

*repld. to. 94 C.L.R.  
206.*

[HIGH COURT OF AUSTRALIA.]

WHEELER AND ANOTHER . . . APPELLANTS ;  
PLAINTIFFS,  
AND  
WAR VETERANS' HOME AND ANOTHER . RESPONDENTS.  
DEFENDANTS,

*Acquisition of Land—Resumption—"Owner"—Member of the forces—Official acts—* H. C. OF A.  
*Preliminary to resumption—During period of owner's protection—Resumption* 1953.  
*after expiration of protection period—Validity—Purpose—Public—Re-establish-*  
*ment and Employment Act 1945-1952 (No. 11 of 1945—No. 89 of 1952), ss. 108,* SYDNEY,  
*118, 130, 137—Crown Lands Consolidation Act 1913-1948 (N.S.W.) (No. 7 of* April 30 ;  
*1913—No. 48 of 1948), s. 197—Public Trusts Act 1897-1944 (N.S.W.) (No. 8* May 1, 12,  
*of 1897—No. 8 of 1944), ss. 2, 3, 5.* 13, 20.

The exercise of the power to acquire compulsorily land owned by a member  
of the forces, or any act or proceeding with a view to any such compulsory  
acquisition, without the prior consent thereto of the Attorney-General, is, by  
s. 118 of the *Re-establishment and Employment Act 1945-1952*, prohibited, and  
s. 120 prescribes the period of time during which a member of the forces is so  
protected.

With the object of acquiring compulsorily certain land in which a member  
of the forces had a beneficial interest the Minister referred to a local land  
board the question whether the compulsory acquisition of that land for the  
purpose of extending a War Veterans' Home was warranted in the public  
interest. The board answered in the affirmative. The proceedings before  
that board took place during the period of protection applicable to the said  
member of the forces, but after that period had expired the Minister declared  
in the *Government Gazette* that the Home was a public purpose within the  
meaning of s. 197 of the *Crown Lands Consolidation Act 1913-1946* (N.S.W.),  
and notice of the resumption of the land was published in the *Government  
Gazette*.

*Held*, (1) that the declaration that the War Veterans' Home was a public  
purpose within the meaning of the *Crown Lands Consolidation Act 1913-1946*  
(N.S.W.) was not a contravention of s. 118 of the *Re-establishment and Employ-*  
*ment Act 1945* ; (2) that the basic acquisition was not void under State law ;  
and (3) that s. 130 (2) of the *Re-establishment and Employment Act 1945* does  
not purport to give an order of invalidation a retrospective effect.

Decision of *Taylor J.* affirmed.

Taylor J.  
SYDNEY,  
Nov. 19, 20,  
23 ;  
Dec. 3.  
Dixon C.J.,  
Webb and  
Kitto JJ.



H. C. OF A. APPEAL from *Taylor J.*

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In an action brought in the High Court, by way of writ of summons, by Alice Ann Wheeler and Alan George Wheeler, mother and son, against the War Veterans' Home and the Minister for Lands for the State of New South Wales, the plaintiffs claimed relief under s. 130 (2) of the *Re-establishment and Employment Act* 1945-1952.

The statement of claim was substantially as follows :—

1. The plaintiffs were at all material times the registered proprietors pursuant to the *Real Property Act* 1900-1940 (N.S.W.) of certain land situate in the Parish of Manly Cove, County of Cumberland, in the Metropolitan Land District and being part of the land comprised in Certificate of Title, vol. 4162, fol. 143, comprising, *inter alia*, fifty acres, two roods, thirty-eight perches being part of portion 1299 east of South Creek Road.

2. The defendant War Veterans' Home was a company duly incorporated under the *Companies Act* 1936-1940 (N.S.W.) as a company limited by guarantee and was liable to be sued in and by its said corporate name and style. The company owned and carried on the War Veterans' Home at Narrabeen, New South Wales. The second-named defendant was the Minister for Lands for the State of New South Wales.

3. The second named defendant on or about 27th August 1946 and purporting to act under s. 197 of the *Crown Lands Consolidation Act* 1913-1945 (N.S.W.) referred to a local land board duly constituted under that Act, at Sydney for its determination the question as to whether or not the public interest warranted the resumption of, *inter alia*, the lands mentioned in par. 1 above for the purposes of the extension of the War Veterans' Home. The plaintiffs alleged that that purpose was not a purpose in connection with the defence of the Commonwealth or the efficient prosecution of the war, and that the said reference was made by the Minister with a view to acquiring compulsorily the plaintiffs' land.

4. On 24th January 1947, the Minister by notification in the New South Wales Government *Gazette* declared that the War Veterans' Home was a public purpose within the meaning of s. 197 of the said Act.

5. On 3rd February 1947 the local land board found that the public interest warranted the resumption pursuant to s. 197, *inter alia*, the said lands.

6. On 28th February 1947, the plaintiffs appealed to the Judge of the Land and Valuation Court (N.S.W.), and on 9th September



1947 the judge reported that the public interest warranted the resumption of, *inter alia*, the said lands.

7. On 28th April 1949, the Minister by a notification of resumption published in the *Government Gazette* purported to resume the said lands pursuant to powers purported to have been conferred by s. 197 of the Act, as amended, and not otherwise.

8. At the time of the happening of the events set out in pars. 3-6 inclusive the plaintiff Alan George Wheeler was a protected person within the meaning of the provisions of the *Re-establishment and Employment Act* 1945.

9. The Minister did not obtain the consent of the Attorney-General to the proceedings before the local land board or to the proceedings before the Land and Valuation Court or to the notification referred to in par. 4.

10. The plaintiffs had requested each of the defendants to refrain from proceeding further with the resumption of the said lands and to reconvey those lands to the plaintiffs but that each of the defendants had neglected and refused to do.

The plaintiffs claimed, *inter alia*, (i) a declaration that the resumption by the Minister of the said lands was and always had been invalid and of no effect; and (ii) an injunction restraining each of the defendants from dealing with those lands in accordance with that resumption.

In its statement of defence the defendant the War Veterans' Home, in answer to par. 1 of the statement of claim, alleged that at all material times the plaintiffs were registered proprietors of the said land as and being executrix and executor of the estate of James Wheeler deceased and not otherwise; in answer to par. 3, did not admit that the said reference was made by the Minister with a view to acquiring compulsorily the plaintiffs' said lands; in answer to par. 7, did not admit that on 28th April 1949 by a notification of resumption published in the *Government Gazette*, the Minister resumed the said lands. On that date there appeared in that *Gazette* a notification as follows:—"It is hereby notified and declared by His Excellency the Governor, acting with the advice of the Executive Council, that the land described hereunder has been resumed under Section 197 of the *Crown Lands Consolidation Act* 1913, for extension of War Veterans' Home at Narrabeen, and in accordance with the provisions of the said section has become reserved from sale and lease until further notified." The lands "described hereunder" were identical with the said lands of the plaintiffs; in answer to par. 8, did not admit that at the time of the happening of the events set out in pars. 3-6 inclusive the plaintiff

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Alan George Wheeler was a protected person within the meaning of the provisions of the *Re-establishment and Employment Act* 1945, and in further answer to par. 8, said that the plaintiffs were represented by a solicitor in the proceedings before the local land board and never raised the question that the plaintiff Alan George Wheeler was a member of the forces within the meaning of that Act, that the plaintiffs themselves brought the appeal to the Land and Valuation Court and although represented there by senior counsel again did not raise that question and the defendants incurred considerable expense in connection with the proceedings before the local land board and the said appeal and the plaintiffs were estopped by their conduct from raising the said question; and in further answer to the statement of claim, the defendant, War Veterans' Home, said that any claim to relief which the plaintiffs may have had, which was not admitted, had been lost by their laches, acquiescence and delay, and that the making of the orders sought in the statement of claim would be to prejudice its rights in respect of and arising out of the transaction and proceeding which were acquired bona fide and without notice of any alleged contravention of the *Re-establishment and Employment Act* which was not admitted.

The defendant, the War Veterans' Home, said that the statement of claim was bad in substance and in law, on the following, amongst other grounds: (a) that the facts alleged did not afford any ground for relief to the plaintiffs; (b) that those facts did not show that the transactions mentioned therein were invalid; and (c) that the High Court had no ground to grant the relief asked for in the action.

In his statement of defence the Minister, in answer to par. 1 of the statement of claim, alleged that at all material times the plaintiffs were registered proprietors of the said lands as and being executrix and executor of the estate of James Wheeler deceased and not otherwise; in answer to par. 3, denied that the said reference was made by him with a view to acquiring compulsorily the plaintiffs' said lands; in answer to par. 7, denied the allegation as to the resumption by notification in the *Government Gazette* and said that the only notification of resumption was in the terms as shown in the statement of defence of the defendant, the War Veterans' Home; in answer to par. 8, did not know and therefore could not admit that at the time of the happening of the events set out in pars. 3-6 inclusive the plaintiff, Alan George Wheeler, was a protected person within the meaning of the provisions of the *Re-establishment and Employment Act* 1945; and, in further answer to the statement of claim, charged as a fact that the making of the



orders sought in the statement of claim would prejudice the rights of the War Veterans' Home in respect of or arising out of the transaction or proceeding which were acquired bona fide and without notice of the alleged contravention which alleged contravention the Minister did not admit.

Issue was joined.

Counsel for the parties agreed :—

1. That the plaintiffs were at all material times executrix and executor respectively of the will of James Wheeler of Narrabeen (deceased) ;

2. That James Wheeler died on 26th January 1945 ;

3. That the will directed that the real estate be divided into two parts ;

4. That the property the subject of the resumption formed part of the estate of James Wheeler ; and

5. That there had not been any division under the terms of the will.

Further facts and relevant statutory provisions appear in the judgments hereunder.

The action was heard before *Taylor J.*

*B. P. Macfarlan* Q.C. and *J. F. Lincoln*, for the plaintiffs.

*C. M. Collins*, for the defendant, the War Veterans' Home.

*G. Wallace* Q.C. and *E. J. Hooke*, for the defendant Minister for Lands.

*Cur. adv. vult.*

The following written judgment was delivered by :—

TAYLOR J. In this suit the plaintiffs, pursuant to s. 130 of the *Re-establishment and Employment Act* 1945-1952, seek an order invalidating certain "proceedings" taken with a view to the resumption of a parcel of approximately fifty acres of land of which they are registered under the provisions of the *Real Property Act* 1900-1940 (N.S.W.) as the joint proprietors for an estate in fee simple.

Section 130 (1) purports to validate proceedings taken in contravention of Pt. X of the Act, while sub-s. (2) is in the following terms :—"The appropriate court may, on the application of the Attorney-General or of any person interested, make an order that a transaction or proceeding entered into or taken in contravention of this Part shall be invalidated, but the court shall not make any

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such order if the court is satisfied that the effect of the order (if made) would be to prejudice the rights of a person in respect of, or arising out of, the transaction or proceeding which are acquired *bona fide* and without notice of the contravention." By sub-s. (3) this Court is an appropriate court and the plaintiffs seek an order to the effect already indicated.

The "proceedings", which were steps preliminary to the publication of a notification of resumption pursuant to s. 197 of the *Crown Lands Consolidation Act 1913-1948* (N.S.W.), are claimed to have constituted contraventions of s. 118 of the *Re-establishment and Employment Act*. This section is in the following terms:—"Where power is conferred upon any person by or under any law of the Commonwealth or of a State or Territory of the Commonwealth to acquire land compulsorily for any purpose, that person shall not, without the prior consent of the Attorney-General, exercise the power, in relation to the acquisition of land which is owned by a member of the Forces, for any purpose other than a purpose in connexion with the defence of the Commonwealth or the efficient prosecution of the war, or do or commence or continue to do any act, or commence or continue any proceeding, for the purpose of or with a view to any such acquisition or obtaining possession of the land in connexion with any such acquisition." The protection afforded by this section is not given for an indeterminate time but is subject to the qualification introduced by s. 120 which limits the period of protection given to a member of the forces, after ceasing to be engaged on war service, to a period of four years, or a period equal to the period during which he was engaged on war service, which ever is the shorter. It is common ground that the male plaintiff, Alan George Wheeler, was a member of the forces within the meaning of this section and also that the period during which he was entitled to the protection afforded by s. 118 continued until 7th August 1948, when it expired.

Before discussing the effect of the provisions to which I have referred, it is convenient, briefly, to refer to some of the relevant facts, including the events leading up to the notification of resumption which was published in the *New South Wales Government Gazette* on 29th April 1949, a date which, it will be observed, was some eight months after the expiration of the period of protection referred to. The resumption, however, was contemplated, and several steps in connection with the proposal to resume the land were taken before the expiration of this period. On 27th August 1946, the defendant Minister, acting pursuant to s. 197 of the *Crown Lands Consolidation Act 1913-1945*, referred to a local land board



for its determination the question whether or not the public interest warranted the resumption of the land in question for the purposes of the extension of the War Veterans' Home, an institution which was maintained and controlled by the first named defendant, a company incorporated under the *Companies Act* 1936-1940 (N.S.W.) as a company limited by guarantee. Thereafter the Minister, on 24th January 1947, by notification in the *Government Gazette* of the said State, declared that the "War Veterans' Home" was a public purpose within the meaning of s. 197 of the *Crown Lands Consolidation Act* and on 3rd February 1947 the local land board found and reported that the public interest warranted the resumption of the land in question. In pursuance of their right so to do, the plaintiffs on 28th February 1947 appealed to the Judge of the Land and Valuation Court and on 9th September 1947 the judge of that court also reported that the public interest warranted the resumption of the said land. After an interval of some eighteen months, on 29th April 1949, a notification of the resumption of the land was duly published in the *Gazette* pursuant to s. 197, and subsequently on 23rd December 1949, the first named defendant was, pursuant to the provisions of the *Public Trusts Act* 1897-1944 (N.S.W.), duly appointed trustee of the resumed land which, in the notification of appointment, was referred to as the War Veterans' Home (Extension) at Narrabeen.

I have mentioned that the plaintiffs are the registered proprietors of the land in question but the evidence discloses that they are the executors of their predecessor in title, James Wheeler deceased, and the subject land, together with other lands of the deceased, is held by them on the trusts of his will. By his will the deceased devised his real estate upon trust to divide the same "into two parts and to transfer one such part" to his wife absolutely: "as to the other half" he directed that the income therefrom should be paid to his wife during her lifetime and on and after her death to his son the plaintiff Alan George Wheeler. On and after the death of his said son he directed that the corpus be divided amongst and *paid* to the children of such son on their attaining the age of twenty-one years share and share alike as tenants in common or if only one to that one solely. There was no information before the Court as to the state of the administration of the deceased's estate but it was common ground that no division of the deceased's realty has yet taken place.

One other matter remains to be mentioned. The administrator of the first named defendant was called as a witness and, upon his evidence, I am satisfied that that defendant did not have any

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notice of any contravention of s. 118 of the Act. Although deeply interested in the proposal to resume the plaintiffs' land, there is no reason to suppose that the War Veterans' Home was in any way concerned with the machinery employed for the purposes of the resumption, and I am satisfied that at no time did that defendant know that the resumption was effected or that any of the acts leading up to it were done without the consent of the Attorney-General of the Commonwealth.

Upon these facts a number of questions arise. In the first place, it is questionable if the male plaintiff was the beneficial owner of land affected by the resumption. Probably the extended definition of the meaning of the word "land" contained in s. 108 removes the question from the ambit of the discussions in cases such as *Cooper v. Cooper* (1); *Lord Sudeley v. Attorney-General* (2); *Baker v. Archer-Shee* (3); *Glenn v. Federal Commissioner of Land Tax* (4); *Horton v. Jones* (5); *Robertson v. Deputy Federal Commissioner of Land Tax* (6); *MacKinnon v. Campbell* (7); *McCaughey v. Commissioner of Stamp Duties* (8), but even though by virtue of s. 108, "land" includes any "right . . . in, or in connexion with, land", I have grave doubt whether it can properly be said that the power of resumption was exercised in relation to land of which the male plaintiff was the owner. For the purposes of this case, however, I am prepared to assume that it was and to proceed to consider whether the preliminary steps to which I have referred constitute contraventions of s. 118.

The notification of resumption considered independently of the preliminary steps did not constitute a contravention for it took place after the expiration of the period of protection applicable in the case of the male plaintiff. But counsel for the plaintiffs contended that the preliminary steps, all of which took place before 7th August 1948, were within the prohibitions erected by s. 118, and that the taking of each of them constituted a contravention of that section. The validity of this contention depends first of all upon the construction of s. 118. The operation of that section, standing alone, is unlimited in point of time, but s. 120 prescribes a period of protection for each of the three sections which precedes it. The period varies in the manner already indicated and since its determination is dependent upon individual circumstances and, originally, was applicable to more than one section, it was, no

(1) (1874) L.R. 7 H.L. 53.  
 (2) (1897) A.C. 11.  
 (3) (1927) A.C. 844.  
 (4) (1915) 20 C.L.R. 490.  
 (5) (1935) 53 C.L.R. 475.

(6) (1941) 65 C.L.R. 338.  
 (7) (1944) 45 S.R. (N.S.W.) 140; 62 W.N. 26.  
 (8) (1945) 46 S.R. (N.S.W.) 192; 62 W.N. 230.



doubt, convenient to devote a particular section to its prescription. But when it is applied to s. 118 it may well be argued that what is primarily forbidden by that section is compulsory acquisition, during the period of protection, of land which is owned by a member of the forces. But the section also forbids the doing or commencing or continuing of any act for the purpose of or with a view to any such acquisition or obtaining possession of the land in connection with any such acquisition. For the defendants, it is said that "any such acquisition" means any acquisition of the kind referred to in the earlier part of the section, that is, a forbidden acquisition, and that since the acquisition itself took place after the expiration of the period of protection and it was not, therefore, a forbidden acquisition, the preliminary steps were also outside s. 118.

It may well be that the legislature intended to give protection only to the extent indicated by this argument, but the language of s. 118, in my opinion, goes further. The protection given by it extends expressly to acts of a certain character, that is, those which are done with a view to the acquisition by compulsory process of land which is owned by a member of the forces and the only limit to this protection is the period prescribed by s. 120. The expression "for the purpose of or with a view to . . . such acquisition" is directed to defining the character of the forbidden acts and, in my opinion, they are not capable of any further qualification in the manner suggested by the defendants' contention on this point.

Accordingly, on the assumption which I have made, the preliminary steps constituted a contravention of s. 118 but this circumstance did not operate to invalidate those steps or deprive them of all legal effect. Whatever the position may have been in the absence of some provision such as that contained in s. 130 (1) it is clear that nothing contained in the Act deprived these steps of their normal legal significance whatever that may have been. It was argued on behalf of the defendants that none of the preliminary steps was essential to the exercise of the power to resume under s. 197 of the *Crown Lands Consolidation Act*, but reference to the definition of "public purpose" in s. 5 and to the express terms of s. 197 itself leaves little doubt in my mind that the declaration of the "War Veterans' Home" as a public purpose was an essential prerequisite to the particular exercise of the power to resume. Moreover a consideration of the history of s. 197 and the various amendments which have been made to it from time to time strongly suggests that an inquiry and report in accordance with the second paragraph of the section is a condition precedent to the exercise of the power to resume although, curiously enough, it seems that this condition

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may be satisfied even if the report is adverse to the proposal to resume. These considerations, however, leave untouched the critical point on this aspect of the matter. Section 130 (2) does not enable the Court to make an order "invalidating" the notification of resumption for this took place after the expiration of the period of protection; the only order which may be made in these proceedings is an order "invalidating" the preliminary steps referred to. In these circumstances it is, I think, critical to inquire what effect, if any, such an order would have upon the resumption itself, for if it would have no effect then, obviously, no order should be made.

The order which s. 130 (2) confers jurisdiction to make is that certain transactions and proceedings "shall be invalidated". Difficulties arise in determining the true meaning of this expression in its application to the different classes of transactions and proceedings with which Pt. X of the Act is concerned. But even if the effect of an order in this case that the various preliminary steps "shall be invalidated" could be to avoid such steps *ab initio* there would be difficulty in holding that such an order would also operate to invalidate the resumption. This would be so whether such preliminary steps were or were not essential prerequisites to the resumption for the notification of resumption was duly published after the period of protection had expired, at a time when the preliminary steps possessed their normal legal significance and when there was no reason why, upon the publication of the notification of resumption, the provisions of s. 197 should not operate to vest the subject land in the Crown. Indeed, it is impossible to deny that this legal consequence followed and, in my view, any order now made with respect to the preliminary steps would not defeat the resumption. Accordingly I am of the opinion that no such order should be made.

The concluding portion of s. 130 (2) furnishes an independent ground upon which the suit should be dismissed. This sub-section provides that the court shall not make any order if it is satisfied that the effect of the order (if made) would be to prejudice the rights of a person in respect of, or arising out of the transaction or proceeding which are acquired bona fide and without notice of the contravention. All of the preliminary steps were taken by the second defendant and I have no doubt that the first defendant acted bona fide and did not either at the time such steps were taken, or, when it was appointed trustee, or, at any other material time, have any notice of any contravention of s. 118. But it may, perhaps, be said that the word "rights" in this provision means



beneficial rights and, consequently, that the War Veterans' Home did not, upon its appointment as trustee, acquire any rights within the meaning of the sub-section. In my opinion, however, the right to control and manage the resumed land for the purposes of the War Veterans' Home which, as trustee, that defendant acquired is sufficient to enable it to invoke the aid of the sub-section. It was further argued that this right did not arise out of the proceedings which are attacked by the plaintiffs in this suit but, if the existing rights of the War Veterans' Home are dependent for their continued subsistence upon the validity of such proceedings then, in my judgment, their rights do in a very real sense arise out of those proceedings.

Upon the views which I have formed on the matters which I have already discussed it may perhaps be unnecessary to deal with the question whether the discretion conferred by s. 130 should, if all other difficulties in the way of the plaintiffs were removed, be exercised. But I feel that before parting with the case it is proper to say that upon a consideration of the whole of the facts I am firmly of the opinion that, if I were required to decide the contest between the parties on this point, I should resolve it against the plaintiffs. The resumed land is adjacent to land at present owned and used by the War Veterans' Home. In the main it is unimproved, though at the southern end a substantial portion of it has been cleared of timber and in the south-western corner, at the most remote point from the existing War Veterans' Home, there stands a cottage in which since December last the male plaintiff has resided. The evidence shows that neither the plaintiffs nor their predecessor in title have made any substantial use of the land and that it is, and, for some time has been, the desire of the plaintiffs to subdivide the land and sell it. On the other hand, the War Veterans' Home is carrying out a useful and important work of great value to ex-servicemen and, although some criticism was made by counsel for the plaintiffs concerning the need of the War Veterans' Home for this land, as distinct from other land in the vicinity which it previously owned and parted with, I am by no means prepared to say that the resumed land is not reasonably required for the purpose for which it was resumed. Nor am I prepared in any way to dissent from the finding made on two previous occasions that the public interest warranted the resumption of the land for that purpose. As a consequence of the resumption the plaintiffs in their representative capacity will receive a sum of money by way of compensation. As I have already said, it was their intention to convert the land by subdivision and sale and the only matter which

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can be of real concern to them is whether the moneys payable to them by way of compensation will be less than that which they may obtain if left free to carry out this intention. There is nothing before me to indicate that the plaintiffs will suffer any real detriment in this respect and if there were no other facts for my consideration I would be unwilling to make an order invalidating any of the steps leading up to the resumption whatever effect such an order may have had upon the resumption itself. But when I add to the circumstances already briefly referred to the fact that the male plaintiff's interest in the land is an interest in the rents and profits for his life expectant upon his mother's death, the fact that the will itself authorizes and, probably, contemplates, a sale of the land for the purpose of the distribution therein directed, and the fact that the resumption itself did not take place until some eight months after the expiration of the period of protection appropriate in the case of the male plaintiff, it is inevitable that the suit must be dismissed. For the reasons given the suit is dismissed with costs.

From that decision the plaintiffs appealed to the Full Court of the High Court.

W. J. V. Windeyer Q.C. (with him J. F. Lincoln), for the appellants. An appeal lies. This is simply a matter of the true construction of s. 133 of the *Re-establishment and Employment Act* 1945-1952, in conjunction with s. 127. The Court has to determine whether it has jurisdiction, that is, jurisdiction based on value and not jurisdiction generally. Section 133 (2) deals only with matters of jurisdiction and relates to s. 127. If any acts, which were necessary precedents of resumption, were done in contravention of s. 118 the judge appealed from should have declared invalid the acts so done and the resumption which followed. Section 130 (2) on its true construction does not give any discretion. The Court here has an obligation, if the invalidating circumstances be made out, to invalidate the transaction. A complete and unfettered discretion is vested in the Attorney-General and is appropriate for exercise as a matter of administration. Such a discretion is not appropriate to be exercised by a court. Section 130, in effect, makes a transaction which contravenes Pt. X of the Act voidable but not void. The scheme of the section is that such a transaction remains valid until a declaration of invalidity is sought from the court. If a declaration of invalidity is sought, it must be made unless the rights of a bona-fide taker without notice would be



prejudiced. The word "may" in s. 130 (2), which in this setting is not a matter of any great importance, does not give a discretion (*In re Baker; Nichols v. Baker* (1); *Julius v. Lord Bishop of Oxford* (2)). The position shown in the last-mentioned case (3) is in marked contrast to the position in this case. The whole jurisdiction under s. 130 arises only if there has been some contravention. If done in contravention of the Act the matter should be invalidated. The word "may" ought not to be construed as giving the court a discretion, because it would be impossible to know on what grounds such a discretion should be exercised or what evidence would be relevant to its exercise. The obligation is upon the person who relies upon the claim that he took without notice to prove his claim. There is evidence that those actively associated with the War Veterans' Home knew that the male appellant was a member of the forces. Under these provisions of the law it must be taken that that fact was known. The question that arises is whether the War Veterans' Home can by virtue of the words in sub-s. (2) be in any better position than the Crown. The vesting of the Home in trustees was done subsequent to the dedication. There was a contravention of s. 118 because the consent of the Attorney-General was not obtained: cf. *Land Settlement Debenture Co. Ltd. v. Housing Commission (N.S.W.)* (4). The matter of the Attorney-General's consent was dealt with in *Williamson v. Ah On* (5). Both the inquiry by the local land board and the declaration for the purposes of s. 197 of the *Crown Lands Consolidation Act 1913-1946* (N.S.W.), that the War Veterans' Home was a public purpose, were, on the true construction of s. 197, conditions precedent to a valid resumption. If either was ineffective the notification of resumption was inoperative. There are some difficulties in calculating the period during which, by operation of s. 120 of the *Re-establishment and Employment Act 1945*, protection existed. Before the judge of first instance the case was conducted on behalf of both parties on the basis that the protection continued until August 1948. The true position appears to be (1) if the period in s. 120 (1) (a) is applicable, namely, 1,048 days from date of discharge, 7th September 1945, protection expired on 21st July 1948, that is, after the local land board inquiry, the appeal to *Roper J.*, and the notification of the War Veterans' Home as a public purpose; (2) if some other period be applicable the position appears to be as follows: (a) as the law stood at the date of discharge, protection, namely, twelve months

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(1) (1890) 44 Ch. D. 262, at p. 270.

(4) (1947) A.L.R. 578.

(2) (1880) 5 App. Cas. 214, at p. 235.

(5) (1926) 39 C.L.R. 95.

(3) (1880) 5 App. Cas., at p. 238.



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from discharge, would have expired on 7th September 1946; (b) s. 120 (1A) was introduced by Statutory Rule 100 of 1947 notified in the *Gazette* of 29th July 1947, and seemingly the result was to make the protection expire on 7th September 1947, but a question arises as to what effect that enactment had on the interval from 7th September 1946 to 29th July 1947; and (c) s. 120 (1A) was amended by Statutory Rule 57 of 1948 notified in the *Gazette* of 14th May 1948, and thereby substituted four years for two years, and, seemingly, the result, as from 14th May 1948, was to make the male appellant's period expire on 21st July 1948, leaving in doubt the position between 7th September 1947 and 14th May 1948. It is difficult, having regard to the *Acts Interpretation Act* 1901-1950, to say what is the effect of the apparent gaps in the period, because the statutory rules, which were made pursuant to s. 137 (2), seem designed to cover the whole period and not to leave any intervals. On any basis of calculation the local land board inquiry occurred during the period of protection: see *Wheeler v. Minister for Lands* (1). The War Veterans' Home has not got any right. It was declared a trustee under the *Public Trusts Act* 1897-1944 (N.S.W.); but the land was not vested in it and its duties as a trustee were not stated. Both the Crown in right of the State of New South Wales and the War Veterans' Home knew that the male appellant had been a member of the forces. The period of his service was proved at the local land board inquiry at which the administrator of that Home was present. Moreover, the resumption was invalid and therefore could not confer any right. Because the resumption is invalid by the State law no one can get a right under it, which right is preserved by the concluding words of s. 130 (2). The resumption was invalid by State law because it was not for a public purpose. The definition of "public purpose" in s. 5 of the *Crown Lands Consolidation Act* 1913, as amended, does not entitle the Crown to declare anything a public purpose for ss. 24 and 197. All that the Crown can do is to declare as "public purposes" for those sections purposes additional to those specified in the sections, but such additional purposes must be in fact public purposes. The War Veterans' Home was, in those words, declared a public purpose. Those words, however, were not a description of a purpose, but meant either the body corporate or the existing War Veterans' Home at Narrabeen. Furthermore, they cannot describe a *public* purpose because that Home is not a public institution (*Little Company of Mary (S.A.) Inc. v. The Commonwealth* (2); *Lemm v.*

(1) (1947) 26 L.V.R. 23.

(2) (1942) 66 C.L.R. 368.



*Federal Commissioner of Taxation* (1); *Public Trustee (N.S.W.) v. Federal Commissioner of Taxation* (2); *Essenden Corporation v. Blackwood* (3); *O'Connell v. Newcastle Municipal Council* (4); *Re Income Tax Acts (No. 1)* (5); *Rodgers v. Attorney-General (Vict.)* (6); *Reg. v. James* (7). If the purpose of the resumption was invalid the resumption is invalid (*Baiada v. Baulkham Hills Shire Council* (8)). If the dedication was invalid, because not supported by any public purpose under s. 24, the War Veterans' Home did not get any rights under the dedication or by the *Public Trusts Act* 1897. The purpose to be a public purpose must be one which is harmonious with it being Crown land.

[DIXON C.J. referred to ss. 45, 46, *Judiciary Act* 1903-1950.]

If the declaration of purpose was bad then there was not any public purpose within s. 197. The policy of the Act is to make the welfare and protection of ex-servicemen the paramount consideration. The use to which the representatives of the War Veterans' Home proposed to put the land and other matters taken into consideration by the judge appealed from, were not relevant. The relevant considerations are the detriment which the ex-serviceman will suffer as a result of the contravention of his petition.

*L. C. Badham* Q.C. (with him *C. M. Collins*), for the respondent War Veterans' Home. An appeal does not lie from the decision of the judge below in this matter. An application by the male appellant had been heard and determined by the "appropriate court" under s. 130 (2) of the *Re-establishment and Employment Act* 1945-1952. The "appropriate court" (s. 130 (3)) had determined the matter against the applicant and an appeal from that decision does not lie: see s. 133 (2) and *Watson v. Federal Commissioner of Taxation* (9). The resumption in this case was a good and valid resumption. The requisites and machinery of resumption are provided by the *Crown Lands Consolidation Act* 1913-1952 (N.S.W.), and in particular by s. 19. The actual resumption is a State matter: see s. 197. The resuming authority is the Governor with the advice of the Minister. Nothing the local land board could do had any effect upon the resumption as such. The Governor was not bound to take any notice of recommendations by either body. Up to 1947 nothing had been done which had any effect in law. The only thing done which had a real effect was

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(1) (1942) 66 C.L.R. 399.

(2) (1934) 51 C.L.R. 75.

(3) (1877) 2 App. Cas. 574, at p. 585.

(4) (1941) 41 S.R. (N.S.W.) 190;  
58 W.N. 166.

(5) (1930) V.L.R. 211.

(6) (1944) V.L.R. 55.

(7) (1952) N.Z.L.R. 596.

(8) (1951) 83 C.L.R. 344.

(9) (1953) 87 C.L.R. 353.



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done after the protection ceased. The act of resumption by the Governor in April 1949, completed, so far as resumption was concerned, the act of resumption, it became then and there a valid resumption, and no attack upon it had any effect. Everything required under the State Act to bring about a valid resumption had been done; each thing so done was a link in the chain of resumption. Section 130 gives a validation if one be necessary (*O'Neill v. O'Connell* (1)). The subject purpose was a public purpose within the meaning of ss. 197 and 5. Even though the consent of the Attorney-General was not obtained as required by s. 118 of the *Re-establishment and Employment Act* 1945, that does not invalidate the resumption (s. 130 (1)), unless the "appropriate court" so declares as provided by s. 130 (2). The appropriate court has not so declared. On a consideration of Federal and State legislation this was a valid resumption, and even though the proceedings before the local land board were a condition precedent. The male appellant was not a "member of the Forces" for the purpose of attracting the protection of s. 118 of the *Re-establishment and Employment Act* 1945, so he was excluded by s. 120 of that Act at the time when the land became vested in the Crown although he was so protected at the time of the inquiry and report by the local land board under s. 119 of the *Crown Lands Consolidation Act* 1913, as amended. The said inquiry and report were not conditions precedent to the exercise of the power to resume. The finding of the "appropriate court" under s. 130 (2) depends upon the exercise of a judicial discretion and that will not be interfered with unless the Court is of opinion that the court concerned had proceeded upon a wrong principle, or had considered, or had omitted from consideration, relevant matters. No such defects in the proceedings before the court concerned, or in its conclusions, have been shown. The person interested must be a person affected by the order he wishes to attack. It must be something of the nature of what has happened and how affected (*Reg. v. Bishop of Oxford* (2)). The rule in *Julius v. Lord Bishop of Oxford* (3) is not that wherever the word "may" is used in connection with a public purpose it means "shall". Where "may" is used it has been held that the word is inoperative (*Metropolitan Coal Co. of Sydney Ltd. v. Australian Coal and Shale Employees' Federation* (4)). That word is purely permissive (*Julius v. Lord Bishop of Oxford* (3)). The court having the jurisdiction is not compelled in the exercise

(1) (1946) 72 C.L.R. 101, at pp. 121, 132.

(2) (1879) 4 Q.B.D. 525, at p. 563.

(3) (1880) 5 App. Cas. 214.

(4) (1917) 24 C.L.R. 85, at p. 96.



of that jurisdiction to make an order if it considered or realized that a protected person was affected in some way. The section means that the Court shall have a discretion; absence of principles is not any argument for ruling against discretion. Rights of a person do not mean only rights in that person as a beneficial owner. Rights mean powers which they can exercise for the purposes of resumption. "Person" includes a body corporate: see *Interpretation Act* 1897-1942 (N.S.W.), s. 21. The War Veterans' Home is a body which can, under the assumption, deal with the land in accordance with the trust. The powers of trustees appointed under s. 26 (2) of the *Crown Lands Consolidation Act* 1913 are powers of regulating the control of land. The subject lands are dedicated for a special purpose, therefore they are not Crown lands. If the views expressed on behalf of the appellants are correct then the right to run the War Veterans' Home would be affected or denied us. That Home is a public service. The power of the Governor to acquire is only limited for a public purpose. To establish such a purpose it is not necessary that it should be supported by all the people, it is sufficient if it be supported by a substantial section of the public. An institution which provides amenities for ex-servicemen of two wars, operating over the greater part of the State, is properly regarded as a public purpose. The definition of "public purpose" in s. 5 includes any purpose declared by the Minister. It must be assumed that any power held by the Minister will be exercised by him in a reasonable and proper manner. Whether an institution is a public purpose or not has no legal basis or concept; it is a question of fact in each case (*Little Company of Mary (S.A.) Incorporated v. The Commonwealth* (1)). The male appellant failed on all points raised in the statement of claim and should not now or at any later stage be allowed to again raise any of them.

G. Wallace Q.C. (with him E. J. Hooke), for the respondent Minister for Lands (N.S.W.). The Court has no jurisdiction to inquire into the validity of the resumption, or any step therein under State law as the matter comes to the Court by virtue of s. 76 (ii.) of the Constitution (*Carter v. Egg and Egg Pulp Marketing Board (Vict.)* (2); *Parton v. Milk Board (Vict.)* (3); *P. J. Magennis Pty. Ltd. v. The Commonwealth* (4)). The Court should confine its deliberations to whether *Taylor J.* was correct on the question

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(1) (1942) 66 C.L.R., at p. 378.

(2) (1942) 66 C.L.R. 557, at pp. 577, 586, 587.

(3) (1949) 80 C.L.R. 229, at pp. 249, 257, 258.

(4) (1949) 80 C.L.R. 382, at p. 425.



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of validity. The references in the statement of claim to the declaration of public purpose and reference to the local land board do not go to validity under the State law but to found an application under s. 130 (2) of the *Re-establishment and Employment Act* 1945-1952. The most this Court can do is to declare the preliminary steps invalid. It cannot inquire into the result, if any, which would flow from such an order. The proclamation of resumption having been made outside the period of protection, an order cannot be made in respect of the preliminary steps even though they be prerequisites of a valid resumption. The Court sitting in original jurisdiction—*Taylor J.*—has a discretion under s. 130 (2) reviewable only in accordance with accepted principles. Having found that a proper case exists for applying the section the Court is bound to make an order, but it has a discretion to determine what is a proper case (*Re Jackson and the Conveyancing Act* (1); *Re Fettell* (2); *Macdougall v. Paterson* (3)). It is wrong to say that it is bound to make an order merely because breach of s. 118 is proved. The use of the words “may” and “shall” in the same sub-section and the general scheme of the section support this view. The judge below correctly exercised his admitted discretion under the second part of s. 130 (2). The word “rights” in that second part should be given a wide meaning. In this context it means powers. Here the trustees had the “right” to manage and control: see s. 17 of the *Crown Lands Consolidation Act* 1913-1945 (N.S.W.), s. 26 (2) thereof as inserted by Act No. 29 of 1938, s. 8 (b) (ii). On the true construction of the will the male appellant was not the “owner” of the land resumed. He merely has an equitable right to receive the rents and profits of half the land for his life expectant on the death of his mother, the other appellant. The matters complained of in pars. 4-6 of the statement of claim were not “transactions” or “proceedings” within the meaning of s. 130. This respondent adopts the arguments addressed to the Court on behalf of the first named respondent.

*W. J. V. Windeyer* Q.C., in reply. This Court is competent to deal with the matter now before it. Notice, as required by the rules, of intention to take a preliminary point was not given. The interest of the male appellant under the will is an interest in “land” as defined in s. 108 of the *Re-establishment and Employment Act* 1945. Resumption causes an expropriation of all interests in the land and

(1) (1951) 52 S.R. (N.S.W.) 42, at p. 44; 69 W.N. 29, at p. 31.

(2) (1952) 52 S.R. (N.S.W.) 221, at pp. 225-226; 69 W.N. 186, at p. 189.

(3) (1851) 11 C.B. 755, at p. 773 [138 E.R. 672, at pp. 679-680].



makes it again Crown land. Therefore if the male appellant's interest could not be taken the land could not be resumed (*Baiada v. Baulkham Hills Shire Council* (1)). A valid local land board inquiry is a condition precedent to a valid resumption in this case: *Crown Lands Consolidation Act* 1913-1948 (N.S.W.), s. 197 (3), proviso. The inquiry was held with a view to the proposed resumption within the meaning of s. 118 of the *Re-establishment and Employment Act* 1945. The board must ascertain the price for resumption: see *Caldwell v. Rural Bank of New South Wales* (2).

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THE COURT delivered the following written judgment:—

Dec. 3.

The action out of which this appeal arises was instituted in this Court claiming relief under s. 130 (2) of the *Re-establishment and Employment Act* 1945-1952. Sub-section (1) of s. 130 provides that, subject to the section, no transaction or proceeding should be invalidated by reason only that it has been entered into or taken in contravention of the part of the Act in which s. 130 occurs, namely Pt. X—War Service Moratorium. The sub-section goes on to say that nothing in the section shall affect the liability of any person to a penalty in respect of any such contravention. Sub-section (2) is as follows:—"The appropriate court may, on the application of the Attorney-General or of any person interested, make an order that a transaction or proceeding entered into or taken in contravention of this Part shall be invalidated, but the court shall not make any such order if the court is satisfied that the effect of the order (if made) would be to prejudice the rights of a person in respect of, or arising out of, the transaction or proceeding which are acquired *bona fide* and without notice of the contravention." The expression "the appropriate court" is defined by sub-s. (3) to mean the High Court or the Supreme Court of the State or Territory of the Commonwealth in which the transaction or proceeding was entered into or taken.

The plaintiffs-appellants are mother and son, executrix and executor of the will of James Wheeler deceased. In that capacity they are the registered proprietors of fifty acres of land at Narrabeen. The son was a member of the forces within the meaning of s. 118 of the *Re-establishment and Employment Act* 1945. On 28th April 1949 the Governor-in-Council of the State of New South Wales, by a notification of resumption published in the Government

(1) (1951) 83 C.L.R., at pp. 351, 352.

(2) (1951) 53 S.R. (N.S.W.) 415; 69 W.N. 246.



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*Gazette*, purported to resume such land pursuant to s. 197 of the *Crown Lands Consolidation Act* 1913-1948 (N.S.W.). The notification stated the purpose of the resumption as "for extension of War Veterans' Home". Section 118 (1) provides:—"Where power is conferred upon any person by or under any law of the Commonwealth or of a State or Territory of the Commonwealth to acquire land compulsorily for any purpose, that person shall not, without the prior consent of the Attorney-General, exercise the power, in relation to the acquisition of land which is owned by a member of the Forces, for any purpose other than a purpose in connexion with the defence of the Commonwealth or the efficient prosecution of the war, or do or commence or continue to do any act, or commence or continue any proceeding, for the purpose of or with a view to any such acquisition or obtaining possession of the land in connexion with any such acquisition." By s. 120 the period of time during which a member of the forces is protected by this provision is limited and the male plaintiff had ceased to enjoy the protection of s. 118 not later than 22nd July 1948. But some of the antecedent steps leading up to the purported acquisition had taken place while he still enjoyed that protection. The two plaintiffs bring the action seeking an order under s. 130 (2) invalidating these antecedent steps and claiming that the consequences of that invalidation would be that the acquisition itself must become void. The reason why the male plaintiff ceased to enjoy the protection afforded by s. 118 (1) is to be found in sub-s. (1) of s. 120 as amended by statutory regulation pursuant to the power conferred by s. 137. Section 120 (1), before the amendment of the section, provided that the protection afforded by, among other sections, s. 118 should continue until the expiration of the period (a) immediately following the date on which the member of the forces ceased otherwise than by his death to be engaged on war service equal to the period during which he was so engaged; or (b) of twelve months immediately following that date, whichever is the shorter. His war service extended over 1,048 days and ended on 7th September 1945. A period of 1,048 days from that date expired not later than 22nd July 1948. Twelve months would therefore be the earlier period. It expired on 7th September 1946.

The power to make regulations conferred on the Governor-General by s. 137 enables the Governor-General to make regulations providing for the repeal or amendment of or the addition to any of the provisions of the Act. By Statutory Rule 1947 No. 100, which appears to have come into force on 29th July 1947, a new subsection was inserted in s. 120 of the Act providing that the protection



afforded by s. 118 should continue in accordance with the provisions of the section as if for the words "twelve months" wherever occurring there were substituted the words "two years". Except for the word "continue" there is nothing to make the provision retrospective, even if that could be done. It seems, therefore, that between 7th September 1946 and 29th July 1947 the male plaintiff lost the protection of s. 118. As will appear it was during that interval that one of the antecedent steps complained of as leading to the acquisition was taken. By Statutory Rule 1948 No. 57, which, it seems, took effect on 14th May 1948, a period of four years was substituted for that of two years in the new subsection introduced by the previous regulation. That period expired for the male plaintiff on 7th September 1949. But by that time the shorter of the two periods allowed had expired. For as already stated, a period of 1,048 days, the aggregate time of his war service, calculated from 7th September 1946, expired not later than 22nd July 1948.

As has been said, the two plaintiffs hold the land as the legal personal representatives of James Wheeler deceased. The will of James Wheeler deceased, however, gives them beneficial interests in the land. The testator directed that his trustees, who are the plaintiffs, should divide his real estate into two equal parts and transfer one such part to his wife, the female plaintiff, absolutely. As to the other part, the will directed that the income thereof should be paid to his wife during her lifetime and on and after her death that the income be paid to his son, the male plaintiff, and on and after his death that the corpus should be divided amongst his children, with a gift over in the event of his dying without issue. It will be seen that in a representative capacity the male plaintiff holds an undivided share as joint tenant but that beneficially his interest is in a divided half share of the land and is a future equitable life interest expectant upon the death of his mother. It can hardly be supposed that s. 118, when it protects land which is owned by a member of the forces, refers to ownership in a representative capacity. The only thing that the plaintiff can be said to "own" beneficially is the future equitable life interest. As the land has not yet been divided in pursuance of the direction contained in the will, this future equitable interest is in an undivided half share. It may be questioned whether this is enough to bring his case within the expression "land which is owned by a member of the Forces". However, the word "land" is defined by s. 108 (1) to include any estate or interest in land (legal or equitable) and any easement, right, power or privilege over, in, or in connection with,

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land. Let it be assumed that the definition is applicable. It is then a grave question whether, if the plaintiffs succeeded in other respects, the protection given by s. 118 in respect of this interest would lead to the entire invalidation of the acquisition of the fee simple. But for reasons which will appear it is a question which it is unnecessary to decide.

As has been said, the present acquisition took place under s. 197 of the *Crown Lands Consolidation Act* 1913-1948 (N.S.W.). That provision consists of seven unnumbered paragraphs. The first of them provides that the Governor-in-Council may acquire for a variety of purposes which it enumerates, lands of any tenure either by way of purchase or resumption or by exchange. Any land so acquired shall thereupon be deemed to be reserved from sale and lease. In the enumeration of purposes there occurs the expression "for any public purpose." Section 5 of the *Crown Lands Consolidation Act* defines "public purpose" to mean and include, in addition to any purpose specified as a public purpose in any section of the Act, any purpose declared by the Minister by notification in the *Gazette* to be a public purpose within the meaning of such section. On 24th January 1947 a declaration was made in purported pursuance of this definition. It declared the War Veterans' Home to be such a purpose within the meaning of s. 197. That is the first step that is complained of as a violation of s. 118 (1) of the *Re-establishment and Employment Act* 1945. The complaint that it was in violation of s. 118 assumes (erroneously as it now appears) that at that time the male plaintiff enjoyed the protection of that section and further assumes or asserts that to make the declaration of purpose was an act or proceeding "with a view to the acquisition" of the land.

The third paragraph of s. 197 of the *Crown Lands Consolidation Act* provides that the local land board shall inquire into and report upon any application or proposal for the exchange or purchase or resumption of any land under the section and that the respective values of any land to be acquired or granted in pursuance thereof shall, for the purpose of the section, be determined by the local land board. There was a proviso which has been repealed to the effect that if the land is required for returned servicemen the Governor may resume it without inquiry or report by the local land board. The sixth paragraph of the section provides that the price to be paid for the land resumed shall be that determined by the land board or the Land and Valuation Court on appeal. A reference to the local land board was made on 27th August 1946 and proceedings before the board were on foot early in 1947. The board made its



report on 3rd February 1947. On 28th February 1947 the plaintiffs appealed to the Land and Valuation Court and that appeal was dismissed on 9th September 1947 : see *Wheeler v. Minister for Lands* (1).

It is not disputed that the male plaintiff enjoyed the protection of s. 118 at the time when the proceedings before the local land board took place. They are challenged by the plaintiffs as violations of s. 118 (1) of the *Re-establishment and Employment Act* 1945. They form the second of the proceedings so challenged, being, of course, antecedent to the actual acquisition. The contention of the plaintiffs is that inquiry and report by the local land board and a determination of values are matters that upon the proper interpretation of the *Crown Lands Consolidation Act* are prescribed as conditions precedent to the exercise of the power of acquisition under the first paragraph of s. 197. Inquiry and report by the land board are clearly antecedent requirements and there is a good deal to be said for the view that fulfilment of the requirement is an essential condition, the view that the provision requiring inquiry and report is not merely directory. On that basis the plaintiffs' contention is that if that proceeding can be invalidated by the use of the Federal Act, the acquisition must as a consequence of State law fall to the ground as itself invalid, because owing to such invalidation there will be a non-compliance in point of law with a condition precedent under the State Act to the exercise of the power of acquisition. The view that inquiry and report and determination of the price is a condition precedent to acquisition is supported not only by the character of the now repealed proviso to the third paragraph of s. 197, but is supported also by the enactment of Act No. 31 of 1920 validating resumptions that had been made under s. 197 notwithstanding that the notification of resumption preceded the determination by the local land board of the price to be paid for the land.

Before proceeding further in the examination of the case of the plaintiffs-appellants, it is perhaps desirable to state more of the circumstances in relation to the acquisition of the land. The War Veterans' Home is an institution conducted by a company limited by guarantee incorporated not for the acquisition of gain. Its purposes are sufficiently indicated by its name. The institution carried on its activities upon a site adjoining the land of the plaintiffs and the resumption has in fact for its purpose the extension of the property of the institution. What the declaration of purpose exactly means in stating that the War Veterans' Home is a public

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(1) (1947) L.V.R. 23.



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purpose is not clear. It may mean that the institution is a public purpose or that its property is a public purpose or that its activities are a public purpose. On behalf of the plaintiffs the validity of the declaration is denied on the ground that it is not authorized by the definition in s. 5. That, of course, means that it is invalid as unauthorized by State law and is not a matter which this Court has jurisdiction to decide unless as an incident to the exercise of Federal jurisdiction.

The fifth paragraph of s. 197 provides that upon notification of the resumption the land is to become vested in the Crown and be deemed to be Crown land for the purposes of the Act but reserved from sale or lease until otherwise notified by the Minister. Section 24 of the *Crown Lands Consolidation Act* provides that the Minister by notification in the *Gazette* may dedicate Crown lands in such manner as may seem best for the public interest or, among other things, any other public purpose, and that upon such notification being published in the *Gazette* the land shall be dedicated accordingly. We were informed that at an earlier date, namely, 1943, the War Veterans' Home had been declared a purpose within this provision, but the declaration does not appear to be in evidence. However, after acquisition a notification was published dedicating the land to what was named as a public purpose and described as "War Veterans' Home Extension". That was on 15th July 1949. Then in pursuance of the *Public Trusts Act* 1897-1944 (N.S.W.), s. 2, by notice in the *Gazette* dated 22nd December 1949 the Governor appointed the defendant company under the description "The War Veterans' Home", as trustees of the land. The land was not, however, vested in the company pursuant to s. 3 or otherwise, nor was it transferred or conveyed to them. The result seems merely to be to give the corporate body the powers over the land set out in s. 5. The defendants-respondents say that the Act imports a power of control and administration independently of vesting.

The suit was heard by *Taylor J.*, who dismissed it upon three grounds, any one of which would be enough to disentitle the plaintiffs to relief. In the first place, his Honour held that even if the effect of an order invalidating any of the preliminary steps taken while the male plaintiff enjoyed the protection of s. 118 would be to avoid such steps *ab initio* the result would not be to invalidate the resumption because, at the time it was made, the preliminary steps possessed their normal legal significance and there was no reason why, upon publication of the notification of the resumption, the provisions of s. 197 should not operate to vest the land in the Crown. In the next place, his Honour was of opinion



that the War Veterans' Home, that is to say, the company, had acquired rights bona fide in consequence of the acquisition and of the subsequent steps already described and that to make an order would be to prejudice those rights. Accordingly, the case fell within the latter part of sub-s. (2) of s. 130, which provides that the Court shall not make an order under the sub-section if the Court is satisfied that the effect of the order (if made) would be to prejudice the rights of a person in respect of, or arising out of, the transaction or proceeding which are acquired bona fide and without notice of the contravention. In the third place, his Honour was of opinion that the power given by sub-s. (2) of s. 130 is discretionary and in the exercise of that discretion his Honour was prepared to refuse to make an order invalidating the prior steps.

From this decision the plaintiffs appeal. It is apparent from what has been already said that their case is full of difficulties. But the argument made on their behalf begins with the effect of State law as its very foundation. The basis of the argument is that as a matter of State law the continued validity of the steps taken to fulfil the conditions precedent which that law prescribes is essential to sustain the acquisition of the land. On that basis the plaintiffs say that under State law a declaration of purpose was essential to bring s. 197 into play and enable the Governor-in-Council to acquire the land for the purpose of the War Veterans' Home. As a further, but alternative, foundation for the argument the plaintiffs rely on the interpretation of s. 197 of the *Crown Lands Consolidation Act*, which makes an inquiry and report and a determination of value by a local land board an essential prerequisite to the exercise of the power of resumption. The argument then turns to s. 118 of the *Federal Re-establishment and Employment Act* and seeks to apply it to these two steps so as to make them contraventions of that provision. As to the first step, it is contended that the declaration of purpose was in fact made with a view to the acquisition. The contention treats it as immaterial that the declaration of purpose, if valid under State law, must have a general operation constituting the War Veterans' Home a purpose within s. 197 so that the section may be employed for the acquisition of land for the War Veterans' Home at any time, unless and until, the declaration of purpose is revoked. The argument insists that however that may be, the view with which the declaration of purpose was made was in fact the future acquisition of this precise piece of land. In the same way it is contended that although the reference by the Governor to the land board in pursuance of the *Crown Lands Consolidation Act* regulations was ostensibly a reference

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to inquire and report as to the application or proposal for the resumption of the land and in respect of the value of the land the result of which might have negatived acquisition, yet in truth it was a proceeding taken for the purpose of or with a view to the acquisition of the particular piece of land.

On the footing that these contentions are made out the argument of the plaintiffs then takes up s. 130 (2) and asserts that each of these steps is a transaction or a proceeding within that provision entered into or taken in contravention of Pt. X, which contains s. 118. Accordingly, so it is said, the Court may make an order that each of these transactions or proceedings shall be invalidated. Then it is said that once such an order is made the declaration of purpose under s. 5 of the *Crown Lands Consolidation Act* with reference to s. 197 is void and is as if it never were. In the same way, the reference to and the proceedings before the land board and its report and determination are to be treated as void and as if they never were. Consequently, if all the necessary support for the exercise of the power of acquisition is thus withdrawn by the order under the Federal law, it is immaterial, it is said, that the actual acquisition was made at a date when the male plaintiff had ceased to be protected under s. 118 and at a time when no order invalidating the prior steps had been made, so that at the moment when the acquisition was made it possessed the requisite support of the due fulfilment of the conditions precedent.

This argument fails to take into account the important fact that sub-s. (2) of s. 130 does not purport to give an order of invalidation a retrospective effect. Indeed, its words are "shall be invalidated." The consequences of retroactively invalidating a transaction or proceeding or rescinding it *ab initio* are necessarily different from those of invalidating it as from the date when the order is made, and there is no reason for construing s. 130 (2) as going beyond what it exactly says, namely, authorizing an order that the transaction shall be invalidated. An order that a thing shall be invalidated means *prima facie* as from the date when the order is made. Even if the plaintiffs could sustain all the earlier steps of their contention, it must fail on this ground, which, in effect, is the first ground on which *Taylor J.* based his decision.

It may be added that even if the Federal law did purport to invalidate transactions or proceedings retrospectively so that these two steps must be treated as if they never were, it would be a question if the operation of State law upon that legal condition of things would lead to the acquisition itself being void as a conse-



quence. According to State law, considered apart from Federal law, the acquisition was completely valid and Federal law could not deal directly with the acquisition. It would be necessary to extract from the State law an implication that although the acquisition itself at the time it was made was based on a perfectly valid series of steps leading up to it, yet if afterwards they were retrospectively invalidated, the acquisition itself must by consequence also be invalidated retrospectively. Such a view of State law is not a necessary consequence of the form in which s. 197 is expressed.

It is desirable to add that the plaintiffs' attempt to treat the making of the declaration that the War Veterans' Home was a public purpose within s. 5 of the *Crown Lands Consolidation Act* as a contravention of s. 118 of the *Re-establishment and Employment Act* encountered a separate difficulty. The declaration was made during the interval between 7th September 1946 and 29th July 1947 when the male plaintiff had lost, and had not regained, the protection of s. 118. The making of the declaration therefore could not be a contravention of s. 118.

But an attack was made upon the validity under State law of the declaration of purpose. As already has been remarked, that could afford no ground upon which this Court exercising Federal jurisdiction could give relief against the resumption. But the attack was expressly directed to show that the second ground which *Taylor J.* assigned as an alternative ground of his decision could not be supported because, as it was said, whatever rights the defendant company might otherwise have acquired, the basic acquisition was void under State law. In this circuitous way it was sought to show that under State law the declaration of purpose was void. The curious consequence would be that while for the purpose of the application of s. 130 (2) the declaration of purpose was relied upon as something done in pursuance of State law amounting to a contravention of s. 118, yet for the purpose of negating the prohibition in the second part of s. 130 (2) the declaration of purpose was alleged to be void and of no effect. This may seem an extreme example of blowing hot and cold. But the reliance on the declaration in order to invoke this Court's jurisdiction must fail because the declaration was not in fact a contravention of s. 118 which did not at that time protect the male plaintiff. The failure of this limb of the plaintiff's argument perhaps removes the charge of inconsistency. However, in view of the fact that the plaintiffs cannot succeed at all by means of s. 130, it is necessary to do no more than mention this peculiar difficulty. It is perhaps desirable to add that the

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question whether the power given by s. 130 (2) is discretionary is a difficult one with which it is unnecessary to deal in the view that has been taken.

For the foregoing reasons the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants, *J. K. Dixon.*

Solicitors for the respondent War Veterans' Home, *Barker & Jones.*

Solicitor for the respondent Minister for Lands (N.S.W.), *F. P. McRae*, Crown Solicitor for New South Wales.

J. B.