

[HIGH COURT OF AUSTRALIA.]

HOWARTH AND OTHERS . . . . . APPELLANTS;  
PLAINTIFFS,

AND

McMAHON . . . . . RESPONDENT.  
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF  
NEW SOUTH WALES.

H. C. OF A. *Resumption of Land—Statutory power of council—“Provide, control, and manage,  
1951. or . . . subsidise . . . clubs for returned sailors and soldiers”—  
Notification of resumption—Stated purpose—“Providing a club for returned  
SYDNEY, sailors and soldiers”—Sale of the land by council to ex-servicemen’s organization  
April 13, 16, —Unauthorized purpose—Validity of notification—Effect—Local Government  
27. Act 1919-1948 (N.S.W.) (No. 41 of 1919—No. 44 of 1948), ss. 358 (1) (f),  
Dixon, 477, 532, 536—Public Works Act 1912 (N.S.W.) (No. 45 of 1912), s. 42.  
Williams and  
Webb JJ.*

*Referred to:-  
87 L.R. 130  
Referred to:-  
1953 (N.S.W.) S.R. 425  
Referred to:-  
53 (N.S.W.) S.R. 530*

The *Local Government Act 1919-1948* (N.S.W.) provides, by s. 358 (1), that councils “may provide, control, and manage, or may subsidise— . . . (f) associations, institutes, and clubs for returned sailors and soldiers”; and, by s. 532, that councils “may acquire land . . . for any purpose of this Act by lease, purchase, appropriation or resumption in accordance with this Part”. Section 536, in that Part, provides that if authorized the resumption shall be effected by *Gazette* notification under Div. 1 of Part V. of the *Public Works Act 1912* (N.S.W.) and that upon notification that the land is vested in the council the land thereupon so vests. Section 42, Div. 1 of Part V. of the *Public Works Act 1912*, requires that a *Gazette* notification of the resumption of land, which may only be “for the purpose of carrying out any authorised work”, must state the purpose of the resumption, and the purpose stated must be a public purpose.

Certain land was purported to be resumed under the provisions of s. 536 of the *Local Government Act 1919-1948*, and Div. 1 of Part V. of the *Public Works Act 1912*, and vested in a council, the purpose being, as stated in the *Gazette* notification, “the purpose of providing a club for returned sailors and soldiers”. By a conveyance the council purported to convey the



land so resumed to the trustees of a sub-branch of the Returned Sailors, Soldiers and Airmen's Imperial League of Australia in fee simple in consideration of the sum of £1,400 paid by the trustees to the council.

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*Held*, (1) that the power conferred by the phrase "provide control and manage" in s. 358 (1) was designed to enable a council to provide and maintain under its authority things considered to be for the general advantage and for that reason enumerated in the sub-section, and (2) that the purported resumption was invalid, because, on the evidence, the council never intended to build or provide a club, over which it would exercise control and management.

*Motor Wheel & Tyre Co. Ltd. v. Commissioner for Railways*, 50 S.R. 205; 67 W.N. 166, discussed.

Decision of the Supreme Court of New South Wales (*Roper C.J. in Equity*): *Howarth v. McMahon*, (1950) 51 S.R. (N.S.W.) 73; 68 W.N. 25, affirmed.

#### APPEAL from the Supreme Court of New South Wales.

Alexis Howarth, Richard Victor Davis and George Christie, who were the trustees of the Redfern Sub-branch of the Returned Sailors, Soldiers and Airmen's Imperial League of Australia, applied by way of originating summons to the Supreme Court of New South Wales in its equitable jurisdiction for (a) an injunction to restrain Thomas Francis McMahon from placing any bricks or other materials, or permitting any bricks or other materials to be placed or to remain upon certain land situate at Redfern, Sydney, and more particularly described in conveyance registered Number 624 Book 2074, and (b) an order directing the defendant to remove all bricks and other materials then on the said land.

The plaintiffs claimed that under the said conveyance they had been at all times since 22nd November 1948, and still were, seised of an estate in fee simple in possession in the land therein described and that the retention on the land of the bricks and other materials owned by the defendant was a continuing trespass.

The defendant became the tenant in fee simple of the land in about 1925 and in 1936 he deposited on the land about 250,000 bricks and some forty to fifty tons of iron and masonry building materials to be used in the construction of a garage on the land, which building, however, was not approved by the council. The bricks, iron and masonry building materials had remained on the land ever since.

The bricks and other materials covered the greater part of the surface of the land and were heaped thereon to a height of up to six feet, and unless they were removed a proposed building could not be erected on the land.



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By a notification under the *Local Government Act* 1919 (N.S.W.) and the *Public Works Act* 1912 (N.S.W.), dated 17th September 1947 and published in the *Government Gazette* of 26th September 1947, it was notified that the land was resumed and vested in the Council of the Municipality of Redfern for the purpose of providing a club for returned sailors and soldiers.

By a deed of conveyance dated 22nd November 1948, the Council of the Municipality of Redfern, in consideration of the payment to it of the sum of £1,400, purported to convey the land in fee simple to the plaintiffs, who were described in the deed as trustees of the Redfern Sub-branch of the Returned Sailors, Soldiers and Airmen's Imperial League of Australia.

In pursuance of a resolution passed by the members at a meeting of the Sub-branch held on 30th June 1949, the plaintiffs proposed to erect a building on the land, presumably for use as a returned sailors and soldiers' club. They requested the defendant to remove the bricks, iron and masonry building materials but he refused to do so. Upon receipt of the request the defendant maintained his right of property in them and set up (a) that the purported resumption was ineffective to vest the land in the council, and (b) that if it was effective so to vest the land the purported sale of the land by the council to the plaintiffs was ultra vires and ineffective to give the plaintiffs any title to the land.

*Roper* C.J. in Eq., held that the purported resumption did not operate to vest the land in the council and dismissed the suit (*Howarth v. McMahon* (1)).

From that decision the plaintiffs appealed to the High Court.

The relevant statutory provisions are sufficiently stated in the head-note hereto and in the judgment hereunder.

*G. Wallace* K.C. (with him *A. Bridge*), for the appellants. The decision appealed from affects the appellants' title to real property valued at £1,400; therefore the appeal lies as of right under s. 35 (1) (a) (2) of the *Judiciary Act* 1903-1950 (*Oertel v. Crocker* (2)). Even if there is not any appeal as of right, important questions of law are raised on matters of public interest affecting the construction of the resumption provisions of two statutes. Special leave to appeal, if necessary, should be granted.

The subject land was validly resumed by the Council of the Municipality of Redfern under statutory powers before being conveyed by it to the appellants. The validity of a resumption

(1) (1950) 51 S.R. (N.S.W.) 73; 68 W.N. 25. (2) (1947) 75 C.L.R. 266, at pp. 267, 270, 275.



by a council of real property for ultimate use as a returned sailors and soldiers' club does not require the council to "control" and "manage" the club as well as to "provide" it. The words "provide, control and manage" in s. 358 of the *Local Government Act* 1919, as amended, although conjunctive in form are disjunctive in meaning. That phrase occurs frequently in the Act and is merely a compendious method of expressing a power which in some instances is not exercisable in a collective fashion: cf. ss. 348, 350, 353, 357, 358, 361, 364, 365, 454, 456 and 482. The same or a similar phrase has been used consistently, regardless of whether alternative powers are practicable to meet the subject matter described. Sections 454 and 456, which deal with the same subject matter, use the phrases "provide, control and manage" and "provide, control or manage" interchangeably. It is not within the usual or practical functions of a council to control or manage a club as well as to provide it. Section 358 (1) (f) should be construed accordingly. It was not necessary for the resumption notice to state the purpose of the resumption. The subject resumption was not made under the *Public Works Act* 1912, but under s. 536 of the *Local Government Act* 1919, to which the provisions of ss. 42 and 43 of the *Public Works Act* 1912 are not appropriate. In so far as it was necessary for the notice to state the purpose, it did so sufficiently in indicating the purpose of providing a club. Any reference to control or management would have been mere words of description of administration and not associated with the class of club concerned.

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*M. H. Byers*, for the respondent. The appellants did not have any title to the land, the resumption by the council being invalid for two reasons. The first reason is that the council had no power to provide, control and manage a club for returned sailors and soldiers. The council could only resume for a purpose of the Act: see s. 532. Section 477 is an incidental power only. A council cannot deem it expedient to acquire &c. land in the interests of the area unless such power is elsewhere given in the Act. Section 358 (1) confers two powers—that is, a power to provide, control and manage and a power to subsidise. The subject matters of both of those powers are contained in pars. (a) to (f) inclusive. The section does not mean that the power to provide, control and manage can be exercised in relation to each of the subject matters in those paragraphs. In order to determine what are the subject matters of the power to provide, control and manage reference must be made to the nature of the subject matter; that is, the



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subject matter must be one that is susceptible of provision, control and management. "Club" in par. (f) means a society because of the collocation of words in which it appears: see s. 353 (c). It is impossible to provide, control and manage an association or a society. The subject matters of the power are not susceptible to provision, control and management, but are susceptible of being subsidised. The power to provide, control and manage in s. 358 (1) is applicable only to pars. (d) and (e). The second reason for the invalidity of the resumption is that the only purpose for which the council could resume was to provide, control and manage a club for returned sailors and soldiers. That power is contrasted with the power to subsidise: see ss. 358, 360. The words "provide, control and manage" describe a composite and continuous activity which power is only validly exercised when a council sets up and runs a club. That construction is aided by the consideration that three powers are conferred on councils by the *Local Government Act*, namely, (i) a power to provide, control and manage, (ii) a power to control and regulate, and (iii) a power to subsidise. Power (i) involves the setting up and supervision of the subject matter of the power of the council. Power (ii) means the supervision only, and power (iii) means the assisting without power to supervise: see ss. 298, 348-350, 353, 355, 357 (1) (2), 358, 360, 361, 364, 367, 446, 447, 450, 454, 456-458. Power to control and regulate is contained in ss. 281, 289, 290, 302, 305, 354, 362, 363, 448 and 452. Power to subsidise is given by ss. 298, 358 and 360. Where a power to subsidise only is given, no power of supervision is conferred: see ss. 358 (2) and 367. There is not any valid exercise of a power to provide, control and manage where the purpose of the resumption is to sell the land to trustees who may or may not carry on the club. The resumption therefore is invalid. The fact that the notification was published in the *Gazette* does not validate the resumption. The land is only vested in a council if (i) the resumption is for a purpose of the Act within the meaning of s. 532; (ii) the council bona fide exercises its power to resume, and (iii) the purpose of the resumption is correctly expressed in the *Gazette* (*Thompson v. Randwick Municipal Council* (1)). Section 42 of the *Public Works Act* 1912 requires the purpose to be expressed and effects a resumption for that purpose alone. That is a condition precedent to the valid exercise of the power (*Dyer v. Luckett* (2)). That section and s. 536 of the *Local Government Act* 1919 are machinery provisions. They do

(1) (1950) 81 C.L.R. 87; 17 L.G.R. 256.

(2) (1928) 41 C.L.R. 44, at pp. 47, 49; 9 L.G.R. 21, at p. 22.



not confer a power to resume. If the Court were to hold that a mala fide exercise of the power of resumption were effectuated upon notification in the *Gazette*, it would construe s. 536 (5) as a power-giving provision. The effect of such a construction would defeat the rule that local authorities may never resume except for a purpose of the Act (*Thompson v. Randwick Municipal Council* (1); *Jones v. Metropolitan Meat Industry Board* (2)). *Motor Wheel and Tyre Co. Ltd. v. Commissioner for Railways* (3) was wrongly decided. It was based on a misconception of *Criterion Theatres Ltd. v. Municipal Council of Sydney* (4). Assuming the resumption is valid, the council did not have any power to sell the land because by so doing it abdicated its powers (*Birkdale District Supply Co. Ltd. v. Southport Corporation* (5); *Ayr Harbour Trustees v. Oswald* (6)). The conveyance to the appellants deprived the council of its power to control and manage a returned sailors and soldiers' club to be erected on the land. The purported sale was therefore invalid.

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G. Wallace K.C., in reply.

*Cur. adv. vult.*

THE COURT delivered the following written judgment:—This is an appeal from a decretal order made by *Roper* C.J. in Eq. whereby a suit instituted by originating summons was dismissed with costs. The originating summons sought injunctions against the defendant of a mandatory character. The purpose was to require the removal of large quantities of bricks from a parcel of land in the municipality of Redfern which, though at the time the bricks were deposited there it belonged to the defendant, had, according to the claim of the plaintiffs, since become the property of the latter. They claimed that, by a resumption notice published in the *Government Gazette* of 26th September 1947 the land had been resumed and vested in the Municipality of Redfern, which by a conveyance dated 22nd November 1948 had conveyed the land to the plaintiffs. The *Gazette* notice did in fact purport to vest the land in the council of the municipality and the conveyance to convey it to the plaintiffs. The notice stated that the council had made application that the land be appropriated or resumed for the purpose of providing a club for returned sailors and soldiers. The

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(1) (1950) 81 C.L.R., at pp. 103-106;  
17 L.G.R., at pp. 266-268.

(2) (1925) 37 C.L.R. 252, at p. 262.

(3) (1950) 50 S.R. (N.S.W.) 205; 67  
W.N. 166.

(4) (1925) 35 C.L.R. 555.

(5) (1926) A.C. 355, at pp. 364, 365,  
368.

(6) (1883) 8 App. Cas. 623, at pp.  
634, 635, 638-640.



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Governor in Council then went on to declare that the land was thereby resumed under Div. 1 of Part V. of the *Public Works Act* 1912 for the purposes aforesaid and the Minister for Public Works notified the vesting of the land in the council. In the conveyance the plaintiffs were described as the trustees of the Redfern Sub-branch of the Returned Sailors, Soldiers and Airmen's Imperial League of Australia. It was recited that the council, described as the vendor, had agreed with them for the sale to them of the land at the price of £1,400, and it was witnessed that in consideration of that sum paid by them to the vendor (reading the word "vendor" as repeated as obviously was intended) the vendor as beneficial owner conveyed the land to the plaintiffs in fee simple.

*Roper C.J.* in Eq. inferred from the sequence of events that the council sought to have the resumption effected so that it could then sell the land to the sub-branch of the League and held that it had no power to adopt that course and further that the purpose, stated in the notice, of "providing a club" did not pursue the power of the council, the power being to provide, control and manage such a club. His Honour therefore decided that the purported resumption did not operate to vest the land in the council and on that ground dismissed the suit.

In considering the correctness of this conclusion it is necessary to turn first to the powers of resumption. These are to be found in Part XXV. of the *Local Government Act* 1919-1948. Section 532, which occurs in that Part, provides that the council may acquire land within or outside the area for any purpose of the Act by lease, purchase, appropriation, or resumption in accordance with the Part. Under the heading "machinery of resumption" s. 536 provides that the council proposing to acquire land by resumption may apply to the Governor through the Minister, that the Governor may authorize the resumption, that the Minister may thereupon resume the land by *Gazette* notification under Div. 1 of Part V. of the *Public Works Act* 1912 and notify that the land is vested in the council, that thereupon the land shall be vested in the council and that for the purposes of the *Public Works Act* 1912 such resumption shall be deemed to be for the purpose of carrying out an authorized work within the meaning of that Act. The opening words of s. 42, with which Div. 1 of Part V. of the *Public Works Act* begins, are "for the purpose of carrying out any authorized work". The section contains the procedure for notifying the resumption and laying it before Parliament. It is followed by other sections the effect of which it is unnecessary to state. The incorporation of these provisions by s. 536 of the



*Local Government Act* 1919 is in order to provide machinery for the more complete fulfilment of the power of acquisition conferred by s. 532 and not to extend or enlarge the power of resumption. The better construction of the *Local Government Act* appears to be that their operation depends entirely on the substantive power becoming exercisable and that means, when the power is sought in s. 532, that it is an indispensable condition that the resumption shall be for a purpose of the Act.

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In *Criterion Theatres Ltd. v. Sydney Municipal Council* (1) there are dicta by Isaacs J. and by Rich J. to the effect that similar provisions in other legislation give a conclusive operation, at all events in some respects, to the resumption notice in the *Gazette*. These dicta are entitled to great weight, but the place which s. 532 occupies in the present legislative plan seems clear. Unless the conditions that section expresses are fulfilled the authority to resume does not arise and the machinery has nothing upon which it ought to be regarded as operating. There is no sufficient justification for making the *Gazette* notice conclusive of the fulfilment of those conditions. The resumption must therefore be for a purpose of the Act.

The decision of Roper C.J. in Eq. in *Motor Wheel & Tyre Co. Ltd. v. Commissioner for Railways* (2) turns entirely on the *Public Works Act* 1912. His Honour, in the course of his reasons, rejected a contention that s. 34 (2) of the *Government Railways Act* 1912-1950 was the source of the power there in question. Having done so, his Honour placed the case entirely under Part V. of the *Public Works Act* 1912. Having found that the notice of acquisition complied with the requirements of s. 42 of that Act, his Honour then decided that s. 43 accomplished the vesting of the land notwithstanding that upon the facts behind the acquisition he was of opinion that the works contemplated did not in truth form an authorized work within the meaning of s. 42. The distinction between the present case and *Motor Wheel & Tyre Co. Ltd. v. Commissioner for Railways* (2), as will be seen, lies in the fact that in the latter case the whole question came within ss. 42 and 43 of the *Public Works Act*. In the present case the *Public Works Act* 1912 does not apply unless and until it is, so to speak, drawn in by a proper use of the *Local Government Act*. For the reasons already given, the *Public Works Act* is not drawn in by the *Local Government Act* unless the conditions stated by s. 532 are fulfilled

(1) (1925) 35 C.L.R. 555, at pp. 563 and 564.

(2) (1950) 50 S.R. (N.S.W.) 205; 67 W.N. 166.



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and here they are not fulfilled. It is therefore not proper in the present case to express any opinion about the correctness of the conclusion that in a case exclusively under Part V. of the *Public Works Act* the facts behind the notice of acquisition are not examinable.

Section 477, which occurs as the first section in Div. 2 of Part XXIII., headed "Various powers", provides that the council may purchase or resume land within or outside the area in any case where the council deems it expedient to acquire or hold land in the interests of the area. The vagueness of the expressions employed in this provision affords no warrant for giving it a more generous scope than s. 532. On the contrary, it suggests that it is an incidental power depending upon specific powers the exercise of which calls for the acquisition of land. No machinery is supplied outside Part XXV. for acquiring land when s. 477 is invoked. But, as the *Gazette* notice in this case resorts plainly enough to s. 536 and s. 532, it is unnecessary to consider s. 477 further. The view already expressed that the power of resumption rests upon the existence of "a purpose of this Act", within the meaning of s. 532, is not compatible with the contention of the appellants that the *Gazette* notice under s. 42 of the *Public Works Act* and s. 536 (4) of the *Local Government Act* is conclusive in favour of the council. Whatever may be the position under other Acts, under the *Local Government Act* the cardinal provision is s. 532 and that makes the existence of the requisite purpose essential. Thus the inquiry is remitted to the question whether the purported resumption of the land of the defendant respondent was for a purpose within the power of the municipality.

For the power which the plaintiffs appellants claim sufficed to enable the council to resume, reliance is placed upon s. 358 (1) (f). Paragraph (f) was added to pars. (a) to (e) of sub-s. (1) of s. 358 by s. 10 (c) (ii) of Act No. 41 of 1928, the *Local Government (Amendment) Act* 1928. Section 358 (1) had provided that the council might provide, control and manage or might subsidise (a) schools of arts, (b) literary institutes, (c) mechanics institutes, (d) art galleries and (e) museums. Paragraph (f), which was then added, contained the incongruous words "associations institutes and clubs for returned sailors and soldiers". The conception of a council providing, controlling and managing an association is strange and the incongruity is not lessened by its being an association of returned sailors and soldiers. To provide a club would be understood *prima facie* as establishing and equipping a club house and a similar meaning may be applied to providing an institute,



but it is not so easy to treat an association as a place or an institution. However, the governing words are "provide, control and manage or subsidise". The first three expressions "provide, control and manage" describe a composite authority or power to which the power to subsidise is evidently an alternative. It may be true that the council must begin by "providing" before it can "control and manage". But clearly enough it was never intended to control things enumerated under pars. (a) to (f) established by private or independent enterprise, things with which the council had no connection. Further, it can hardly be doubted that the power was designed to enable a council to provide and maintain under its authority things considered to be for the general advantage and for that reason enumerated in the sub-section. The council is to be and remain responsible for what is provided. The phrase "provide, control and manage" occurs in a number of sections and speaking generally the manner in which it is used shows that the power the words are intended to confer is pointed at the establishment or procurement for the area by the council of some facility or advantage in which the council will continue to be concerned. But the legislation is inartistically conceived and unskillfully expressed and the amendments that have been made in it are not always distinguished for care, consistency or precision in the use of language. It is a mistake to place much reliance on the way phrases are used in different contexts in such an instrument. Now in the present case the council obviously never intended to build or cause to be built or otherwise to provide upon the land any club or other facilities for returned sailors and soldiers, still less to do so as a thing over which the council would exercise control and management.

The inference drawn by *Roper C.J.* in *Eq.* was plainly right: indeed it was an inevitable conclusion from the simple facts. All that has happened is that the council decided to acquire compulsorily a piece of land in order to sell it to the sub-branch of the League. This is wholly outside the contemplation of s. 358 (1) (f).

The resumption was therefore ultra vires and void.

For these reasons the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellants, *Vincent J. Brady, Donald & Co.*

Solicitors for the respondent, *McFadden & McFadden.*

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