[HIGH COURT OF AUSTRALIA.]

WHITFELD . . . . . APPELLANT;
NOMINAL DEFENDANT,

AND

McQUADE AND ANOTHER . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 7, 8, 11.

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

Resumption of land by Government—Notification of resumption—Resumption of part of property—Refusal by owner to sell part—Option of Government—Election—Implied contract—Lapse of time—Compensation for injury to land—Public Works Act (*N.S.W.*) 1900 (*No.* 26 *of* 1900), *secs.* 37, 131.

The Government, by notification of resumption under the *Public Works Act* 1900, resumed portion of a residential property of the respondents for the purpose of certain public works. When the works were nearly completed the respondents, relying upon sec. 131 of the Act, gave notice that they objected to selling a portion of the property, and called upon the Government to resume the whole. The Government refused to resume the whole, and claimed to retain the portion. In a suit by the respondents against the Government a decree was made in September 1902 that the Government was not entitled to resume the portion without taking the whole, and that if they refused to resume the whole they held the portion in trust for the respondents and must reconvey it to them. While the suit was pending the works were completed, and the resumed land vested in the Harbour Trust Commissioners. A series of appeals which extended over several years resulted in the Privy Council affirming the decree of the Supreme Court in March 1906. During the interval the Government continued in occupation of the portion resumed, and no change in the position took place until January 1907, when the Government, in reply to a demand made by the respondents in August 1906, refused to resume the whole property and offered to reconvey the portion resumed.

In a second suit by the respondents, in which they contended that, in the events which had happened, the Government was bound to resume the whole, and claimed in the alternative that the Government was not entitled to revest the portion without restoring it to its original condition and paying compensation for use and occupation and loss by deprivation, or, if the land could not be so restored, making in addition compensation for the deterioration in its value;

Held, that the Government was not bound to take the whole property, but that having under the original decree an option to take the whole or to take none, and not having done anything which amounted to an election to take the whole, as soon as they had definitely asserted their intention not to resume the whole, they became trustees for the respondents of the portion resumed; and

That, though the respondents were entitled in some form of proceeding to obtain compensation from the Government as trustee for any injury in the nature of waste done by it during its occupation, and for use and occupation and other damage, yet they could not obtain such relief in the present suit, as it was wholly inconsistent with the case made by the statement of claim; and there was no material before the Court upon which an inquiry as to such damage could be ordered. Mere delay on the part of the officers of the Government in the exercise of their option was not sufficient to fix the Government with an obligation to take the whole property. If the respondents wished to prevent delay they should have applied under the liberty to apply in the original suit for an order fixing a date for the exercise of the option.

Sed quære, whether the Government could by order of the Court be compelled to exercise a power vested in the Governor in Council, inasmuch as any order intended to have that effect, though in form a decree in a suit in Equity, would be in substance a mandamus to the Crown.

The Government is not bound, under sec. 131 of the *Public Works Act*, to resume the whole of a property unless they have done something from which a contract to take the whole will be implied.

But *semble*, that though such a contract might be implied with respect to proceedings for the resumption of land by notice to the parties, it could not in the case of resumption by notification in the *Gazette*.

Decision of *A. H. Simpson* C.J. in Equity: (*McQuade* v. *Whitfield*, (1908) 8 S.R. (N.S.W.), 320), reversed.

APPEAL from a decision of *A. H. Simpson*, Chief Judge in Equity, of the Supreme Court of New South Wales.

This was a suit by the respondents against the appellant as nominal defendant on behalf of the Government of New South

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Wales to have it declared that, under the circumstances appearing in the statement of claim and set out in the judgments hereunder, the Government was bound to resume the whole of a property of the respondents known as "Bomera," at Potts Point, Sydney, fronting the harbour, and that the Government was not entitled to decline to resume a portion of the property, which it had already purported to resume, and which it now sought to revest in the respondents. The respondents also claimed in the alternative a declaration that the Government, if it declined to resume the whole, was not entitled to revest the portion without restoring the land to its original condition, and paying compensation for use and occupation, and for the loss sustained by the respondents by reason of having been deprived of the land, or that if the Government was unable to restore the land to its original condition it was not entitled to revest it in the respondents without compensating the respondents not only for the damage mentioned, but also for its deterioration in value. The Government in its defence denied that there had been any injury or material change in the condition of the land resumed, and again asserted its willingness to revest the land in the respondents.

A. H. Simpson C.J. in Equity, before whom the suit came for hearing, held that under the circumstances disclosed in evidence the Government was bound to resume the whole property as on 20th November 1900, the date of the *Gazette* notification, and made a decree accordingly: *McQuade* v. *Whitfield* (1).

From that decision the present appeal was brought.

Sec. 131 of the *Public Works Act* 1900, which was held by the Privy Council, (*Williams* v. *Permanent Trustee Co. of New South Wales* (2)), to apply to resumption by notification in the *Gazette*, as well as to resumption by notice, is set out in the judgment of *Griffith* C.J.

Cullen, K.C. (*Langer Owen* K.C. and *Harriott* with him), for the appellant. There is nothing in the *Public Works Act* 1900 which compels the Government to resume land which it does not wish to resume, and there is nothing in the circumstances of this case to impose any such obligation on it.

(1) (1908) 8 S.R. (N.S.W.), 320. (2) (1906) A.C., 249.

Under the first decree the rights of the parties were declared. The result of that decree is that the Government, having refused to take the whole property, are trustees for the respondents of the portion resumed. The Government had an option to take the whole or none, and have now made their election to take none. Nothing has been done by the Government to bar the exercise of their right of election. If the respondents objected to the delay they should have applied to the Court of Equity for an order in the original suit fixing the time within which the Government must elect: *Daniell Ch. Prac.*, 6th ed., vol. I., p. 876. But the relief now claimed is inconsistent with the claim in the original suit, and with the decree.

[HIGGINS J.—Why did you not move to stay proceedings in this suit?]

That would have been futile, as the Judge was of opinion that the plaintiffs had an equity. Even if delay could bar the right of the Crown to elect, there has been no prejudice to the plaintiffs. There was no change in the condition of the land since the decree. The vesting of the land in the Harbour Trust Commissioners was merely a departmental matter, not a transfer to a third party: *Sydney Harbour Trust Commissioners* v. *Wailes* (1); and it took place before the decree. The negotiations by the Commissioners for a lease of the land resumed were not evidence of intention to take the whole. It was not shown that the Commissioners then had knowledge of the Privy Council decision, and, in any case, no lease was made. The Government by appealing from the original decree did not give up the rights which the decree declared.

[GRIFFITH C.J.—The obligation to elect did not begin until the opinion of the Privy Council was known.]

It was assumed in the Court below that the acquisition by *Gazette* notification was irrevocable. But that is altogether inconsistent with the original claim and the decree. The Government cannot be bound until there is something in the nature of an election. Until election there was power to reconvey what had been taken.

[GRIFFITH C.J.—A party entitled to elect may elect at any

(1) 5 C.L.R., 879.

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time before he has done anything to deprive himself of his right. This case is put as a matter of estoppel. The Government did not, in fact, elect to take the whole, but we are asked to hold that they did. It would require very strong reasons to induce the Court to hold that.]

There is no difference in regard to revocability between resumption by *Gazette* notification and resumption by notice. [He referred to *Public Works Act* 1900, secs. 28, 33, 36, 37, 41, 127, 130, 131.] The vesting in both cases accrues without conveyance. There was no necessity for an express provision that the Crown should reconvey. No doubt a reconveyance could not be forced upon an owner, but in this case the decree itself obviated any difficulty that might arise from want of consent. [He referred to *The Queen* v. *London and South Western Railway Co.* (1); *Marson* v. *London, Chatham, and Dover Railway Co.* (2).] But the power to reconvey existed independently of the decree.

Even if there was delay that might bar a private individual it could not bar the Crown. The doctrine of laches as between individuals does not apply to the Crown. The Crown cannot be prejuduced by misconduct or laches on the part of its officers: *Sheffield* v. *Ratcliffe* (3); *The Queen* v. *Renton* (4).

[ISAACS J. referred to *Grosvenor* (*Lord*) v. *Hampstead Junction Railway Co.* (5).]

Even a private individual cannot be barred from a purely legal right by mere delay. In this case the right of the Government was legal, not equitable. [He referred to *In re Maddever*; *Three Towns Banking Co.* v. *Maddever* (6).]

[GRIFFITH C.J. referred to *Chadwick* v. *Manning* (7).]

If the respondents have suffered any damage they can proceed under the Act for compensation.

Pilcher K.C. and *Rich* (*Gordon* K.C. and *Dr. Coghlan* with them), for the respondents. The Government are bound to take the whole property. The decree declared that they had an option, and under the circumstances they must be taken to have exer-

(1) 12 Q.B., 775.
(2) L.R. 6 Eq., 101; S.C. L.R. 7 Eq., 546.
(3) Hob., 347; 80 Eng. Rep., 487.
(4) 2 Ex., 216, at p. 220.
(5) 26 L.J. Ch., 731; 1 De G. & J., 446.
(6) 27 Ch. D., 523.
(7) (1896) A.C., 231.

cised the option and elected to resume the whole. There was not mere delay or omission on the part of the Crown. There was positive commission. Assuming that the work on the land was completed before the decree, the Government made use of the land afterwards in such a way as to indicate their intention of retaining it. They remained in possession and received rent for the wharf, which was dependent upon the resumed land for support. The decision of the Privy Council was in effect that if the Crown resumed the portion they must take the whole; and, therefore, when the Crown retained the portion, they in effect elected to take the whole. Even before the work was completed the continuation of the work by the Government, after receiving notice of objection from the respondents, was an unequivocal indication of intention to take the whole property, for they must be taken to have known that the consequence of taking the portion was an obligation on them to take the whole. [They referred to *Brown and Allen, Law of Compensation*, 2nd ed., p. 222.]

[ISAACS J.—But you must show an implied contract. If you assume that the whole must be taken your position may be good. But can that be resumed without taking the proper steps under the Act? Is there any other way in which the Crown can be said to have resumed land?]

Taking the portion would amount in law to taking the whole. It is not a mere matter of contract, but a statutory obligation imposed by sec. 131. No question can arise as to the Crown being on a different footing from private persons, because the Act only contemplates resumption by the Crown, and consequently any obligations imposed by the Act upon the resuming authority can only relate to the Crown. The owner under the circumstances is entitled to say to the Crown: "You must take the whole by virtue of sec. 131, because you have taken part, and I refuse to sell part without the residue." The provision as to the trusteeship in the original decree was purely a concession to the Crown, allowing the Crown to escape the obligation it had incurred if it could put the respondents in their original position. The position of the Crown after the notice of objection was the same as that of the undertaking authority under sec. 92 of the English *Lands Clauses Consolidation Act* after counter-

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notice. If after counter-notice the authority does anything showing its intention to take the portion originally resumed, a binding contract to take the whole property is created. It is a form of estoppel by contract.

[GRIFFITH C.J.—That may be so with regard to individuals. But here the power to elect can only be exercised by the Governor in Council. What authority has the Court to order the Governor to act with the advice of the Executive Council or to order the Executive to give any particular advice? This is not a case in which the Crown can bind itself by an agent. You cannot assume that an act of the Executive Council can be treated as something quite different unless a Statute makes it so.]

If that is an objection the decision of the Privy Council was purely academic. They must be taken to have known the effect of the English section, and that sec. 131 was practically the same, and that the result of their decision was to impose an obligation on the Crown. The Government have by their conduct assented to the notice of objection, and that created a quasi-contract to take the whole; under sec. 97 of the *Lands Clauses Consolidation Act* there is no necessity for a further notice of intention to take the whole. [They referred to *Brown and Allen, Law of Compensation*, 2nd ed., pp. 42, 226; *The King* v. *Wycombe Railway Co.* (1); *Marson* v. *London, Chatham, and Dover Railway Co.* (2); *Grosvenor (Lord)* v. *Hampstead Junction Railway Co.* (3); *Pinchin* v. *London and Blackwall Railway Co.* (4); *Schwinge* v. *London and Blackwall Railway Co.* (5); *Tiverton and North Devon Railway Co.* v. *Loosemore* (6).] After the proclamation vesting the land in the Harbour Trust Commissioners, the Government had no control over the land unless it were withdrawn from them. That could only be done if the land were found unnecessary for the purposes of the Act: *Sydney Harbour Trust Act*, No. 1 of 1900, sec. 27. If the Government are not bound to resume the whole, sec. 131 is meaningless.

[GRIFFITH C.J.—If the Government resume part and refuse to take the whole, they may be liable to an action as wrongdoers.]

(1) 29 L.J. Ch., 462.
(2) L.R. 6 Eq., 101; L.R. 7 Eq., 546.
(3) 26 L.J. Ch., 731; De G. & J., 446.
(4) 24 L.J. Ch., 417; 1 K. & J., 34.
(5) 24 L.J. Ch., 405.
(6) 9 App. Cas., 480.

Although no time was fixed by the decree for the exercise of the option, the Government were bound to say within a reasonable time that they would not take any of the land, if they wished to escape the obligation to take the whole.

[ISAACS J. referred to *The Queen* v. *London and South Western Railway Co.* (1).]

The respondents in their prayer ask not only for the declaration that the Government must take the whole, but for compensation in the alternative, so that if the Court is against them on the main prayer, there is a good claim for restoration of the land resumed in its original condition or restoration as it now is with compensation. The respondents are clearly entitled to compensation for injury done to the land, for use and occupation, and for deprivation of the enjoyment of the land. Even if that is wholly or partly legal relief, the claim for injury in the nature of waste by the Government as trustees is equitable, and the other relief may be given in the same suit. This relief could not have been obtained in the original suit, as waste was not alleged. A supplemental suit would have been necessary. At the most, therefore, there should only be a variation of the order appealed from. It is material on the question of costs that the appellant denied any liability to pay compensation, and made no offer to revest with compensation.

Cullen K.C. in reply. The claim in this suit could not, unless altogether remodelled, be converted into a claim for compensation for injury done by the defendant to the land while in its possession. The suit should be dismissed and the respondents left to their proper remedy for whatever injury they may have sustained. [He also referred to *Public Works Act* 1900, secs, 73. 89.]

Cur. adv. vult.

December 11.

GRIFFITH C.J. The *Public Works Act* 1900 authorizes the Governor to resume land from private persons under conditions set out in the Act. Two methods of resumption are provided. One is a summary method by notification published in the

(1) 12 Q.B., 775.

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Gazette which usually takes the form of a proclamation by the Governor in Council. Upon publication of that notification in the *Gazette* the land becomes vested in the constructing authority. The other method, analogous to the method established in England by many Statutes, of which the *Lands Clauses Consolidation Act* is one, is by notice to the owner. Sec. 131, which stands in Part VIII., described as "provisions applicable in every case where land is taken or acquired for authorized works," provides that "no party shall, at any time, be required to sell or convey to the constructing authority a part only of any house or other building or manufactory, if such party is willing and able to sell and convey the whole thereof."

The respondents in the present case are the owners of a residential property fronting the harbour of Port Jackson and containing about 1½ acres. The Government were about to construct a wharf on the frontage and desired to take a portion of the property. They adopted the first method of resumption, and on 20th November 1900 a *Gazette* notification was published by the Governor with the advice of the Executive Council resuming a portion containing 30 perches. This particular portion of the land fronted the harbour, much of it being reclaimed land, and was practically bounded on the harbour side by a stone wall. The land was required by the Government not for the purpose of constructing any works or buildings upon it, but for the purpose of fixing under its surface supports for a wharf to be erected in deep water some distance from the shore. The works were begun at some time in 1900, and the work was finished, so far as any work upon that piece of land was concerned, in June 1901. On 7th May 1901 the owners of the land gave notice to the Government that they objected to sell part of the land, and required the Government, if they took any, to take the whole. On 26th May 1902, more than a year afterwards, they commenced a suit against the Government of the State in the Supreme Court in its equitable jurisdiction by which they submitted (paragraph 7 of the statement of claim), that the whole of the "house land curtilage and garden must be resumed if any portion thereof be taken," and claimed that in the event of the Government declining to do so, it might be declared that the

defendant Minister only held the portion resumed as trustee for the plaintiffs, and might be directed to do all things necessary to reconvey it to them. The Government in their defence did not raise any question whether the whole area of 1½ acres came within the words "house or other building or manufactory" in sec. 131; nor did they raise any defence founded upon the fact that the owner of the land had waited for several months, during which work had been going on upon the land, before claiming to take advantage of sec. 131. The only defence set up was a submission to the judgment of the Court of the question of law raised by the 7th paragraph of the statement of claim, to which I have already referred. The suit came on for hearing, and the learned Chief Judge in Equity was of opinion that sec. 131 applied to the case, and made a decree in terms of the prayer of the statement of claim. That decree, which was dated 22nd September 1902, after declaring that the Government were not entitled to resume the portion in question without resuming the whole and ordering that the Government be restrained accordingly, proceeded "this Court doth declare that in the event of the Government declining to resume the residue of the said land . . . the defendant holds the said portion so resumed in trust for the plaintiffs, and . . . doth order that in the event of the said Government so declining to resume the residue . . . the defendant . . . do all things necessary to revest the said portion so resumed . . . in the plaintiffs."

The decree was affirmed by His Majesty on appeal in March 1906, but when the order reached Australia the owners did not take any steps to enforce their rights as declared by the Court. It is obvious that under the decree it was open to the Government either to take the remainder of the land or to decline to resume the residue, and that in the latter event they became trustees of the portion resumed for the plaintiffs. That is to say, a duty of choice was imposed upon the Government: they were bound to adopt one or the other alternative. One would have supposed that under these circumstances some application would have been made in the suit by the plaintiffs to the Court under the liberty to apply, to compel the Government to elect which of the alternatives they would adopt. If they declined to

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resume the whole of the land, the trusts declared by the Court would come into operation and the plaintiffs would be entitled to a reconveyance. The plaintiffs, however, did not take that course, but in August 1906 they demanded that the Government should resume the remainder of the land, and after some delay, such as might be expected in a Government department, the Government in January 1907 definitely stated that they would not take the remainder. Thereupon the right of the plaintiffs became absolute to have the land taken reconveyed to them. The Government, when declining to resume the remainder of the property, offered at the same time to execute the necessary documents in order to revest the portion resumed in the plaintiffs. The plaintiffs did not accept that offer, but brought another suit, the one now before this Court. In the statement of claim, after setting out the facts, says par. 17, they contended that "considering the length of time which has elapsed since the resumption of the said portion, the material alterations and obstructions made therein and thereto, and to the foreshores thereof, and the vesting of the said portion as aforesaid in the Sydney Harbour Trust Commissioners," (which was a purely departmental matter, the Commissioners being the public body charged with the care of wharves at Sydney) "and the long-continued enjoyment thereof by the said Government or the said Commissioners, the said Government is not now entitled to revest the said portion in the plaintiffs, but are bound to resume the whole of the said property." Now, seeing that the rights of the parties had been fully litigated and finally disposed of by the decree in the first suit, which was afterwards affirmed by the Privy Council, it is difficult to understand how such a claim as that made by the plaintiffs can be put forward. It is entirely inconsistent with the view taken by the Supreme Court and the Privy Council. The rights of the plaintiffs were declared to be to have the land reconveyed to them. They refuse to accept that relief, and maintain that the Government are bound to resume the whole property. A difficult question might arise, if it were necessary to determine it, whether the Supreme Court could compel the Government to exercise a power vested in the Governor to be exercised with the advice of the

Executive Council. It might be contended with force that the well known objections to the issue of a writ of mandamus against the Crown would apply to granting substantially the same relief in the form of a decree in a suit in equity. It is manifest that the Governor cannot be ordered to exercise a discretion in any particular way, and that the Executive Council cannot be ordered to give any particular advice. If any such claim could be supported, it would have to be founded upon something in the nature of a contract to be inferred against the Government by reason of their conduct. Whether such a contract could be set up with respect to a proceeding which was initiated on the resumption of land by *Gazette* notification may be very arguable. In England under the provisions for resumption of land by notice it has been held that, if, after a notice is given by an undertaking body of their intention to take a piece or part of land or house from the owner, and a counter-notice is given by the owner requiring the undertakers to take the whole or none, and the undertakers go into possession or continue in possession, a contract will be implied as against them to take the whole property. Whether such a contract can be implied in this State where the proceedings have been initiated by *Gazette* notification is a matter that may possibly some day, though it probably never will, arise for argument. In the present case there is absolutely nothing in the facts to raise any suggestion of an implied agreement by the Government to take the remainder of the land. They were not required by the plaintiffs to take it until practically all that was to be done on the portion taken had been done. The whole work had been practically completed. If there were no more in the case, and if the resumption had been by notice to the owners, there would be a great deal to be said against the implication of a contract. But the Government absolutely declined to do anything. They disputed the obligation to take the remainder, and asserted their readiness to reconvey the part taken. No change has taken place in the condition of the land from that time to the present day. The single fact that could be set up against the Government was that it was nearly six months after the opinion of the Privy Council had been pronounced before the

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Government said definitely that they did not intend to resume the residue, and made the offer to reconvey the portion resumed.

Under these circumstances it is, in my opinion, absolutely impossible to suggest that there is anything in the nature of a contract. It is not necessary, however, to determine that question, because the rights of the parties were definitely decided by the decree of the Supreme Court to be that in the events which have happened the Government or the constructing authority became trustee for the plaintiffs of the land resumed. The plaintiffs are entitled to what the Supreme Court declared them to be entitled to in 1902, and which has been offered to them since the decision of the Privy Council finally settled the question, and to no more. But in this suit they claim, first, a declaration that under the circumstances the Government were bound to resume the whole of the property known as "Bomera," and were not entitled to decline to resume the portion already attempted to be resumed and to revest it in the plaintiffs; or in the alternative that the Government were not entitled to decline to resume and revest the portion in the plaintiffs without restoring the land to its original condition, and removing the obstructions complained of, and paying compensation for use and occupation of the land and for the loss sustained by the plaintiffs by reason of being deprived of the land; or in the further alternative, that, if the Government were unable to restore the land to its original condition, they were not entitled to revest it in the plaintiffs without making the compensations referred to, and in addition, compensating the plaintiffs for the deterioration in value in the land owing to the alterations and obstructions mentioned. That, although put in the negative form, is really, if it means anything at all, a claim for compensation founded upon the position that the Government are trustees for the plaintiffs and have while trustees been guilty of something like waste. But that is entirely inconsistent with the whole case made by the statement of claim. There is no doubt that the Government or the constructing authority, being trustee for the plaintiffs, are in the events which have happened liable for anything in the nature of waste committed while the land was in their possession, and also, no doubt, liable to pay compensation to the plaintiffs for the use and

occupation of their land. There may also be other claims, including a claim for damages for severance, but we are not in a position to say what is the precise nature of the relief to which the plaintiffs are entitled by reason of the fact of their land having been in the unauthorized occupation of the Government for a period of 6 or 7 years. No doubt they are entitled to obtain relief in some form. But this suit is not brought to enforce any such right. It may be that the plaintiffs are entitled to get all that relief by an application in the original suit under the liberty to apply, or, if not in that way, by a supplemental suit or some similar form of proceeding. But it would be entirely changing the character of this suit, and would involve setting up claims entirely new, if we were now to make any such amendment as would justify a decree giving the plaintiffs that relief. There is no evidence of any contract upon which the Court could formulate the terms of such an inquiry. Under these circumstances it seems to me that the suit has failed in its object and should be dismissed, without prejudice to any proceeding that the plaintiffs may be advised to take to enforce whatever claim they may have to relief. They are clearly entitled to some compensation for the use and occupation of their land by the Government, and for any injury done to the land by or during that occupation.

BARTON J. I am entirely of the same opinion.

ISAACS J. I agree, and only wish to add a few words, and upon this basis that the argument for the respondents rested mainly upon the assumption that prior to the institution of the first suit the Government of the State had, in effect, so acted as to elect to take the whole property. Well, I will only say that a perusal of the statement of claim in the first suit will show that it is absolutely inconsistent with that assumption. That statement of claim is based upon the assumption, and it distinctly so states, that the Government had refused and declined to resume the balance of the land. And it was submitted on behalf of the plaintiffs that the defendant Minister did not hold the portion vested in him at all, and that was the basis of the suit and of

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the decree. On this I thoroughly agree with what has been said by the learned Chief Justice that nothing has happened since the decree in that case that can amount, in effect, to an election by the Government to take the rest of the land. That being so ends the matter. I wish also to say that I altogether reserve my opinion on the question whether if the facts were sufficient the law would presume an implied contract to have been made in that way. It is possible, but I offer no opinion whatever upon the subject.

HIGGINS J. read the following judgment:—This is a curious action—in the main an action to compel the Government of New South Wales to take land which, by the decree of the Supreme Court, affirmed by the Full Court, and by the Privy Council, the Government had an election to take, or not to take, as they saw fit. No doubt, the claim is based on facts which are alleged to have taken place during the pendency of the original suit (par. 12). But this is not framed as a supplemental suit; and, in any event, the facts alleged—except lapse of time—actually occurred before, not after 26th May 1902, the date of the commencement of the original suit.

We must take as a starting point the decree in the original suit, which, having been affirmed by the Privy Council, is binding on both parties and on this Court. The Supreme Court decided in favour of the plaintiffs, that sec. 131 of the *Public Works Act* 1900 applied in case of land taken compulsorily by *Gazette* notice under sec. 36 as well as in the case of land taken under "notice to treat" (sec. 41). The decree, therefore, declared that the Government is not entitled to resume that part of the plaintiffs' land which they wanted without resuming the whole; and that in the event of the Government declining to resume the residue of the land, the Minister—in whom that portion had been vested by *Gazette* notice—holds "that portion" in trust for the plaintiffs, and in that case the Minister is ordered to do all things necessary to revest it in the plaintiffs. It probably would have been better if the decree had fixed some date for the Government to elect to take all the land or none; but as no date was fixed, it was competent for the plaintiffs in the original suit to apply in

that suit for an order fixing a date (*Daniell's Chancery Practice*, 6th ed., p. 876). What actually happened was that on 14th March 1906 the Privy Council dismissed the defendant's appeal; that on 8th August following the plaintiffs' solicitor wrote to the Premier calling on the Government to resume the whole of "Bomera" (the property in question), that on 4th January 1907 the Crown Solicitor wrote to the plaintiffs' solicitors to the effect that the Government had decided not to resume the whole of the property, and would revest the portion taken; and the plaintiffs instituted this new suit. No objection has been taken on behalf of the Government to this unusual and expensive course of enforcing rights under a decree; no motion was made for a stay of proceedings; and I am inclined to think that the irregular procedure adopted has tended to obscure the true position. The learned Judge below has decided in favour of the plaintiffs, that the Government are bound to resume the whole of "Bomera," and from that decision this appeal is brought.

I concur in the view that the reasons given for holding the Government bound to take the whole of "Bomera" are insufficient, and I need not criticise in detail the reasons which have already been criticised in the judgment of the Chief Justice. I cannot find anything in sec. 131 to justify the opinion that, where a portion of land is resumed by *Gazette* notice, the Government must be treated as having elected to resume the whole if called upon by the owner to do so. All that sec. 131 says in effect is: —"You—the Government—cannot resume a portion unless you resume all." It does not say "You must take all, if you resume, or attempt to resume, a portion." There is surely a clear distinction between a provision preventing the Government from taking a fraction, and a provision compelling the Government to take the integer. The Government certainly never consented to, or intended to, take the whole of the land; the Statute does not compel the Government to take it; and there are no facts to support an estoppel against the Government, preventing them from showing that they did not consent. I know of no ground other than a contract, a Statute, or perhaps estoppel, which could bind the Government to purchase. Besides, this is not the case made by the statement of claim. As I have stated, the state-

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ment of claim is based on acts alleged to have been done, but not done, since the original suit. The plaintiffs' view of sec. 131 is also inconsistent with the decree, which obviously implies that the Government were still in a position, notwithstanding that they had taken possession of the portion of land under the *Gazette* notice, to resume or not to resume the whole as they saw fit.

As for the alternative claims made in the prayer of the statement of claim, they are clearly impossible, on the grounds stated in the judgments already delivered. During the argument I thought that, if the plaintiffs insisted on it, they might be entitled in this suit under the prayer for other relief, *secundum allegata et probata*, to get compensation for any loss sustained by reason of the Government's interference with the land—the insertion of angle irons, &c.—that even if the plaintiffs could not prove the interference to have taken place after the original suit was commenced, still they could make the Government liable as trustees for injuring the trust property. The decree—rightly or wrongly, it is not for us to say now—declares the Minister to be a trustee of the portion resumed; and I presume that his trusteeship began at the vesting, the date of the *Gazette* notice, 14th November 1900. The compensation, if given, would have to be confined to any loss occasioned by physical interference with the land, and there would certainly have to be an inquiry in Chambers. But, on reconsideration, I do not think that we can, in this suit, properly order any such compensation. The allegations of paragraph 12 are clearly pointed to the blocking of access to the land, —the extension of the wharf, the securing of the extension by means of angle irons to the land, the filling in of the harbour with rubble, &c. Such blocking of access by these means is not a matter for which the Government is liable as trustee of the portion of land described in the *Gazette* notice, and we cannot say then in this suit whether the Government is liable otherwise or not. The proper course, in my opinion, is that already indicated to allow the appeal, and to dismiss the suit, without prejudice to any proceeding for compensation.

Appeal allowed. Judgment appealed from discharged. Suit dismissed with costs,

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without prejudice to any proceedings that the plaintiffs may be advised to take to recover compensation for injury.

Respondents to pay the costs of the appeal.

Solicitor, for the appellant, *The Crown Solicitor for New South Wales.*

Solicitor, for the respondents, *C. A. Coghlan.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

MAIDEN . . . . . APPELLANT;
DEFENDANT,

AND

MAIDEN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 11, 14, 15, 16, 18; *April* 5.

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

Appeal from Supreme Court—Point not taken below—Formal defect—Procedure in Supreme Court—Common law relief in equity suit—Recovery of possession of land—Separation of equitable and common law jurisdiction—Jurisdiction of Equity Court—Equity Act 1901 (*N.S.W.*), (*No.* 24 *of* 1901), *sec.* 8*—*Form of injunction as to possession of land.*

* Sec. 8 of the *Equity Act* 1901 is as follows :—"In any suit or proceeding in equity wherein it may be necessary to establish any legal title or right as a foundation for relief the Court shall itself determine such title or right without requiring the parties to proceed at law to establish the same, and whenever any question now cognizable only at law arises in the course of any proceeding before it the Court shall have cognizance thereof as completely as if the same had arisen in a Court of law, and shall exercise in relation to such title, right, or question all the powers of the Supreme Court in its common law jurisdiction, and no suit in equity shall be open to objection on the ground that the remedy or appropriate remedy is in some other jurisdiction.