[HIGH COURT OF AUSTRALIA.]

THE MINISTER FOR LANDS (N.S.W.) . . APPELLANT;
RESPONDENT,

AND

PYE AND OTHERS . . . . . RESPONDENTS.
APPELLANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1952-1953.

1952.
SYDNEY, *Nov.* 11-13.

1953.
MELBOURNE, *March* 10.

Dixon C.J., McTiernan, Williams, Fullagar and Kitto JJ.

Resumption—Closer settlement—Compensation—Assessment—Valuation—Advisory board—Land and Valuation Court—Value of land as at date fixed by statute—Evidence tendered of value at other dates—Rejected—Admissibility—Relevancy—Closer Settlement (Amendment) Act 1907-1950 (*N.S.W.*) (*No.* 12 *of* 1907—*No.* 27 *of* 1950), *ss.* 4 (1) (*b*), (4) (*a*) (*b*), 9—*War Service Land Settlement Act* 1941-1950 (*N.S.W.*), (*No.* 43 *of* 1941—*No.* 27 *of* 1950), *s.* 3.

Where land has been resumed under s. 4 (1) (b) of the *Closer Settlement (Amendment) Act* 1907-1950 (N.S.W.) for the purposes of s. 3 of the *War Service Land Settlement Act* 1941 (N.S.W.), the proviso to s. 4 (4) (b) of the former Act is effectual to limit, by reference to values as at 10th February 1942, the estimate of value by an advisory board under s. 3 (1) (b) of the Act and the determination of value by the Land and Valuation Court on appeal therefrom.

Decision of the Supreme Court of New South Wales (Full Court): *Pye* v. *Minister for Lands* (1952) 69 W.N. (N.S.W.) 291, reversed.

APPEAL from the Supreme Court of New South Wales.

The facts are sufficiently stated in the judgment of the Court.

M. F. Hardie Q.C. (with him *E. N. Dawes* and *A. C. Saunders*), for the appellant. For the purposes of this case ss. 2, 3 (1) (2), 4 (4) (a) and (b) of the *Closer Settlement (Amendment) Act* 1907-1950 (N.S.W.) are important statutory provisions. The Full Court of

[EDITOR'S NOTE.—On 28th May, 1953 the Judicial Committee of the Privy Council granted special leave to appeal from this decision.]

H. C. OF A. 1952-1953.

MINISTER FOR LANDS (N.S.W.) v. PYE.

the Supreme Court read into s. 4 (4) (a) (b) a proviso and then said that that proviso destroyed the operation of the legislative provisions. If the Full Court be correct then the whole of the proviso in s. 4 (4) (b) is rendered inoperative. Section 7 is important in the interpretation of the words " is made " which appear in the proviso to s. 4 (4) (b). The word " resumption " which appears in s. 4 (4) (b) and the proviso thereto should not be regarded as a completed act, as the Court below appeared to hold, but that it should be regarded as referring to a process of resumption. In the Act " resumption " refers to the process of resumption, that is, from the first step to the final step. The Court below thought it meant the actual point of time. That Court construed the words " is made " to mean " has been made " and, wrongly, said that the advisory board's powers ceased at the date of resumption. Therefore, on its construction of the words " is made " the advisory board was set an impossible task.

Statutory provisions which have some material relevance to the matter now before the Court are ss. 9, 10A and 11 of the *Closer Settlement (Amendment) Act* 1907 ; *Closer Settlement Act* 1904-1950 (N.S.W.), s. 18 ; *Closer Settlement Act* 1914-1943 (N.S.W.), s. 11 ; *Closer Settlement and Returned Soldiers Settlement (Amendment) Act* 1927-1939 (N.S.W.), s. 4 ; *War Service Land Settlement Act* 1941-1950 (N.S.W.), s. 3 ; and the *War Service Land Settlement and Closer Settlement (Amendment) Act* 1951.

Other statutory provisions which have a bearing upon this case are : *War Service Land Settlement Agreement Act* 1945 (N.S.W.) ; *War Service Land Settlement and Closer Settlement (Amendment) Acts* 1945-1948 (N.S.W.) ; and the *War Service Land Settlement and Closer Settlement Validation Act* 1950 (N.S.W.) ; see *P. J. Magennis Pty. Ltd.* v. *The Commonwealth* (1) and *Pye* v. *Renshaw* (2). There is not any right of election given to an owner of land under the provisions of s. 4 (4) (b) of the *Closer Settlement (Amendment) Act* 1907-1950. That provision was not designed for the benefit of the owner but was designed for the benefit of the advisory board and the Executive. Even if par. (i) of s. 4 (4) (b) does not operate then par. (ii) operates. Paragraphs (i) and (ii) do not deal with particular types of cases. Paragraph (i) deals with one type of case, and par. (ii) deals with all other cases. It matters not why there is not any agreement within the meaning of par. (i) because par. (ii) then comes into operation. There is nothing to suggest that the remedy for a breach is that the provisoes should not operate ;

(1) (1949) 80 C.L.R., at pp. 405, 406, 408, 419, 420.

(2) (1951) 84 C.L.R., at p. 81.

Halsbury's Laws of England, 2nd ed., vol. 31, p. 497; *Craies* on *Statute Law*, 5th ed. (1951), pp. 67, 90; *Salmon* v. *Duncombe* (1); *Murray* v. *Inland Revenue Commissioners* (2); *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* (3); *Seaford Court Estates Ltd.* v. *Asher* (4); *In the Goods of Gilligan* (5); *Melbourne Corporation* v. *Attorney-General for Victoria* (6); *Brisbane City Council* v. *Attorney-General for Queensland* (7); and *McCawley* v. *The King* (8). The alternative argument on the duty of the advisory board is that if "is made" means "has been made" then the advisory board has been impliedly given a power to make a fresh assessment after resumption. The board could then assess a figure on a 1942 basis. Although no such assessment has been made in this case, the owners having appealed against the assessment could not be heard to say that the assessment appealed against was not a valid assessment.

F. G. Myers Q.C. (with him *B. P. Macfarlan* Q.C., *C. M. Collins* and *E. J. Hooke*), for the respondents. The advisory board was bound to report and assess the value of the land before resumption. This follows from ss. 3 (b) and 9 of the *Closer Settlement (Amendment) Act* 1907-1950 (N.S.W.). It was the duty of the board to assess under s. 3 (b) at the current value unless the proviso to s. 4 (4) (b) applied. That proviso did not apply or confer further power because, (i) it applies only after resumption, and (ii) it is limited to cases where the owner has agreed to accept the board's assessment, or, having the opportunity to agree he has not done so. Even if there is a further power it has not been exercised. As to (i), the words of the Act are clear and do not say "is being made". "Is made" is equivalent to "is made", "is being made", or "is proposed to be made" and covers the whole time from request to advisory board or proclamation of advisableness. The meaning of "is being made" involves "is being made for the purpose of s. 3" of the *War Service Land Settlement Act* 1941-1950. Even if that construction be adopted there is not any evidence that resumption was then being made for the purpose of s. 3 of that Act. If it means "is being made" then the owner agrees to accept the board's assessment; the resumption would not be made for the purpose of s. 3, and there would not be any right of appeal. The agreement does not only refer to resumptions under the proviso; see s. 4 (3). The owner need not necessarily know the purpose. No steps prior

(1) (1886) 11 App. Cas. 627, at p. 634.
(2) (1918) A.C. 541, at p. 553.
(3) (1940) A.C. 1014, at p. 1022.
(4) (1949) 2 K.B. 481, at p. 498.
(5) (1950) P. 32.
(6) (1906) 3 C.L.R. 467, at p. 474.
(7) (1908) 5 C.L.R. 695, at p. 720.
(8) (1918) 26 C.L.R. 9, at p. 45.

H. C. OF A. 1952-1953.

MINISTER FOR LANDS (N.S.W.) v. PYE.

to 3rd May 1950—the date of the assent to the *War Service Land Settlement and Closer Settlement Validation Act* 1950—could have been steps in process of a resumption for the purpose of s. 3. What was the intention? There is not any room for implication. The relevant principles of construction are to be found in *Crawford* v. *Spooner* (1); *Lumsden* v. *Inland Revenue Commissioners* (2); *Broome* v. *Chenoweth* (3); *Inland Revenue Commissioners* v. *Ayrshire Employers Mutual Insurance Association Ltd.* (4); *Magor and St. Mellons Rural District Council* v. *Newport Corporation* (5); and *Ex parte Stephen Major* (6). Implication does not involve supplying a meaning but writing in that which is naturally or necessarily involved in what is expressed. The fact that more than one implied phrase can be suggested shows that there is not *one* phrase which is implicit. Unless *only one* is implicit none is. Adding such phrases as " or is proposed " would require the redrafting of the whole proviso. Where the legislature wished to go further than " is resumed " it said so expressly: see sub-s. (3) of s. 197 of the *Crown Lands Consolidation Act* 1913-1951 (N.S.W.) added by s. 8 (b) of the *War Service Land Settlement and Closer Settlement (Amendment) Act* 1945. Even if the words " proposed " or " intended " are read in it does not help the Crown because there is not any evidence that it was " proposed " or " intended ". The proviso to s. 4 (4) (b) is limited to cases where the owner has agreed to accept the advisory board's assessment or, having had the opportunity to agree, has not done so. The Act should be read as giving the owner the opportunity to elect whether he will agree to accept the advisory board's assessment, because (a) that was the intention of the legislature (*P. J. Magennis Pty. Ltd.* v. *The Commonwealth* (7)); (b) that is the only construction which will avoid injustice (*Hill* v. *East and West India Dock Co.* (8)); (c) if it does not mean that there is to be a right to choose, the question whether an owner will get the extra fifteen per cent is left to the whim of the Minister. There cannot be any reason or justification for that. The suggestion that the object was to speed resumptions by allowing the advisory board to offer an inducement to owners not to appeal is not well-founded because that would be outside the advisory board's statutory functions and, further, would leave the matter to the whim of the advisory board. In the cases now

(1) (1846) 6 Moo. P.C. 1 [13 E.R. 582.]
(2) (1914) A.C. 877, at pp. 887, 892, 896, 897.
(3) (1946) 73 C.L.R. 583, at p. 598.
(4) (1946) 1 All E.R. 637, at pp. 640, 641.
(5) (1952) A.C. 189, at pp. 190-192.
(6) (1908) 8 S.R. (N.S.W.) 68, at p. 75; 25 W.N. 24.
(7) (1949) 80 C.L.R. 382, at p. 420.
(8) (1884) 9 App. Cas. 448, at p. 456.

before the court there could not have been an opportunity to agree because the resumption had not been made. Alternatively, evidence should have been admitted to show that there had not been any such opportunity. The evidence of the witness Corlis was leading to this on the basis that assessment and report are not necessarily the same. The court was also required to determine the value as current value unless the proviso to s. 4 (4) (b) applied. It did not apply because (1) it is limited to cases in which the owner has had an opportunity to agree, and (2) the proviso cannot operate in part only : if one part falls the whole falls. It would be absurd that the advisory board should be bound to value at current values but the court on appeal at 1942 values. Paragraph (ii) of the second proviso to s. 4 (4) (b) of the *Closer Settlement (Amendment) Act* 1907-1950, obviously, was intended to apply only where the advisory board and the court were both limited to 1942 values. It would be a violation of that intention to hold that it applied in any other circumstances. If par. (i) could never apply par. (ii) would be meaningless. Its meaning depends on the existence of par. (i). Reference to the advisory board in par. (ii) would have to be struck out, and if the advisory board failed to value correctly at current values there would not be any method of correcting it. The right of appeal to the Land and Valuation Court is given to enable the owner to dispute the correctness of the advisory board's decision, and therefore the question for the court is the same as the question for the advisory board, that is, the value of the land at the time of the advisory board's assessment : see *R.* v. *Justices of County of London and London County Council* (1). The court admittedly exercises original jurisdiction (*Ex parte Australian Sporting Club Ltd.*; *Re Dash* (2)). The problem, however, is not the nature of its jurisdiction but the question it has to decide. Putting aside the proviso to s. 4 (4) (b) the answer to that problem is necessarily to be found in ss. 9 and 10. Section 9 provides that a person dissatisfied with the value assessed by the advisory board " may appeal . . . against such assessment ". If the question for the court were value at the date of the resumption, a person would not have any right to appeal if he were satisfied with the advisory board's assessment as the value at that time, even though he considered the value at the date of resumption was much higher. Neither s. 9 nor s. 10 requires or authorizes the court to determine the value of the land. The only right is to " appeal against the

(1) (1893) 2 Q.B. 476, at p. 494.

(2) (1947) 47 S.R. (N.S.W.) 283 ; 64 W.N. 63.

H. C. OF A. 1952-1953.

MINISTER FOR LANDS (N.S.W.) v. PYE.

assessment" and the only jurisdiction is to "hear and determine the appeal". Unless the court had to determine the same question as the advisory board it would not be an appeal against the assessment. Therefore the court has to determine whether the assessment was correct and, where the proviso does not apply, this is an inquiry into the value as at the date of the assessment. Section 10 gives the court jurisdiction to hear and determine the appeal. It has no other jurisdiction. To determine value at a different date would be beyond its jurisdiction. Section 4 (4) (b) provides that the compensation shall be the value assessed by the advisory board or, where there has been an appeal under s. 9, determined by the court. Paragraph (ii) of the proviso to s. 4 (4) (b) provides that the value *so* assessed or determined, shall not exceed the 1942 value. The court has jurisdiction only to determine the correctness of the advisory board's assessment and if the advisory board is not entitled to value as at 1942, neither may the court on appeal. Paragraph (ii) of the said proviso obviously refers to an appeal against an assessment; to circumstances in which both the advisory board and the court are restricted to 1942 values. Alternatively, assuming that the question on appeal is the value at the time of resumption and not at the date of the advisory board's assessment, then the determination by the court is not in any sense an appeal at all. The determination and assessment are two totally different inquiries. Paragraph (ii) of the proviso, however, provides for an appeal in the ordinary sense, that is, an assessment by the advisory board at 1942 values, and a determination by the court on the same basis. It really adds to the jurisdiction conferred by ss. 9 and 10. That must be wrong. The true effect would be that the advisory board would still ascertain the true value but if it exceed the 1942 value reduce the assessment accordingly. Similarly, the court would ascertain the value as at the date of resumption and if necessary reduce it accordingly. Paragraph (ii) of the proviso only applies where both questions are the same. If the advisory board is restricted to 1942 values par. (ii) does not apply. Examples of erroneous views of the law by the legislature are shown in *Deputy Federal Commissioner of Taxes (S.A.)* v. *Elders' Trustee and Executor Co. Ltd.* (1); *Bridge* v. *Great Western Portland Cement and Lime Ltd.* (2); *Inland Revenue Commissioners* v. *Ayrshire Employers Mutual Insurance Association Ltd.* (3); and *Inland Revenue Commissioners* v. *Dowdell O'Mahoney & Co. Ltd.* (4).

(1) (1936) 57 C.L.R. 610, at pp. 625, 626.
(2) (1932) 48 C.L.R. 522, at p. 528.
(3) (1946) 1 All E.R. 637, at pp. 640, 641.
(4) (1952) A.C. 401, at p. 426.

M. F. Hardie Q.C., in reply, referred to *Estates Development Co. Pty. Ltd.* v. *Western Australia* (1); *Huidekoper* v. *Douglass* (2); and *Bridge* v. *Great Western Portland Cement and Lime Ltd.* (3).

Cur. adv. vult.

March 10, 1953

THE COURT delivered the following written judgment:—

The Minister for Lands of the State of New South Wales appeals by leave against the answers given by the Supreme Court of New South Wales to certain questions submitted to it in three cases stated by the Land and Valuation Court. The cases were stated in appeals by the present respondents to the latter Court against assessments of the values of three parcels of land forming together a pastoral and agricultural property of almost 40,000 acres known as the Ghoolendaadi Estate, for the resumption of which the respondents were entitled to be paid compensation by the Government of New South Wales.

In the Land and Valuation Court, *Sugerman* J. held that upon the true construction of the relevant legislation the value of the resumed land must be determined, not as at 1st September 1950 which was the date of the resumption, but as at 10th February 1942 when land values were notoriously much lower than they became by September 1950. The parties had agreed that the value of the subject land was only £211,629 in 1942, whereas by 1950 it was certainly much more and according to the respondents was more than £600,000. The decision of *Sugerman* J. therefore meant that all that the respondents were entitled to receive was a sum substantially less than the fair equivalent of the land which the Government had taken. The respondents appealed to the Supreme Court by way of case stated, and the decision of *Sugerman* J. was reversed. The learned Judges, (*Street* C.J., *Owen* and *Herron* JJ.), reached the conclusion that in the statutory provisions upon which the Government relied there was not to be found a sufficiently clear expression of intention to deprive an owner of his land in exchange for a sum of money far below its true value, and that the respondents were entitled to have their lands valued for compensation as at the date of resumption.

The Minister for Lands, being dissatisfied with this decision, now appeals to this Court, and contends that the relevant Act is so framed as to effect the confiscatory purpose which the Supreme Court

(1) (1952) 87 C.L.R. 126, at p. 142.
(2) (1805) 3 Cranch 1 [2 Law. Ed. 347].
(3) (1932) 48 C.L.R. 522.

H. C. OF A. 1952-1953.

MINISTER FOR LANDS (N.S.W.) v. PYE.

Dixon C.J. McTiernan J. Williams J. Fullagar J. Kitto J.

felt itself unable to attribute to the Parliament of New South Wales consistently with recognized principles of construction.

The resumption was effected under the provisions of the *Closer Settlement (Amendment) Act* 1907-1950 (N.S.W.). That Act, which with all relevant amendments may be referred to as the 1907 Act, makes by par. (b) of s. 4 (4) a provision as to the compensation payable in respect of resumptions under the Act, and the provision there made is clearly intended to be exhaustive. The decision of the present appeals must therefore depend upon the true construction of that paragraph. In particular it depends upon the construction of a proviso which was inserted by the Act No. 48 of 1948 and amended by the Act No. 14 of 1950. Before adverting to the terms of the paragraph, however, it is necessary to examine briefly the scheme of this Act, which is devoted entirely to the topic of the acquisition of land by the Crown for purposes of closer settlement, by means of purchase or resumption.

The power to purchase or resume is conferred by s. 4. It is exerciseable, subject to approval by resolutions of both Houses of Parliament, " where an advisory board reports that any land is suitable to be acquired for closer settlement ". The constitution of advisory boards is provided for by s. 2, and their duty with respect to making reports is laid down by s. 3. Sub-section (1) of s. 3 provides that every such board shall, at the request of the Minister and within such time or extended time as he may appoint, report to him upon a number of matters specified in pars. (a) to (f) of the sub-section. The first three matters are : (a) whether any, and if so what, land within an area to be specified by the Minister is suitable to be acquired for closer settlement ; (b) the estimated value of the land ; and (c) the price at which the board recommends the acquisition of the land, and the method of arriving at such price. Where the board reports that any land is suitable to be acquired for closer settlement, s. 4 (1) empowers the Governor (a) subject to the Act, to purchase it by agreement with the owner, or (b) to resume it under the Act. The approval of both Houses of Parliament is required by s. 4 (2), and a further condition precedent to a resumption is added by s. 4 (3), which provides (except where the owner has agreed not to claim compensation in excess of the value of the land as assessed by an advisory board) that before resuming any land the Governor shall, by notification in the *Gazette*, notify that he proposes to consider the advisableness of acquiring such land for purposes of closer settlement. Where a purchase is made, the Act requires a conveyance to His Majesty

for the purposes of the Closer Settlement Acts : s. 7 (2). A resumption, on the other hand, is to be effected by notification in the *Gazette* ; upon the notification being made the land vests in His Majesty (subject to a right of retainer given by s. 13) for the purposes of the Closer Settlement Acts : s. 7 (1). Section 4 (4) provides in par. (a) that the price to be paid in respect of a purchase shall not exceed the price at which an advisory board has recommended the acquisition of the land (i.e. the price recommended in the board's report pursuant to par. (c) of s. 3 (1)), and provides in par. (b) that the compensation to be paid in respect of a resumption shall, (unless an agreement is entered into in terms of s. 11—and there was no such agreement in the present case), be the value of the land as assessed by an advisory board (i.e. the value stated in the board's report pursuant to par. (b) of s. 3 (1)), or, where an appeal has been made in terms of s. 9, as determined by the Land and Valuation Court. A proviso was added to each of the pars. of s. 4 (4) by the Act No. 48 of 1948 ; and, after it had been held in *P. J. Magennis Pty. Ltd.* v. *The Commonwealth* (1), that the proviso to par. (b) was inoperative, both provisoes were amended by the Act No. 14 of 1950 in a manner which renders that decision no longer applicable.

Section 9 gives to a person interested in resumed land who is dissatisfied with the advisory board's assessment of its value a right to appeal to the Land and Valuation Court within twenty-eight days after the publication in the *Gazette* of the notification of resumption or such further time as the Court may allow ; and s. 10 gives the Court jurisdiction to hear and determine the appeal. To provisions of other sections it will be sufficient to make brief references later.

It will be seen that there were two important features in the scheme of the Act as it stood before the 1948 amendment. The first was that a purchase or resumption must be preceded by a report from an advisory board, declaring the land suitable to be acquired for closer settlement and stating its estimated value and the recommended price of acquisition. The second feature was that the board's recommendation as to price set a maximum to the price which could be paid in the event of a purchase, and the board's assessment of value (or the Court's determination of value if there should be an appeal) fixed the compensation payable in the event of a resumption. It was upon the second of these features of the scheme that qualifications were imposed by the provisoes introduced in 1948 and amended in 1950. It is desirable to set

(1) (1949) 80 C.L.R. 382.

H. C. OF A. 1952-1953.

MINISTER FOR LANDS (N.S.W.) v. PYE.

Dixon C.J. McTiernan J. Williams J. Fullagar J. Kitto J.

out, notwithstanding their length, both par. (a) and par. (b) of s. 4 (4), with the provisoes as amended. They read as follows :— " (4) (a) The price to be paid in respect of any such purchase shall not exceed the price at which an advisory board has recommended the acquisition of the land :

Provided that where any such purchase is made for the purpose of section three of the War Service Land Settlement Act, 1941, as amended by subsequent Acts, the price at which an advisory board recommends the acquisition of the land shall not exceed by more than fifteen per centum the price which it would have recommended in respect of an identical purchase as at the tenth day of February, one thousand nine hundred and forty-two excepting the value of any improvements effected on such land since that date.

(b) The compensation to be paid in respect of any such resumption shall, unless an agreement is entered into in terms of section eleven of this Act, be the value of the land as assessed by an advisory board, or where an appeal has been made in terms of section nine of this Act, as determined by the Land and Valuation Court :

Provided that where any such resumption is made for the purposes of section three of the War Service Land Settlement Act, 1941, as amended by subsequent Acts, the following provisions shall apply :—

(i) in the case of any such resumption where the owner has agreed not to claim compensation in excess of the value of the land as assessed by an advisory board the value of the land as so assessed shall not exceed by more than fifteen per centum the value which would have been so assessed or determined in respect of an identical resumption as at the tenth day of February, one thousand nine hundred and forty-two, excepting the value of any improvements effected on such land since that date ;

(ii) in the case of any such resumption other than a resumption where the owner has agreed not to claim compensation in excess of the value of the land as assessed by an advisory board, the value of the land as so assessed or determined shall not exceed the value which would have been so assessed or determined in respect of an identical resumption as at the tenth day of February, one thousand nine hundred and forty-two, excepting the value of any improvements effected on such land since that date."

On 4th October 1945, by a proclamation published in the Government *Gazette* pursuant to s. 4 (3), the Governor notified that he proposed to consider the advisableness of acquiring the respondents'

land for the purposes of closer settlement. Shortly afterwards, on 17th January 1946, the *War Service Land Settlement and Closer Settlement (Amendment) Act*, 1945, (No. 14 of 1946), was assented to, and by s. 3 (d) of that Act new sub-ss. (1) and (1A) were inserted into s. 6 of the 1907 Act. These sub-sections applied to proclamations already made under s. 4 of the 1907 Act, and in relation to the respondents' land they gave to the proclamation of 4th October 1945 the effect of a prohibition of any transfer or other dealing without the prior consent of the Minister until the expiration of six years from the commencement of the 1945 Act.

More than four years went by before any further step was taken. On 4th May 1950, a closer settlement advisory board made a report to the Minister stating that, all attempts to reach agreement with the owners having failed, it was proposed to resume the whole of the Ghoolendaadi Estate, except a small area which one of the respondents had elected to retain pursuant to the right of retention allowed by s. 13. The report set out the board's valuation of the several areas comprised in the estate, and it added that the values had been assessed in accordance with sub-s. (4) (b) (ii) of s. 4. The report further stated that the land was suitable to be acquired for closer settlement, that the board recommended that action be taken to resume the land, and that compensation be paid in accordance with the values assessed as abovementioned.

On 1st September 1950, there appeared in the *Gazette* a notification by the Governor, reciting the proclamation of 5th October 1945, the report of the advisory board, the fact that both Houses of Parliament had by resolution approved the resumption of the respondents' lands, and the fact that the resumption to be effected was made for the purposes of s. 3 of the *War Service Land Settlement Act*, 1941, as amended by subsequent Acts. By this notification the Governor declared that the respondents' lands were thereby resumed under the *Closer Settlement (Amendment) Act*, 1907, as amended. The proclamation effected the resumption of the respondents' land by virtue of s. 7 (1), and the last of the recitals which it contained provides conclusive evidence that the resumption was made for the purposes of s. 3 of the *War Service Land Settlement Act*, 1941, as amended by subsequent Acts. (The evidentiary effect of the recital comes from a provision added to s. 4 (4) by s. 8 (1) (a) of the *War Service Land Settlement and Closer Settlement (Amendment) Act*, 1951, (No. 40 of 1951), which is deemed to have commenced on 3rd May 1950: s. 8 (3) of the same Act.) The respondents did not agree at any time that they would not claim

H. C. OF A. 1952-1953.

MINISTER FOR LANDS (N.S.W.) v. PYE.

Dixon C.J. McTiernan J. Williams J. Fullagar J. Kitto J.

compensation in excess of the value of the land as assessed by an advisory board. The Minister's contention is that in these circumstances the case is governed by sub-par. (ii) of s. 4 (4) (b), and that by reason of that sub-paragraph the Land and Valuation Court was right in holding itself bound to determine the value of the respondents' land according to the value it had on 10th February 1942.

The learned judges of the Supreme Court did not fail to perceive that it was with just such a case as this that the draftsman of sub-par. (ii) of the proviso had set out to deal. But their Honours came to the conclusion, after examining in great detail the terms of the Act and its historical development, that the proviso was so expressed that to give it any application at all was impossible. For that reason they held that there was nothing in the Act which effectually deprived the respondents of their prima facie right to an amount of compensation equal to the full value of their land at the date of its resumption.

The steps by which their Honours reached this conclusion were, briefly, as follows. Both the sub-paragraphs of the proviso to s. 4 (4) (b) are governed by the introductory words of the proviso, and they therefore cannot be treated as applying in a given case until a stage has been reached at which it is possible to say that the case is one in which the resumption " is made for the purposes of " s. 3 of the *War Service Land Settlement Act*, 1941, as amended. A resumption is not made, and therefore cannot be said to be made for these purposes, until the appropriate notification is published in the *Gazette* pursuant to s. 7. But although, for this reason, the proviso cannot apply until the resumption of the land has been effected, the only operation which sub-par. (i) purports to have, and the only operation which sub-par. (ii) purports to have so far as it relates to the assessment of value by an advisory board, is at an anterior point of time. Each sub-paragraph consists of a direction to be observed by the advisory board when assessing the value of the land, and it is evident from s. 3 that the assessment of value by the advisory board must precede the resumption. The value to be stated in the report must be the value at the date of the report. The assessment of that value by the advisory board having necessarily been completed before the resumption, the proviso attempts to achieve an impossibility when it purports, after the resumption has been effected, to give the advisory board a direction as to the manner in which it shall go about a task already performed. In relation to a determination of value by the Land and Valuation Court on appeal it is otherwise, because the case cannot

come before the Court until after the resumption has been effected, and, since the so-called appeal to the Court is not an appeal in the strict sense, the Court is not restricted as the board was to determining the value as at the date of the board's report. But the antithesis between the two sub-paragraphs of the proviso gives rise to an inference that, as a condition precedent to the operation of the proviso in any given case, the owner shall have an opportunity before the advisory board assesses the value, of agreeing or refraining from agreeing not to claim compensation in excess of the value as assessed by the board. It is impossible, however, for the owner to have that opportunity before the board assesses the value, because it makes its assessment before the land has been resumed and therefore before it can be known that the purposes of the resumption are those of s. 3 of the *War Service Land Settlement Act*, 1941. It is only in default of the owner's taking advantage of an opportunity to make the agreement mentioned in sub-par. (i) that sub-par. (ii) applies, even in relation to a determination of value by the Court; and since it is impossible that the opportunity should exist, it must follow that sub-par. (ii) cannot take effect.

Such, in outline, is the reasoning which led their Honours to conclude that the proviso to s. 4 (4) (b) cannot be given any operative effect. Counsel for the Minister complained that this conclusion frustrated the manifest intention of the legislature, but to meet the difficulties which weighed so heavily with the Supreme Court he had no suggestions to offer which it is possible to regard as satisfactory. His main argument was that the Supreme Court was in error in thinking that there could be no resumption "made for the purposes of section three of the *War Service Land Settlement Act*, 1941" until the notification of resumption appeared in the *Gazette*. He contended that a resumption is a process extending over a period, and that "made" should accordingly be interpreted as meaning "is in the course of being made". Alternatively he submitted, "made" should be read as "about to be made". The Act, however, lends no support to either contention. Section 7 provides that the resumption of land under the Act shall be "effected" by notification in the *Gazette*, and that "on such notification being made" the land shall vest in the Crown. Clearly enough, it is publication of the notification which is the making of the resumption. Resumption is not a process; it is an event occurring at the moment of the notification. Some help for the contrary argument was claimed from s. 10A, which gives the Minister, when any resumption is "made" and compensation is

H. C. OF A. 1952-1953.

MINISTER FOR LANDS (N.S.W.) v. PYE.

Dixon C.J. McTiernan J. Williams J. Fullagar J. Kitto J.

payable, a right within a month after the first determination of the amount of compensation by the Court, to elect whether the Crown will pay the amount or discontinue the resumption; but too much should not be read into the word "discontinue" in this context. The effect of an election to discontinue the resumption is stated by the section to be that the proclamation and all proceedings thereon and thereafter are to be treated as a nullity; and from this it is clear that what is referred to as a discontinuance is really a rescission *ab initio* of a resumption which has been made and which the section itself describes as having been made. Section 8 (1) was also relied upon as supporting the Minister's contention, but it merely creates another difficulty similar in kind to that which exists under s. 4 (4) itself.

If it were found impossible to give any intelligible meaning to the language of the proviso to s. 4 (4) (b) when considered in the context of the Act, the position would simply be that Parliament had failed to make known its intention, and the proviso would of necessity be treated as forming no part of the law. But if there is a meaning to be found in the proviso, it cannot be treated as void by reason of any difficulty in working it into the scheme of the Act. In truth the proviso makes very clear what the legislature intended to achieve by enacting it; and, that being so, the judicial function is to construe the proviso, and the Act as a whole, in such a manner as will overcome any difficulties there may be in the application of the proviso, and, by so doing, to effectuate the declared intention of Parliament. The search for a satisfactory construction must begin with an acceptance of some of the considerations which were relied upon in the judgment appealed from. The first of these considerations has already been mentioned. It is that the words "Where any such resumption has been made", in the introductory portion of the proviso, mean where there has been made in the *Gazette* a notification having the effect, by virtue of s. 7, of vesting land in the Crown. Thus it is clear that with respect to particular land the provisions contained in the sub-paragraphs of the proviso have no application until the resumption of the land is an accomplished fact. There must be a resumption actually made, and made for the purposes of s. 3 of the *War Service Land Settlement Act*, 1941, before either of the sub-paragraphs has any application. It is also clear that when land has been resumed it is too late for either of the sub-paragraphs to impose upon the advisory board an obligation to comply with its provisions in assessing the value of the land, for the board's assessment has then already been made.

And, finally, it is clear that the question whether the owner has or has not agreed not to claim compensation in excess of the value of the land as assessed by the advisory board must be answered as at the time of the making of the advisory board's valuation; for the answer to that question determines whether the board was precluded from exceeding the 1942 value or was precluded only from exceeding the 1942 value plus fifteen per centum.

But the difficulties which the Supreme Court felt to be insuperable arose in consequence of an assumption which the parties tacitly made and from which the argument on each side proceeded. The assumption was that the proviso is in the nature of a command to the advisory board, prescribing for it the basis upon which it shall perform its duty of valuation. That duty being a pre-resumption duty, a direction to be obeyed in performing it would necessarily be nugatory if contained in a provision so expressed as not to apply until after resumption. But if the intention had been to give a binding direction to the board, the appropriate place in the Act for the insertion of the proviso would have been at the end of par. (b) of s. 3 (1). It was not inserted there, no doubt for the very reason that it would then have been obviously incapable of any operation. The task to which the draftsman was addressing himself was, clearly enough, to limit the compensation payable in a particular class of cases. The class could not be described in any other way than by reference to the purposes of the resumption, and it was obvious therefore that the description must postulate a resumption. As the Act fixed the compensation payable at the amount of the value which had been assessed by the advisory board (unless altered on appeal), the draftsman was faced with the problem of inserting a provision which would apply only when a resumption had been actually made for the particular purposes in question, which therefore could not be inserted as a qualification upon s. 3 (1) (b) so as directly and as a matter of law to govern the board in making its valuation, and yet which would ensure that the board would in fact observe 1942 values in the cases to which the amendment was directed.

The problem was not altogether simple, and the solution which the draftsman adopted was to add a proviso to the sub-section which fixed the owner's compensation at the amount of the value as assessed by the advisory board, and to rely upon the practical effect which this would necessarily have upon the mind of the board when making its valuation. Thus the key to the problem was found in the fact that in actual practice the advisory board

H. C. OF A. 1952-1953.

MINISTER FOR LANDS (N.S.W.) v. PYE.

Dixon C.J. McTiernan J. Williams J. Fullagar J. Kitto J.

would be certain to know the purposes for which the resumption was likely to be made, and a proviso added to s. 4 (4) (b), while not a command obligatory upon the board when valuing, would nevertheless operate as notice to the board at that time that unless it limited its assessment by reference to the 1942 value, (or that value plus fifteen per centum if the owner had agreed not to appeal), the assessment would not be effective to determine the compensation in the event of the resumption being in fact made for the stated purposes. The board is therefore valuing on the hypothesis of a future resumption. For that reason (it may be mentioned in passing) the board's duty appears to be to estimate the value, not as at the date of its report, but (if it makes any difference) as at the anticipated time of resumption. The proviso to s. 4 (4) has the effect of requiring the board to forecast not only when the resumption is likely to take place if it is decided upon, but also whether the resumption (if made) will be for the purposes of s. 3 of the *War Service Land Settlement Act*. Theoretically, of course, it would be possible for a resumption to be made for purposes other than those which the board had anticipated, but this fact presented no real difficulty ; the presence of the proviso in the Act would be sufficient to ensure that the Minister, before resuming for the altered purposes, would call for a fresh report from the board, giving a valuation on the appropriate basis.

The draftsman's problem had another element in it : a fifteen per centum margin over 1942 values was to be available to the advisory board if the owner had agreed to abide by the board's assessment. The object, of course, was to give the owner an inducement to forego in advance his right of appeal and so to save the Crown the delay, trouble and expense which an appeal would entail. If this object were to be effectively served, the legislation must ensure that where a resumption was made for the purposes of s. 3 of the *War Service Land Settlement Act* not only the board but also the owner must have been in a position, at the time when the board was about to make its valuation, to foresee that the resumption would be made for those purposes. But again the draftsman was able to rest upon practical considerations. The advisory board, with a view to obtaining for the Crown the benefit of immunity from appeal, would naturally inform the owner that it was for the purposes of s. 3 of the *War Service Land Settlement Act*, 1941, that resumption was being considered, and would draw his attention to the terms or effect of the proviso. If he then agreed not to claim compensation in excess of the value as assessed by the

advisory board, his agreement would of course relate only to compensation for the contemplated resumption, and would have no effect in the event of his land being resumed for a purpose outside the proviso.

The draftsman, it must be remembered, was not preparing an amendment of the Act in the interests of the owner ; if he had been, he would have needed to provide a means whereby, before the making of the advisory board's valuation, the owner would be presented with an opportunity of electing whether or not he would forego his right of appeal in order to raise by fifteen per centum the maximum amount of his compensation. The draftsman made no attempt to do this, and the reason which suggests itself at once is that the primary object in view was to benefit the Crown, by equipping it with an inducement which it could offer the owner if it chose to do so, in order to procure his acceptance of the advisory board's valuation in advance. There is therefore no ground for reading sub-par. (i) of the proviso as conferring upon the owner an option which the Crown must give him an opportunity to exercise, and as therefore carrying an implication that the proviso as a whole shall not operate if it is impossible for the owner to know, before the board's valuation is made, that the case is one in which the option is available to him. The fact that quite obviously the owner cannot have this knowledge at any time before the resumption has been effected provides the strongest possible reason for refusing to make such an implication. But the fundamental answer to the argument in favour of the suggested reading of the proviso is that it overlooks the fact that the proviso qualifies, not the provision which creates the advisory board's duty to assess the value, but the provision which regulates the *quantum* of the compensation payable upon resumption. For this reason it cannot be read as an absurd and necessarily inefficacious attempt to turn back the hands of time, giving the owner an option after the time for its exercise has passed, and imposing upon the advisory board an obligation as to the manner in which it shall perform a duty already discharged.

In the present case the advisory board in its report of 4th May 1950 stated the estimated value of the respondents' lands assessed on the footing that the lands would shortly be resumed, that they would be resumed for the purposes of s. 3 of the *War Service Land Settlement Act*, and that the case was not one in which the owners had agreed not to claim compensation in excess of the value of the land as assessed by the board. Accordingly the values stated were kept down to the values the board would have assessed in

H. C. OF A. 1952-1953.

MINISTER FOR LANDS (N.S.W.) v. PYE.

Dixon C.J. McTiernan J. Williams J. Fullagar J. Kitto J.

respect of an identical resumption as at 10th February 1942, excepting the value of any improvements effected on the land since that date. The result of the values having been in fact estimated on this basis was that, the event having turned out as the board anticipated, and the case falling accordingly within sub-par. (ii) of the proviso to s. 4 (4) (b), the board's valuation is found to comply with the requirement of that sub-paragraph, and the principal provision of s. 4 (4) (b) therefore operates to fix the compensation at the value as assessed by the board, subject to appeal under s. 9. In relation to the appeal to the Land and Valuation Court, sub-par. (ii) applies whether or not the respondents were given, before the advisory board made its estimate of value pursuant to s. 3 (1) (b), an opportunity to accept the board's assessment as final, because the respondents did not in fact so agree and the case therefore satisfies literally and precisely the condition of the sub-paragraph. The Court was therefore bound to determine the value on the 1942 basis.

For these reasons we must allow the appeal. The position would have been very different if the resumption had been made under an Act of the Parliament of the Commonwealth, for the legislative power of the Commonwealth with respect to the acquisition of property for Commonwealth purposes is limited by the constitutional requirement of just terms. There is no similar limitation upon the legislative power of the State of New South Wales. The Parliament of the State, if its sense of justice allows it to do so, can authorize people's property to be taken or their services to be conscripted without just recompense, or indeed without any recompense at all.

The case stated by the Land and Valuation Court submitted three questions for decision. The first asked whether certain evidence which had been tendered on behalf of the respondents to the present appeal was relevant and admissible. The evidence was of two kinds, one relating to the question whether the respondents were in fact given an opportunity to agree that they would not claim compensation in excess of the advisory board's assessment, and the other directed to establishing the value of the resumed land as at the date of the resumption. For the reasons which have been given, neither class of evidence was relevant or admissible.

The second question asked whether the Court was bound on the hearing of the appeals to determine the values of the resumed lands (a) as at 10th February 1942, (b) as at the date of resumption, or (c) as at the date of the advisory board's assessment. The answer must be, as at 10th February 1942.

The third and last question does not arise, for it was asked on the assumption that the values should be determined as at the date of the advisory board's assessment.

Appeal allowed. Order of the Supreme Court of New South Wales of 22nd July 1952 *discharged. In lieu thereof order that the questions in the case stated by Sugerman J. be answered as follows:* (1) (*a*) *No.* (*b*) *No.* (2) (*a*) *Yes.* (*b*) *No.* (*c*) *No.* (3) *This question does not arise. Order that the case be remitted to the Land and Valuation Court. No order as to the costs of the appeal and of the case stated in the Supreme Court.*

Solicitor for the appellant, *F. P. McRae*, Crown Solicitor for New South Wales.

Solicitors for the respondents, *Dudley Westgarth & Co.*

J. B.