re The Presbyterian Church (N.S.W.) Property Trust* (1).

On 11th April 1957 Bentley, upon his undertaking to pay the costs of appeal in any event, was granted special leave to appeal to the High Court from this decision.

The relevant statutory provisions and the arguments of counsel appear sufficiently in the judgments hereunder.

D. F. Lewis, for the appellant.

J. P. Slattery, for the respondent Benbow.

There was no appearance for the respondent stipendiary magistrate.

Cur. adv. vult.

NOV. 22.

The following written judgments were delivered:—

DIXON C.J., KITTO AND TAYLOR JJ. The appellant is the agent of The Presbyterian Church (New South Wales) Property Trust and in August 1956 he instituted proceedings in a court of petty sessions at Sydney to recover possession from the respondent of certain premises of which she is the tenant. The ground upon which possession was sought was that prescribed by s. 62 (5) (h) of the *Landlord and Tenant (Amendment) Act* 1948-1954. An order for possession was made in the petty sessions court but upon appeal to the Full Court of the Supreme Court, pursuant to s. 74 of the Act, further proceedings upon the order were prohibited. This appeal is now brought by special leave from the order of the Supreme Court.

The premises in question are known as number 186 Palmer Street. The building is old and was erected about seventy years ago upon a portion of certain lands conveyed to the trustees of the Presbyterian Church in 1856. By the conveyance the land was to be held by the trustees upon trust for the erection thereon of a church under the superintendence of the Synod of Australia in connexion with the established Church of Scotland in conformity with the provisions of two specified Acts of the Legislative Council of New South Wales and upon trust for the erection thereon of a schoolhouse under the superintendence of the said synod and "of other buildings if required in connection with the said Church and

(1) (1957) S.R. (N.S.W.) 547; 74 W.N. 292.

Schoolhouse and for no other purpose whatsoever". At some stage after the land was acquired by the trustees a church was erected on part of the land and upon another part the premises in question were erected for use as a manse. These premises were so used for many years but some twenty years ago their use for this purpose was discontinued. It appears that at about this time the premises were let to a tenant and were thereafter used as what is popularly known as a residential. The respondent, who has been the tenant since about 1945, has used the premises for the same purpose.

Section 62 of the *Landlord and Tenant (Amendment) Act* provides that, except as provided by Pt. III thereof, the lessor of any prescribed premises shall not give any notice to terminate the tenancy or take any proceedings to recover possession of the premises from the lessee or for the ejectment of the lessee therefrom. Subject however to the provisions of Pt. III a lessor may take proceedings in any court of competent jurisdiction for an order for the recovery of possession if, before taking the proceedings, he has given to the lessee, upon one or more of the grounds prescribed by s. 62, notice to quit in writing for a period determined in accordance with other provisions of the Act. A notice to quit, otherwise in an appropriate form, was given upon the ground prescribed in sub-s. (5) (h) of s. 62. That sub-section is in the following terms:—"(5) The prescribed grounds shall be—(h) that the premises are used as, or have been acquired for use as, a parsonage, vicarage, presbytery or other like premises and are reasonably required for the personal occupation of a minister of religion (including a person who, although not ordained, is performing all the duties of a minister of religion)".

In the main the argument in the case was concerned with the construction of the statutory provision and the competing contentions of the parties were advanced upon the hypothesis that the trustees had, at some earlier time, acquired the premises in question with the intention of using them as a manse. If that was so, the appellant contended, he was entitled to invoke the assistance of the prescribed ground; it was, it was argued, sufficient to show that at the time of acquisition—however remote and notwithstanding intervening events—the trustees contemporaneously entertained an intention to devote the premises to that purpose. The respondent, on the other hand, maintained that, in their context, the words "have been acquired for use as a parsonage" etc., had a more restricted meaning. Rather, it was asserted, this part of the provision was designed to deal with cases where, in the process of carrying into effect the purpose, as yet unfulfilled, for which the

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premises have been acquired, the owner seeks to obtain possession. The latter view is, in our opinion, to be preferred; it is, we think, supported not only by a consideration of the language employed, but also by an examination of the history of the provision.

The earlier branch of the sub-section, it will be observed, deals with the case where the premises "are used as" a parsonage etc. In such cases the purpose of the original acquisition is irrelevant; the critical question is whether at the relevant time, the premises are actually so used. Accordingly it is of no consequence that the premises have been so used at some earlier time if in fact they are not so used at the time when notice to quit is given. It is the existing use which is all-important and unless this critical fact is established the owner will fail. Accordingly if the sub-section went no further it would be impossible to obtain an order for possession of premises which had been acquired for the specified purpose and which, because of an existing tenancy, could not be devoted to and used for that purpose. The appellant, however, contends that the second branch of the sub-section covers not only such cases but also those where, premises having originally been acquired for such a purpose, the owner has obtained possession and, either, re-let them immediately, or, having used them for the prescribed purpose for a time, has discontinued that use and then re-let them. It is sufficient, it is said, if originally, and however remote the acquisition was, they were acquired for the prescribed purpose. Acceptance of this contention would mean that in some cases where premises had formerly been used as a parsonage etc., the owner, although not able to bring himself within the first branch of the sub-section, would be entitled to recover possession whilst in other cases he would not. The rights of the parties would depend upon whether or not the premises originally had been acquired for that purpose. It can, we think, safely be said that no such result was intended. The use in the sub-section of the words "have been acquired for use as a parsonage" etc., must be taken to refer to an unfulfilled intention, that is to say, an intention existing at the time of acquisition and which the owner has been prevented from carrying into effect because he is not in possession, and not to an intention formed at some earlier stage and, thereafter, abandoned. (Cf. *In re Stories' University Gift* (1).)

This view is we think confirmed by a consideration of the history of the provision. By the *National Security* (*Landlord and Tenant*) *Regulations* as amended by Statutory Rule No. 44 of 1944, one of the prescribed grounds upon which a notice to quit might have been

(1) (1860) 30 L.J. Ch. 193.

given was " that the premises are a parsonage, vicarage, presbytery or other like premises and are required for the personal occupation of a minister of religion ". Leaving aside immaterial amendments the ground in the form in which it was to be found both in the later regulations made under the *National Security Act* and in the New South Wales Act was somewhat wider ; the words " or have been acquired for use as " were added. It seems reasonably clear that the addition of these words could not have been intended to produce the result contended for by the appellant ; they should, we think, be taken to have been intended to cover the restricted class of case to which we have already referred.

This is enough to dispose of the appeal but there are other difficulties in the way of the appellant. In the first place there is great difficulty in the way of saying that the land upon which the premises were subsequently erected was acquired for use as a parsonage etc. ; it was but part of a larger parcel of land devoted by the terms of the trust to a number of objects. They were the erection of a church and of a schoolhouse and " of other buildings if required in connection with the said church and schoolhouse ". Moreover the land so acquired cannot be regarded as " premises " within the meaning of the *Landlord and Tenant (Amendment) Act* (see *Simms* v. *Lee* (1) and *McNamara* v. *Quinn* (2) and *Turner* v. *York Motors Pty. Ltd.* (3)). The appellant however attempted to say that when the manse was built it constituted " premises " and the trustees should be regarded as then having, within the meaning of the sub-section, acquired those premises for the prescribed purpose. But such a contention involves an unjustified distortion of the word " acquired " and is in our view without substance.

For the reasons given the appeal should be dismissed.

McTIERNAN J. The facts of this case are stated concisely in the reasons of the Supreme Court as follows : " In 1856 vacant land in Sydney was conveyed to the then trustees of the Presbyterian Church for the purpose of building on it a church and school-house and other buildings, if required, in connection with the church and school-house. The land later became vested in the respondent Trust. At some stage a church and a house for use as a " presbytery " were erected on the land and the house was used as a " presbytery " for many years. Its use for this purpose was, however, discontinued and the Trust leased the premises to the present applicant who conducted a residential on them. More recently the church

(1) (1945) 45 S.R. (N.S.W.) 352 ; 62 W.N. 182.
(2) (1947) V.L.R. 123.
(3) (1951) 85 C.L.R. 55, at pp. 75, 82-84.

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authorities have decided to appoint a resident minister to the church." The question at issue is whether these facts are sufficient to support a notice to quit based on s. 62 (5) (h) of the *Landlord and Tenant (Amendment) Act* (N.S.W.). There is a finding by the magistrate that the premises are reasonably required for the personal occupation of a minister of religion. That finding is not disputed. The point for decision is whether the premises " have been acquired for use as a parsonage, vicarage, presbytery or other like premises ". The vesting of the land in the trustees was not an acquisition for the purposes in hand, because the word " premises " in the present context does not include vacant land. But I am of opinion that when the house was erected on the land for the occupation of the minister serving the church, which was erected at the same time on the land, the house had been " acquired " within the ordinary meaning of the word, and the use for which it was acquired comes within par. (h). This was the view adopted by the Supreme Court on that point. The next question is whether the paragraph applies only to premises that were acquired subject to a tenancy. The facts of this case show that the tenancy sought to be terminated was created after the premises had been acquired. The Supreme Court decided that upon the true construction of the paragraph it applies only to premises acquired subject to a tenancy. However, the learned judges of the Supreme Court considered that the question of the construction of the paragraph " is one on which minds may differ ". It seems to me that unless a limitation is applied, the words to be construed extend both to premises let to a tenant after they have been acquired and to premises which were let when acquired. In my view the context provides no certain ground upon which to imply the limitation needed to confine the application of the paragraph to premises which have been acquired subject to an existing lease. With respect to the learned judges of the Supreme Court I disagree with their restricted interpretation of par. (h), but with some hesitation.

I would therefore allow the appeal.

WILLIAMS J. The fate of this appeal, which is brought by special leave, depends upon the true meaning of s. 62 (5) (h) of the *Landlord and Tenant (Amendment) Act* 1948-1954 (N.S.W.). This paragraph contains one of the grounds prescribed by sub-s. (5) upon which the lessor of prescribed premises may give a notice to quit such premises under the Act. It is in the following terms :— " (h) that the premises are used as, or have been acquired for use as, a parsonage, vicarage, presbytery or other like premises and are

reasonably required for the personal occupation of a minister of religion (including a person who, although not ordained, is performing all the duties of a minister of religion) ".

The material facts are brief and not very precise. By an indenture executed on 19th November 1856 the subject property now known as 186 Palmer Street, Sydney, which was then vacant land, was conveyed by its then owners to trustees on behalf of the Presbyterian Church their heirs and assigns habendum " To have and To hold the said land and hereditaments Unto and To the Use of the said Trustees their heirs and assigns Upon Trust for the erection thereon of a Church under the superintendence of the Synod of Australia in connexion with the established Church of Scotland in conformity with the provisions of an Act of the Governor and Legislative Council of New South Wales made and passed in the eighth year of the reign of His late Majesty King William the Fourth intituled 'An Act to regulate the temporal affairs of the Presbyterian Churches and Chapels connected with the Church of Scotland in the Colony of New South Wales' and of a certain other Act of the Governor and Legislative Council made and passed in the seventh year of the reign of His said late Majesty King William the Fourth and numbered three so far as the same may apply to the trusts of this Indenture And upon trust for the erection thereon of a Schoolhouse under the superintendence of the said Synod of Australia and of other buildings if required in connexion with the said Church and Schoolhouse and for no other purpose whatsoever."

The land adjoins the Presbyterian Church in Woolloomooloo. Some years after the trustees acquired the land, apparently about 1886, a building was erected upon it as a manse for the minister of that church. Many years later, apparently about 1936, the church no longer desired to use the building for this purpose, and the property was let to a tenant who commenced to carry on a residential business. The respondent Mrs. Benbow became the tenant of the property about 1947 and has since carried on this business. The lessor of the property is now The Presbyterian Church (N.S.W.) Property Trust on behalf of the Presbyterian Church and the appellant John Bentley is a director of Killen and Thomas Pty. Ltd. a company which manages the property as agent for the Trusts. On 17th July 1956 he served a notice to quit on Mrs. Benbow, the prescribed ground being that set out in par. (h). Mrs. Benbow failed to quit the property on the termination of the notice and proceedings were then taken by Bentley at the Central Court of Petty Sessions, Liverpool Street, Sydney on 8th November 1956 for recovery of the premises. A considerable amount of evidence

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was tendered before the magistrate, the respondent E. J. Gibson, Esq., who held that this ground had been established and decided the question of hardship in favour of the lessor. Accordingly he adjudged that the lessor was entitled to possession.

Mrs. Benbow then obtained a rule nisi for a writ of prohibition in the Supreme Court of New South Wales on the ground that there was no evidence upon which the learned magistrate could properly find that the said premises had been acquired within the meaning of s. 62 (5) (h) of the *Landlord and Tenant (Amendment) Act* 1948-1954 by The Presbyterian Church (New South Wales) Property Trust for use as a parsonage, vicarage, presbytery or other like premises. Upon the hearing of the application to make the rule nisi absolute the Full Supreme Court upheld this ground and made the rule absolute. In a joint judgment their Honours said "At the time of 'acquisition' the trustees had vacant possession of the premises and the lease which the Trust now seeks to determine is one which it itself granted and not one to which its title was subject when it acquired the premises. The question is whether, in these circumstances, par. (h) can have any application. The point is one on which minds may differ but on the whole we are of opinion that the paragraph has no application. We think that the paragraph contemplates an acquisition of premises subject to a then existing lease which, unless terminated, prevents the premises acquired from being put to the use for which they were acquired" (1).

In all respect to their Honours, this construction appears to place an implied restriction upon the meaning of par. (h) which its language does not warrant. There is nothing in this language which requires that the premises should have been at the date of acquisition subject to a lease. The language is quite apt to apply to the case where the premises have been acquired for use as a parsonage etc., but have subsequently been let and at a later date are reasonably required for the personal occupation of a minister of religion. The paragraph has two limbs (1) that the premises are used as a parsonage etc., and are reasonably required etc. This limb would apply to cases where at the date of the notice to quit the existing tenant is using the premises as a parsonage etc., but the lessor reasonably requires them for the personal occupation of some particular minister of religion. (2) That the premises have been acquired for use as a parsonage etc., and are at the date of the notice to quit reasonably required for the personal occupation of a minister of religion. It is this second limb which is of importance in the present case. The initial words of this limb require and require only that the premises

(1) (1957) S.R. (N.S.W.) 547, at p. 548; 74 W.N. 292, at p. 293.

should have been originally acquired for use as a parsonage etc. These are uses authorised by the trusts of the indenture. The land was, when acquired, vacant land but it was acquired in order to be built upon for certain purposes and the manse, which fulfilled one of those purposes, was erected about 1886. It was a building required in connexion with the church and falls within the description in par. (h) of a " parsonage, vicarage, presbytery or other like premises ". The Act does not apply to vacant land which is let for the purposes of occupation as vacant land (*Turner* v. *York Motors Pty. Ltd.* (1)) ; but it does apply to land which is let subject to a covenant to erect a building on it as soon as the building has been erected : *Belmore Property Co. (Pty.) Ltd.* v. *Allen* (2).

The land at 186 Palmer Street, having been built upon, was at the date of the notice to quit prescribed premises within the meaning of the Act and the property became subject to the Act when it was let to a tenant in 1936. But the fact that the property was at the date of the indenture vacant land is immaterial. It was acquired so that it could be built upon for church purposes. When the manse was built the acquisition of the land for use as a parsonage etc., was complete. At the date of the notice to quit, therefore, the property was premises which " have been acquired for use as a parsonage " etc. There are no express words in the second limb of par. (h) which require that, to come within it, the property must at the date of acquisition have been subject to a lease which the landlord desires to terminate at the date of the notice to quit. At the date of the notice to quit there must of course be a subsisting lease otherwise the tenancy would not be subject to the Act. But the words " have been acquired " relate not to the date of the notice to quit but to the date of acquisition. It is sufficient if at the date of acquisition the property was acquired for use as a parsonage etc. The use to which the premises may have been put between the date of acquisition and the date of the notice to quit is immaterial for the purposes of par. (h), although it may be very material for other purposes of the Act and particularly with respect to the questions that arise under s. 70 of the Act.

In the course of their judgment their Honours said : " Every other paragraph in s. 62 (5) is directed to a state of affairs in which, during the currency of the lease which it is sought to terminate, circumstances have arisen which the legislature regards as providing a reason for terminating the lease. We are of opinion that the relevant part of par. (h) is similarly designed to operate and to apply where

(1) (1951) 85 C.L.R. 55, at pp. 75, 82-84.

(2) (1950) 80 C.L.R. 191.

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there has been an acquisition of premises subject to a lease and not where there has been an acquisition followed by the grant of a lease" (1). But again with respect to their Honours, while one can agree that all these paragraphs refer to circumstances which have arisen during the currency of the subsisting lease which the legislature regards as a reason for terminating it, the circumstances in question in par. (h) are that, in the case of the second limb, the premises have been acquired for use as a presbytery etc., and are at the date of the notice to quit reasonably required for the personal occupation of a minister of religion. The paragraph does not say that one of the circumstances must be that the premises have been acquired subject to the lease which at the date of the notice to quit the lessor desires to terminate or subject to any lease. The initial requisite is that the premises must have been originally acquired for use as a parsonage etc. If that requisite is fulfilled the second requisite is that they should at the date of the notice to quit be reasonably required for the personal occupation of a minister of religion.

The appeal should be allowed.

Appeal dismissed with costs.

Solicitors for the appellant, *Hunt & Hunt.*
Solicitors for the respondent, *Minter Simpson & Co.*

R. A. H.

(1) (1957) S.R. (N.S.W.), at p. 548; 74 W.N. 292, at p. 293.