

[HIGH COURT OF AUSTRALIA.]

STATE ELECTRICITY COMMISSION OF
VICTORIA
DEFENDANT,

}
APPELLANT ;

AND

MCWILLIAMS
PLAINTIFF,

RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

H. C. OF A. *Acquisition of Land—Power of statutory corporation for the purposes of its Act—*
1953-1954. *Pursuant to direction by Governor in Council—Statement of purpose by Governor*
in Council—Conclusiveness—Scheme by corporation for setting up new township
1953, *—To house employees and persons supplying services etc. to employees—Acquisi-*
MELBOURNE, *tion for—Validity—State Electricity Commission Act 1928 (Vict.) (No. 3776),*
Oct. 8, 9, 12,
13 ;
1954,
SYDNEY,
April 7 ;
MELBOURNE,
May 20,
June 2.
Dixon C.J.,
Webb and
Kitto JJ.

Section 15 (1) of the *State Electricity Commission Act 1928* provides “ For
the purposes of this Act the Commission may acquire and take for the Crown
by agreement or compulsorily such lands in the township of Morwell or
within a radius of twenty miles therefrom as the Governor-in-Council from
time to time by Order directs ; and all lands so acquired and taken shall
thereupon become and be deemed to be unalienated lands of the Crown.”
Held, that the purposes referred to are those actuating the Governor in
Council and not the commission. Consequently, a direction specifying a
particular purpose as being the purpose of the acquisition is conclusive of
the actual existence of that purpose but leaves untouched the question of
law whether the specified purpose is a purpose of the Act.

W. H. Blakeley & Co. Pty. Ltd. v. The Commonwealth (1953) 87 C.L.R. 501
referred to, *Baiada v. Baulkham Hills Shire Council* (1951) 83 C.L.R. 344
distinguished.

The State Electricity Commission of Victoria had, pursuant to statute,
carried on for many years a large undertaking at Yallourn. In respect of a
certain area at that place, the commission was, under statute, deemed to be
a municipal council or local authority and was constituted, with certain
exceptions, the sole authority in relation to works of every description. In
March 1950, the commission’s undertaking was, in response to a growing

demand, being greatly extended. This extension required a large labour force, which could not be attracted and held unless adequate housing was provided. The district was remote from large centres of population and the housing available in the existing townships, including Yallourn, was far from sufficient. Accordingly, the commission ordered pre-cut houses from England and selected a tract of land for the laying out of a new settlement in the nature of a dormitory suburb to Yallourn. For this purpose it adopted a plan of sub-division which provided for streets, parks and sites for dwellings, shops, schools, churches, recreation facilities etc. It proposed to erect buildings appropriate to the sites, to construct the necessary watermains, drains and electric mains, and to let the dwellings to its employees engaged at Yallourn and to others whom it might be necessary to have in the area. A small portion of the land chosen was within the area in respect of which the commission was deemed to be the local authority, but the greater part of it fell outside that area. The whole area was within a radius of twenty miles of Morwell. For the purpose of acquiring the land chosen, the Governor in Council, on 7th March 1950, directed that "the State Electricity Commission of Victoria may for the purposes of the *State Electricity Commission Acts* acquire and take for the Crown (by agreement or compulsorily) an estate in fee simple in the land described in (a schedule) being land in the township of Morwell or within twenty miles therefrom." An owner of land which lay outside the area in respect of which the commission was deemed to be the local authority, but which was included in the direction, claimed that the acquisition of his land was invalid.

Held, that the direction by the Governor in Council not having stated a particular purpose, the Court was not precluded from investigating the purpose of the acquisition.

Held, further, that in the circumstances the provision of the houses and facilities was reasonably incidental to the main purposes of the Act and, consequently, that the acquisition was valid.

Decision of the Supreme Court of Victoria (*Dean J.*) reversed.

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APPEAL from the Supreme Court of Victoria.

Walter McWilliams commenced an action in the Supreme Court of Victoria as plaintiff on 25th October 1952 against the State Electricity Commission of Victoria, a body corporate incorporated by the *State Electricity Commission Act* 1928 (Vict.). The relevant portions of the statement of claim were as follows:—2. The plaintiff is and has at all material times been registered under the *Transfer of Land Act* 1928 as proprietor of all that piece of land comprising 54 acres 3 roods and 10.2/5 perches or thereabouts situate at Newborough. (The land was described). The plaintiff was at the time specified in the next succeeding paragraph in possession of the said land. 3. In or about the month of March 1950 by its

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officers, servants, or agents the defendant without the leave or licence of the plaintiff entered upon and unlawfully took possession of part of the said land, namely, an area comprising 23 acres 1 rood 39.2/10 perches (hereinafter called "the said area") being so much of the said land as lies south of the southern boundary of the land required for the Moe-Yallourn railway. The defendant has since the month of March 1950 continued to enter upon and retain possession of the said area and has erected thereon a number of dwelling houses being approximately forty in number and by reason thereof the plaintiff has suffered damage. 4. The defendant purported to so enter upon and take possession of the said area and erect the said dwelling houses in pursuance of the provisions of s. 15 of the *State Electricity Commission Act* 1928. 5. On or about 26th September 1951, the defendant gave to the plaintiff a notice dated the said date, purporting to be a notice to treat in respect of the said area in pursuance of the said Act and the *Lands Compensation Act* 1928. 6. At all material times it was and it is the intention and purpose of the defendant to use the said area as sites for the erection of dwelling houses thereon and letting the same for occupation as dwelling houses and for the construction and provision of streets, parks, shops, schools, churches, recreation facilities and other amenities for persons occupying the said houses and the defendant claims that the same is a purpose of the said *State Electricity Commission Act* and is a purpose for which it is lawfully authorized to acquire land. 7. The said purpose is not a purpose of the said *State Electricity Commission Act* and is not a purpose for which the defendant is lawfully authorized to acquire land. 8. The defendant intends to and unless restrained will continue to enter upon and retain possession of the said area and erect dwelling houses thereon and thereby the plaintiff will suffer damage and the plaintiff claims (i) a declaration that the said purpose is not a purpose of the *State Electricity Commission Act* and is not a purpose for which the defendant is lawfully authorized to acquire land. (ii) A declaration that the defendant, its officers, servants or agents were and are not entitled to enter upon and take possession of the said area or erect the said dwelling houses thereon or to construct or provide thereon streets, parks, shops, schools, churches, recreation facilities and other amenities. (iii) A declaration that the said purported acquisition and the notice referred to in par. 5 hereof are and were of no force and effect. (iv) An injunction restraining the defendant, its officers, servants or agents from continuing to enter upon and retain possession of the said area or erect the said dwelling houses thereon or to construct or

provide thereon streets, parks, shops, schools, churches, recreation facilities or other amenities. (v) An injunction directing the defendant to remove the said dwelling houses. (vi) Damages.

By its defence dated 6th November 1952, the defendant admitted the allegations contained in pars. 2, 4, 5 and 6 of the statement of claim, denied the allegations contained in par. 7 thereof and pleaded as follows. 3. Save that it admits that in or about the month of March 1950 it, acting by its officers and servants, entered upon and took possession of the said area and that it has retained possession of the said area and has erected or partly erected on the said area approximately sixty-one dwelling houses and has also erected or partly erected certain dwelling houses which are partly on the said area and partly on other lands not mentioned in the statement of claim herein it denies each and every allegation in par. 3 thereof. 6. It states that in addition to the notice to treat referred to in the said par. 5 it also served upon the plaintiff on or about 3rd March 1950 a notice to treat dated 2nd March 1950 in respect of the said area and in pursuance of the *State Electricity Commission Act* 1928 and the *Lands Compensation Act* 1928. 7. It states that on 7th March 1950 the Governor in Council by Order directed that the defendant might acquire and take for the Crown (by agreement or compulsorily) an estate in fee simple in (*inter alia*) the said area. 8. It states that it entered upon and took possession of the said area and has retained possession thereof pursuant to powers conferred on it by the *State Electricity Commission Act* 1928 and the *Lands Compensation Act* 1928 and that at the time of the said entry and at all other material times the said land had been acquired or taken by the defendant or alternatively by the defendant for the Crown pursuant to powers conferred on it by the said Acts. 10. It states that it intends and purposes to use the said land for the erection of dwelling houses for occupation by its employees engaged at Yallourn in or upon or about the following operations, namely the construction, maintenance and working of its electrical undertakings at Yallourn and the generation and supply by it of electricity and the opening, establishment, supervision, operation and maintenance of open-cut workings for the production of raw brown coal, briquetting works and by-products recovery works and for the provision of streets, parks and other amenities for the benefit of and use by such employees living in the said dwelling houses. It states further that no other proper or sufficient accommodation is available for such employees and that the provision of the proposed dwelling houses is essential in order to enable it to obtain and retain the number of employees needed for the said operations and

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in order to carry on or commence the said operations. 12. Save that it admits that it intends to retain possession of the said area and to erect and construct dwelling houses, streets, parks and other amenities thereon it denies each and every allegation in par. 8 thereof. 13. The said land is within a radius of twenty miles of the township of Morwell.

The action was heard before *Dean J.* who delivered an interim judgment on 18th November 1952 and a final judgment on 14th May 1953. The trial judge made the following order: 1. Declare that the entry of the defendant upon the plaintiff's land in March 1950 and the purported acquisition of such land by virtue of the notice to treat dated 3rd March 1950 were not justified by law and were not for any purpose of the *State Electricity Commission Acts* and are invalid and illegal. 2. Declare that the entry of the defendant upon the plaintiff's land in September 1951 and the purported acquisition of such land by virtue of the notice to treat dated 26th September 1951 were not for any purpose of the *State Electricity Commission Acts* and are invalid and illegal. 3. Direct that an inquiry be held before a judge of this Court as to the value of the plaintiff's land on 3rd March 1950. 4. Order defendant to pay to plaintiff the amount of such value as ascertained upon such inquiry together with interest at the rate of four per centum per annum upon such amount as from 3rd March 1950 until the date of payment of such amount and interest. 5. Order plaintiff upon such payment to execute a transfer of the said land to the defendant and to do all such other acts as may be necessary in order to enable title to the said land to be vested in defendant free of all encumbrances. 6. Order defendant to pay the plaintiff his costs of this action down to this date which I direct to be taxed, such costs to include pleadings and discovery. The costs of the inquiry as to damages are reserved until further order.

From this decision in pursuance of leave granted to both parties by the trial judge under s. 35 (1) (a) of the *Judiciary Act* 1903-1950, the defendant appealed to the High Court of Australia and the plaintiff gave notice of cross-appeal on the question of damages.

D. I. Menzies Q.C. (with him *G. H. Lush*), for the appellant. It is not disputed that the notice to treat dated 3rd March 1950 was invalid because it was not given in pursuance of any direction of the Governor in Council, and that accordingly the commission was a trespasser on the plaintiff's land until 26th September 1951, the date of service of the second notice to treat. Under s. 15 (1) of the *State Electricity Commission Act* 1928, power to acquire land

within a radius of twenty miles of the township of Morwell is not in any way limited by the powers and purposes of the State Electricity Commission. The acquisition is for the Crown which may then direct that the commission have the land. But it need not so direct, and, in that event the land remains unalienated land of the Crown. The "purposes of the Act" can not be determined by reference to the powers of the commission. The trial judge was wrong in treating "for the purposes of this Act" as going no further than "for the carrying out of the powers given by this Act." The words are not a condition on the exercise of the power but constitute merely a direction to the responsible authority for consideration in determining whether there shall be an acquisition.

[DIXON C.J. referred to *Werribee Council v. Kerr*, per Isaacs J. (1).]

Frequently a declaration by the Executive of the purpose of an acquisition is made conclusive. [He referred to *W. H. Blakeley & Co. Pty. Ltd. v. The Commonwealth* (2).] The acquisition is by the Governor in Council. *Minister for Public Works v. Duggan* (3) is distinguishable because the council in that case merely obtained the approval of the Governor in Council. *Criterion Theatres Ltd. v. Sydney Municipal Council* (4) is more in point. The purpose is that of the Governor in Council because the commission may never get the land. The provision by the commission of housing for employees is not expressly authorized by the *State Electricity Commission Act* 1928 but arises either from the general words in s. 43 (1) and s. 47 (1) (g) or by implication. The only authority on the powers of the State Electricity Commission is *Campbell v. State Electricity Commission of Victoria* (Supreme Court of Victoria, Irvine C.J., Mann and McArthur JJ. 15th December 1927 unreported) which decided that the commission did not have power to conduct the business of licensed victualler. It is not relevant in this case. The trial judge accepted the view that the commission may provide accommodation in order to attract labour, but held that the particular standard of accommodation went beyond what was necessary. It is submitted that it is not for the court to substitute its own opinion for the opinion of the commission with regard to the suitability of accommodation, unless that opinion is so obviously unreasonable that it could not be regarded as incidental to any power vested in the commission. [He referred to *Marquess of Clanricarde v. Congested Districts Board for Ireland* (5); *Werribee Council v. Kerr*, per Isaacs J. (6).] It is not inconsistent with the

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(1) (1928) 42 C.L.R., at pp. 17 et seq.

(2) (1953) 87 C.L.R. 501, at p. 521.

(3) (1951) 83 C.L.R. 424.

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

(5) (1914) 31 T.L.R. 120

(6) (1928) 42 C.L.R. 1, at pp. 17-20.

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view put that s. 20 of the *State Electricity Commission Act* 1928 (Vict.) as amended by s. 13 of the *State Electricity Commission (Yallourn Area) Act* 1947 (Vict.) grants extensive town-planning and municipal functions to the commission with respect to an area of land not in question in this case. Section 20 is a grant of power and is not a denial of the same powers with regard to other places.

Gregory Gowans Q.C. (with him *M. V. McInerney*), for the respondent. The expression "for the purposes of this Act" in s. 15 (1) of the *State Electricity Commission Act* 1928 means "for such purposes as may be effectuated by turning private land into Crown land". An acquisition, as in this case, for the purpose of permitting the commission to build a township and demise the land to its employees is not for a purpose of the Act. The test whether a particular activity is a purpose of a statute authorizing resumption of land has been frequently laid down. [He referred to *Attorney-General v. Great Eastern Railway Co.* (1); *Deuchar v. Gas Light & Coke Co.*, per *Pollock* M.R. (2); *Attorney-General v. Racecourse Betting Control Board*, per Lord *Hanworth* M.R. (3), per *Maugham* L.J. (4).] Alternatively the expression means "purposes expressed in the Act". [He referred to *James v. Cowan*, per *Isaacs* J. (5).]

[KITTO J. referred to *Kenneally v. Berman* (6).]

[WEBB J. referred to *Clements v. Bull* (7).]

The expression is a condition on the exercise of the power. [He referred to *Shrimpton v. The Commonwealth* (8).] If there are no limitations on the power then it can be said (a) that it is incidental to the power to employ men to provide homes for them (b) that it is incidental to provide shops for persons providing services for employees (c) that it is incidental to provide sites for shops and to demise those shops to traders. This goes beyond what pertains to the relationship of employer-employee at a number of points (1) Where the provision of homes is not a term of the employment but merely makes the area more attractive to labour. (2) Where the provision of homes goes beyond providing temporary shelter while employees are working. In doing the acts proved in this case, the commission has moved from the status of employer to that of landlord. [He referred to *Manchester &c. Railway Co. v. Guardians of Barnsley Union* (9); *Elliott v. London County Council*, per *Lawrance* J. (10).] The test of what is incidental to the

(1) (1880) 5 App. Cas. 473.

(2) (1924) 2 Ch. 426, at pp. 431-432.

(3) (1935) 1 Ch. 34, at pp. 49-50.

(4) (1935) 1 Ch., at pp. 59, 64-65.

(5) (1930) 43 C.L.R. 386, at pp. 399-400, 405-406, 407, 410-411, 412-413.

(6) (1949) V.L.R. 362.

(7) (1953) 88 C.L.R. 572.

(8) (1945) 69 C.L.R. 613.

(9) (1892) 67 L.T. 119.

(10) (1899) 2 Q.B. 277, at p. 281-282.

power is to be ascertained objectively and not subjectively by the commission. Neither *Marquess of Clanricarde v. Congested Districts Board for Ireland* (1) nor *Werribee Council v. Kerr* (2) touches this question. [He referred to *Craies on Statute Law*, 5th ed. (1952), p. 261; *Baroness Wenlock v. River Dee Co.*, per Lord Watson (3); per Lord *Fitzgerald* (4).]

[DIXON C.J. referred to *Small v. Smith* (5).]

The respondent is prima facie entitled to an injunction to restrain the commission from trespassing on the land in future. Under *Lord Cairns's Act* (21 & 22 Vict. c. 27, s. 2) now the *Supreme Court Act* 1928 (Vict.), s. 62 (4) damages may be granted in lieu of the injunction. The injunction having been refused, damages should be awarded on the basis that the trespass will continue for ever.

[KITTO J. But the Attorney-General may obtain an injunction against the commission to restrain it from its ultra vires activities. If that happened the respondent could resume possession of his land.]

Having regard to the fact that the commission has spent a great deal of money in building etc. on the land, it would not be realistic to assume that it will vacate it. [He referred to *Fritz v. Hobson* (6); *Ball v. Ray* (7); *Leeds Industrial Co-operative Society Ltd. v. Slack*, per Viscount *Finlay* (8); per Lord *Sumner* (9).]

G. H. Lush, in reply.

Cur. adv. vult.

The following written judgments were delivered :—

April 7, 1954.

DIXON C.J. AND KITTO J. This is an appeal by leave against an interlocutory judgment of the Supreme Court of Victoria (*Dean J.*). The judgment declared that the entry of the appellant commission upon certain land of the respondent and the acquisition thereof by the commission by virtue of one or other of two notices to treat were not justified by law and were not for any purpose of the *State Electricity Commission Acts* (Vict.) and were invalid and illegal. It directed an inquiry as to the value of the land on 3rd March 1950 (the date of service of the first notice to treat), and ordered that the commission pay the amount of such value with interest to the respondent and that the latter thereupon execute a transfer of the land to the commission.

(1) (1914) 31 T.L.R. 120.

(2) (1928) 42 C.L.R. 1.

(3) (1885) 10 App. Cas. 354, at p. 362.

(4) (1885) 10 App. Cas., at p. 363.

(5) (1884) 10 App. Cas. 119.

(6) (1880) 14 Ch. D. 542, at p. 557.

(7) (1873) 30 L.T. 1.

(8) (1924) A.C. 851, at p. 859.

(9) (1924) A.C. 851, at pp. 868-869.

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The land in question is an area of about twenty-three acres, part of a larger area of about fifty-four acres which the respondent owned. It is situate about three and a half miles from Yallourn, a township established by the commission in a district in which it carries on extensive activities in performance of its functions under the *State Electricity Commission Acts* (Vict.). A brief account must be given of those Acts and of what had been done under them when the events occurred which gave rise to this litigation.

On 7th January 1919, the Royal assent was given to the first Act passed to enable the brown coal area in the vicinity of Morwell in southern Victoria to be developed for the generation and supply of electricity. This was the *Electricity Commissioners Act* 1918 (No. 2996), which provided for the constitution of a body corporate consisting of three electricity commissioners (s. 3), to administer the Act subject to ministerial control (s. 8), and also to administer the *Electric Light and Power Act* 1915 (Vict.) governing the supply of electricity generally (s. 9). The commissioners were required as soon as practicable to prepare and submit to the minister a scheme, with all necessary plans, specifications, estimates and particulars, for a coal mining and electrical undertaking to be undertaken by them in the neighbourhood of Morwell and the distribution of electricity therefrom; and the Governor in Council was authorized, upon receipt of a report upon the scheme, to approve of the undertaking (s. 10), which would then be an electrical undertaking as defined in the Act (s. 2). It was provided that subject to the Act, the commissioners might on behalf of His Majesty (*inter alia*) construct, maintain and work any electrical undertaking as defined in the Act, supply electricity to any Commonwealth or State government department or any public body or institution, supply electricity in bulk to any undertaker or statutory corporation, and in connection with any such undertaking carry on any business normally associated with such an undertaking (s. 12). Their powers included a power to encourage and promote the use of electricity and especially the use thereof for industrial and manufacturing purposes (s. 11 (b)). For the purposes of the Act they were empowered to acquire and take for the Crown by agreement or compulsorily such lands in the township of Morwell or within a radius of twenty miles therefrom as the Governor in Council should from time to time by order direct; and it was provided that all lands so acquired and taken should thereupon become and be deemed to be unalienated lands of the Crown (s. 13 (1)). A general power was also given to the commissioners to purchase by agreement or take compulsorily any land which they were authorized

to acquire and take under the Act or which was required for the purposes of the Act (s. 28 (1)). The *Lands Compensation Act* 1915 (Vict.) (which provides machinery for the acquisition of land and regulates the purchase money or compensation payable) was incorporated with the Act subject to certain adaptations (s. 28 (2)); but, (doubtless because it was considered the only practicable way of ensuring that compensation payable for land acquired in the Morwell district should not be increased by reason of the passing of the Act or anything done or expected to be done thereunder) it was provided that, notwithstanding anything in the *Lands Compensation Act*, the purchase money or compensation payable for or in respect of any lands taken under s. 13 (1) (that is, the lands in or within twenty miles of Morwell) should not exceed the value thereof on the day of the commencement of the then present session of Parliament, with such addition to such value as should be due to substantial and permanent improvements effected after that day, and that no addition should be made by reason of any actual or prospective expenditure by the electricity commissioners (s. 13 (2)). In addition to a wide variety of powers which need not be mentioned in detail, power was conferred upon the commissioners to open, establish, supervise, operate and maintain State coal mines (s. 26), and to do all such acts, matters and things as should be necessary or incidental to the execution and discharge of their powers, duties and authorities under the Act (s. 27).

Two years later there was passed the *State Electricity Commission Act* 1920 (Vict.) (No. 3104), which re-constituted the body corporate, altered its name to the State Electricity Commission of Victoria (s. 5), and conferred express power to open, establish, supervise, operate and maintain open-cut workings for the production of raw brown coal, briquetting works and by-product recovery works (s. 9). It would seem probable that the scheme for a coal-mining and electrical undertaking had been prepared pursuant to s. 10 of the 1918 Act, (though perhaps it had not been approved by the Governor in Council, for the 1928 Act contained a special provision (s. 12) declaring it to have been so approved); but at least the Governor in Council had made orders directing the acquisition of lands in or within twenty miles of Morwell under s. 13 of the 1918 Act and these orders had been acted upon, for the Act validated any such orders and provided that the subject lands should be deemed to have been duly acquired and taken for the Crown and to have become unalienated lands of the Crown (s. 10). According to the affidavit of Mr. Price (par. 2 (c)), this was considered necessary because the orders had not all stated that the acquisitions

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were to be "for the Crown". But the most important feature of the 1920 Act for present purposes is that it contained a group of new provisions (ss. 11 to 14 inclusive) which provided for the preparation by the commission of a general plan and description of a scheme for the erection and establishment by the commission of a township at Morwell. The Governor in Council was authorized, if he approved the scheme, by order to specify the boundaries of the area to be included in the scheme and declare that such area should cease to form portion of the municipal district of any municipality in which the area was theretofore included. The commission was given a variety of powers for the purpose of the erection and establishment of a township in accordance with the scheme or with any modification thereof, modifications being thereby authorized (s. 11 (8)). It was given the care and management of all public highways etc., within the area, and the Governor in Council was authorized to extend to the area many of the provisions of the *Local Government Act* 1915 (Vict.) with such alterations, modifications and substitutions as might be necessary or expedient.

Some other Acts having been passed which are of no present materiality, the law relating to the commission was consolidated in the *State Electricity Commission Act* 1928 (No. 3776). The scheme for an electricity undertaking in the neighbourhood of Morwell was declared, as has already been mentioned, to have been approved by the Governor in Council (s. 12). In fact the undertaking had already been established, together with open-cut workings for the production of raw brown coal and briquetting works. For the accommodation of employees, houses and other buildings had been erected, there being until then no habitation in the area except the dwellings of a few farmers. The need for housing must have been constantly growing, for the works were greatly extended from time to time. But the scheme contemplated by the 1920 Act for the erection and establishment of a new township at Morwell had not yet, it seems, been approved by the Governor in Council. The 1928 Act accordingly provided that as soon as that scheme should be approved, and the area to be included in it specified and declared, the area should cease to form a portion of any municipal district in which it was formerly included (s. 20 (1)). Other provisions were made which were similar to those which had appeared in ss. 11 to 14 of the 1920 Act. The general power of acquisition and the incorporation and adaptation of the *Lands Compensation Act*, which had first appeared in s. 28 of the 1918 Act, were repeated in s. 44. The special power of acquisition with respect to lands in the township of Morwell or within twenty miles

therefrom, and the limitation of compensation for such lands by reference to 1918 values re-appeared in s. 15, the actual date (9th July 1918) being given instead of the reference to the day of commencement of the relevant session of Parliament. The power to do all necessary or incidental acts, matters and things was found in the new s. 43.

In due course the new township was established and became known as Yallourn. The only subsequent Act which need be noticed here is the *State Electricity Commission (Yallourn Area) Act* 1947 (Vict.) (No. 5219), which came into force by proclamation on 24th September 1947. It provided (s. 13) for the definition by proclamation of the Yallourn works area, described as the area occupied by the works of the commission at Yallourn, and for the definition, also by proclamation, of a portion of the Yallourn works area as the Yallourn town area. For the latter area the Act set up the Yallourn Town Advisory Council with limited powers to make by-laws and to make recommendations to the commission; and in relation to the Yallourn works area it made a new provision by way of substitution for s. 20 of the 1928 Act. The new s. 20 excluded not only, like its predecessor, the township, but the whole Yallourn works area from any municipal district. It provided that for the purposes of certain Acts the area should be deemed to be a borough, and that in respect of the area the commission should be deemed to be a municipal council or a local authority; and it constituted the commission the sole authority in relation to works of every description (except roads under the control of the Country Roads Board) in the area, with the powers of a municipal council of a borough as if the area were its municipal district. In addition, the commission was expressly given wide powers with respect to (*inter alia*) the provision, construction and maintenance of buildings, houses, streets, electricity and gas supplies, sewerage and drainage works, and other like works and services in the Yallourn works area, and power to beautify any part of the area and make any part suitable for recreation and other public purposes: sub-s. (4). The Governor in Council was empowered by proclamation to re-define the Yallourn works area from time to time by proclamation: sub-s. (5).

By March 1950 a serious problem had arisen. The report of a Royal Commission in 1947 had strongly advocated a vast increase in the capacity of the commission's undertaking for the generation of electricity, in order to meet a mounting demand which was anticipated in view of the rapidly expanding industries of Victoria. The commission was engaged in extending its enterprise accordingly.

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It was planning substantial extensions to its generating station ; it was about to erect a second briquetting plant ; and it proposed to establish an additional open-cut coal mine. All this necessitated a greatly increased supply of labour, and labour could not possibly be attracted and held unless adequate housing were provided. The district is remote from the large centres of population, and the housing available in the existing townships including Yallourn was far from sufficient. It had become apparent, moreover, that the Housing Commission, to which repeated and urgent requests for assistance had been made, was quite unable to meet the need, though it had erected a large number of homes and planned to erect many more. The seriousness of the position is indicated by the fact that a report made in July 1949 by the commission's property officer stated the number of unsatisfied applications for homes as 450, which represented an increase of 132 in six months.

In this situation, the commission turned to a course of self-help. It ordered pre-cut homes from England, and selected a tract of land for the laying out of a new settlement, to be called the Newborough settlement, in the nature of a dormitory suburb of Yallourn. It adopted a subdivisional plan which provided for streets, parks, and sites for dwellings, shops, schools, churches, recreation facilities and other amenities. It proposed to erect buildings appropriate to the sites, to construct the necessary watermains, drains and electric mains, and to let the dwellings to the commission's employees engaged at Yallourn and others whom it might be necessary to have in the area. A small portion of the tract chosen for the settlement was within the Yallourn works area, but the greater part of it fell outside that area. This was unavoidable, as all other vacant land within the area either contained coal which the commission intended to mine in the future or was unsuitable for the purposes of a housing area by reason of its height or other physical characteristics. The whole of the land to be subdivided, however, was land to which the power of acquisition conferred by s. 15 of the 1928 Act extended, for it was less than twenty miles, and indeed less than eight miles, from Morwell.

The respondent was the registered proprietor under the *Transfer of Land Act* 1928 (Vict.) of about fifty-four acres of land outside but closely adjacent to the Yallourn works area, and about twenty-three acres of this land, being the portion south of a line described as the southern boundary of the land required for the Moe-Yallourn railway line, was included in the commission's subdivisional scheme for the Newborough settlement. On 3rd March 1950, the commission served the respondent with a notice to treat relating to this

twenty-three acres, and its officers and servants then entered upon and took possession of that area. The Governor in Council, however, had not yet given any direction under s. 15 which applied to the respondent's land. Such a direction was given for the first time on 7th March 1950, when it was directed that "the State Electricity Commission of Victoria may for the purposes of the *State Electricity Commission Acts* acquire and take for the Crown (by agreement or compulsorily) an estate in fee simple in the land described in (a schedule), being land in the township of Morwell or within twenty miles therefrom". No further notice to treat was given to the respondent until 26th September 1951; but on that date he was served with the second notice to treat. Each notice to treat informed the respondent that his twenty-three acres would be required by the commission for the purposes of the *State Electricity Commission Acts*, and that in the exercise of the powers conferred upon the commission by those Acts it was the commission's intention to enter upon, take and use the land referred to. It also stated the commission's willingness to treat for the purchase of the land and as to the compensation to be made to the respondent, and it otherwise complied with the requirements of s. 9 of the *Lands Compensation Act* 1928 (Vict.).

It is not disputed that, if the acquisition of the respondent's land was within the authority conferred by s. 15 (1) of the *State Electricity Commission Act* 1928, the second notice to treat, given, as it was, after an appropriate direction by the Governor in Council, was effectual as a notice to lead to the acquisition of the land for the Crown by the commission by virtue of the provisions of the *Lands Compensation Act* as incorporated with adaptations in the *State Electricity Commission Acts*. The question for decision therefore turns in the main upon the provisions of s. 15 (1) which is in these words:—"15. (1) For the purposes of this Act the Commission may acquire and take for the Crown by agreement or compulsorily such lands in the township of Morwell or within a radius of twenty miles therefrom as the Governor in Council from time to time by Order directs; and all lands so acquired and taken shall thereupon become and be deemed to be unalienated lands of the Crown".

The foundation of the respondent's case is a submission that the purposes for which the commission desired his land are not purposes of the Act within the meaning of s. 15, and that the commission therefore had no power of acquisition under the section. With this contention Dean J. felt constrained to agree. The learned judge held that the crucial question was whether the purpose of the intended acquisition could fairly be regarded as incidental to

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or consequential upon the purposes directly authorized by the statute. That question his Honour answered in the negative because he took the view that, although it was reasonably incidental to the main purposes of the Act to provide homes for the commission's employees and the employees of persons contracting with the commission, and also for shopkeepers and others who might provide services for such employees, it was going beyond the limits of the reasonably incidental to acquire tracts of country, to lay out and construct streets according to the commission's own design, to provide water, electricity, drainage and other services, and to set aside land for schools, churches, playgrounds, parks and recreation reserves as had been done on the land embraced in the commission's Newborough scheme of settlement. This conclusion his Honour considered to be fortified by a consideration of s. 20 of the *State Electricity Commission Acts*, as enacted by the 1947 Act.

The learned judge was clearly right in holding that in the circumstances the provision in the manner proposed of homes for employees and persons ministering to the ordinary needs of employees was fairly incidental to the effectuation of the purposes for which the Acts provided. Indeed, it is not too much to say that in the situation proved to have existed in the Morwell district in 1950, it was painfully clear that an adequate performance of the commission's statutory functions over the next few years would be impossible unless housing on the scale contemplated by the commission were provided. But that entailed, as a matter of practical necessity, the establishment of a new settlement. The object in view, to attract and retain, by means of suitable housing provision, a large body of employees close to a scene of expanding industrial activity in a country district, simply could not be achieved unless the living conditions to be provided conformed to a reasonable extent with the accepted standards of life in a modern community. The orderly arrangement and convenience of access which planned streets provide, the lighting, heating and drainage services which are now regarded as necessities, reasonable facilities for education, recreation and religious observance—all these things were inevitably involved in the provision of the kind of housing which employees would be likely to regard as acceptable. It was submitted on behalf of the respondent that, while the provision of houses for employees may be reasonably incidental to the conduct of such an undertaking as the commission had at Yallourn, to add the amenities of a town is (as it was put) only incidental to the incidental, and is too remote from the conduct of the undertaking to be regarded as

incidental to it. But it is quite an untenable proposition that in a case such as this the frontiers of the incidental are reached when a house is built. The short answer to it in this case is that, in the circumstances which are proved to have confronted the commission, the establishment of the Newborough settlement, as a whole and with all its features, was an appropriate means, and the means which practical considerations were reasonably considered to dictate, for providing the living conditions without which the commission could not hope to obtain the labour force necessary for its purposes.

Dean J. thought that confirmation for the view he took was to be found in a consideration of the specific provisions which the legislature had made with respect to the township of Yallourn. He gathered from s. 20 that the express power to establish Yallourn was subject to two limitations: it was exercisable only in respect of land within the Yallourn works area, and the land utilized was excluded from its existing municipal district so that no conflict could arise between the commission and a municipality by reason of duality of authority. His Honour inferred that there could not be an implied power to do the same or similar things in respect of land lying outside the Yallourn works area and within a municipal district. If the acquisition of the respondent's land were held to be valid there could be no need, he said, to re-define the Yallourn works area in order to enable the commission to exercise similar powers outside the area as at present defined. The commission could disregard the area at will, and the exercise of the powers of the municipality concerned would be seriously affected.

It will be remembered that the statutory provisions which authorized the establishment of the township of Yallourn were s. 11 of the 1920 Act and the original s. 20 of the 1928 Act, and that it was not until a new s. 20 was substituted by the 1947 Act that the Yallourn works area was provided for. It is true, however, that first the township area, and ultimately the whole works area, were removed from the authority of the local municipality, and that the commission was made in respect of them the repository of local government powers and responsibilities, and was expressly given wide powers of a kind appropriate for the construction of new settlements. It is also true that if, before the commission took steps to found the Newborough settlement, the Governor in Council had re-defined the Yallourn works area so as to include in it the land chosen for the settlement, these general powers and responsibilities and these specifically conferred powers would have extended

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to that land. But it does not by any means follow that there should be attributed to the legislature by implication an intention to deny to the commission a power to provide housing by the establishment of new townships in areas outside that in which it is made the local government authority. It is easy to see strong practical reasons why it might be thought desirable to exclude the ordinary form of municipal government from the township which the commission had built as the centre of its local administration, and indeed from the whole area of the Yallourn works, and to make the commission autonomous with respect to local matters within these geographical limits. But although, as the evidence shows, the commission in exercise of its powers, has established thermal and hydro-electrical undertakings in other country districts of Victoria, the legislature has not seen any reason to interfere with the ordinary forms of local government elsewhere than within the area of the works at Yallourn. There is no sufficient ground for inferring from s. 20 or from the considerations to which his Honour adverted, an intention to restrict in any way the powers of the commission in places outside that area.

The foregoing reasons suffice to entitle the commission to succeed on this appeal. It is desirable, however, to refer to an independent ground upon which the commission claimed to be entitled to the judgment of the court, namely that on the true construction of s. 15 (1) the direction given by the Governor in Council should be accepted as establishing conclusively that the purpose of the acquisition was a purpose of the Act. It may be accepted that if the direction given by the Governor in Council in the present case had stated a particular purpose falling within the purposes of the Act there would have been an end of the matter. Cases such as *Baiada v. Baulkham Hills Shire Council* (1) must be put on one side as dealing with a different type of legislation, under which a body such as a municipal council is given power to acquire land, and the power is made subject to the two conditions that the purpose for which the body desires the land is a purpose of the Act and that the Governor's approval of the acquisition is obtained. This Court has held on several occasions that legislation of that kind has not made the proclamation or other expression of the Governor's approval conclusive as to the purpose in fact entertained by the acquiring body. But under s. 15 the decision to acquire is the decision of the Governor in Council. He does not approve, he directs. The acquisition is an acquisition "for the Crown", and

(1) (1951) 83 C.L.R. 344.

its effect is that the land becomes unalienated land of the Crown. The commission obtains no title itself, unless by virtue of a subsequent grant from the Crown: (s. 16 (2)). The provision is that the commission "may" acquire and take the lands for the Crown, but a duty to do so is to be gathered from the nature of a direction, especially as it is a direction by the Governor in Council to a statutory body which is subject to executive control in its administration of the Act (s. 10) and is established to perform functions on behalf of the Crown (s. 14). While it is doubtless true that in practice the initial selection of land for acquisition will be made by the commission, the acts which the commission has to do under s. 15 are procedural only, and the commission is but the instrument chosen to carry out the decision of the Governor in Council. In view of these considerations, the introductory words of the section, "For the purposes of this Act", must be intended to be applied to the purposes actuating the Governor in Council, and not to the purposes of the commission. If a direction of the Governor in Council specifies a purpose as being the purpose of the acquisition, no court will go behind the statement, for the good faith of the Governor in Council cannot be questioned in the courts. The only question as to purpose which then remains for judicial decision is the question of law, whether the specified purpose is a purpose of the Act: *W. H. Blakeley & Co. Pty. Ltd. v. The Commonwealth* (1). In the present case, however, the direction given did not refer to any particular purpose, but directed the acquisition "for the purposes of the *State Electricity Commission Acts*". It must be taken from this that the direction was given for a purpose which the Governor in Council considered to be within the purposes of the Act; but the document gives no information as to the nature of that purpose so as to enable the courts to decide whether the view taken as to the scope of the purposes of the Act was correct. The only material from which the actual purpose may be inferred consists of the evidence already discussed, as to the situation which had arisen and the manner in which an endeavour was made to cope with that situation. The commission's contention that the direction of the Governor in Council precludes investigation of the purpose of the acquisition cannot be upheld.

The appeal should be allowed, and it follows that the cross-appeal, which relates only to the damages to be awarded to the respondent in the event of the acquisition being held invalid, should be dismissed. The judgment below should be set aside, and in the action there should be judgment for the defendant.

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WEBB J. With great respect, I think that the learned trial judge, having held that the erection of houses was necessary should have held further that the provision of modern lighting, drainage, sewerage, streets, schools and churches was also necessary to attract the required labour force. This was because not only one or two houses but whole blocks of houses were necessary in the reasonable judgment of the commission ; and they were required immediately. The educational and spiritual needs of the workers and their families are not the concern of the commission ; but schools and churches may well be essential if the necessary labour is to be secured and retained. Further, without lighting, drainage and streets, the houses would be little better than slums, which there certainly is no occasion or power to create. The *expressio unius* rule which his Honour applied because a township with local government was expressly authorized for Morwell might have prevented the constitution of a local government for this particular area ; but it did not prevent the provision of houses, as indeed his Honour held. But, as Mr. *Gowans* perceives, if houses were authorized, so too were drainage, streets and the rest, and so he attacks the judgment as going too far. His argument is that the employment of labour is necessarily incidental to the operations of the commission, but that the provision of houses for employees is merely incidental to what is incidental and so beyond power. But Mr. *Gowans* also relies on the express provisions for Morwell. However it is only a township in the full sense of the term—the composite conception with its local government—that the *expressio unius* rule negatives, if it applies, which I doubt. After all, it is only a question of legislative intention. Did the special authority for Morwell indicate that the legislature intended necessary works in this and other areas outside Morwell not to be undertaken or to be abandoned if a modern housing settlement or even a township were required for their completion ? In my opinion, clearly not. Moreover, needs vary with time, place and circumstances. What was required for Morwell could also be required elsewhere sooner or later.

The full provision made for Morwell is, I think, an indication of what the legislature thought to be the extent of the commission's needs ; and what was necessary for Morwell could become necessary in other places. In the circumstances the legislative affirmation in respect of Morwell did not amount to a legislative denial in respect of other places, regardless of the needs of the commission in those places.

I would allow the appeal and necessarily dismiss the cross-appeal.

As to the cross-appeal, however, his Honour found the resumption invalid ; but gave judgment for damages to be assessed as from the date of the trespass and not as at the date of the judgment. In the latter case, the damages would be based on the knowledge of the commission's activities in the locality and be greater for that reason. His Honour's reasons for so doing appear to be based on the nature of the terms of an appropriate injunction in the particular circumstances ; but I cannot see how the terms of any appropriate injunction against the commission could properly have influenced the choice of the critical date.

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After hearing further argument on 20th May 1954 the Court made the following order.

Appeal allowed with costs. Cross-appeal dismissed. No order as to the costs of the cross-appeal. Discharge so much of the order of the Supreme Court of Victoria dated 14th May 1953 as follows after the first declaration therein contained. Vary the said declaration by omitting the words " and were not for any purposes of the State Electricity Commission Acts and are invalid and illegal " and by substituting therefor the words " by reason of the absence of any prior direction by Order in Council under s. 15 of the State Electricity Commission Act 1928 ". In lieu of so much of the order as is discharged as aforesaid order as follows :—

June 2.

- (1) *Order and adjudge that the plaintiff in respect of the defendant's entry and trespass upon the lands mentioned in par. 3 of the statement of claim on and from 3rd March 1950 until 26th September 1951 rendered unlawful by the absence aforesaid of such prior direction do recover from the defendant damages to be assessed.*
- (2) *Direct that such damages be assessed by a judge of the Supreme Court.*
- (3) *Refer it to the Taxing Master of the Supreme Court :—*
 - (a) *to tax the costs of the plaintiff of the action up to the date of this order of the High Court except so far as they are increased by the inclusion therein of causes of action and claims to relief other than the cause of action in respect of the defendant's said entry and trespass on and from 3rd March 1950 until 26th September 1951 rendered unlawful*

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as aforesaid by the absence of such prior direction and the claim for damages for such entry and trespass,

(b) *to tax the costs of the defendant of the action up to the date of this order of the High Court so far as they are occasioned by the inclusion of such causes of action and claims to relief.*

(4) *Order that such costs when taxed be set off and that the Taxing Master certify the balance due to the party entitled thereto and that judgment for the recovery of the amount of such balance be entered in favour of such party accordingly. For the purposes of such taxation let the costs include the costs of pleadings and discovery and the costs of the attendances in chambers on 18th February 1953 and 30th March 1953, each such attendance to be certified as a matter proper for the attendance of counsel.*

(5) *Liberty to apply to the Supreme Court.*

Solicitors for the appellant, *Norval H. Dooley & Breen.*

Solicitors for the respondent, *Mahony, O'Brien & Duggan.*

R. D. B.