Cons *Aust Tape Manufacturers Assoc Ltd* v *Commonwealth* (1993) 112 ALR 53
Cons *Aust Tape Manufacturers Assoc Ltd* v *Commonwealth* (1993) 25 IPR 1
Appl *Aust Tape Manufacturers Assoc Ltd* v *Commonwealth* (1993) 67 ALJR 315
Dist *Tunnock* v *State of Victoria* (1951) 84 CLR 42
Cons *WSGAL Pty Ltd* v *Trade Practices Comm* (1994) 51 FCR 115
Foll *Commonwealth of Australia* v *Western Mining Corporation Ltd* (1996) 67 FCR 153
Appl *Newcrest Mining (WA) Limited* v *BHP Minerals Limited & Cth* (1997) 71 ALJR 1346
Cons *Durham Holdings Pty Ltd* v *New South Wales* (1999) 47 NSWLR 340
Cons *Durham Holdings Pty Ltd* v *New South Wales* (1999) 152 FLR 94
Cons *Pauls Ltd* v *Dwyer* (2002) 43 ACSR 413

[HIGH COURT OF AUSTRALIA.]

P. J. MAGENNIS PROPRIETARY LIMITED . PLAINTIFF;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

H. C. OF A. 1949.

SYDNEY, *Nov.* 23, 24; *Dec.* 21.

Latham C.J., Rich, Dixon, McTiernan, Williams and Webb JJ.

Constitutional Law—Rehabilitation of discharged members of the Forces—Settlement on land—Joint scheme—Agreement between Commonwealth and a State—Acquisition of land—Just terms—Compensation—Value as at 10th February 1942—Financial assistance—Commonwealth statute—Validity—State statute—Operation—The Constitution (63 & 64 *Vict. c.* 12), ss. 51 (*vi.*), (*xxxi.*), (*xxxix.*), 96, 109—*War Service Land Settlement Agreements Act* 1945 (*No.* 52 *of* 1945), *s.* 3 (1), (2), *First Schedule—Re-establishment and Employment Act* 1945 (*No.* 11 *of* 1945), *s.* 103—*Closer Settlement* (*Amendment*) *Act* 1907-1948 (*N.S.W.*) (*No.* 12 *of* 1907—*No.* 48 *of* 1948), *ss.* 4, 5 (7) (*e*), (*f*), 7, 9—*War Service Land Settlement Agreement Act* 1945 (*N.S.W.*) (*No.* 6 *of* 1946), *Schedule—War Service Land Settlement and Closer Settlement* (*Amendment*) *Act* 1945-1948 (*N.S.W.*) (*No.* 14 *of* 1946—*No.* 48 *of* 1948), *s.* 3.

An agreement between the Commonwealth and the State of New South Wales made in order to carry into effect proposals agreed to at a conference of Commonwealth and State Ministers with a view to the settlement on land in the State of discharged members of the Forces and other eligible persons, was approved by the Commonwealth Parliament by the *War Service Land Settlement Agreements Act* 1945, and was approved by the State of New South Wales by the *War Service Land Settlement Agreement Act* 1945. The agreement, under which both parties assumed financial and other obligations, contained a term that, for the purposes of the agreement, land should be acquired compulsorily or by agreement at a value not exceeding that ruling on 10th February 1942. A similar term was contained in a proviso to s. 4 (1) of the *Closer Settlement* (*Amendment*) *Act* 1907-1948 (N.S.W.) with respect to land acquired for the purpose of the scheme contained in the agreement. A proclamation was, prior to the approval of the agreement by the State, made under s. 4 that it was proposed to consider the advisableness of acquiring the plaintiff's land for purposes of closer settlement. The land had greatly increased in value since February 1942.

Held, by *Latham* C.J., *Rich*, *Williams* and *Webb* JJ. (*Dixon* and *McTiernan* JJ. dissenting), (1) that the *War Service Land Settlement Agreements Act* 1945 (Cth.) was legislation with respect to the acquisition of property upon terms which were not just and was invalid; therefore (2) the *War Service Land Settlement Agreement Act* 1945 (N.S.W.) and the *Closer Settlement (Amendment) Act* 1907-1948 (N.S.W.), although not invalid, were inoperative so far as they related to and purported to give powers to resume lands for the purposes of the agreement.

Per Latham C.J., *Rich*, *Dixon*, *Williams* and *Webb* JJ.: Legislation can be legislation with respect to the acquisition of property even though it also be legislation for other purposes with respect to which the Commonwealth Parliament has power to make laws.

DEMURRER.

In an action brought in the High Court by P. J. Magennis Pty. Ltd. against the Commonwealth of Australia, the Honourable John Johnstone Dedman, the Attorney-General for the Commonwealth of Australia, the State of New South Wales, the Honourable William Francis Sheahan, and the Attorney-General for the State of New South Wales, the statement of claim was substantially as follows :—

1. P. J. Magennis Pty. Ltd. the above-named plaintiff is a company duly incorporated under the law in the State of New South Wales and is entitled to sue in and by its said incorporated name.

2. The plaintiff is duly registered under the provisions of the *Real Property Act*, 1900, (N.S.W.) for an estate in fee simple in the lands hereunder described in the schedule to the proclamation referred to in par. 6 of the statement of claim.

3. The area of the lands described in par. 2 consists of approximately 14,000 acres.

4. For many years past the plaintiff has conducted and still conducts on the whole of those lands the business of grazing. The plaintiff has during that period made large profits from the conduct of its business.

5. During that period and in particular since the month of February 1942 the plaintiff has spent large sums of money on improvements to those lands and for the purchase of sheep for use in the conduct of its business. The said lands have greatly increased in value since the month of February 1942.

6. By proclamation dated 23rd August 1945 and notified in the New South Wales Government *Gazette* No. 88 dated 24th August 1945, his Excellency the Honourable Sir Frederick Richard Jordan K.C.M.G. Lieutenant Governor of the State of New South Wales notified as follows :—

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"I the Honourable Sir Frederick Richard Jordan, Lieutenant Governor of the State of New South Wales, with the advice of the Executive Council of the said State, in pursuance of the provisions of section 4 of the *Closer Settlement (Amendment) Act*, 1907, as subsequently amended, do notify by this Proclamation to be published in the Government *Gazette*, that I propose to consider the advisableness of acquiring the parcels of land described in the Schedule hereunder for the purposes of closer settlement.

SCHEDULE

Estate	Land District	Shire	County	Area	Shown on Plan	By
Jeir	Queanbeyan, Yass	Goodradigbee Yarowlumla	Murray	14,253	Ms.3385 Gbn.	Red edging"

7. The defendant John Johnstone Dedman is the Minister of State for the Commonwealth of Australia at the time being administering the provisions of the *Re-establishment and Employment Act* 1945 (No. 11 of 1945) as amended and the provisions of the *War Service Land Settlement Agreements Act* 1945 (No. 52 of 1945.)

8. The Honourable William Francis Sheahan is the Minister of State for the State of New South Wales for the time being administering the *Closer Settlement (Amendment) Act*, 1907, as amended, the *War Service Land Settlement Agreement Act*, 1945 (No. 6 of 1946) and the *War Service Land Settlement Act* 1941 (No. 43 of 1941) as amended.

9. In or about the year 1945 an agreement was made between the Commonwealth of Australia of the one part and the State of New South Wales of the other part, the terms of which are set forth in the first schedule to the *War Service Land Settlement Agreements Act* 1945 (No. 52 of 1945).

10. By that agreement it was recited that at a conference of Commonwealth and State Ministers on 22nd August, 1945, certain proposals were agreed to with a view to the settlement on land in the State of discharged members of the Forces and other eligible persons and that it was expedient that an agreement be made between the Commonwealth and the State in order to carry into effect those proposals.

11. By the terms of and for the purposes of that agreement the Commonwealth was required to make provision for the payment

of certain moneys to the State and to persons settling on the said lands.

12. By the terms of that agreement the State in addition to providing certain moneys for the purposes of the scheme was also required to resume or otherwise acquire certain land at a value not exceeding that ruling on 10th February 1942.

13. By the *War Service Land Settlement Agreements Act* 1945 (No. 52 of 1945) the Commonwealth purported to authorize that agreement. By the *War Service Land Settlement Agreement Act* 1945 (No. 6 of 1946) the State of New South Wales purported to ratify that agreement.

14. The State of New South Wales has threatened and intends to resume the land hereinbefore described for the purposes of that agreement.

15. The Commonwealth threatens and intends to pay out of Commonwealth funds moneys for the purpose of and in pursuance of the said resumption.

The plaintiff claimed (1) declarations that: (i) the *War Service Land Settlement Agreements Act* 1945 (No. 52 of 1945) (Cth) was *ultra vires* and beyond the powers of the Commonwealth; (ii) the *War Service Land Settlement Agreement Act* 1945 (No. 6 of 1946) (N.S.W.) was invalid; (iii) the War Service Land Settlement Agreement was void and inoperative; and (iv) the *Closer Settlement (Amendment) Act* 1907, as subsequently amended and in particular s. 4 thereof were invalid; and (2) injunctions restraining: (*a*) the Commonwealth and the defendant John Johnstone Dedman from paying out of the consolidated revenue of the Commonwealth any moneys for the purpose of or in connection with the resumption of the said lands; (*b*) the Commonwealth and the defendant John Johnstone Dedman from carrying out or taking any further action pursuant to the terms of the alleged War Service Land Settlement Agreement; (*c*) the State of New South Wales and the defendant William Francis Sheahan from resuming the said lands or taking any further action with the object or intention of resuming those lands.

The defendants the Commonwealth, Dedman and the Attorney-General for the Commonwealth demurred to so much of the statement of claim as related to and claimed relief against them, upon the following grounds: (1) that it disclosed no cause of action; (2) that the Acts and matters therein alleged so far as they respectively purported to depend on or derive authority from the legislative powers of either the Commonwealth or the State of New South Wales were a valid exercise of those powers respectively; (3) that

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in particular the *War Service Land Settlement Agreements Act* 1945 of the Commonwealth and the *War Service Land Settlement Agreement Act* 1945 of New South Wales were each respectively a valid exercise of legislative power and the War Service Land Settlement Agreement respectively authorized and approved by those Acts was in all respects valid and operative; and (4) that the plaintiff so far as the statement of claim related to and claimed relief against them had no sufficient interest in the subject matter of the action to enable it to maintain that action.

The defendants the State of New South Wales, Sheahan, and the Attorney-General for New South Wales demurred to the whole of the statement of claim on, *inter alia*, the following grounds: (*a*) that the facts alleged therein did not show any cause of action or any ground of relief against them or any of them to which effect could be given by the Court against them or any of them; (*b*) that the agreement referred to in par. 9 of the statement of claim was validly made and was within the competence of the Commonwealth of Australia and the State of New South Wales; (*c*) that the *War Service Land Settlement Agreements Act* 1945 (Cth.) was a law validly made by the Parliament of the Commonwealth in pursuance of the powers of that Parliament conferred upon it by the Constitution of the Commonwealth; (*d*) that (i) the *War Service Land Settlement Agreement Act* 1945 (N.S.W.), (ii) the *Closer Settlement (Amendment) Act* 1907 (N.S.W.) and the amendments thereto, and (iii) the *War Service Land Settlement Act* 1941 (N.S.W.) and the amendments thereto, were laws validly made by the Parliament of the State of New South Wales; and (*e*) that the resumption referred to in par. 14 of the statement of claim was authorized by law.

The provisions of the relevant statutes and the agreement are sufficiently set forth in the judgments hereunder.

G. E. Barwick K.C. (with him *B. P. Macfarlan*), for the plaintiff. The agreement contained in the first schedule to Act No. 52 of 1945 (Cth.) shows a scheme for the settlement of discharged members of the Forces chosen by the Commonwealth upon land to be acquired by the State, the land and the scheme of its use to be mutually agreed upon between the Commonwealth and the State. The analysis of that agreement shows that the scheme is a Commonwealth scheme of land settlement seeking to obtain the necessary land upon unjust terms by the use of State machinery for settling thereon such discharged members of the Forces as may be chosen by the Commonwealth. The scheme seeks to avoid the constitutional limitation imposed by s. 51 (xxxi.) of the Constitution. The agreement in the

first schedule to the Act shows a greater degree of State participation in administration and a greater contribution by the State to the cost of the scheme than does the agreement in the second schedule to the Act, otherwise the scheme of the two agreements is the same. The scheme applies to any "eligible person" and it provides that the Commonwealth may choose a class of persons with the concurrence of the State and deem them eligible. There is nothing to identify in any way the persons with the State. Under clause 7 (2) of the agreement the Commonwealth assumes entirely the financial responsibility for the training of, living allowances and transport for the persons who are applicants or who have been accepted as settlers. The agreement assumes that the valuation of the land will always be something lower than the cost of acquisition, development and improvement. There is a direct relationship between the cost of land in resumption or purchase and the Commonwealth's obligation to pay money under the agreement, because the amount written off will vary according to whether the land is cheaply or dearly bought. Under clause 13 of the agreement, so far as the assistance period is concerned, the Commonwealth determines the rate and the conditions under which the living allowance will be paid for the first year, and the Commonwealth alone has the right to determine whether there will be an extension of the period during which the living allowance will be paid, but under clauses 6 and 7 the parties equally bear the rent and interest which is foregone during the period of assistance. So far as advances to settlers are unrecovered and lost, the parties are to bear the loss equally. But the arrangements for the making of the advances must be subject to the approval of the Commonwealth. The proclamation referred to in par. 6 of the statement of claim would be a step taken under clause 10. The date 10th February 1942 was expressly chosen in order to keep down the cost of resumption. Clause 12 refers to the determination and classification of eligible persons by the State "on behalf of the Commonwealth." Broadly, the agreements are a complete scheme for the settlement of discharged members of the Forces. It is noticeable that they are controlled by the Commonwealth at every vital point, and, indeed, as to the persons to be settled, the choice is to be made on behalf of the Commonwealth. Act No. 52 of 1945 in its application to land in New South Wales, is invalid. It is not an Act merely granting financial assistance to a State in connection with some of the activities of the State. It is quite clearly a Commonwealth scheme and in no sense is it a State scheme. The Act is a law with respect to the acquisition of property because there is a Commonwealth purpose. By the Act

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No. 14 of 1946 (N.S.W.) the former State scheme was completely changed so as to accord with the scheme under the agreement. Under that Act and under the agreement the only price which is authorized to be paid for acquired land is a price not exceeding the value as at 10th February 1942. Since that date land has greatly increased in value. It is sufficient to destroy the agreement if it be shown that the price or compensation to be paid for the land acquired is its value as at a date long anterior to the date of resumption, and a date expressly chosen to keep the value down. The agreement is a complete scheme in itself; it is not a State scheme, in the sense that the Commonwealth participates at every critical point. The scheme is a Commonwealth purpose within the meaning of par. (xxxi.) of s. 51 of the Constitution. The acquisition of land is at the very centre of the scheme; it is acquisition from persons other than the State in the first instance. Clause 11 of the agreement reduces or tends to reduce the price or compensation at which the land will be acquired; the Commonwealth gets the benefit. The particular payments that are made, and the amount of them, the circumstances in which they are paid, would have to be justified, and would be justified, by Act No. 52 of 1945, although an Appropriation Act would make the total sum available and authorize, in a broad sense, the withdrawal of the total sum.

[DIXON J. referred to *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (1) and *H. V. McKay Pty. Ltd.* v. *Hunt* (2).]

It is not necessary to go so far as to say that Act No. 52 of 1945 would be a complete authority, without an Appropriation Act. An agreement such as the agreement now under consideration could not be made by the Commonwealth executive other than under the authority of an Act. There is not any head of power authorizing agreements. The Act would have to be justified. The authorizing Act itself must be a law under some head of power. It must be an Act with respect to a subject matter, with respect to which the Commonwealth Parliament can make laws. It would derive its validity from the terms of the agreement it authorized. Having regard to the terms of the agreement Act No. 52 of 1945 is a law with respect to the acquisition of land for a purpose in respect of which the Commonwealth Parliament may make laws under par. (vi.) and par. (xxxi.) of s. 51. That is particularly so as regards s. 3 of the Act, and upon the failure of the section the agreement is unauthorized. The acquisition of the land need not be by

(1) (1922) 31 C.L.R. 421. (2) (1926) 38 C.L.R. 308.

the Commonwealth (*McClintock* v. *The Commonwealth* (1); *Jenkins* v. *The Commonwealth* (2); *Bank of New South Wales* v. *The Commonwealth* (3)).

[LATHAM C.J. referred to *Dawson* v. *The Commonwealth* (4).

WILLIAMS J. referred to *Real Estate Institute of New South Wales* v. *Blair* (5).]

The question of whether the fixing of an antecedent date for the assessment of compensation was or was not just, was considered in *Grace Brothers Pty. Ltd.* v. *The Commonwealth* (6). There is nothing in that case which would prevent the conclusion in this case that the choice of 10th February 1942 was an unjust term. Section 3 of Act No. 52 of 1945 is itself a law with respect to the acquisition of property on unjust terms. An Act which authorizes such an agreement is itself a law with respect to the acquisition of property. The scheme was intended to be the sole scheme for settling discharged members of the Forces on land. Clause 10 (*b*) shows that there is no scope left for a competitive State scheme during the currency of the agreement. A State scheme which departed from the agreement would create an inconsistency. The agreements in the schedules to Act No. 52 of 1945 are agreements of the kind contemplated by s. 103 of the *Re-establishment and Employment Act* 1945 (Cth.). By that Act the Commonwealth intended to ensure that it had the entire subject of the settlement of discharged members of the Forces, and intended to retain the control thereof by means of agreements made with the States. Assuming then, the invalidity of Act No. 52 of 1945, a State Act which purports to enact a law conformable to the form of agreement would be an attempt on the part of the State to intrude into this field (*Wenn* v. *Attorney-General* (*Vict.*) (7)). Section 103 operates to prevent States settling discharged members of the Forces on land other than under the agreement. Although it is true the general power to acquire does not come from the Commonwealth Act, the exercise of it is directly controlled per medium of the agreement and its authorizing Act by the Commonwealth law. The legislative power under s. 51 (xxxi.) of the Constitution cannot be confined to such laws as themselves create the power of acquisition; it would be far too narrow and too late to attempt to read the power down to that area. Laws which prescribe the conditions upon which a power of acquisition may be exercised must fall within power under s. 51 (xxxi.), irrespective of

(1) (1947) 75 C.L.R. 1, at pp. 23, 36.
(2) (1947) 74 C.L.R. 400, at p. 406.
(3) (1948) 76 C.L.R. 1, at p. 250.
(4) (1946) 73 C.L.R. 157.
(5) (1946) 73 C.L.R. 213.
(6) (1946) 72 C.L.R. 269, at pp. 280, 286, 291.
(7) (1948) 77 C.L.R. 84, at pp. 108-112, 114-122.

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whether that power of acquisition is derived from a Commonwealth source; it depends upon a particular Commonwealth Act or some other power which the Commonwealth Parliament or the Constitution gives. It is nothing to the point to say the power derives from the State source. As to s. 96 of the Constitution it is pointed out that most of the various obligations assumed as between the Commonwealth and the States are not for payment of money to the States, but payment of money to individuals.

[DIXON J. referred to *W. R. Moran Pty. Ltd.* v. *Deputy Federal Commissioner of Taxation* (*N.S.W.*) (1).]

The use of Commonwealth money for other than Commonwealth purposes was dealt with in *Attorney-General* (*Vict.*) v. *The Commonwealth* (2).

F. W. Kitto K.C. (with him *F. Louat*), for the defendants the Commonwealth, Dedman, and the Attorney-General for the Commonwealth. The ultimate question must be whether s. 4 (1) (*b*) of the *Closer Settlement* (*Amendment*) *Act* 1907-1948 (N.S.W.) authorized or did not authorize the resumption which the plaintiff alleges is threatened. Its contention must be that, when the Governor purports to exercise the power which s. 4 (1) (*b*) in terms gives him, he exceeds his authority if the underlying purpose is to achieve the fulfilment of the agreement. If Act No. 52 of 1945 is valid, it must follow that the Governor's purpose in making the resumption was a lawful purpose, and therefore that there is no ground whatsoever for suggesting that this case, by reason of anything contained in the agreement, is taken outside the operation of s. 4 (1) (*b*) of the *Closer Settlement* (*Amendment*) *Act*. It may be that if there were an inconsistency in the matter of quantum of compensation as between the State Act and the agreement, the State Act would be inoperative to that extent, or it may be that the whole provision for compensation would be inoperative, but that does not affect the point at issue. Section 103 of the *Re-establishment and Employment Act* 1945 contemplates merely the possibility that the Commonwealth may make agreements between itself and a State or some States, and if it does then advances may be made pursuant to the agreement for certain specific purposes. It lacks any indication that Parliament was intending by such a provision to preclude the States from embarking upon any legislation which might deal with the subject of the settlement of discharged members of the Forces. That section contemplates that the States will have their own schemes and in so far as those schemes include the acquisition of

(1) (1940) 63 C.L.R. 338.

(2) (1945) 71 C.L.R. 237.

land and its improvement and development, the Commonwealth may contribute financial assistance towards the achievement of those purposes. The fact is alleged and admitted that the resumption is the purpose, and the next question is: what is the result of having a purpose to achieve something which is incapable of achievement. It has no effect in law at all. The existence of the purpose, even if it be incapable of fulfilment because the scheme is invalid, does not invalidate the resumption itself, the only effect would be that the proviso would be incapable of operation.

[LATHAM C.J. referred to *Municipal Council of Sydney* v. *Campbell* (1).]

That case is not applicable. It decides that a statutory power to resume for a particular purpose cannot be exercised for another purpose. Section 4 (1) (*b*) of the State Act authorizes resumption for the purpose of closer settlement, that is to say, of land which is reported to be suitable to be acquired for closer settlement. So long as it is suitable for closer settlement it falls within the purpose disclosed by the Act. It falls within the provisions of the Act independently of the deviation of the land to another purpose. The steps necessary to be taken for closer settlement for the purposes involved have been taken. There are two purposes side by side; one is to carry out the scheme, the other is to carry out the purposes of closer settlement. It does not follow that if the Commonwealth Act be invalid there cannot be an acquisition for the purposes of the scheme. The scheme is there; it is a *de facto* scheme upon which two Governments are *ad idem*. The scheme by which the Governor proposes to carry out the resumption does not touch the power conferred under s. 4 (1) (*b*) and does not affect the proposed resumption. It is really unnecessary to decide whether Act No. 52 of 1945 which authorized the agreement is valid or not, because, if it is valid, then the resumption that is threatened is authorized by s. 4 (1) (*b*). If it is invalid, then that may go to the question of compensation, or it may not. But it does not touch anything other than compensation. It still leaves s. 4 (1) (*b*) authorizing the resumption. That section is an exercise of New South Wales sovereignty. The resumption is good even though the provision limiting the price may be bad. That provision is only a provision relating to the matter of compensation. The power of acquisition is independent of Act No. 52 of 1945 authorizing the agreement and it is independent of the amount of compensation. Act No. 52 of 1945, and particularly s. 3, cannot be described as being an Act with respect to the acquisition of property. It simply authorizes

(1) (1925) A.C. 338.

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the execution of the agreement. That agreement is an agreement with respect to the assumption by the Commonwealth of the obligations set out therein. In a wider sense the Act is an Act with respect to the settlement of discharged members of the Forces upon land. The only acquisition in contemplation is to be carried out by the legislative authority of the State Parliament. The power of the Commonwealth Parliament to make laws with respect to the acquisition of property is a power to make laws either acquiring property, or providing for its acquisition, or dealing in some way with the acquisition of property by the operation of those laws. Act No. 52 of 1945 does none of those things. It is not a law with respect to the acquisition of property; it is a law which deals with other subjects. It does not affect or purport to affect the power of the State to acquire property, or the consequences of the acquisition of property. Clause 10 of the agreement is concerned to lay down a procedure. The agreement read as a whole, and read together with s. 3 of Act No. 52 of 1945, cannot be placed in any higher category than that of a law with respect to the assumption of obligations by the Commonwealth concerning the settlement of discharged members of the Forces upon land. When par. (xxxi.) of s. 51 of the Constitution speaks of laws with respect to the acquisition of property it is speaking of laws which themselves operate with respect to the acquisition of property in one of three ways in which a law can operate with respect to that subject matter. The Act is justified by par (vi.) and par. (xxxix.) of s. 51 and, in so far as it provides for payments by the Commonwealth to the States, it is justified by s. 96 of the Constitution (*Victoria* v. *The Commonwealth* (1)). Section 96 justifies the whole Act because all the financial obligations of the Commonwealth are obligations to pay money either to the State, or to persons who will be citizens of the State, for the purpose of establishing them on land acquired by the State. If payment to the beneficiary direct were done at the request of the State it would be justified under s. 96. It is as much financial assistance to the State to pay it to each intended beneficiary direct as to pay it to the State for payment to the beneficiary. As to "eligible person" the obligations which the Commonwealth assumes by this agreement do not extend beyond discharged members of the Forces. The Commonwealth need not select another class. At the moment the agreement is one which can only operate with respect to discharged members of the Forces unless the Commonwealth desires to extend that class. Clause 2 (1) (*b*) of the agreement should be read *ut magis valeat*. The position as to

(1) (1926) 38 C.L.R. 399.

the two classes of eligible persons may be in alternative ways: (i) that it is severable and the agreement is a valid agreement *qua* discharged members of the Forces; and (ii) in any case clause 2 (1) (*b*), as a matter of construction, is limited to persons whose inclusion would not carry the agreement outside the ambit of the Commonwealth legislative power. This is simply a case of an agreement for a resumption by the State of land for the purpose of the settlement of discharged members of the Forces. It falls within the defence power so far as any payment to be made to the men is concerned; it falls within that power and s. 96 of the Constitution so far as payments to the States are concerned. It is not a law with respect to the acquisition of property, but it is a law with respect to matters that fall within other heads of legislative power of the Commonwealth. It goes back to s. 4 (1) (*b*) of the *Closer Settlement* (*Amendment*) *Act* 1907, as amended. There is nothing in any Commonwealth legislation with which such a resumption would be inconsistent.

M. F. Hardie K.C. (with him *H. Maguire*), for the defendants the State of New South Wales, Sheahan, and the Attorney-General for New South Wales. Irrespective of what the agreement means, and irrespective of the validity of Act No. 52 of 1945, the plaintiff is not entitled to any of the relief sought against these defendants. Paragraph 6 of the statement of claim shows that the date when it was decided to acquire the land for the purpose of closer settlement was a date prior to the date of the agreement and of the Commonwealth and State Acts respectively authorizing and ratifying it. Paragraph 14 of the statement of claim is equivalent to an allegation that these defendants were intending to resume the land for the purpose of closer settlement within the meaning of s. 4 (1) of the *Closer Settlement* (*Amendment*) *Act* 1907, as amended. Upon its true construction it is obvious that land resumed for the purposes of the agreement is resumed, from the point of view of New South Wales law, for the purposes of closer settlement. There is nothing which the Court will, by a process of construction, import into the wide unlimited power of resumption conferred by s. 14 (1) (*b*), in restriction, by reason of the reference in s. 4 (1) (*b*) to the compensation being determined in a certain way if the land is being resumed for the purposes of the scheme contained in the agreement. If the proviso to s. 4 (1) (*b*) limiting compensation to the value as at 10th February 1942 is bad, then that proviso no longer has any effect and compensation is determinable under s. 4 (1) (*b*). The resumption does not depend in any respect for its validity

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upon the validity of the Commonwealth and State legislation referred to above, but it depends entirely upon the provisions of s. 4 (1) (*b*) of the *Closer Settlement* (*Amendment*) *Act* 1907 (N.S.W.), as amended. Even if Act No. 52 of 1945 and the agreement are invalid, such invalidity does not render invalid New South Wales Act No. 6 of 1946 or the proviso to s. 4 (1) (*b*) of the *Closer Settlement* (*Amendment*) *Act* 1907 inserted by Act No. 14 of 1946. The fact that the document set forth in the schedule to the *War Service Land Settlement Agreement Act* 1945 (N.S.W.) (No. 6 of 1946) may be ineffective as an agreement between the Commonwealth and the State by reason of its being *ultra vires* of the Commonwealth does not prevent Act No. 6 of 1946 from operating as an approval of the scheme on behalf of the State. The approval or adoption of the scheme for the purposes of State law does not depend upon a valid adoption of the scheme by the Commonwealth. It is unnecessary to determine whether the agreement set forth in the schedule to Act No. 6 of 1946 is binding on the Commonwealth. Whether it is or not, it has been approved and adopted by State legislation. It has been ratified by the State Parliament. That approval makes it a scheme of settlement of discharged members of the Forces for the purposes of New South Wales law. The proviso to s. 4 (1) (*b*) is valid and operative regardless of whether Act No. 52 of 1945 is valid. The dominant words in the proviso are " for the purposes of the scheme." The agreement made by the Commonwealth is in the main an agreement to make available funds for certain purposes. That agreement cannot be fully operative and binding on the Commonwealth unless and until the Commonwealth passes some further legislation appropriating money. The effect of Act No. 52 of 1945 is *intra vires* the Commonwealth Parliament. The scheme embodied in the first schedule to that Act is not a Commonwealth scheme; it is a joint Commonwealth and State scheme. The resumption that was being effected in this case, or the acquisition of property contemplated by the agreement, was an acquisition by the State as an independent entity and not on behalf of or as agent of the Commonwealth. Having regard to clauses 5, 11 and 17 of the agreement it is clear that the State is given by this scheme the responsibility in the main for selection, acquisition and development of the land proposed to be used in the scheme, and the making of title to the settler. It is an important aspect of the scheme that the State not only actually effects the resumption, and not only provides the capital moneys for the resumption, including one-half of the amount of the Crown costs involved in the scheme, but also determines the holding. The

tenure is determined by the State; the terms and conditions of the holding are regulated entirely by State legislation, and the land resumed becomes land of the State. The inference is plain that it is a joint State and Commonwealth scheme and not a Commonwealth scheme exclusively. In the second schedule to Act No. 52 of 1945 these matters are, in the main, determined by the Commonwealth and there is no limitation of the value to the value as at 10th February 1942. Clause 12 (*c*) in the first schedule is not so far reaching as clause 4 in the second schedule. The nature and effect of the agreement in the first schedule cannot be determined by having regard only to the phrase " on behalf of the Commonwealth " which finds place only in clause 12 (*c*). The Commonwealth and the States have concurrent powers on the subject of the settlement of discharged members of the Forces. The legislation that is now attacked has some resemblance to the legislation which was considered by the Court in *Deputy Federal Commissioner of Taxation* (*N.S.W.*) v. *W. R. Moran Pty. Ltd.* (1); affirmed on appeal (2). That case shows that it is now a well-recognized method for dealing with practical problems for State and Commonwealth Governments to act jointly. Another instance of joint action between the Commonwealth and the States is found in *Victoria* v. *The Commonwealth* (3). Not only did the *Federal Aid Roads Act* 1926, there under consideration, authorize the execution of the agreement by the Commonwealth, but it also appropriated a sum of money. The subject matter of Act No. 52 of 1945 is not the acquisition or the authorization of the acquisition of property for Commonwealth purposes. The subject matter of the Act and the agreement is the settlement of discharged members of the Forces. Before s. 51 (xxxi.) of the Constitution invalidates Commonwealth legislation, that legislation must either effect or authorize an acquisition of property. The providing of money for an acquisition is, in itself, immaterial. The plenary powers of the State in the matter of acquisition are shown in *New South Wales* v. *The Commonwealth* (4). Section 51 (xxxi.) is a provision directed to legislation for the acquisition of property (*Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd. v. The Commonwealth* (5); *Real Estate Institute of New South Wales* v. *Blair* (6)). Such acquisition is limited to acquisition by the Commonwealth, or by a Commonwealth instrumentality or agency, or acquisition by some person

(1) (1939) 61 C.L.R. 735, at pp. 752-754.
(2) (1940) A.C. 838; 63 C.L.R. 338.
(3) (1926) 38 C.L.R. 399.
(4) (1915) 20 C.L.R. 54, at pp. 66, 67, 77, 78.
(5) (1943) 67 C.L.R. 314, at pp. 317, 318.
(6) (1946) 73 C.L.R. 213, at pp. 223, 235.

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who or authority which is given power by Commonwealth legislation (*Jenkins* v. *The Commonwealth* (1); *McClintock* v. *The Commonwealth* (2); *Bank of New South Wales* v. *The Commonwealth* (3)). Only Commonwealth legislation effecting or authorizing an acquisition of property is within the scope of s. 51 (xxxi.). The arguments of Mr. *Kitto* relating to s. 96 and s. 109 of the Constitution, and also to the meaning of the phrase "eligible person" are adopted on behalf of these defendants.

[DIXON J. referred to *Anderson* v. *The Commonwealth* (4).]

F. W. Kitto K.C., by leave. Even if the agreement were held to be invalid the plaintiff would still not have any interest to maintain the action. Unless the plaintiff has an interest of its own—it not being an Attorney-General to complain of the alleged invalid Act of the Commonwealth—he cannot maintain a suit for a declaration of invalidity. The proclamation alleged in par. 6 of the statement of claim does not show any threatened or intended resumption. It merely states that it is proposed to consider the advisableness of acquiring the land. If the arguments adduced on behalf of the plaintiff do not lead to the conclusion that the resumption will be invalid, then it has no interest to proceed on hypothetical grounds.

G. E. Barwick K.C., in reply. If the State has to do justice to the plaintiff it will not take the land. There is a threat to take the land for the purposes of the agreement, and there is not any intention to pay the value of the land. The plaintiff certainly has an "interest" in an action of *declaratur*. If Act No. 52 of 1945 be declared invalid the plaintiff would succeed in the action because the demurrers are too wide. By virtue of amendments made to the State legislation there is not any longer an overall power to resume land. The purpose must be determined before the resumption because the Advisory Board's report is contingent as to its content on that factor. The defendants cannot fall back on any unreal suggestion that they were proposing to take this land for closer settlement and not for the settlement of discharged members of the Forces. They have nominated the purpose for which they desire to resume the land. Upon the disappearance of that purpose the resumption can be restrained under *Municipal Council of Sydney* v. *Campbell* (5) because a non-existent purpose is just as bad as an unlawful one, or one that is outside the purpose of the Act. "Eligible persons"

(1) (1947) 74 C.L.R., at p. 406.
(2) (1947) 75 C.L.R., at p. 23.
(3) (1948) 76 C.L.R., at p. 250.
(4) (1932) 47 C.L.R. 50.
(5) (1925) A.C. 338.

as defined in clause 2 (1) (*b*) of the agreement could be persons who had not been engaged on war service, and could be persons outside the defence power. Clause 12 (*b*) does not narrow the meaning of "eligible persons" in the way suggested by the defendants. The definition of the phrase "eligible person" has been incorporated in the State legislation, therefore "severability" is not applicable. The agreement is bilateral, there is not any intention for partial operation. One of the parties to the agreement has carried its part into execution on the basis of total validity of the agreement. So far as s. 51 (xxxi.) is concerned all that one inquires is: What is the subject matter of the law? Is it a law on the subject matter of acquisition? The argument that the power under this head of power is less than plenary, is untenable. If Commonwealth participation in the agreement is completely destroyed upon the destruction of Act No. 52 of 1945, then the State Act must also be destroyed. The State could not compel the Commonwealth to participate in a State activity. The agreement is not in any sense the provision of financial assistance to a State within the meaning of s. 96 of the Constitution. The purpose of s. 96 is shown in *Deputy Federal Commissioner of Taxation* (*N.S.W.*) v. *W. R. Moran Pty. Ltd.* (1). The mere fact that an Act is an Act granting financial assistance is not enough; it must not in its purpose and substance be objectionable (*W. R. Moran Pty. Ltd.* v. *Deputy Federal Commissioner of Taxation* (*N.S.W.*) (2)). The Commonwealth cannot in effect say to a State: "If you resume property on unjust terms, the Commonwealth will make a grant of financial assistance to you." The agreement does not provide for such assistance to a State.

Cur. adv. vult.

Dec. 21.

The following written judgments were delivered:—

LATHAM C.J. The Commonwealth Parliament and the Commonwealth Government are limited in the exercise of the power to acquire property by the constitutional requirement that any Commonwealth law with respect to the acquisition of property must provide for just terms of acquisition: Commonwealth Constitution, s. 51 (xxxi.). This constitutional provision requires the terms actually to be just and not merely to be terms which the Parliament may consider to be just. State Parliaments are not bound by any similar constitutional limitation. They, if they judge it proper to do so for some reason, may acquire property on any terms which

(1) (1939) 61 C.L.R., at p. 763.

(2) (1940) 63 C.L.R. 338, at pp. 345, 349, 350.

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they may choose to provide in a statute, even though the terms are unjust. The legislation the validity of which is challenged by the plaintiff company in this action is designed to escape from the constitutional limitation contained in the Commonwealth Constitution by using State legislative powers under an agreement made with the Commonwealth and approved by the Commonwealth Parliament for the purpose of acquiring land upon terms set out in the agreement, the Commonwealth subsidizing the State in its expenditure for this purpose. The land is to be acquired for the settlement of ex-servicemen, which is clearly a Commonwealth purpose, being a purpose in respect of which the Commonwealth Parliament has power to make laws under s. 51 (vi.) of the Commonwealth Constitution—power to make laws with respect to defence. The agreement provides that the land is to be paid for at a value not exceeding that ruling on 10th February 1942.

The allegations in the statement of claim in this action must be accepted as true for the purpose of this proceeding by way of demurrer, which is a means of obtaining a decision upon the question whether, if the plaintiff proves the facts alleged, there is a cause of action against a defendant. The statement of claim contains allegations that the State proposes to acquire under its Closer Settlement Acts and in pursuance of the aforesaid agreement land owned by the plaintiff company, that since February 1942 the plaintiff has spent large sums of money on improvements to the land, and that the land has greatly increased in value since February 1942. The plaintiff claims declarations that the Commonwealth and State legislation approving the agreement and the agreement itself and an amendment of the State *Closer Settlement (Amendment) Act* made to give effect to the agreement are invalid, and consequential injunctions. The action is brought against the Commonwealth, the Minister administering the relevant Commonwealth Acts, the Attorney-General of the Commonwealth, and against the State of New South Wales and the Attorney-General thereof. All the defendants have demurred to the statement of claim.

Counsel for the defendants did not argue that such terms of acquisition were just. To acquire land at an under value for soldier settlement cannot be said, however desirable the objective may be, to be acquiring land on just terms. The motives of the respective legislatures are legally unimportant. The only question is whether the Parliaments of the Commonwealth and, in this case, of the State of New South Wales, have by joint action succeeded in evading the constitutional obligation of the Commonwealth Parliament to provide just terms when it makes a law with respect to the

acquisition of property for a purpose for which the Commonwealth Parliament has power to make laws. If the Parliaments have succeeded in acting within the law, the intent of either or both to evade the constitutional limitation of Commonwealth legislative power is immaterial in considering the validity of the legislation.

The Commonwealth and State legislation takes the form of authorization or approval of an agreement between the Commonwealth and the State of New South Wales. The immediately relevant Acts are the Commonwealth *War Service Land Settlement Agreements Act* 1945 and the State *War Service Land Settlement Agreement Act* 1945. The Commonwealth Act, s. 3 (1), provides that: "The execution, by or on behalf of the Commonwealth, of agreements between the Commonwealth and the State of New South Wales, the Commonwealth and the State of Victoria, and the Commonwealth and the State of Queensland, substantially in accordance with the form contained in the First Schedule to this Act, is hereby authorized." Section 3 (2) authorizes the execution, on behalf of the Commonwealth, of agreements substantially in accordance with the form contained in the second schedule with the States of South Australia, Western Australia and Tasmania.

The agreement with the States of New South Wales, Victoria and Queensland contains a clause that land acquired by the State for the purposes of the agreement is to be acquired "compulsorily or by agreement and at a value not exceeding that ruling on the tenth day of February, one thousand nine hundred and forty-two" —clause 11 (1) (*b*). In the agreement in the second schedule (with the States of South Australia, Western Australia and Tasmania) there is no provision limiting the amount to be paid for land to the value on 10th February 1942.

The agreement with the State of New South Wales, clause 2, defines "eligible person" as meaning—(*a*) certain discharged members of the Forces; (*b*) persons included in the class of persons (if any) which the Commonwealth with the concurrence of the State determines shall be deemed eligible to participate in land settlement contained in the agreement. It was argued that provision (*b*) made it possible to apply the scheme to persons who had no war service and had nothing to do with the Forces, so that the Act went beyond the limits of the defence power.

But clause 12 of the agreement shows that no person can "participate under the scheme" unless he applies to participate. Clause 12 (*b*) fixes a time limit for applications—"An eligible person may apply to participate under the scheme not more than five years after—(i) the fifteenth day of August, One thousand nine

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hundred and forty-five; or (ii) the date when he ceased to be engaged on war service, whichever is the later." This provision specifies alternative periods of limitation in the words " whichever is the later." These alternatives are treated as being applicable in the case of every applicant. Every applicant is therefore a person who can specify a date when he ceased to be engaged on war service. He must therefore be a person who was engaged on war service. Provision for the training, selecting and settling of such persons is within the power to make laws with respect to defence.

A further answer to this objection is to be found in the fact that par. (*b*) of the definition of " eligible person " does not have any effect unless and until the Commonwealth and the State agree upon some class of persons. If they do so agree and provision for such persons is outside the defence power of the Commonwealth Parliament, that further agreement would not be valid as an exercise of that power. On the other hand, such an agreement might be in such terms as to be a valid exercise of that power. But the possibility that such further agreement might be invalid cannot affect the validity of the agreement contained in the schedule to the Act. Clause 2 (1) (*b*) says only that the Commonwealth and the State may make an agreement to extend the scheme to persons not included within par. (*a*) of clause 2 (1). If such an agreement should be made a question may perhaps arise as to its validity. But the fact that, if the agreement in the schedule is itself valid, such a question may arise cannot affect the validity of that agreement itself.

Clause 3 of the agreement sets out the principles to be applied in carrying out land settlement under the scheme. Clause 4 provides that the Commonwealth shall provide financial assistance and that the State shall initiate proposals for settlement, but that the Commonwealth may initiate proposals where such proposals " are directly associated with any matter in respect of which the Commonwealth has power to make laws." Clause 5 provides that the State shall provide capital moneys for acquiring, developing and improving land for settlement in accordance with the agreement. Clause 6 provides that the State is to bear the cost of all State administration of the scheme and that the State shall make a certain capital contribution. Clause 7 provides that the Commonwealth shall bear the cost of Commonwealth administration of the scheme, shall provide training and pay living allowances to selected applicants, and that the Commonwealth shall make a capital contribution in respect of each holding of an amount equal to one-half of the excess of the total cost involved in acquiring, developing and

improving the holding over the sum of valuations of the land and improvements, such valuations to be made in accordance with a stated principle which will enable a person without capital to obtain the benefits of the scheme : clause 6 (5). The substance of clause 11, providing for acquisition on the basis of values as at 10th February 1942, has already been quoted.

The *War Service Land Settlement Agreement Act* 1945 of New South Wales approves and ratifies the agreement in the schedule, which is in the same terms as that contained in the first schedule to the Commonwealth Act.

Section 51 (xxxi.) of the Commonwealth Constitution is in the following terms :—" The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to—. . . (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws." The requirement of just terms must be satisfied by any Federal legislation which is a law with respect to the acquisition of property. If Commonwealth legislation with respect to the acquisition of property does not provide just terms, the legislation is invalid : *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (1).

The constitutional provision is not limited in terms to laws providing for the acquisition of property by the Commonwealth itself. The words are general—" with respect to the acquisition of property." It is obvious that the constitutional provision could readily be evaded if it did not apply to acquisition by a corporation constituted by the Commonwealth or by an individual person authorized by a Commonwealth statute to acquire property. Further, the present case shows that the constitutional provision would be quite ineffective if by making an agreement with a State for the acquisition of property upon terms which were not just the Commonwealth Parliament could validly provide for the acquisition of property from any person to whom State legislation could be applied upon terms which paid no attention to justice. The question whether the constitutional requirement applies to acquisitions in pursuance of Commonwealth law other than acquisition by the Commonwealth itself was mentioned in the case of *Real Estate Institute of New South Wales* v. *Blair* (2). In *McClintock* v. *The Commonwealth* (3), *Starke* J. and *Williams* J. held that it applied in the case of acquisition of property authorized under Common-

(1) (1943) 67 C.L.R. 314.
(2) (1946) 73 C.L.R. 213, at p. 224.
(3) (1947) 75 C.L.R., at pp. 23, 36.

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wealth law though the Commonwealth itself did not acquire the property. *Williams* J. applied the principle in *Jenkins* v. *The Commonwealth* (1). See also *Bank of New South Wales* v. *The Commonwealth* (2), per *Rich* and *Williams* JJ. I agree that, as legislation with respect to the subject of the acquisition of property can be enacted by the Commonwealth Parliament only by virtue of the power conferred by s. 51 (xxxi.), all such Commonwealth legislation must affirmatively provide just terms for such acquisition whether the acquisition be by the Commonwealth or by a State or by any other person.

The next question which arises is whether the Commonwealth legislation contained in the *War Service Land Settlement Agreements Act* 1945 is legislation with respect to the acquisition of property. It is submitted for the defendants that a law cannot fall within this category unless it is either a law which directly acquires property by force of its own terms or creates a previously non-existing power in some person to acquire property or which comes into operation upon the acquisition of property. All such laws doubtless would be laws with respect to the acquisition of property. But there is nothing in the words of s. 51 (xxxi.) of the Constitution which supplies any warrant for limiting the application of this provision to laws which fall within the classes mentioned.

The provisions in the schedule to the Commonwealth Act are provisions of an agreement and not of a statute. It is true that the Act is a law authorizing only the execution of the agreement, but the whole subject matter of the agreement is the acquisition of property upon certain terms and conditions for certain purposes. The provisions of the agreement are directed to the acquisition of property and the agreement becomes effective in achieving its objective of the settlement of discharged servicemen only when property has been acquired. I can see no reason whatever for holding that a law approving an agreement of such a character as this is not a law with respect to the acquisition of property.

It is next said for the defendants that the Commonwealth Act is a law with respect to the re-establishment in civil life of discharged servicemen and is not a law with respect to the acquisition of property. A law providing for such re-establishment is a law which falls within the defence power (*Attorney-General for the Commonwealth* v. *Balding* (3); *Repatriation Commission* v. *Kirkland* (4)). The fact that the settlement of ex-servicemen is a defence purpose is the circumstance which makes the law a law for a purpose with

(1) (1947) 74 C.L.R. 400.
(2) (1948) 76 C.L.R., at p. 250.
(3) (1920) 27 C.L.R. 395.
(4) (1923) 32 C.L.R. 1.

respect to which the Commonwealth Parliament has power to make laws. But this fact most obviously does not show that it is not also a law with respect to the acquisition of property. All Federal laws for the acquisition of property are required by s. 51 (xxxi.) also to be laws for a purpose in respect of which Parliament has power to make laws. Accordingly there is nothing in the objection that the Act is not an Act with respect to the acquisition of property for the reason (true in itself) that it is an Act with respect to a defence purpose. Similarly there is no substance in the objection that the Act is an Act giving financial assistance to States (Constitution, s. 96) and is therefore not a law with respect to the acquisition of property.

Upon the allegations in the statement of claim it is clear that under the agreement it is intended that land should be acquired for a Commonwealth purpose upon terms which necessitate paying for the land compensation which represents its value in February 1942, which value is less than the present value of the land. It follows that the Act is an Act with respect to the acquisition of property upon terms which are not just and is therefore invalid.

This conclusion makes it unnecessary for me to consider in detail a contention for the plaintiff that the Commonwealth Act is invalid by reason of s. 103 of the Commonwealth *Re-establishment and Employment Act* 1945—No. 11 of 1945. There are in my opinion several effective answers to this argument, but the simplest is that the Act authorizing the execution of the agreement by the Commonwealth (No. 52 of 1945) was passed after Act No. 11 of 1945.

But the legislative power of the State Parliament is not limited by any requirement of just terms and, therefore, it is submitted for the defendants that the State legislation approving and ratifying the agreement, Act No. 6 of 1946, the *War Service Land Settlement Agreement Act* 1945, is valid even if the Commonwealth Act is invalid. But that which the State Act approves is an agreement made between the State and the Commonwealth. If the agreement cannot validly be made by the Commonwealth then it cannot be valid as an agreement between the State and the Commonwealth. The agreement cannot be valid as an agreement in the case of the State and invalid as an agreement in the case of the Commonwealth. The operation of the agreement depends at all points upon action by the Commonwealth in pursuance of the agreement and upon the undertaking and performance by the Commonwealth of definite pecuniary obligations under the agreement. The State Parliament has not enacted the terms of the agreement as provisions of a statute, but has only approved the making of the agreement as an

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agreement. If the agreement completely fails on the side of the Commonwealth it also completely fails as an agreement on the side of the State. The result therefore is that as the State legislation only approved that which was treated by the legislation as amounting to an agreement if executed by both the Commonwealth and the State, and as that agreement is not valid, the State also is not bound by the agreement and the State Act approving the execution of the agreement therefore did not come into operation. The result is not that the State Act is invalid, but simply that it has no effect.

But it is contended that, even if the Commonwealth Act is invalid, the State can acquire the land under its Closer Settlement Acts. This is doubtless true, but the question is whether the State can validly proceed with the resumption of the plaintiff's land, not under the ordinary provisions of State statutes, which provide for payment of the value of the land with an appeal to the Land and Valuation Court, but as under the terms of the agreement with the Commonwealth at the value of 10th February 1942. Machinery for acquiring land for settlement is contained in various Closer Settlement Acts of New South Wales. The *Closer Settlement* (*Amendment*) *Act* 1907 provides for the constitution of Closer Settlement Advisory Boards, and s. 4 provides that where an advisory board reports that any land is suitable to be acquired for closer settlement, the Governor may—(*a*) subject to the Act, purchase it by agreement with the owner; or (*b*) resume it under the Act. Section 4 (3) provides as follows:—"Before resuming any land, the Governor shall, by proclamation in the *Gazette*, notify that he proposes to consider the advisableness of acquiring such land for the purposes of closer settlement." Such a proclamation was made in respect of the plaintiff's land on 23rd August 1945 by the Lieutenant-Governor acting as Governor under s. 4 (3), *i.e.* before the Commonwealth and State Acts relating to the agreement. The Commonwealth Act was assented to on 11th October 1945 and the State Act on 7th January 1946. Section 5 (7) (*e*) of the *Closer Settlement* (*Amendment*) *Act* 1907 provides that in the absence of agreement the compensation to be paid on resumption of land under the Act shall be the value of the land as assessed by the Advisory Board or as determined by the Land and Valuation Court on appeal. After Act No. 6 of 1946, approving the War Service Land Settlement Agreement with the Commonwealth, had been passed, the *War Service Land Settlement and Closer Settlement* (*Amendment*) *Act* 1945 was passed. That Act altered the definition of discharged members

of the Forces who were entitled to benefits under prior State legislation and brought the definitions of "discharged member of the Forces," "member of the Forces," "war service" and "eligible person" into line with definitions contained in the agreement with the Commonwealth.

Section 3 of this Act provided that where land was resumed for the purposes of the scheme contained in the agreement with the Commonwealth the value of the land as assessed by the Board or determined by the Land and Valuation Court should not exceed the value which would have been so assessed or determined in respect of an identical resumption as at 10th February 1942 excepting the value of any improvements effected on such land since that date.

Section 3 (*d*) of this Act provided that when a proclamation had been made under s. 4 by the Governor that he proposed to consider the advisableness of acquiring any land for settlement the land should not, while such proclamation remained in force, be transferred or otherwise dealt with without the consent of the Minister. It has been mentioned that the proclamation in the present case was made before the passing of the State Act approving the agreement with the Commonwealth. Section 3 (*d*) of the 1946 Act contains a provision that the provision restricting transfer &c. shall apply to land in respect of which such a proclamation was made before the commencement of the Act.

By Act No. 48 of 1948, s. 7, the State amended the provisions of s. 4 so as to make it possible to pay up to fifteen per centum above the value of the land on 10th February 1942 in cases where land-owners agree to transfer their land and to take compensation at not more than the assessed value. In the case, however, of owners who do not so agree the restriction to the value as at 10th February 1942 was retained. If this provision had appeared in Commonwealth legislation it would have been impossible to defend it as providing just terms. But, as already stated, State Parliaments are not subject to any constitutional provision that they must provide just terms upon the acquisition of any property.

There is in my opinion no doubt as to the power of the State Parliament to provide for compensation for land resumed upon any basis which it thinks proper. But in the present case the State proposes to resume the land, not under the general provisions of State statutes which provide for paying the value of the land, but "for the purposes of" the agreement with the Commonwealth and, at present at least, not otherwise: par. 14 of statement of claim. I have stated my reasons for the opinion that the State legislation is inoperative so far as it relates to, and purports to give powers

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to resume lands for the purposes of, the agreement. The result is that the State may proceed with the resumption of the plaintiff's land under the Closer Settlement Acts—but at a value assessed by a Board and subject to appeal to the Land and Valuation Court: Act of 1907, ss. 9, 10. The provisions which limit the amount of compensation for resumed land to the value as at 10th February 1942 (with a possible increase up to fifteen per cent more if the owner does not exercise his right of contesting the assessment) apply only to purchase or resumptions "made for the purpose of the scheme contained in the agreement approved and ratified by the *War Service Land Settlement Agreement Act* 1945": Act No. 14 of 1946, s. 3 (*b*) and (*c*). When a Board assesses or the court, upon appeal, determines the price or value for resumed land, the limitation to value as at 10th February 1942 applies to the assessment of the Board or the decision of the court "where any purchase or resumption is made for the purposes of the scheme" contained in the agreement: Act No. 14 of 1946, s. 3 (*b*), inserting a proviso to that effect in par. (*f*) of sub-s. (7) of s. 5 of the *Closer Settlement* (*Amendment*) *Act* 1907. As in my opinion there is no such agreement, the direction as to the limit of compensation has no operation in this or in any case.

For the reasons which I have stated I am of opinion that the contention of the defendants that the plaintiff has no cause of action fails and that therefore the demurrers should be overruled.

Rich J. I have had the opportunity of reading the judgment of my brother *Williams* and agree with it.

In my opinion the demurrers should be overruled.

Dixon J. The plaintiff is the owner of a large area of land in respect of which a proclamation has been made under s. 4 (3) of the *Closer Settlement* (*Amendment*) *Act* 1907 (N.S.W.) as amended. The proclamation is a notification that the Governor in Council proposed to consider the advisableness of acquiring the plaintiff's land for the purposes of closer settlement. Such a proclamation must be made before land is resumed for those purposes. The procedure is for an Advisory Board to report to the Minister, at his request, as to the suitability of the land and upon other matters including the estimated value of the land and the price at which the Board recommends its acquisition: s. 3 (1). Then if it is decided to acquire the land, the resumption is effected by notification in the *Gazette*. On that the land vests in the Crown for the purposes of the Closer Settlement Acts and must be dealt with

thereunder: s. 7. An appeal may be brought to the Land and Valuation Court against the value assessed by the Advisory Board: s. 9. But the assessment of the Board or the Court fixes the amount of compensation.

After the proclamation under s. 4 (3) had appeared, the *Closer Settlement (Amendment) Act* 1907 was further amended. It was done by Act No. 14 of 1946 and Act No. 48 of 1948. One amendment made was to add a new sub-section (sub-s. (4)) to s. 4 of the principal Act. Paragraph (*b*) of the new sub-section provides that "the compensation to be paid in respect of any such resumption shall . . . be the value of the land as assessed by an advisory board, or where an appeal has been made . . . as determined by the Land and Valuation Court." To this paragraph there is a proviso. The purpose of the suit is to overcome the operation of the proviso. It provides that where any such resumption is made for the purposes of the scheme contained in the agreement approved and ratified by the *War Service Land Settlement Agreement Act* 1945 (N.S.W.) certain provisions shall apply which are then set out. The effect of these provisions is to limit the value at which the Advisory Board may assess the land. The limitation is by reference to the value obtaining on 10th February 1942.

If the owner has agreed not to claim compensation in excess of the value assessed by the Board, the value the Board may fix is restricted to not more than fifteen per cent over the value as at that date. If the owner has not so agreed, the value the Board may fix or the Court determine is restricted to the value as at that date, that is, without the addition of fifteen per cent.

The date 10th February 1942 is that mentioned in the *National Security (Economic Organization) Regulations* as a reference point for various purposes, including the control of the price of land.

The plaintiff says that it is intended to resume its land for the purposes of the scheme contained in the agreement to which the proviso refers, and not unnaturally it objects to its land being resumed at a value which doubtless is as remote from the present in amount as it is in time.

The agreement ratified by the *War Service Land Settlement Agreement Act* 1945 (N.S.W.) (No. 6 of 1946) is an agreement made on 28th November 1945 between the Commonwealth and the State of New South Wales.

According to recitals contained in the agreement, it was made in order to carry into effect proposals agreed to at a conference of Commonwealth and State Ministers with a view to the settlement

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on land in the State of discharged members of the Forces and other eligible persons.

The plaintiff contends that the agreement is not binding upon the Commonwealth as a valid and enforceable obligation. From this it goes to the proposition that the State statute is not effective to resume its land at the value prescribed by the proviso.

I am quite unable to perceive how this second proposition follows from the first. The State law cannot be invalid, that is, unless some inconsistent Federal law is produced.

If, because of the unenforceability of the agreement, s. 4 (3) ceases to authorize the resumption of the plaintiff's land or s. 4 (4) (*b*) for that reason does not operate to restrict the value which may be assessed or determined, it must be because the State enactment so intends. But how possibly could such an intention be extracted from the provisions ?

When s. 4 (4) (*b*) speaks of a resumption made for the purposes of the scheme contained in the agreement approved and ratified by the State statute, it is doing no more than describing a plan set out in an instrument the subject of a public transaction. It implies nothing as to its legal status or enforceability. Still less does it imply that the provisions which it proceeds to set out shall have no application if it is found that the agreement is not a binding obligation of the Commonwealth legally enforceable in the courts of justice.

To import such an unexpressed term into a statute and make it a resolutive condition has, I believe, no warrant either in principle or in precedent.

Whether the resumption is made for the purposes described is a matter left to the Advisory Board and the Governor in Council. If these authorities have not sufficient faith in the fulfilment of the expectations that are raised by the execution of the agreement on behalf of the Commonwealth, doubtless they will not resume land for the purposes of the scheme. But if they are satisfied, why should the statute be read as meaning that they cannot act under it unless the agreement can be enforced by legal sanctions ?

Let it be assumed that s. 4 (3) must now be treated as authorizing two different forms of acquisition, that is, acquisitions for two different purposes, for closer settlement generally and for the purposes of the scheme. Even so, it is no less an acquisition for the purposes of the scheme because the obligation of the agreement is found to be political and not legal.

What considerations, whether of logic or of practical affairs, justify the introduction of a condition that the agreement must

bind the Commonwealth as a legal obligation before the purpose which the State provision describes can animate the Advisory Board and the Governor in Council ?

If the agreement is examined it will be found that there are not a few clauses which depend on, or provide for, agreed action by State and Commonwealth, and the general tenor of the document suggests rather an arrangement between two governments settling the broad outlines of an administrative and financial scheme than a definitive contract enforceable at law.

It is not my purpose to discuss the agreement in detail and in order to illustrate how much future concurrence of the governments is needed it is enough to refer to the following clauses :—4 (2) : 6 (4) : 9 : 10 (*b*) (*c*) and (*d*) : 13 (3) : 15 (1) and par. (*b*) of the definition of " eligible person " in clause 2 (1).

It is, I think, a question whether the agreement could be treated as a contract enforceable by suit. Certainly many clauses are not susceptible of legal enforcement. Surely the operation of the State statute does not depend on the question.

But it was not on this ground that the plaintiff denied obligatory force to the agreement. The execution of the agreement on behalf of the Commonwealth was authorized by a Federal statute : No. 52 of 1945. The argument assumed that, if the Federal statute authorizing the execution of the document on behalf of the Commonwealth was valid, the agreement formed a binding legal obligation of the Commonwealth .But it attacked the validity of the Federal Act as outside legislative power. It was conceded that the general subject of soldier settlement might fall within the defence power. But two reasons were assigned for the conclusion that the power would not support Act No. 52 of 1945. One reason is that the agreement is not confined to discharged servicemen but is capable of extension to other classes of people. The other is that, according to the argument, part of the subject of the agreement is the acquisition of property. A law upon that subject can be supported not under the general powers but only under s. 51 (xxxi.). It is said that the law authorizing the execution of the agreement is a law for the acquisition of property ; but s. 51 (xxxi.) will not support it because the terms contemplated are not just.

For the reasons I have given, whether all this is right or wrong, it does not appear to me to help the plaintiff to escape s. 4 (3) and s. 4 (4) (*b*) of the State statute. But as I think it is quite wrong, it is better that I should say so.

The first reason given for impeaching the validity of No. 52 of 1945 depends on the definition of " eligible person " in clause 2 of

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the agreement. The scheme is for the purpose of settling " eligible persons " on the land. The definition of the expression is in two paragraphs.

Paragraph (*a*) deals with discharged members of the Forces: paragraph (*b*) adds a class of persons (if any) which the Commonwealth with the concurrence of the State determines shall be eligible to participate in land settlement under the scheme. Even if this paragraph would cover persons completely outside the principle of rehabilitating servicemen and their dependants, a thing which other clauses make very doubtful, it would not matter. The whole agreement would not fall outside the subject of the Commonwealth power, simply because the parties reserved to themselves the right of extending it by future agreement and failed to restrict the reservation to the subjects of Federal authority.

The second reason assigned for saying that the Federal Act is void gives to the doctrine that a law with respect to the acquisition of property must rest on s. 51 (xxxi.) to the exclusion of other powers an application which appears to me to be completely outside its scope. All Act No. 52 of 1945 (*War Service Land Settlement Agreements Act* 1945) did is to provide that the execution by or on behalf of the Commonwealth of agreements between the Commonwealth and the States, naming them, substantially in the forms in the schedules was thereby (that is by the Act) authorized. There were two agreements scheduled. The agreement with New South Wales executed in pursuance of the authority is substantially in the schedule form appropriate to that State.

A legislative authority of this kind removes possible objections based on such authorities as *Commercial Cable Co.* v. *Government of Newfoundland* (1) and *The Commonwealth* v. *Colonial Ammunition Co. Ltd.* (2); it puts beyond doubt the authority of the signatory to execute the instrument on behalf of the Commonwealth; and it secures for the executive government Parliamentary approval of the transaction. But it goes no further. It does not otherwise change the legal character of the instrument or of the transaction it embodies. It certainly does not convert the terms of the agreement into the provisions of a law. The statute does not authorize the acquisition of property. It contains no provision whatever about property. It is entirely concerned with the execution of an agreement. I should say that it was a law with respect to a matter incidental to the execution of a power vested by the Constitution in the Government of the Commonwealth and was an exercise of

(1) (1916) 2 A.C. 610.

(2) (1924) 34 C.L.R. 198.

the legislative power conferred on the Parliament by par. (xxxix.) of s. 51.

Whatever the agreement might say about the acquisition of property I fail to see how the statute could be a law with respect to the acquisition of property that must be justified by par. (xxxi.) or be *ultra vires*.

What the agreement does say about the acquisition of property in fact concerns acquisition by the States. It is needless to discuss its provisions at length. The scheme it contains is one for the land settlement of servicemen in which the Commonwealth and State bear in equal proportions the deficiency arising from the difference between the cost of acquiring the land, of its development and improvement and the purchase price obtained from the settler. Certain functions in carrying out the arrangement fall to one government, certain functions to the other. So with the burden of costs of particular services performed. Some things are to be done in conjunction or in consultation.

But for the purpose in hand the provision that matters is clause 11 which is as follows :—" 11. (1) The State shall—(*a*) set apart or resume, as the case may be, for settlement such land comprised in an approved plan of settlement as is Crown land ; and (*b*) acquire compulsorily or by agreement and at a value not exceeding that ruling on the tenth day of February, One thousand nine hundred and forty-two, private land or lands held under lease from the Crown comprised in an approved plan of settlement. (2) The State shall subdivide develop and improve the land to a stage where it can be brought into production by a settler within a reasonable time having regard to the type of production proposed."

Because it is provided that the State shall exercise its powers, legislative or executive, in this manner, it is said that the enactment authorizing the execution of the agreement on behalf of the Commonwealth is a law with respect to the acquisition of property. Thus, because the State undertakes to exercise its powers of acquisition, it is argued, apparently, that there is therefore an acquisition " with respect to " which the Commonwealth legislates when it passes a law authorizing the execution of the agreement containing the State's undertaking.

It could hardly be more remote from the real purpose of s. 51 (xxxi.) which is to furnish the Commonwealth with a legislative power of acquiring property and providing for the acquisition of property by its agencies and instrumentalities and perhaps by persons standing in no such relation to the Commonwealth for purposes within its legislative competence, at the same time imposing the condition that it must be on just terms.

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The State is bound by no such condition and, however hard or unjust it may be considered, there is nothing in s. 51 (xxxi.) to restrain the power of the State and nothing to prevent the Commonwealth including such a provision as clause 11 in an agreement with the State.

In my opinion there is no foundation for the view that Act No. 52 of 1945 is without validity.

It is perhaps worth remarking that the present plaintiff would have no *locus standi* to impeach the validity of the Act and the agreement unless, contrary to the opinion I have expressed, they could show that its invalidity affected the operation upon them of the State legislation (*Anderson* v. *The Commonwealth* (1)).

On the hypothesis that the invalidity of Act No. 52 of 1945 could be established, an argument was advanced that s. 103 of the *Re-establishment and Employment Act* 1945 would then be the Federal legislation governing the relation of the States to the subject of the settlement of servicemen on the land and that the existence of the State legislation now in question involved an inconsistency with s. 109 of the Constitution. The argument was not developed and I think that an inspection of s. 103 is enough to show that it had no basis.

Another argument founded on s. 109 was suggested. It adopted the assumption that Act No. 52 of 1945 is valid and moreover that it gave the agreement the force of law. On that hypothesis it was suggested that the State legislation departed in some particulars from the agreement, e.g. slight differences in the persons it covered exist and the allowance of fifteen per cent in addition to the value of 10th February 1942 where the owner agreed to the Board's assessment is new. Accordingly it was urged that the State legislation was invalid.

There are two clear answers to this suggestion. First, Act No. 52 of 1945 does not give the agreement the force of law. Second, even if it were a law or the equivalent of one, the State legislation would be invalid only to the extent of the inconsistency and this would not avail the plaintiff.

In my opinion the demurrers should be allowed and judgment entered for the defendants with costs.

McTIERNAN J. In my opinion the demurrers should be allowed.

The question is whether the State of New South Wales can validly resume the plaintiff's land described in the statement of claim " for the purposes of the agreement " which the Parliament

(1) (1932) 47 C.L.R. 50.

of the State ratified and approved by the *War Service Land Settlement Agreement Act* 1945 of New South Wales. The terms of the agreement are set out in the Schedule to that Act and also in the First Schedule to the *War Service Land Settlement Agreements Act* 1945 of the Commonwealth. By this Act the Parliament of the Commonwealth authorized the execution, by the Commonwealth or on its behalf, of an agreement substantially in accordance with the form in the First Schedule. The plaintiff alleges by its statement of claim that the State of New South Wales threatens and intends to resume the land for the purposes of this agreement: and in this demurrer this allegation is assumed to be correct.

The first recital in the agreement states that at a conference held at Canberra on 22nd August 1945 between Commonwealth and State Ministers they agreed to proposals for "the settlement on land in the State of discharged members of the Forces and other eligible persons." The second recital states that it is expedient to make an agreement "in order to carry into effect the said proposals." The first clause of the agreement says that it is not to have any force or effect or bind either party until it is approved by the Parliament of the State. This was done by the *War Service Land Settlement Agreement Act* 1945 of New South Wales to which reference has been made.

The agreement is a scheme for co-operation between the Commonwealth and the State in the settlement of persons of the class to whom the agreement applies upon the land in New South Wales. Both parties assume financial burdens in connection with the scheme. The State accepts the important part of providing land for the purposes of settlement and putting the settlers on the land. This part is completely within its constitutional powers. The Constitution indeed leaves the power to settle the lands within a State to the State. The State of New South Wales has elaborate legislative and executive machinery for the promotion of settlement on the land of the State. By the agreement the State accepts the duty of operating this machinery in order to carry out its part in the scheme. The agreement is in the nature of a political arrangement between the Commonwealth and the State to promote the settlement on the land of New South Wales of persons of the class for whose good the scheme is designed.

The *Closer Settlement* (*Amendment*) *Act* 1907 (N.S.W.) as it stood when the agreement was ratified by the State Parliament, gives power to the Governor of the State to resume land for closer settlement—s. 4: before this power can be exercised to resume any land, it is necessary for the Governor to notify that he proposes

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to consider the advisableness of acquiring the land for the purposes of closer settlement. A notification was made on 23rd August 1945 under s. 4 with respect to the plaintiff's land. That indeed was the date of the conference of Ministers at which the proposals embodied in the agreement were approved. Assent was given to the Commonwealth Act authorizing the execution of the agreement on 11th October 1945 and to the State Act ratifying it on 7th January 1946. In consequence of the approval and ratification of the agreement by the State Parliament, that legislature amended the State's *War Service Land Settlement Act* 1941 and the *Closer Settlement (Amendment) Act* 1907. These amendments were made by the *War Service Land Settlement and Closer Settlement (Amendment) Act* 1945, to which assent was given on 17th January 1946. The most important for present purposes of these amendments was made in consequence of clause 11 of the agreement. The material parts of this clause provide that the State shall (*a*) set apart or resume, as the case may be, for settlement such land comprised in an approved plan of settlement as is Crown land; and (*b*) acquire compulsorily or by agreement and at a value not exceeding that ruling on 10th February, 1942, private land or lands held under lease from the Crown comprised in an approved plan of settlement. The State had legislative and administrative machinery to purchase or compulsorily acquire land and it could by setting that machinery in motion carry out the part assigned to it by these parts of clause 11. There was no provision in any State law limiting value by reference to the rule laid down in clause 11. Section 3 of the *War Service Land Settlement and Closer Settlement (Amendment) Act* 1945, to which assent was given on 17th January 1946, made an amendment in s. 4 of the *Closer Settlement (Amendment) Act* 1907 which imposes a limitation upon value in accordance with the rule laid down in clause 11 in any case where land is resumed "for the purpose of the scheme contained in the Agreement approved and ratified by the *War Service Land Settlement Agreement Act*, 1945." This is the State Act to which reference has been made.

The State Parliament did not create any new power to resume land for the purposes of the agreement. It would have been within its constitutional power to do so. Section 4 of the *Closer Settlement (Amendment) Act* 1907, as subsequently amended, arms the State with power to carry out the terms of clause 11 of the agreement. The purposes of closer settlement for the attainment of which the Governor may exercise this power include the settlement upon the land of persons of any class to which the agreement applies. A resumption made under s. 4 is purely a State resumption, whether

made for the purposes of the agreement or for the purpose of settling any class of persons who are outside the agreement.

Section 7 of the *Closer Settlement (Amendment) Act* 1907, as subsequently amended, provides that the power given by s. 4 may be exercised by publishing a notification of resumption in the Government *Gazette* of New South Wales; that upon resumption the land vests in His Majesty for the purposes of the Closer Settlement Acts; and that the land must be "dealt with thereunder." His Majesty is the Crown in right of the State of New South Wales: the laws under which the land must be "dealt with" are laws of New South Wales. The resumption, vesting and dealing if resumed by the State "for the purposes of the agreement" would depend entirely on State law. Every legislative provision necessary to support the resumption is a State law and it is clearly within the constitutional powers of the State. Section 109 does not come into play because there is no Commonwealth law which is inconsistent with any State law necessary to support the resumption.

The *War Service Land Settlement Agreements Act* 1945 of the Commonwealth is not part of the constitutional basis of the legislative provisions upon which the State of New South Wales can rely to proceed with the resumption of the plaintiff's land, if the State intends to resume the land for the purposes of the agreement, as is alleged by the statement of claim. These provisions have their full force and vigour as laws by virtue of the constitutional powers of the State. Nothing that has been said against the validity of the above-mentioned Act of the Commonwealth can impugn the validity of any State law authorizing the State to resume the subject land with the object of using it to fulfil its part of the agreement ratified by the State Parliament, or the validity of the resumption, if made, for that object. Every such State law remains in force irrespective of the question whether the Commonwealth Act is valid or not. The doctrine of frustration does not apply to a legislative Act: it is not repealed by reason of a change in the circumstances in which the Act was expected to operate. If the Commonwealth Parliament has no power to enter into the agreement, nevertheless the amendments made by the State Parliament to the Acts of New South Wales in consequence of its ratification remain in those Acts and lose nothing of their legal force on that account.

The *War Service Land Settlement Agreements Act* 1945 is not, however invalid. The Act is not, in my opinion, a law with respect to the acquisition of property. It does not acquire property or authorize the acquisition of any property by the Commonwealth, a State, or

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any corporation or person. The condition in s. 51 (xxxi.) of the Constitution provides no reason against the validity of this Act. This Act is not a law with respect to the acquisition of property by any test yet applied to determine whether a law is with respect to any subject matter of Commonwealth power, and the references in the agreement to the purchase and acquisition of property do not make it such a law.

It is plain upon the terms of the agreement that the Commonwealth and State were co-operating in a scheme to settle on the land persons whom each Government has constitutional power to assist. The words of *Starke* J. in *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (1) can be applied—"The legislative bodies of the Commonwealth and the States were each entitled to use to the full the powers vested in them for the purpose of carrying out the scheme. Co-operation on the part of the Commonwealth and the States may well achieve objects that neither alone could achieve; that is often the end and the advantage of co-operation. The court can and ought to do no more than inquire whether anything has been done that is beyond power or is forbidden by the Constitution." The State of New South Wales used its constitutional power to play its part in the scheme by amending its Acts for the promotion of closer settlement. It would be surprising if by making this agreement with the Commonwealth the State restricted its legislative power, including its power to resume land within the State by importing into its own Constitution a condition in the Commonwealth Constitution restricting Commonwealth power only: it would be a novel result that a State power becomes less when a State agrees upon co-operation with the Commonwealth than it is when the State acts separately. In my opinion the State has lawful authority to proceed with the resumption of the subject land if it should think fit to do so.

WILLIAMS J. These are demurrers by the defendants to an action in which the plaintiff claims declarations that the *War Service Land Settlement Agreements Act* 1945 (Cth.), the *War Service Land Settlement Agreement Act* 1945 (N.S.W.), the *Closer Settlement (Amendment) Act* 1907 (N.S.W.) as subsequently amended and in particular ss. 4 (1) (*b*) and 5, and the War Service Land Settlement Agreement are all invalid, and consequent injunctions. Paragraph 14 of the statement of claim alleges, and these allegations must be taken to be true for the purposes of the demurrers, that the State of New South Wales has threatened and intends to resume the plain-

(1) (1939) 61 C.L.R., at p. 774.

tiff's land for the purposes of the War Service Land Settlement Agreement. This is an agreement made between the Commonwealth and the State of New South Wales. Section 3 (1) of the *War Service Land Settlement Agreements Act* 1945 (Cth.), which came into operation on 11th October 1945, provides that the execution by or on behalf of the Commonwealth of agreements between the Commonwealth and the State of New South Wales, the Commonwealth and the State of Victoria, and the Commonwealth and the State of Queensland, substantially in accordance with the form contained in the First Schedule to this Act, is hereby authorized. This Act also provides, s. 3 (2), that the execution by or on behalf of the Commonwealth, of agreements between the Commonwealth and the State of South Australia, the Commonwealth and the State of Western Australia, and the Commonwealth and the State of Tasmania, substantially in accordance with the form contained in the Second Schedule to this Act, is hereby authorized. The most important variation between the two forms of agreement for the purposes of the present case is that the first agreement provides (clause 11), that the State shall set apart or resume, as the case may be, for settlement such land comprised in an approved plan of settlement as is Crown land; and acquire compulsorily or by agreement and at a value not exceeding that ruling on the 10th February 1942, private land or lands held under lease from the Crown comprised in an approved plan of settlement; whereas the second agreement provides (clause 11), that the State shall set apart Crown land or with funds provided by the Commonwealth resume for settlement Crown land and acquire compulsorily or by agreement private land comprised in an approved plan of settlement at a value to be approved by the Commonwealth and will hold the same for use for the purposes of the scheme. There is therefore in the second agreement no limitation of the value at which the land is to be acquired to that ruling on 10th February 1942.

On these demurrers we are concerned with the agreement authorized by s. 3 (1) of the *War Service Land Settlement Agreements Act* 1945 entered into between the Commonwealth and the State of New South Wales. Clause 1 of this agreement provides that it shall have no force or effect and shall not be binding on either party unless and until it is approved by the Parliament of the State. The agreement, which was made on 28th November 1945, and therefore after the date of the Commonwealth Act, was approved by the Parliament of New South Wales by the *War Service Land Settlement Agreement Act* 1945, which came into force on 7th

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January 1946. Section 2 of this Act provides that the agreement, a copy of which is set forth in the schedule to the Act, is hereby approved and ratified.

The agreement provides for the settlement of discharged members of the Forces and other eligible persons on land in the State. By clause 2 eligible person is defined to mean (*a*) a discharged member of the Forces as therein defined; or (*b*) a person included in a class of persons (if any) which the Commonwealth with the concurrence of the State determines shall be deemed eligible to participate in land settlement under the scheme. Paragraph (*b*) is only an agreement to enter into an agreement, and pending such further agreement the agreement appears to me to be confined to discharged members of the Forces because clause 12 (*b*) provides that an eligible person may apply to participate under the scheme not more than five years after (i) 15th August 1945; or (ii) the date when he ceased to be engaged on war service, and it is only possible in the case of discharged members of the Forces to ascertain which would be the later of these two dates. An argument was submitted for the plaintiff that the class of eligible persons defined in par. (*b*) could include persons who could have no claims to rehabilitation on account of war service, and therefore persons whom the Commonwealth could not assist to settle on the land under the defence or any other constitutional power, and that this paragraph is inseverable from par. (*a*). But as I am of opinion that par. (*b*) is at most an agreement to enter into an agreement, and that the only persons at present eligible to participate in the scheme are discharged members of the Forces as defined in par. (*a*), I do not propose to discuss this contention.

The agreement is a joint scheme entered into by the Commonwealth and the State to settle discharged members of the Forces on land in New South Wales. The agreement is not for a fixed term. It is dated 28th November 1945 and will continue until 15th August 1950 at least, and may continue for an indefinite period afterwards. Yet, whenever the State acquires private land by agreement or compulsion for the purposes of the scheme, it must do so at a value not exceeding that ruling on 10th February 1942. It is therefore immaterial what changes in the value of the land may occur between 10th February 1942 and the date of acquisition, even assuming that no improvements are made in the meantime, and if they are made, there is no provision for the owner receiving compensation for any increase in the value of the land on this account. The compensation is therefore obviously inequitable and the agreement provides for the compulsory acquisition of land from

private owners on a semi-confiscatory basis. Section 51 (xxxi.) of the Constitution provides that Parliament shall have power to make laws with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws. Whenever, therefore, the Commonwealth Parliament legislates with respect to the acquisition of property for a purpose in respect of which the Parliament has power to make laws, the legislation must provide just terms, that is the legislation must provide that the owner shall receive the full equivalent in money for the value of the property of which he is deprived. The agreement attempts to escape this constitutional requirement by providing that the State and not the Commonwealth shall make the acquisition and become the owner of the land. The State legislation relied upon is contained in the *Closer Settlement (Amendment) Act* 1907, s. 4 as amended by s. 3 of the *War Service Land Settlement and Closer Settlement (Amendment) Act* 1945 (N.S.W.) and s. 7 of the *War Service Land Settlement and Closer Settlement (Amendment) Act* 1948 (N.S.W.) The method of acquisition provided for by s. 4 is that where an advisory board reports that any land is suitable to be acquired for closer settlement the Governor may, subject to the Act, purchase it by agreement from the owner; or, failing such agreement, resume it under the Act. Before resuming any land, the Governor shall, by proclamation in the *Gazette*, notify that he proposes to consider the advisableness of acquiring such land for the purposes of closer settlement. Section 3 (*b*) of the amending Act of 1946 inserted at the end of s. 4 of the Act of 1907 a new sub-s. 4 (1) and (*b*), of which (*b*) provides in a proviso that where any resumption is made for the purposes of the scheme contained in the agreement approved and ratified by the *War Service Land Settlement Agreement Act* 1945, the value of the land as so assessed or determined (that is assessed by an advisory board or determined by the Land and Valuation Court) shall not exceed the value that would have been so assessed or determined in respect of an identical resumption as at 10th February 1942, excepting the value of any improvements effected on such land since that date. This proviso was amended by s. 3 of the amending Act of 1948. The effect of the amendment is that an advisory board can now add fifteen per cent to the value ruling on 10th February 1942, and in the case of compulsory acquisition, if the dispossessed owner agrees not to claim compensation in excess of the value of the land as assessed by an advisory board, the value of the land as so assessed shall not exceed by more than fifteen per cent the value ruling on 10th February 1942 excepting the value of any improvements

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effected on such land since that date. But in the case of any resumption other than a resumption where the owner agrees not to claim compensation in excess of the value of the land as assessed by an advisory board, the value of the land is still, as under the previous proviso, to be the value ruling on 10th February 1942, excepting the value of any improvements effected on such land since that date. The proviso in its latest form therefore provides an inducement to owners who are prepared to forego their statutory right to appeal to the Land and Valuation Court from an assessment of an advisory board by providing that such owners are to have their compensation assessed at a higher rate than those owners who are not prepared to forego this right. Such an inducement is not provided for in the agreement so that presumably the State is prepared to finance the whole of it. But it is immaterial on these demurrers, for the plaintiff is not prepared to accept the rate ruling on 10th February 1942, even plus fifteen per cent, and has not been induced not to challenge the whole scheme.

The only step which the State has so far taken to resume the plaintiff's land is the initial step of publishing in the New South Wales Government *Gazette* on 24th August 1945 a proclamation under s. 4 (3) of the *Closer Settlement* (*Amendment*) *Act* 1907, as subsequently amended, that it proposes to consider the advisableness of acquiring the plaintiff's land. It was contended by Mr. *Hardie* that in the light of this proclamation par. 14 of the statement of claim must be read as an allegation that the State was intending to resume the plaintiff's land for closer settlement under the provisions of s. 4 (1) (*b*) of the *Closer Settlement* (*Amendment*) *Act*. This would be a resumption of land at its full value. But this is plainly not the true meaning of the allegation. Its true meaning is that the State is intending to resume the land for the purposes of the agreement and therefore to pay compensation on the semi-confiscatory basis provided for in the amending *Closer Settlement* (*Amendment*) *Acts* of 1946 and 1948.

A number of arguments were addressed to the Court on behalf of the plaintiff. The substantial question is whether the *War Service Land Settlement Agreements Act* 1945 (Cth.) is invalidated by s. 51 (xxxi.) of the Constitution, and if it is invalidated, what effect the invalidation has upon the proviso to s. 4 (*b*) of the *Closer Settlement* (*Amendment*) *Act* 1907 as amended by the Acts of 1946 and 1948. It is submitted for the plaintiff that s. 3 of the Commonwealth Act is a law with respect to the acquisition of property for a purpose of the Commonwealth, that is the rehabilitation of discharged members of the Forces, within the meaning of s. 51 (xxxi.)

of the Constitution. Legislation for the rehabilitation of discharged members of the Forces is, of course, authorized by the defence power of the Commonwealth, s. 51 (vi.) of the Constitution, and legislation for this purpose is therefore legislation for a purpose in respect of which the Commonwealth Parliament has power to make laws within the meaning of par. (xxxi.). Section 3 (1) of the *War Service Land Settlement Agreements Act* 1945 (Cth.) merely authorizes the execution of the agreement so that, in order to determine its real effect, it is necessary to turn to the agreement itself. The party which resumes the land under the agreement is the State. The State agrees to resume the land at a sum not exceeding its value on 10th February 1942, but the agreement does not intend the settler to repay the State even on this basis for he is placed on the land at a valuation which will enable him to earn a reasonable living after meeting such financial commitments (excluding principal repayments under any agreement between the State and the settler for the purchase of land) as would be incurred by a settler possessing no capital. If this value is less than the value for which the land was acquired, plus the cost of developing and improving the land for settlement under the terms of the agreement, the State shall contribute one-half of the excess of this total cost and the other half of the excess shall be contributed by the Commonwealth.

Further, applicants may require training, or settlers, that is the persons who have been allotted holdings under the scheme, may require further experience to fit them to work their holdings, and so the agreement makes provision for such training and for an assistance period of one year (subject to extension in special circumstances) during which the settler is to receive a living allowance from the Commonwealth and during which he shall not be required to pay any rent or interest in respect of the holding or make any payment on account of principal or interest in respect of advances (other than certain advances for working capital). It is the Commonwealth which provides the training and pays to applicants selected for training, living allowances and transport incidental to their training, and which provides living allowances for settlers during the assistance period. The Commonwealth also meets one-half of the cost involved in the remission of rent and interest during the assistance period. The selection of the settlers is important. Clause 12 (*c*) provides that an applicant for settlement shall apply to the appropriate State authority which shall on behalf of the Commonwealth determine whether an applicant is an eligible person, and classify eligible persons as suitable (either immediately

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or after training or further experience) or as unsuitable for settlement. Clause 15 provides for the State making arrangements approved by the Commonwealth for making advances to settlers for the purposes of providing working capital and paying for and effecting improvements and acquiring stock, plant and equipment. The agreement provides that any losses incurred in respect of these advances shall be equally borne by the Commonwealth and the State. Finally the agreement provides that the State shall subdivide, develop and improve the land to a stage where it can be brought into production by a settler within a reasonable time having regard to the type of production proposed, and that the form and conditions of tenure on which a holding is to be held by a settler shall be determined by the State.

It is apparent that the agreement is a joint scheme by the Commonwealth and the State to settle on the land discharged members of the Forces selected by a State authority on behalf of the Commonwealth. The scheme requires valid Commonwealth and State legislation to make it effective. The Commonwealth legislation is s. 3 (1) of the *War Service Land Settlement Agreements Act* 1945. It is legislation for a purpose in respect of which the Commonwealth Parliament has power to make laws because its purpose is to enable the executive government of the Commonwealth to carry out the terms of the agreement. It is also legislation with respect to the acquisition of property from, *inter alia*, private persons for this purpose. It is true that the property is acquired from these persons by the machinery of State legislation, and it is only Commonwealth legislation with respect to the acquisition of property which must comply with s. 51, par. (xxxi.) of the Constitution. But the immediate question concerns the validity of s. 3 (1) of the *War Service Land Settlement Agreements Act* and this is Commonwealth legislation. In *McClintock* v. *The Commonwealth* (1), *Starke* J. said: "That the constitutional power to make laws for the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws is not confined to laws for the acquisition of property by the Commonwealth alone as it contended. The only limitations upon the constitutional power are 'just terms' and a 'purpose in respect of which the Parliament has power to make laws.' And there is no reason for further limiting the power. Authorities, independent of the Commonwealth, may be set up for various purposes under the constitutional powers of the Commonwealth and endowed with authority to acquire property. There is no

(1) (1947) 75 C.L.R., at p. 23.

constitutional provision denying this power to the Commonwealth." I said, in a judgment with which *Rich* J. was in substantial agreement, that " section 51, placitum (xxxi.) of the Constitution is not limited to the acquisition of property by the Commonwealth but extends to the acquisition of property for any purpose in respect of which the Commonwealth Parliament has power to make laws. The placitum requires that whenever the Parliament exercises such a legislative power, and the legislation provides for the acquisition of property from any State or person, the legislation must provide just terms for the acquisition, otherwise the acquisition is unlawful " (1). In *Bank of New South Wales* v. *The Commonwealth* (2) it is said in the joint judgment of *Rich* J. and myself that " s. 51 (xxxi.) of the Constitution requires that laws for the acquisition of property shall provide for the acquisition on just terms. The requirement applies whether the law authorizes the Commonwealth or some person or corporation to acquire the property: *McClintock* v. *The Commonwealth* (3); *Jenkins* v. *The Commonwealth* (4)." It was contended by Mr. *Hardie* that the only Commonwealth legislation which falls within par. (xxxi.) is legislation which effects or authorizes an acquisition of property or provides machinery for effecting the acquisition of property authorized by Commonwealth legislation, and that the agreement does not effect or authorize such an acquisition or provide such machinery. But there are no express words in the paragraph which limit its width in this way, and there is nothing in its subject matter or context from which such a limitation can be applied. In my opinion the paragraph applies to all Commonwealth legislation the object of which is to acquire property for a purpose in respect of which the Commonwealth Parliament has power to make laws. It is immaterial whether the acquisition is to be made by the Commonwealth or some body authorized to acquire property by the Commonwealth or by a State by agreement with the Commonwealth. The Commonwealth legislation is invalid unless it provides for the acquisition of the property on just terms by whatever machinery the acquisition is to be brought about. In order to be legislation with respect to the acquisition of property within the meaning of s. 51 (xxxi.) of the Constitution, the Commonwealth or some body authorized by the Commonwealth must no doubt have an interest in the acquisition of the property. Otherwise the acquisition could not be for a purpose in respect of which the Commonwealth Parliament has power to make laws. But the interest need not be a proprietary interest. Any legal

(1) (1947) 75 C.L.R., at p. 36.
(2) (1948) 76 C.L.R., at p. 250.
(3) (1947) 75 C.L.R. 1.
(4) (1947) 74 C.L.R. 400.

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interest including a contractual interest would be sufficient if it made the acquisition one for such a purpose. The present agreement confers on the Commonwealth a number of legal rights which are at least contractual rights with respect to the use and disposal of the land acquired by the State. When the land is so acquired it must be disposed of in accordance with the agreement and not otherwise. The land is acquired by the State on behalf of the Commonwealth and itself. Half the excess cost of acquiring, improving and developing the land, and more than half the other expenses incidental to carrying out the scheme are to be borne by the Commonwealth. The scheme would be in substance the same if the land was acquired jointly by the Commonwealth and the State. Under the scheme the State acquires the land solely but it is then dealt with on account of the Commonwealth and State jointly. The whole transaction is a joint venture entered into between the Commonwealth and the State to settle discharged members of the Forces on the land. The acquisition of the necessary land is of the essence of the scheme. The purpose of the Commonwealth is to settle discharged members of the Forces on this land. Commonwealth legislation authorizing the executive government of the Commonwealth to enter into such an agreement is, in my opinion, legislation with respect to the acquisition of land for a purpose in respect of which the Commonwealth Parliament has power to make laws. Section 3 (1) of the *War Service Land Settlement Agreements Act* is, therefore invalid.

Section 51 (xxxi.) of the Constitution applies only to legislation of the Commonwealth Parliament and does not invalidate State legislation which does not provide just terms. The State of New South Wales could, no doubt, resume the plaintiff's land for closer settlement under the provisions of s. 4 (1) (*b*) of the *Closer Settlement* (*Amendment*) *Act* 1907. The *War Service Land Settlement Agreement Act* 1945 is a valid Act of the Parliament of New South Wales. But it operates only to approve and ratify the War Service Land Settlement Agreement. If this is an agreement which it is beyond the power of the Commonwealth Parliament to authorize, then it is not an agreement between the Commonwealth and the State, and there is no agreement which the State Act can approve and ratify. The State Act is therefore an Act which has in law no operation. It is the same with the proviso to s. 4 (*b*) of the *Closer Settlement* (*Amendment*) *Act* 1907 introduced by the *War Service Land Settlement and Closer Settlement* (*Amendment*) *Act* 1945 as amended by the *War Service Land Settlement and Closer Settlement* (*Amendment*) *Act* 1948. The proviso only operates where there is a resumption of

land for the purposes of the scheme contained in the agreement approved and ratified by the *War Service Land Settlement Agreement Act* 1945. As there is no agreement, this Act approved and ratified nothing, and there could not be any resumption under the *Closer Settlement (Amendment) Act* to which the proviso could apply.

Accordingly, in my opinion, if the allegations in par. 14 of the statement of claim are true, the plaintiff is at least entitled to declarations that the *War Service Land Settlement Agreements Act* 1945 (Cth.) is invalid, and that the *War Service Land Settlement Agreement Act* 1945 (N.S.W.) and the proviso to s. 4 (*b*) of the *Closer Settlement (Amendment) Act* 1907 introduced by the *War Service Land Settlement and Closer Settlement (Amendment) Act* 1945 and amended by the *War Service Land Settlement and Closer Settlement (Amendment) Act* 1948 are inoperative, and to consequential relief, and the plaintiff has a sufficient interest to maintain the action against all the defendants. This Court has power to make the declarations not only with respect to the Commonwealth Act but also with respect to the State Acts because the action involves the interpretation of the Constitution, and in such a case the Court has jurisdiction to adjudicate upon the whole matter other than separate and distinct causes of action which have no relation to the constitutional question, and not merely upon the interpretation of the Constitution (*R.* v. *Bevan* ; *Ex parte Elias and Gordon* (1) ; *Carter* v. *Egg & Egg Pulp Marketing Board* (2)).

For these reasons I would overrule the demurrers.

WEBB J. In June 1945 the Commonwealth Parliament enacted the *Re-establishment and Employment Act* 1945, of which s. 103 provided that the Commonwealth might, in accordance with any agreement, make advances or payments to a State to enable it to acquire land for settlement by discharged members of the Forces, to develop and improve land for that purpose, and to settle discharged members of the Forces thereon ; and for such other purposes relating to the settlement of such members of the Forces as might be prescribed. In August 1945 a conference of Commonwealth and State Ministers was held at Canberra. This conference agreed on certain proposals, which, from the recital of the agreement hereinafter referred to, appear to have been in the terms of that agreement. Before an agreement was entered into between the Commonwealth and any State, the Commonwealth Parliament in October 1945 enacted the *War Service Settlement Agreements Act* 1945 (No. 52

(1) (1942) 66 C.L.R. 452, at pp. 465, 480. (2) (1942) 66 C.L.R. 557.

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of 1945). This Act authorized the execution of agreements between the Commonwealth and the States of New South Wales, Victoria and Queensland substantially in accordance with the form contained in the first schedule to the Act. Authority was also given for the execution by the Commonwealth of agreements with the three remaining States substantially in accordance with the form in the second schedule, but we are concerned only with that in the first schedule. On 28th November 1945, in pursuance of this authority, the Prime Minister of the Commonwealth executed an agreement with the Premier of New South Wales in the form contained in the first schedule. The recital to this agreement refers to the conference of August 1945 at Canberra and states that certain proposals were agreed to with a view to the settlement on land in the State of New South Wales of discharged members of the Forces and other eligible persons. Clause 1 provided that the agreement should not be binding until approved by the State Parliament. By clause 2 " eligible person " was defined to include a discharged member of the Forces and also a person included in a class which the Commonwealth, with the State's concurrence, determined to be eligible to participate in the land settlement. By clause 4 the Commonwealth was to provide financial and other assistance, and the State was to initiate proposals for settlement, but the Commonwealth might do so in matters in respect of which it had power to make laws. By clause 5 the State was to provide capital moneys for acquiring, developing and improving the land. By clause 6 the State was to bear the cost of all State administration and to make a capital contribution in respect of each holding equal to one-half of the excess of the total cost over the valuation made by Commonwealth and State officers who in making the valuation were to allow for a reasonable living for the settler after meeting financial commitments other than land purchase. By clause 7 the Commonwealth was to bear its costs of administration, provide training and pay to trainees, living allowances and other training expenses. Both Commonwealth and State were to bear half the cost of rent and interest remissions and of certain losses and make a capital contribution of half the amount of the excess referred to in clause 6. By clause 10, after the State had selected land suitable for settlement, it was to prevent that land being otherwise dealt with. By clause 11 the State was to set apart or resume approved lands and by sub-clause (1) (*b*) acquire compulsorily or by agreement and at a value not exceeding that ruling on 10th February 1942 private land or land held under Crown lease. By clause 13 a living allowance might be granted to a settler during an assistance period on

terms fixed by the Commonwealth. There were other provisions in the agreement not necessary to refer to, except perhaps clause 15 which with clause 7 made the Commonwealth and State each liable for half the loss on certain advances to settlers.

There was no further Commonwealth legislation, but on 7th January 1946 the New South Wales Parliament approved and ratified the agreement by the *War Service Land Settlement Agreement Act* 1945 (No. 6 of 1946). That Parliament also made amendments of the New South Wales Crown Lands and Closer Settlements Acts to conform to the agreement. Among other amendments were those made by the *War Service Land Settlement and Closer Settlement (Amendment) Act* 1945, by s. 3 of which it was provided that where a purchase or resumption was made for the purposes of the scheme in the agreement the price or value should not exceed that which would have been assessed or determined on purchases or resumption as at 10th February 1942, excepting improvements after that date. The agreement made no exception of such improvements.

By proclamation of 23rd August 1945—the day following the Canberra conference—gazetted on 24th *idem* it was notified that the Governor in Council proposed to consider the advisableness of acquiring the plaintiff's land for the purposes of closer settlement. This notification was published in pursuance of s. 4 of the *Closer Settlement (Amendment) Act* 1907 as amended which provides that where an advisory board reports that land is suitable to be acquired for closer settlement the Governor may purchase it, or, failing agreement, resume it under the Act; but before resuming land the Governor, by proclamation in the *Gazette*, must notify that he proposes to consider the advisableness of acquiring it for closer settlement.

Because of this proclamation the plaintiff has brought an action in this Court against the Commonwealth and the State of New South Wales alleging that the State of New South Wales threatened and intends to resume the plaintiff's land for the purposes of the agreement, and that the Commonwealth threatens and intends to pay moneys for such resumption; and the plaintiff claims a declaration that the agreement is void and inoperative; that the Commonwealth Act authorizing it is *ultra vires*; that the New South Wales Act approving and ratifying it is invalid; and that the amendment of the *Closer Settlement (Amendment) Act*, and in particular s. 4, is invalid; and claiming an injunction restraining the State from resuming the land and the Commonwealth from paying moneys for such resumption.

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The proposals of the Canberra conference appear to have been beyond the power conferred by s. 103 of the *Re-establishment and Employment Act* 1945 and that may have been the reason why the proposals were made the subject of further legislation authorizing the agreement in the form in the schedule to Act No. 52 of 1945. The proposals appear to have gone beyond the authority of the first-mentioned Act in that they made provision for persons other than discharged soldiers, and also for the resumption of lands at February 1942 prices. Under reg. 6 of the *National Security (Economic Organization) Regulations* (see *Manual of National Security Legislation*, 6th ed., pp. 283-285) the compensation payable on resumptions was not subject to such regulations. There may have been other provisions in the proposal which required authority not possessed by the Ministers. It may have appeared reasonable to the Ministers that lands resumed for discharged soldiers should not be paid for at a higher price than lands purchased by agreement in the ordinary way; and it may have been their intention and that of the Prime Minister and Premier of New South Wales, as well as of both Parliaments, that the provision for resumption at February, 1942 prices should operate only so long as the National Security Regulations in respect of the price of land. The date 10th February 1942 indicates that all the Ministers and both Parliaments had these regulations in view. They were repealed as regards land as from 20th September 1948 (see the Declaration of the Commonwealth Treasurer of 17th *idem* made under Statutory Rule 1948 No. 121). Moreover it would be impossible to assume that the Ministers and the Parliament contemplated that the National Security Regulations would be followed by State legislation along the same lines. But counsel for the defendants submitted that the February 1942 prices still operated under the agreement and under the New South Wales legislation. They made an alternative submission that if these prices did not obtain the agreement and the New South Wales legislation was in any event valid as to the balance, although Mr. *Barwick* for the plaintiff asserted, and this was not denied, that there would be no resumption unless it could be made at the February 1942 prices. However, whatever may have been in fact the intention of the Ministers or Parliament there is no justification in law for imputing to them an intention that these prices should cease to operate with the regulations.

Then taking these prices as intended to continue in operation after 20th September 1948, I think that the Commonwealth legislation authorizing the agreement was contrary to par. (xxxi.) of s. 51 of the Commonwealth Constitution. Subject to this, I

think that the agreement could be sustained under par. (vi.) of s. 51 and under s. 96 of the Commonwealth Constitution. As regards discharged soldiers it could be sustained under both sections, and as regards " eligible persons " not being discharged soldiers, it could be sustained under s. 96. I do not see why a provision for payments by the Commonwealth direct to settlers would render s. 96 inapplicable if the State desired or agreed to such payments direct. Both State and Commonwealth might benefit by direct payments, but that would be consistent with financial benefit to the States. However, clause 11 (1) (*b*), if it is still in operation as the defendants submit, does not provide for just terms. The courts will not readily deny that terms provided by the Commonwealth Parliament are just, and in this matter regard will be had to the interest of the public as well as to the interest of the owner. The question is whether the terms provided can reasonably be regarded as just. I can see no ground upon which clause 11 (1) (*b*) can be justified, seeing that it discriminates against a particular class of owners. I can suggest no reason or justification for such discrimination. It may be that there are lands which are not worth more than their value in February 1942, but it is safe to say that most lands would be worth considerably more. Any justification for the February 1942 values being maintained ceased with the repeal of the price-fixing regulations, so called not because of their precise terms but because of their effect in practice. It was not submitted that the terms were just. But it was submitted by Mr. *Hardie* for the New South Wales defendants that the Commonwealth statute No. 52 of 1945 merely authorizes the agreement. There is no substantive independent power in the Commonwealth Parliament to authorize agreements with the States. The power if it exists must be found in some section of the Constitution authorizing legislation to the effect of the agreement. I think the power is found in par. (vi.) of s. 51 and in s. 96. The agreement deals with matters with respect of which the Commonwealth Parliament has power to make laws : i.e. the settlement of discharged soldiers and financial assistance to the States. Further it is an agreement for the acquisition of property for such purposes. The question is whether the agreement and the Commonwealth statute authorizing it constitute a law with respect to the acquisition of property for such purposes. It is submitted for the defendants that it is not such a law because the acquisition is not made by the Commonwealth Parliament or by any body or person deriving the power of acquisition from that Parliament. In my opinion par. (xxxi.) of s. 51 is not so limited. It speaks of a law *with respect* to the

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acquisition of property. As the Commonwealth Parliament is a plenary legislature these words should be given their fullest meaning consistent with other provisions of the Constitution. They are broad enough to include an acquisition by the State exercising its powers of acquisition by agreement with the Commonwealth, and should, I think, be held to extend to such acquisition (see *McClintock* v. *The Commonwealth* (1)).

It was also submitted by the defendants that the New South Wales legislation in support of this agreement authorizes the resumption although the February 1942 prices no longer obtain. Mr. *Kitto* for the Commonwealth defendants submitted that the purpose of the notification was for New South Wales closer settlement and that the scheme under the agreement was only part of that major purpose which survived although the agreement might fail. The titles to the New South Wales legislation, making amendments to conform to the agreement, suggest that the purpose of the agreement was collateral, as Mr. *Barwick* submitted, but I am not satisfied that the elimination of the agreement necessarily frustrates the State purpose of closer settlement. Mr. *Barwick* also relied on clause 10 of the agreement dedicating selected lands for the purposes of the agreement, but of course that argument fails with the agreement. Mr. *Barwick's* submission that s. 103 of the *Re-establishment and Employment Act* 1945 and the decision in *Wenn* v. *Attorney-General* (*Vict.*) (2) reveal that the State is excluded from the field of legislation for soldier settlement, except to the extent of implementing valid agreements with the Commonwealth under that section, must also fail, seeing that there is no agreement authorized by that section. If and when such an agreement is made *Wenn* v. *Attorney-General* (*Vict.*) (2) indicates that State legislation not in terms in conflict with any particular provision of the agreement may still be inoperative under s. 109 of the Constitution. I have come to the conclusion that the State legislation and the proclamation are valid as regards closer settlement for State purposes; but that the State legislation is inoperative so far as it was enacted to give effect to the agreement: properly construed it contemplates, I think, a valid agreement.

The fact that the plaintiff's lands are specified in the proclamation is sufficient to establish its interest in the subject matter of this action, as we must assume that the State threatens and intends to resume them under the agreement.

To sum up: If the agreement expressly stated that its purpose was to secure land for discharged soldiers at less than fair prices

(1) (1947) 75 C.L.R., at pp. 23, 36. (2) (1948) 77 C.L.R. 84.

it would be impossible to hold that the agreement and the Commonwealth statute antecedently authorizing it did not amount to a purported exercise of the defence power under par. (vi.) invalidated by par. (xxxi.) of the Commonwealth Constitution. But invalidity is not avoided because that purpose is implied and not expressed. It is important to keep in mind that the terms of the agreement are set out in the first schedule to the statute.

I would overrule the demurrers.

Demurrers overruled. Leave to defendants to plead on or before 10th January 1950. *Plaintiff to be at liberty to apply to a single Justice for such relief as it may be advised.*

Solicitors for the plaintiff, *Phillips & Co.*, Yass, by *C. M. Marsh & Harvey.*

Solicitor for the defendants, the Commonwealth, Dedman, and the Attorney-General for the Commonwealth, *K. C. Waugh*, Crown Solicitor for the Commonwealth.

Solicitor for the defendants the State of New South Wales, Sheahan and the Attorney-General for New South Wales, *F. P. McRae*, Crown Solicitor for the State of New South Wales.

J. B.