case cited by Mr. *Mitchell*, the *Mayor of Portsmouth* v. *Smith* (1), in which Lord *Blackburn* stated:—"Where a single section in an Act of Parliament is introduced into another Act, I think it must be read in the sense which it bore in the original Act from which it is taken."

I regret that my consideration of this matter leads me to a conclusion different from that reached by my learned brothers.

*Appeal allowed.*

Solicitors, for the appellants, *Sydney M. Quinlan* and *Lee*.

Solicitor, for the respondent, *R. J. O'Halloran*, Tamworth, by *R. H. Levien*.

C. E. W.

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[HIGH COURT OF AUSTRALIA.]

WILLIAM HENRY BOXALL . . . APPELLANT;

AND

THE HON. RICHARD MEARES SLY, CHARLES EDWARD WEBB, EDWARD JOHNSTON SIEVERS, THE HON. SAMUEL WILKINSON MOORE (SECRETARY FOR LANDS) AND THE HON. CHARLES GREGORY WADE (ATTORNEY-GENERAL FOR NEW SOUTH WALES) . . . . . RESPONDENTS;

AND

IVIE JAMES SLOAN . . . . . APPELLANT;

AND

SAME . . . . . RESPONDENTS.



ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.



*Crown Lands—Closer Settlement (Amendment) Act* 1907 (*N.S.W.*) (*No.* 12), *secs.* 4, 5*

*Purchase and resumption of land.*

4. (1) Where an advisory board reports that any land is suitable to be

*Secs. 4 and 5 of the *Closer Settlement (Amendment) Act* 1907 (No. 12) are as follows:—

(1) 10 App. Cas., 364, at p. 371.

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*—Closer Settlement (Amendment) Act* 1909 (*N.S.W.*) (*No.* 21), *sec.* 19—*Resumption of land for closer settlement—Notification of intention to resume under sec.* 4 *of* 1907 (*No.* 12)—*Act passed sanctioning construction of railway—Power to resume land under sec.* 5—*Construction of Act affecting right of disposition of land by land owner—Valuation—Deduction of added value which would accrue from construction of railway—Value accrued at date of resumption.*

Where after notification of an intention to resume land under sec. 4 of the *Closer Settlement (Amendment) Act* 1907, an Act is passed authorizing the construction of a line of railway within 15 miles of the land, the Governor may issue a fresh notification under sec. 5, and resume the land under that section.

acquired for closer settlement, the Governor may—

(*a*) Subject to this Act, purchase it by agreement with the owner; or, failing such agreement,

(*b*) where the value of the land, without the improvements thereon, as estimated by the advisory board, exceeds £20,000, resume it under this Act: Provided that this limitation of value shall not apply to land referred to in the next following section.

(2) Every purchase or resumption shall be subject to approval by resolutions of both Houses of Parliament.

(3) Before resuming any land, the Governor shall, by proclamation in the Gazette, notify that he proposes to acquire such land for the purposes of closer settlement.

5. (1) Where, after 6th November 1907 an Act has been passed sanctioning the construction of a line of railway, the Governor may, within six months after the passing of such Act, notify *in the Gazette a list of estates situated, wholly or partly, within* 15 *miles on either side of the line of proposed railway, whereupon no disposition by the owner of any such estate shall operate to defeat the power of the Governor to resume such estate or any part thereof under this Act. Such proclamation shall cease to have effect after the expiration of* 6 *months from its date, except as to any land included in a proclamation made as hereinafter in this section mentioned:*

*Provided that a proclamation under this paragraph may at any time be rescinded or altered in whole or in part by the Minister by notice in the Gazette. While such restriction is in force the Governor may, by proclamation in the Gazette, notify* (1) that he proposes to acquire for the purposes of closer settlement the land therein specified, being land situate within 15 miles on either side of the line of the proposed railway, being the property of one owner, and exceeding £10,000 in value, exclusive of the value of any improvements thereon.

(2) On such proclamation, the following provisions shall apply to any purchase or resumption of such land:—

(*a*) The Governor may purchase or resume such land, and any land not exceeding £10,000 in value, exclusive of the value of any improvements thereon, forming the residue of the same property and worked with it and situate outside the said distance from the line of railway.

(*b*) The advisory board, or the Court determining the value of any such land, shall, in estimating or determining such value, exclude any added value which would accrue to the land from the construction of the line of railway, *or which has so accrued from the proposed construction of the line* (1).

(*c*) Where the land is resumed, the owner may require the Governor to include in the resumption any land not exceeding £10,000 in value, exclusive of the value of any improvements thereon, forming the residue of the same property, and worked with it and situate inside or outside the said distance from the line of railway, or forming a part of such residue which by the resumption may be so severed from the rest of the area not resumed, as, in the opinion of the advisory board, to render it unworkable with such area.

(1) The words in italics were added by sec. 19 of the *Closer Settlement (Amendment) Act* 1909.

Sec. 5 (2) (*b*) of the *Closer Settlement* (*Amendment*) *Act* 1907 provides that in estimating the value of land resumed under that section, the added value which would accrue to the land from the construction of a railway, which has been authorized after the notification of the intended resumption, shall be excluded from calculation.

*Held*, that any added value which, at the date of resumption, had accrued to the land by reason of the proposed construction of the railway, should be excluded from the compensation payable to the landowner.

Decision of the Supreme Court : *Ex parte Boxall*, 10 S.R. (N.S.W.), 759, affirmed.

APPEALS from the judgment of the Supreme Court discharging a rule *nisi* for a *certiorari* to quash a decision of *Sly* J. and the members of a Special Court, constituted under sec. 10 of the *Closer Settlement* (*Amendment*) *Act* 1907, for the purpose of assessing the compensation payable in respect of the resumption of the North Logan estate. Both appeals were heard together.

By proclamation dated 19th May 1908, under sec. 4 of 1907 No. 12, the Governor notified that he proposed to acquire for the purposes of closer settlement Ivie James Sloan's North Logan estate, comprising about 18,843 acres of land. About 10,290 acres of this estate were the subject of a contract of sale dated 14th March 1908 between the appellants, Sloan and Boxall, each of whom gave notice of their claim to retain portion of the land. After these notices had been given negotiations took place between the appellants and the Chief Officer of the Closer Settlement branch, and an agreement was drawn up in pursuance of which the appellant Sloan lodged a fresh notice of retention, and the notice of retention lodged by Boxall was withdrawn.

On 15th December 1908 the *Cowra-Canowindra Railway Act* was passed authorizing the construction of a line of railway passing near the land in question.

On 5th May 1909 a further proclamation was issued under sec. 5 of 1907 No. 12, reciting the passing of the *Cowra-Canowindra Railway Act*, and stating that the Governor proposed to acquire the land referred to in the first mentioned proclamation, being land situate within 15 miles of the line of the proposed railway, the property of one owner, and exceeding £10,000 in value exclusive of any improvements. Fresh notices of retention were

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given by the appellants, and the Under-Secretary for Lands having stated that this proclamation rendered the agreement previously made nugatory, a new agreement in similar terms was made between the same parties.

The land resumed was valued by a Closer Settlement Advisory Board. The appellants being dissatisfied with the compensation money offered by the Crown a Special Court, the members of which were respondents to this appeal, was appointed to determine its value. Both cases were heard together. The Court determined that the fair market value of the resumed area, together with the value of the improvements thereon, having excluded the sum of £5,116 10s. 0d. (being the added value which would accrue to the land from the construction of the Cowra to Canowindra Railway), was £48,606.

The appellants obtained a rule *nisi* for a *certiorari* to quash the order upon the grounds: (1) that the Governor, having issued a notification under sec. 4 (3) of 1907 No. 12, could not issue another notification under sec. 5 in respect of the same lands; (2) that the sum of £5,116 represented value which had accrued from the construction of the line of railway at the date of the resumption, and therefore could not be deducted. The Supreme Court (*Cullen* C.J., *Pring* and *Street* JJ.) discharged the rule *nisi*: *Ex parte Boxall* (1).

*Wise* K.C. and *Gerald Campbell*, for the appellant Boxall. The issue by the Crown of the proclamation of 19th May 1908, under sec. 4 of 1907 No. 12, conferred certain contractual rights upon the appellant, of which he cannot be deprived by the issue of another proclamation under sec. 5. The undertaking by the Crown under the first proclamation was, subject to the approval of Parliament being afterwards obtained, to pay the price agreed upon by the parties, or, if the owner should be dissatisfied with the price offered by the Crown, the fair market value as determined by the Special Court under sec. 9. The Act provides two alternative methods of acquiring land for the purpose of closer settlement, one or other of which may be adopted by the Crown, but not both. They apply to different circumstances, and are separate

(1) 10 S.R. (N.S.W.), 759.

and distinct. By sec. 6 the issue of a proclamation under sec. 4 restricts the owner's right of disposition of his land for twelve months, and no compensation is provided by the Act. The respondents' contention is that, by issuing successive proclamations, the Crown could prevent the owner from dealing with his land for years. Under sec. 12, in cases where the land has been resumed under sec. 4, the owner can compel the Crown to include in the resumption the residue of the land not exceeding £20,000 in value. This differs from the right conferred by sec. 5. Further, sec. 23 of the *Closer Settlement (Amendment) Act* 1909, dealing with the costs of the appeal, would be quite unworkable if there are two resumptions and offers and valuations. The use of the word "either" in sec. 6 also shows that only one method of resumption was contemplated by the Act. Sec. 13 confers a vested right to retain a specific portion of the land proposed to be resumed under sec. 4, and the issue of a second proclamation under sec. 5 would defeat that right. The resumption must be considered to have taken place under sec. 4, the attempted notification under sec. 5 being inoperative, and the appellant is entitled to have the fair market value of the land determined under sec. 9. If the resumption took place under sec. 5, the Special Court were not entitled to deduct the added value which had accrued from the construction of the railway. The Amending Act of 1909 does not apply, because the rights of the parties are fixed as at the date of the proclamation of 5th May 1909, before that Act was passed. The addition of the words "or which has accrued" to sec. 5 (2) (*b*), by sec. 19 (2) of the Amending Act, 1909 No. 21, shows that the legislature intended to distinguish between added value which has and which will accrue. *Certiorari* is the proper remedy: *R.* v. *Board of Education* (1).

*Canaway* K.C. and *Gerald Campbell*, for the appellant Sloan. The appellants did not in any way assent to the matter being dealt with under the second proclamation. In 1908 they had a vested right to have the fair market value of the land determined under sec. 9 After the notification under sec. 4 there was an obligation imposed upon the Crown to proceed with the resump-

(1) (1910) 2 K.B., 165.

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tion under that section. The principle is that where proceedings have been taken under a statutory authority which is binding on the owner, a reciprocal obligation arises on the part of the Crown: *Birch* v. *Vestry of St. Marylebone* (1). There is no power to countermand a notice once given: *R.* v. *Hungerford Market Co.* (2).

[ISAACS J.—Must not the approval of Parliament be assumed to have been given on the basis on which it was asked, that is, as a resumption under sec. 5?

O'CONNOR J.—Very much more would be paid for the land under sec. 4 that under sec. 5. Surely that is a matter Parliament would consider. The only evidence of the approval of Parliament is in the proclamation which was obviously issued under sec. 5.]

If the operative words of the proclamation of resumption are clear, a misleading recital will be disregarded: *Maule* v. *Lord Moncrieffe* (3). The proclamation of 5th May 1909 was *ultra vires*. Parliament must be taken to have approved of the resumption in accordance with the notification under sec. 4.

The fact that no compensation is provided for the restriction imposed by sec. 6 is a strong argument against doubling the embargo. An Act purporting to give power to interfere with private rights without compensation must be strictly construed: *Commissioner of Public Works (Cape Colony)* v. *Logan* (4). The only case in which the first notification can be withdrawn is where a counter-notice has been given by the landowner under sec. 12 requiring the Crown to resume contiguous land: *Ashton Vale Iron Co. Ltd.* v. *Mayor of Bristol* (5). The words "such restriction shall cease after the expiration of twelve months from the date of such proclamation" show that it was not intended that successive proclamations should be issued. If the powers of sec. 5 could be superimposed on sec. 4 it is reasonable to suppose there would be consequential provisions in the Act for shortening the period of restriction. Sec. 5 should be construed as not applying to lands already covered by a restriction under sec. 4: *Railton* v. *Wood* (6). Sec. 5 has a twofold object which

(1) 20 L.T., 697.
(2) 4 B. & Ad., 327.
(3) 5 Bell Sc. App., 333.
(4) (1903) A.C., 355.
(5) (1901) 1 Ch., 591.
(6) 15 App. Cas., 363.

differentiates it from sec. 4. It enables the Crown to resume estates of smaller value, and at a cheaper rate. The notification under sec. 4 was a representation of an intention to resume which the Crown intended the owner to act upon, and which did in fact alter the position of the owner. The Crown is therefore bound not to do anything which would prevent it from making its representation good: *Carr* v. *London and North Western Railway Co.* (1).

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As to the second point, the Court have erroneously deducted from the fair market value of the land an added value which had accrued at the date of resumption: *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (2).

*Campbell* K.C. and *Pike*, for the respondents. Effect cannot be given to the powers conferred by secs. 4 and 5 unless they are cumulative, and can be exercised successively. They apply to different conditions, and can be exercised whenever those conditions arise. The proclamation under sec. 4 did not confer any vested rights upon the appellants: *R.* v. *Commissioners of Woods and Forests* (3); *Altrincham Union Assessment Committee* v. *Cheshire Lines Committee* (4); *In re Abbott* (5). Cases decided under the Land Clauses Consolidation Acts have no application to the construction of this Act.

The added value was properly excluded as representing the difference between the market value of the land with and without the railway. It was an actual element of value existing at the date of the resumption.

*Wise* K.C. replied.

March 31.

GRIFFITH C.J. The appellants in these two cases are the owners of land which has been resumed by the Government of New South Wales, purporting to act under the powers conferred by sec. 5 of the *Closer Settlement (Amendment) Act* 1907. The appeals are in respect of a deduction from the compensation awarded to the appellants by the Court which assessed the

(1) L.R. 10 C.P., 307.
(2) (1901) A.C., 373.
(3) 15 Q.B., 761.
(4) 15 Q.B.D., 597.
(5) 16 N.S.W. L.R., 77.

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compensation. Sec. 5 provides that in cases to which it is applicable the Court in determining the value of the land shall exclude any added value "which would accrue" from the construction of a railway line as provided in that section.

The appellants' contention is, first, that sec. 5 does not apply to the present case, and, secondly, that if it does, the Court did not adopt the rule of valuation prescribed by that section.

I have done my best to appreciate the very persistent and earnest arguments addressed to the Court on behalf of the appellants, but I am not sure even now that I fully appreciate them. They appear to me to be to a great extent illusory, and to have no foundation either in the provisions of the Statute or the facts of the case.

Apart from the facts, the question for determination depends entirely upon the construction of the Statute, which appears to me to be clear and unambiguous in its terms. The Act of 1907 amends the provisions contained in the Principal Act for the resumption of large estates which are considered suitable for the purpose of closer settlement. It provides for the appointment of boards, called Closer Settlement Advisory Boards, whose duty is to report from time to time to the Minister what land is suitable for closer settlement, its estimated value, the price at which its acquisition is recommended, and some other matters. Sec. 4 provides that after a Board has reported that any land is suitable for closer settlement, the Governor may purchase it by agreement, or, failing such agreement, when the value of the land exclusive of improvements exceeds £20,000, may resume it under the Act. Both under this Act and the Principal Act of which it is an amendment it is assumed that the land is held by one person, or group of persons, under a single title. Every purchase or resumption is subject to the approval by resolutions of both Houses of Parliament. The method of procedure under sec. 4 is that before resumption the Governor, by proclamation in the *Gazette*, notifies that he proposes to acquire the land for the purposes of closer settlement.

Sec. 5 deals with the case where, after 6th November 1907, presumably the date of the introduction of the Act, an Act has been passed sanctioning the construction of a line of railway, and

provides that the Governor may within six months after the passing of such an Act notify by proclamation in the *Gazette* that he proposes to acquire for the purposes of closer settlement the land therein specified, lying within 15 miles on either side of the line of the proposed railway, being the property of one owner, and exceeding £10,000 in value exclusive of improvements. Resumption in either case is affected by notification in the *Gazette* as provided in sec. 7, and the land then vests in His Majesty for the purposes of the Act, subject to certain rights accruing to the owner.

As the land resumed must be the property of one owner it is obvious that, during the interval between the notification of the proposal to acquire the land and the date of resumption, it would be possible for the owner to subdivide the land, and so dispose of it that no one portion of it would be of greater value than £20,000 in the one case, and £10,000 in the other, and thus to frustrate the object of the legislature. It was therefore provided by sec. 6 that, after the proposal to acquire the land under secs. 4 or 5 had been notified, no disposition of the land should operate to defeat the power of resumption under the Act; but that such restriction should cease after the expiration of twelve months from the date of the proclamation of intention. Under sec. 13 the owner is entitled to retain a portion of the land not exceeding £10,000 in value, or, in other words, is entitled at his option to restrict the power of resumption so that it will still leave him £10,000 worth of his estate.

The contention of the appellants is that the notification of an intention to acquire the land has the effect of a notice to treat under the *Land Clauses Consolidation Act*, and constitutes a statutory contract between the Government and the owner that the Government will go on with that resumption.

There are two obvious answers to that argument. In the first place, the resumption is subject to the approval of both Houses of Parliament as to which no Court can impose any restrictions. It might happen for many reasons that Parliament would not approve of the proposal within the twelve months. It does not follow that Parliament would not consider the acquisition of the land desirable at a later date. It is quite impossible to hold that

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the notification of an intention to resume the land binds the Government to resume it. Another answer to the argument is that a power of resumption, such as is conferred by this Act, when conferred upon the Government, has never been held to create any right in the owner of the land to compel the Government to carry out the purpose. This is clearly established in *R.* v. *Commissioners of Woods and Forests* (1). There is therefore no reason why an intention thus notified should not be abandoned, as it must be of necessity if Parliament would not agree to it, or why it should not be again formed and carried into effect.

If, however, it is not carried into effect within the twelve months the restriction upon disposition comes to an end, and the owner is free to subdivide.

Sec. 5 deals with a different case, where Parliament has authorized the construction of a railway. It is plain that circumstances may change after the first notification has been issued, and I am quite unable to apprehend any reason why, if the Government should think it desirable in the public interest to resume the land, which would probably have increased in value in consequence of the proposal to construct a railway, they should not then be allowed to take advantage of the powers conferred by sec. 5. The argument is that the right to retain £10,000 worth of land is in the nature of a vested right, which would be destroyed if the power could be exercised more than once. The power given by sec. 13 is, as already said, a right to restrict the operation of the original notice. If the original notice is allowed to lapse there is an end of the matter, and the owner is where he was before, and has just such rights as the law allows him.

The facts are that by proclamation dated 19th May 1908 the Governor of New South Wales notified that he proposed to acquire the lands in question for the purposes of closer settlement. Any questions as to the right of retention were amicably settled by agreement between the parties. On 15th December 1908 an Act was passed authorizing the construction of a railway from Cowra to Canowindra. Within six months from that date, on 5th May 1909, a proclamation was issued reciting the passing of

(1) 15 Q.B., 761.

the *Railway Act* and stating that it was proposed to acquire the land, being within 15 miles of the proposed line of railway, for closer settlement. On 19th January 1910 a further proclamation was issued reciting the passing of the *Railway Act*, that the land, being within 15 miles of the line and exceeding £10,000 in value exclusive of improvements, had been reported as suitable for closer settlement, that both Houses of Parliament had approved of the resumption, and declaring that the land should vest in His Majesty for the purpose of closer settlement.

The contention of the appellants, so far as I can understand it, is that this proclamation, although it recited in the plainest terms the exercise by the Governor of the powers conferred by sec. 5, must be read as carrying out the intention notified on 19th May 1908 issued under entirely different circumstances before the *Cowra to Canowindra Railway Act* was passed. I confess again my inability to see what objection there can be to the exercise of that power under sec. 5. Effect is sought to be given to the argument in this way: The first proclamation having been issued, anything subsequently done must in point of law be deemed to have been done in pursuance of that proclamation. This argument seems to me to be wholly illusory.

In my judgment the resumption was made in law, as it purported to be in fact, under sec. 5, and the rights of the parties must be determined accordingly.

One of the rights conferred upon the owner is that, in the absence of any agreement, the valuation provided for by sec. 8 is to be made by a Special Court, and in determining the value the Court is to be guided by the rules laid down in sec. 5.

The Court in their order and award dated 1st September 1910 said that they assessed the fair market value of the land without improvements, and having excluded an amount, being the added value which would accrue to the land from the construction of the Cowra to Canowindra railway line, at so much, following the exact words of the section. I have already dealt with the argument that sec. 5 had no application to the case. Assuming the section to apply, the further objection is that the Court did not properly give effect to it, and argument was addressed to us as to the meaning of the words "value which would accrue."

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Anyone familiar with such matters knows that when a railway is constructed through country land the value of the land in the vicinity of the proposed line is, or may be, increased by reason of the cheaper means of communication with a market. The actual enhancement, of course, does not accrue until these means of communication are completed, but an intending purchaser would naturally take the fact into consideration, and would probably be willing to give an increased price in anticipation of the promised benefit. In that sense the market value of the land may be said to have been already increased. But the increase is not inaptly described as "added value that would accrue to the land from the construction of the line of railway" —that is, value which will accrue to the land when the railway is completed and will not accrue to it if the railway is not constructed, or, in other words, the increase in value dependent and contingent upon the provision of railway communication. There can be no doubt that that is the meaning of the words of sec. 5.

The appellants contend that the value had actually accrued since a purchaser would give an increased price. In anticipation of such an argument the legislature has since added the words "or which has so accrued from the proposed construction of the line." In my opinion it is equally correct to speak of "value which would accrue" and "value which has accrued" from the proposed construction. The point of view is different, but when the line is actually under construction the two expressions mean practically the same. The words added by the amendment may, however, include a case where a line has been merely authorized and its construction is still doubtful. In any view of the section it is manifest that what the Court is directed to exclude from consideration is something which the Court would otherwise have taken into consideration, and this can only be the increase in the present market value which is attributable to the expectation of future benefit from the improved means of communication. The case seems to have been conducted on these lines. One of the appellants' principal witnesses, Mr. Busby, was asked by Mr. *Canaway*: "Take Colleton paddock: you gave a value for that without the railway, now value it with the railway on 12th

January 1910." The answer was: "I consider that an added value based on the carrying rates would be 4s. 2d. added to the value which I consider is based on when they had to cart the wheat to Cowra." His Honor then asked: "In other words you give 4s. 2d. per acre added value as between the distance from the siding and from Cowra." The witness replied "Yes."

The witness was further questioned by his Honor as follows: "I thought you gave your value as on 10th January this year—then these are not the values in January this year—these increases are not the value in January this year." The answer is: "I speculate that is what is the value when the railway is in operation."

The evidence given at the hearing was therefore based on the view which I have endeavoured to express. In my opinion, therefore, there was no error in the way the case was conducted.

The question whether the provisions of sec. 4 or those of sec. 5 were applicable to the case is, I think, a proper subject for inquiry upon an application for *certiorari*. Whether the other question is a proper subject for inquiry upon such an application is a matter of more difficulty, upon which I do not express any opinion.

In my judgment the appeal fails.

BARTON J. read the following judgment:—I also am of opinion that the judgment of the Supreme Court must be affirmed. The reasons of their Honors, as expressed by the learned Chief Justice of that Court, appear to me to give ample support to their conclusions, which are the subject of these appeals. Assuming, without deciding, that *certiorari* or *mandamus* would lie if the Supreme Court had erred in the construction of the Statutes in question, I see no reason to doubt the correctness of the construction which that tribunal has adopted.

O'CONNOR J. read the following judgment:—It is quite clear that the notification of intention to resume made under sec. 5 of the *Closer Settlement (Amendment) Act* 1907 was the foundation of the proclamation of resumption under which the land was taken, and also that it was the notice on which the inquiry of

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the Special Court proceeded. The appellants themselves reaped the advantage of the Court, and acted on the assumed fact that the resumption had been made under that proclamation. The proclamation itself recited that it was so, indeed there was no other foundation for the action of the Crown in resuming the land. The appellants have therefore put themselves in this position: Having adopted the procedure which was founded on the second proclamation, they cannot affirm part and disaffirm other parts of the proceedings which followed. If they wish to take advantage of their first objection, it can only be on the footing that the whole of these proceedings in which they took part under the circumstances I have mentioned were absolutely invalid and nugatory. On that basis the argument in this Court proceeded, and it is only on that basis it can stand. I shall now deal shortly with the first objection which I take to be this: Notification having issued of an intention to resume under sec. 4 of the Act, and a period of twelve months not having elapsed, it was unlawful for the Government to issue a second proclamation notifying an intention to resume under sec. 5. I cannot help thinking that the very earnest and ingenious arguments addressed to the Court by Mr. *Wise* and Mr. *Canaway* on behalf of the appellants were founded on a mistaken analogy between resumptions under the procedure laid down in these Acts and proceedings for compulsory purchase under the Land Clauses Consolidation Acts in England. A number of cases were cited by Mr. *Canaway*, which followed the principle adopted and recognized in *Morgan* v. *Metropolitan Railway Co.* (1) and stated as follows by *Kelly* C.B.:—"Ever since the case of *Rex* v. *Hungerford Market Co.* (2) it has uniformly been held that, wherever a company is entitled to take land compulsorily under the powers of an Act of Parliament, if they give notice of their intention to take the land, that is an exercise of their option from which they cannot recede, and the notice operates as a contract or an undertaking by them to become the purchasers."

It has been expressly held in England, in *Reg.* v. *Commissioner of Woods and Forests* (3), that the considerations which

(1) L.R. 4 C.P. 97, at p. 103.
(2) 4 B. & Ad., 327.
(3) 15 Q.B., 761.

bind the party acquiring the land immediately a notice has been given, where the acquisition is for the purposes of private undertaking, have no application where the notice is given and the acquisition is to be made by some authority on behalf of the public. In such a case the only matter to consider is in what terms has the legislature conferred the power and whether the public authority acted within the power. It seems to me, therefore, the line of cases cited in the argument by the appellants' counsel have nothing to do with the question we have to decide. That question, simply stated, is whether the Act we are now considering does or does not permit the Government, which has issued a proclamation notifying its intention to resume land for closer settlement under sec. 4, to issue another proclamation within twelve months thereafter notifying its intention to take the further action provided for by sec 5. Looking at the provisions of the Act itself, the language plainly authorizes both these steps to be taken, applicable as they are to different sets of circumstances. The appellants were therefore driven to rely upon arguments founded on other sections to show that the words of the legislature, as used in secs. 4 and 5, were not to be interpreted according to their ordinary grammatical meaning, but must be so construed as to render sec. 5 inapplicable to lands with respect to which a proclamation has already been issued under sec. 4. The object and purpose of the Act is perfectly plain. It is founded on the principle that private interest must give way to the public good, and that, where it becomes necessary for the Government to take possession of property for the public use, it is right that the Government should be empowered to take it, but always with the proviso that fair compensation must be made to the owner. One may well agree with the principle relied upon by the appellants' counsel that, in interpreting legislation of that kind, it will be assumed the legislature did not intend to take private property for public use without paying fair and reasonable compensation.

Turning now to the particular sections under consideration, it is to be observed that the 4th and 5th sections deal with entirely different sets of circumstances, and aim at protecting the interests of the public in two respects quite independent of

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each other. Sec. 4 deals with cases of land acquired mostly for the purpose of closer settlement. In such cases no factor of added value, by reason of the construction of a railway, can enter into the consideration of the matter by the Court which is to determine the amount of compensation. The only difficulty to be guarded against in those cases is that, after it becomes generally known that there will be a resumption, some action may be taken by the owners to divide or dispose of the property in such a way as to prevent the Act from applying. In order therefore to ensure that the land shall remain as it is for the purposes of the resumption, power is given to issue a proclamation of the intention to resume under sec. 4, which shall have the effect of restricting any disposition of the land by the owner which could operate to defeat the resumption of the land under the Act, the restriction to continue for twelve months from the date of the proclamation. The only effect therefore of the notification under sec. 4 is to put a stop to dealings with the property by the owner; it gives the Government no right to enter upon the property, to use it, or to interfere with the occupation of the owner in any way. Sec. 5 deals with an entirely different set of things, namely, with cases in which an Act has been passed authorizing the construction of a railway. As is well known, statutory sanction to the construction of a Government railway the cost of which is estimated at over £20,000 is reached only after a series of proceedings under the *Public Works Act*, from which the public may gather, at a very early stage, whether the railway is likely to be constructed or not. Those proceedings generally extend over a considerable period, and, by the time the *Railway Act* is passed, there have usually been months, sometimes years, during which the public have had the opportunity of judging how the value of land traversed by the railway is likely to be affected by its construction. It is obvious that, when the land is to be resumed for the purpose of closer settlement, it would be unfair to the public that there should be included in the compensation an added value arising from the action of Parliament in authorizing, or of the Government in building, a railway through it. The principle of betterment is certainly fairly applicable in the case of land so resumed. In order therefore to prevent the Government having

to pay a higher price for the land by reason of a value added by the expenditure or proposed expenditure of public moneys, the legislature has enacted the provisions of sec. 5. The reasonableness of the provisions which I have been explaining cannot, it seems to me, be contested where the land to be resumed is dealt with under the provisions of sec. 5 and under no other section. There would appear to be no reason in the Act itself, nor on any ground of fair dealing, why the protection which sec. 5 throws around the public interests should not be always applicable when the building of a public railway over the land has been authorized. The fact that a proclamation under sec. 4 has been previously issued cannot justify a different construction of sec. 5 from that which must be adopted when no proclamation under sec. 4 has been previously issued. The argument of the appellants' counsel turns upon secs. 13 and 9, and is put thus:—Sec. 13 authorizes the owner of land, after notification of intention to resume, to apply to retain a certain proportion of it; the area, situation and boundaries of the proportion to be retained are to be determined by the Minister on the recommendation of the Advisory Board. If the owner is dissatisfied with the determination, he may waive the exercise of the right. But the right to retain cannot have any effect until after resumption. Before resumption the Government cannot enter on the land or deal with it in any way. It is only in anticipation of resumption that the right to apply for retention can operate. How can it be said with any show of reason that the section gives any vested right to the owner of the land? At that stage neither the Government nor the owner have acquired any vested interests. Sec. 9 also operates only after resumption. The section enables the owner to have the fair market value of the land and improvements determined by the Court. But he gets no vested interest, even to have the matter brought before the Court, until after resumption. So far as the first point, therefore, is concerned it is quite clear that there is no foundation for the argument that the Act is to be read in a way which does violence to the plain grammatical meaning of the words the legislature has used in order to carry out some assumed intention of the legislature.

As to the other grounds I concur in the views expressed by my

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learned brother the Chief Justice. I agree that the Special Court was right in making the deduction, that the decision of the Supreme Court was correct, and that the appeal in both cases must be dismissed.

ISAACS J. read the following judgment:—The Act of 1907 confers separate and distinct powers for the acquisition of private land for the public purpose of closer settlement. Sec. 4 is general, but the estimated value of the land must be over £20,000. Sec. 5 applies where a railway has been authorized, and besides a limitation of time, the conditions are that the land is within 15 miles of the railway and exceeds £10,000 in value.

In each case the power of acquisition is subject to parliamentary approval, so that each particular resumption is effected by the same concurrence of opinion as in the case of a parliamentary enactment. This is a material circumstance when the Court is asked, in order to prevent possible oppression, to limit the primary import of the enactment by reading into it what, if introduced at all, must be necessary implications. It is not to be presumed that harsh and harassing methods would be attempted by those who represent the Crown, or if attempted would be sanctioned by Parliament. I see no warrant for refusing to the words of the Statute the full scope their natural meaning affords.

Very serious practical difficulties, tending to defeat the purpose of the legislation, without any real advantage to the landowner, would result from the appellants' interpretation of the Act. The Government might propose to resume £25,000 worth of land irrespective of any railway, and Parliament might disapprove because no railway came near it. Two years or twenty years later, when a railway is authorized, the Government might desire the land or part of it, and Parliament, its only objection removed, might be willing to approve.

On the appellants' argument this is not permissible, although no confiscation is suggested or possible, although the full and fair value is to be given for the land, and although the owner has his full statutory rights in respect of the desired resumption both as to fixation of the price, and retention of a valued proportion of

the land. The fact which by implication of law, as it is said, disentitles the Government in such case to take the land is that it was a subject of a former proposal to resume it, which failed because an objection then existed that has since been cured.

The suggested reason for giving this potency to the fact is that Parliament has made two special statutory provisions in connection with every projected resumption. The first is that, after a proclamation announcing that the Government proposes to resume any land, every disposition of it is subject to the right of resumption; that is, no subsequent private disposition is treated as competent to destroy the conditions which exist when the notification is issued and upon which resumption can lawfully take place. It is contended that it must be implied that Parliament did not intend that restriction to be imposed more than once on the same land. But if it were not for that provision, the death of the owner the next day distributing his property by will, or the gift *inter vivos* of part to a relative, or the sale of such portion as left less than the statutory value, would render resumption impossible, because before Parliament had any opportunity to pronounce upon the matter the right would have disappeared. It is said a fetter is put on alienation. Alienation is not prohibited, but, until a reasonable time for action has expired, is made subject to the higher public right already attaching to the land. And we must recollect that land is not like some commercial commodity, considered as a subject of frequent transfer until consumed; estates of the magnitude dealt with are not so often cut up or passed from hand to hand as to make the fetter, as it is called, a very formidable one as compared with the public purpose it is designed to serve. I think the proper way to regard sec. 6 is not as a fetter at all, but as a necessary means adopted by Parliament without either taking property or permanently affecting it, in order merely to effectuate the main object of the Act, and without which that object might easily be frustrated.

The other provision relied on is sec. 13, which, it is said, confers a vested right to retain a specific portion of the land, after ascertainment in the way prescribed, and is therefore inconsistent with subsequent resumption. But the only right conferred by that section is the option of limiting the quantity of land which

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under a given proclamation may be resumed. When the proceedings under that proclamation are at an end, either by abandonment or resumption, the operation of the section is exhausted, and the position as to the retained land is precisely as before the proceedings began. Should any future proclamation be made including the same land, sec. 13 may again be called into requisition and used by the landowner. But there is nothing in the section by which land once retained under it is thereby surrounded with perpetual inviolability from all future demands of the public welfare as designed by the enactment.

These contentions failing, the proclamation of 5th May 1909 was valid, and the only question remaining is whether the statutory Appeal Court misconceived the law in thinking it could exclude from the fair market value of the land at the date of the resumption such part of that value as was added on account of the railway.

The argument for the appellants affirmed the misconception on the ground that the phrase "would accrue" meant at some date later than the date of resumption. That contention was supported by the later addition to the section, by which, it was said, a clear distinction was drawn between future and past accretion to value. But the arguments the other way are overwhelming. The unmistakeable intention of the Act is to prevent the State having to pay the landholder for a new value created only by its own project, and the appellants' view would nullify that intention, because, if the landholder received all the added value which up to the date of resumption an ordinary buyer would attach to it by reason of its proximity to the line, there would be nothing left to exclude. The very word "exclude" imports that, but for the statutory exclusion, the fair market value at the date of resumption would include the added value referred to. That added value, then, *ex necessitate*, is to be considered as the matter stands on the day of resumption. The form which the legislative phrasing has taken, viz., "would accrue," is due to the circumstance that the estimate of the Advisory Board is primarily mentioned in the sub-section. The Advisory Board reports before the first proclamation and estimates its value. This is to enable the Governor in the first place, and Parliament in the second, to

see what it would probably cost the State if resumed, and so looking forward to a possible day of resumption, the Advisory Board, by sub-sec. 2 (*b*) of sec. 5, when making its estimate of the value which the State would have to pay, is directed to exclude that part of it which would accrue in consequence of the railway by the day the land is resumed. So much is not doubtful, and both the affirmative estimate and the exclusion are necessarily not later than the date of resumption.

Then in sec. 9 it is provided that if the owner is dissatisfied with the Government's offer, or in the absence of an offer, with the Board's estimate, he can have the value determined by an Appeal Court. But sub-sec. 2 (*b*) of sec. 5 prescribes the same standard of exclusion for the Court as for the Board. The latter tribunal may come to a different conclusion as to amount, and the landowner is free to induce it to do so if he can, as by evidence which the Board did not have, but the nature and extent of the exclusion is the same, and cannot comprise anything later than the date of resumption. I do not think the latter addition has in any way altered the effect of the section as it previously stood.

I agree that the appeal should be dismissed.

*Appeal dismissed.*

Solicitor, for appellants, *Thomas Rose.*

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

C. E. W.