[HIGH COURT OF AUSTRALIA.]

THE QUEEN . . . . . APPELLANT;

AND

RIGBY AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1956.

BRISBANE. *July* 19, 20, 23, 24; *Aug.* 1.

Dixon C.J., McTiernan, Webb, Kitto and Taylor JJ.

Crown Lands (Q.)—Land Appeal Court—Appeal from Land Court—Appeal a re-hearing—Case stated—Principles regulating—The Land Acts 1910 *to* 1953 *(Q.), ss.* 36, 154, 155.

An appeal to the Land Appeal Court under *The Land Acts* 1910 *to* 1953 (Q.) is an appeal by way of re-hearing.

Principles regulating the contents of cases stated, referred to.

Decision of the Supreme Court of Queensland (Full Court), reversed.

APPEAL from the Supreme Court of Queensland.

This was an appeal brought as of right by the Crown in right of the State of Queensland from an order of the Supreme Court of Queensland (*Macrossan* C.J., *Mansfield* S.P.J. and *Hanger* J.) whereby answers were given to certain questions contained in a case stated by the Land Appeal Court and an order of the Land Court was restored.

The relevant facts fully appear in the judgment of the Court hereunder.

A. L. Bennett Q.C. and *C. F. Fairleigh*, for the appellant.

H. T. Gibbs and *P. Connolly*, for the respondent.

Cur. adv. vult.

THE COURT delivered the following written judgment:—

An appeal as of right is brought by the Crown to this Court from an order of the Supreme Court of Queensland by which answers were given to certain questions contained in a case stated by the Land Appeal Court and an order of the Land Court was restored. The case was stated pursuant to s. 36 (1) of *The Land Acts* 1910 *to* 1953 (Q.). That sub-section provides that any person aggrieved by a decision of the Land Appeal Court who desires to appeal therefrom on the ground that the decision is erroneous in point of law, or is in excess of jurisdiction, may within six weeks after the pronouncing of the decision apply in writing to such court to state and sign a case setting forth the facts and grounds of decision for appeal thereon to the Full Court of the Supreme Court. The case is to be transmitted to the Supreme Court and there, as s. 38 provides, the Full Court must determine every question of law arising thereon and may remit the matter to the Land Appeal Court with the opinion of the Full Court thereon or make such other order in relation to the matter as seems proper.

The case now under consideration was stated on the application of the respondents in this appeal. They were holders of a Prickly-pear Development Grazing Homestead selection containing 10,527 acres, which as on 1st December 1951 was resumed by the Governor in Council under s. 145 of *The Land Acts*. The compensation to which they became entitled in accordance with sub-s. (3) of that section was assessed by the Land Court pursuant to s. 29. The amount of compensation was determined at £21,850. From that determination the Crown appealed under s. 36 to the Land Appeal Court. The appeal was allowed and an award or determination of £16,800 was substituted for that of the Land Court. The Supreme Court having reversed this decision on a case stated the Crown now appeals to this Court.

It appears that, although the grounds of the Crown's appeal to the Land Appeal Court were not limited, the chief complaints made before the Land Appeal Court against the determination of the Land Court concerned two matters. One complaint related to the manner in which that court dealt with the right given by s. 72 to a lease-holder if his interest has been resumed to select in priority to others should the land afterwards be thrown open for selection. The Crown said that a substantial value had been attributed to the right and urged that it ought not to be taken into account as a matter of law and that in any case no value could properly be ascribed to it as a matter of fact.

The second and perhaps more important complaint was that a mistake had been made by the Land Court in the course of an

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attempt to give effect to the provisions of ss. 154 and 155 in the application of these sections to ringbarking and clearing and the betterment of the land which ensued therefrom. It was said that the evidence had been misapplied so as to compensate the leaseholders twice over in respect of this head.

The Land Appeal Court approached the decision of the appeal before them by first considering whether some error or misconception could be discovered in the reasons of the Land Court of a kind which would justify a court of appeal in reviewing a finding of fact by a primary judge. With some doubt as to what the Land Court had done on these two matters and as to the correctness of that court's treatment of them, the Land Appeal Court in the end turned to another ground of justification for interfering with the Land Court's determination. That ground simply was that, presumably because of the amount of the determination, it appeared that some factor or factors must have at least been given too much weight, whatever might be the exact process by which the amount had been calculated. The Land Appeal Court on that footing proceeded to re-assess the compensation " on a consideration " as their judgment said " of the whole of the evidence giving due weight on known principles to specific findings of fact made by " the Land Court.

The claimants, the respondents in this Court, not unnaturally, sought to find a remedy against this judgment and, undeterred by its prima facie factual character, applied under s. 36 for a case stated. Notwithstanding the fact that prima facie the conclusion of the Land Appeal Court does wear the appearance of a finding upon a question of fact, namely the amount of compensation, it may well be that concealed in it is some error of law. For, to take one of the two points so much discussed before that tribunal, there is much difficulty in the interpretation and application of ss. 154 and 155 so far as they relate to ringbarking and clearing and the consequences thereof. Indeed after some study of the judgments of the President of the Land Court and of the Land Appeal Court, assisted by the judgment of *Hanger* J. in the Supreme Court, we are by no means satisfied that an error does not reside in the determination of the Land Appeal Court, that is to say an error turning wholly on the view taken of the combined operations of s. 154 and s. 155, where there has been ringbarking etc. For we agree in the observation of *Hanger* J. that s. 155 must be interpreted as adding something to the rights given by s. 154 and we disagree with the contention that where the bracketed words in s. 154 (1) refer to " improvements " they mean improvements in any other or wider sense than that of the definition contained in s. 4.

But it is not possible to say whether any error of the kind was made or indeed to obtain from the case stated a definite factual basis for deciding exactly how ss. 154 and 155 operate upon this matter in the absence of a precise statement of the facts found, as opposed to the evidence. For it became necessary for the Land Appeal Court to apply these provisions so far as they concern ringbarking and clearing and the consequences ensuing therefrom and it is evident that some facts must have been found for the purpose. To some extent the same is true in relation to the priority right annexed to the lease by s. 72, but there is less reason to suspect that any error of law has been made with reference to the manner in which that right was treated in ascertaining the value of the lease. If the command of s. 36 to " set forth the facts and the grounds of decision " had been observed all this would have appeared. Unfortunately nothing of the sort was done. For this the parties must accept the blame, particularly the claimants, the now respondents. They prepared and brought in the case stated. No doubt the claimants wished to attack, in the Supreme Court, the proposition of the Land Appeal Court that, upon a proper application of the principles on which courts of appeal review findings of fact by primary judges, the Land Court's conclusion ought not to stand; and no doubt too it was desired under colour of denying the possibility on the evidence of lawfully reaching certain conclusions to attack the finding or findings of the Land Appeal Court. Such a desire might account for the manner in which the so-called case stated has been framed. The only statement of fact consists of a brief account of the proceedings. But the whole of the evidence and not a little of the argument before the Land Court is annexed, together with the exhibits and the judgment of that court and of the Land Appeal Court. The so-called case stated also comprises a statement of some contentions made on each side, which, subject to an exception to be mentioned, concern matters, which in our opinion are simply questions of fact. The exception is that on the part of the Crown it was contended that in assessing the value of the lease account should not have been taken of the priority right given by s. 72 because that right was extinguished by resumption. Of this it is enough to say that such a contention cannot be supported, and it certainly was not one adopted by the Land Appeal Court. The case stated goes on to state certain conclusions reached by that court extracted from the judgment which really turn on matters of evidence and afford no basis for any matter of law. Four questions are appended which in truth are not questions of law at all, although in an attempt to give them that complexion they are expressed as inquiring whether the Land Appeal Court

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was " authorised or justified in law " in adopting the course they did in respect to the several matters extracted from the court's judgment and set out in the case.

A valiant attempt was made on the part of the respondents to establish that questions of law were discoverable in all this material. To no small extent the attempt was based on a false hypothesis. The hypothesis was that the function of the Land Appeal Court was of the same kind as that of the Court of Appeal in England and was designed to correct the decisions of the Land Court where that court had gone wrong in fact or law upon the materials before it. An examination of Div. IV of Pt. II of the Acts has satisfied us that this misconceives the jurisdiction and function of the Land Appeal Court. It is, we think, a court that is empowered to rehear, on evidence adduced before it, the whole matter which is the subject of the appeal —to hear it anew: see particularly s. 35 (8). There was no legal reason compelling the Land Appeal Court to inquire whether the Land Court had miscarried in law or fact in its treatment of the case. It was entitled to form an altogether independent judgment on the whole case, quite irrespective of the reasons for the conclusion of the Land Court, and indeed it was bound so to do. What materials are laid before the Land Appeal Court in any given case is of course a matter for the parties and so is it a matter for the parties what points are submitted by them for decision. But prima facie a general appeal such as there was in the present case is a retrial. If the parties concur in using the old material, well and good; but that does not alter the substantive character of the court's function and power nor impose any limit upon them.

An alternative contention was advanced that if the party attacks the Land Court's judgment for error, that alters the case and makes the existence of error a question of law upon which the decision of the Land Appeal Court depends. This contention simply cannot be sustained. It ignores the true nature of the court's function and jurisdiction.

Nor can the subsidiary contention be sustained that a written report of Gould as a witness was misconstrued and that that involved a matter of law. In any case the misconstruction was a conclusion reached on the document and other evidence.

The result is that no question of law distinctly arises on the so-called case stated, which is stated in a form that does not conform with s. 36 or with the well-settled law governing the statement of cases and ought not to be countenanced.

It is desirable in view of what has happened to restate some of the principles regulating the contents of cases stated. Upon a case

stated the court cannot determine questions of fact and it cannot draw inferences of fact from what is stated in the case. Its authority is limited to ascertaining from the contents of the case stated what are the ultimate facts, and not the evidentiary facts, from which the legal consequences ensue that govern the determination of the rights of parties. The question may be one of the relevance of evidence and then the nature of the evidence becomes in a sense an ultimate fact for the purpose of that question. But that is not a common case: see *Humphryis* v. *Spence* (1), and cf. *Coughlin* v. *Thompson* (2). The general rule is clearly stated by *Isaacs* J. in the three following passages: "It cannot be too clearly understood that on a 'case stated' the facts stated are to be taken as the ultimate facts for whatever purpose the case is stated. The Court is not at liberty to draw inferences unless the power is, by express words or by necessary implication, specially conferred by some enactment"—*Mack* v. *Commissioner of Stamp Duties* (*N.S.W.*) (3). "Unless care is taken to distinguish between 'inference' and 'implication,' confusion is likely to occur. An implication is included in what is expressed: an implication of fact in a case stated is something which the Court stating the case must, on a proper interpretation of the facts stated, be understood to have meant by what is actually said, though not so stated in express terms. But an inference is something additional to the statements. It may or may not reasonably follow from them: but even if no other conclusion is reasonable, the conclusion itself is an independent fact; it is the ultimate fact, the statements upon which it rests however weak or strong being the evidentiary or subsidiary facts"—*The Merchant Service Guild of Australasia* v. *The Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (4). "It has been authoritatively decided by this Court in several cases that no inferences of fact can be drawn by the Supreme Court or this Court in such circumstances; among those cases are *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (5); *Schumacher Mill Furnishing Works Pty. Ltd.* v. *Smail* (6); *Boese* v. *Farleigh Estate Sugar Co. Ltd.* (7); *Mack* v. *Commissioner of Stamp Duties* (*N.S.W.*) (8); *Alexander* v. *Menary* (9). In the absence of explicit statement of facts, including inferences, the Court engaged in dealing with the case stated may perhaps gather the necessary facts from the construction of the case itself as stated, in the way expounded by Lord *Atkinson* in *Usher's Wiltshire Brewery*

(1) (1920) V.L.R. 407.
(2) (1913) V.L.R. 304.
(3) (1920) 28 C.L.R. 373, at p. 381.
(4) (1913) 16 C.L.R. 591, at p. 624.
(5) (1913) 16 C.L.R. 591.
(6) (1916) 21 C.L.R. 149.
(7) (1919) 26 C.L.R. 477.
(8) (1920) 28 C.L.R. 373.
(9) (1921) 29 C.L.R. 371.

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Ltd. v. *Bruce* (1) "—*Dickson* v. *Commissioner of Taxation* (*N.S.W.*) (2). See further per *Jordan* C.J. in *Dennis* v. *Watt* (3).

When s. 36 speaks of setting forth the facts it means the facts which, if the law is applied to them, will decide the matter of the appeal. To them must be added the grounds on which the decision proceeded. It is not required that questions should be appended, although, of course, to append them will not vitiate the case.

The case stated in the present matter completely disregards the foregoing principles. Yet the Crown, which is here the appellant, does not seem to have objected to the proceeding until the appeal in this Court was opened. Much of the judgment in the Supreme Court from which the Crown appeals is in truth devoted to matters of evidence and fact which could not arise on a case properly stated under s. 36. We think that it was not competent, even in the absence of objection from the Crown, for the Supreme Court to pronounce upon the correctness of the judgment of the Land Appeal Court in so far as it depended on conclusions of fact and it does not positively appear from the case stated that it necessarily depended on anything else. Nor is the case stated in a form which enables the Court to decide any question of law.

We therefore think that the order of the Supreme Court must be discharged.

Under the power conferred by s. 38 " to make such other order in relation to the matter as seems proper " we think that the Supreme Court might have set aside the purported case stated and ordered that the case be restated in accordance with s. 38. On this appeal we are able to make any order which the Supreme Court might have made. Ought we to exercise this power ? Clearly enough we cannot substitute for the order of the Supreme Court any order determining the case stated on the merits. In effect that means that the case stated must be set aside or treated as incompetent. If we thought that no question of law was really involved in the decision of the Land Appeal Court, it would not be proper to order a restatement of the case. But as we have already said we are by no means assured that something has not gone wrong in the application of ss. 154 and 155. Whether there has been an error or not must in the first instance depend on the true meaning and operation of these sections with reference to the subject of ringbarking. But that is not a subject that can be decided in the abstract. It could only be satisfactorily decided on an ascertained set of facts. The elements taken into account in arriving at a value under s. 154 (1) form part of

(1) (1915) A.C. 433, at pp. 449, 450.
(2) (1925) 36 C.L.R. 489, at p. 497.
(3) (1942) 59 W.N. (N.S.W.) 204.

the facts that must appear for the purpose, and no doubt the manner in which a value or values are ascribed to them, or reached by reference to them, may be equally important. Then it would be necessary to know how the last paragraph in s. 155 (1) has been used. In particular it would or at all events might be material to know what value was in the first instance assigned to the " ringbarking or the clearing of undergrowth and useless vegetation or any development work in the nature of clearing " for the purpose of satisfying the words in the last paragraph, " an improvement for which the lessee shall be entitled to be paid " considered with the words " the value of the improvements " occurring in the leading portion of par. (i) of s. 155 (1). That means the value which is placed upon the ringbarking etc. as " improvements " before proceeding to apply either the clause beginning " but in no case shall " or the proviso. Next it would or might be necessary to know how the clause and the proviso had been applied and by means of what figures and on what basis the figures had been reached.

Possibly the claimants, the now respondents, might not wish to litigate further that question or any other question that would arise on a proper case stated ; but on the whole we think that they should not be deprived of the opportunity to do so, if they so desire.

There are certain difficulties which arise from changes in the composition of the Land Appeal Court since the hearing by that court of the appeal. *Stanley* J., who was the judge whose name had been notified by the Chief Justice under s. 35 (1) and who therefore was the judge of the Land Appeal Court for the Southern District at the time of the appeal, no longer occupies that position. *Townley* J. is now the judge so named. Moreover a member of the court has died since that time. But the court is a continuing body and competent to state the case. There seems no reason why it should not be stated on information obtained from *Stanley* J. nor is there any reason why *Stanley* J. should not have the assistance of the parties for the purpose. It would be unfortunate if a rehearing proved necessary, but possibly one might be directed under s. 38 if all else failed. At all events it will be wise to reserve liberty to apply for further or other relief.

We think that the order that we should make is as follows. Appeal allowed. Discharge the order of the Supreme Court. In lieu thereof order as follows. Set aside the purported case stated of the Land Appeal Court transmitted to the Registrar of the Supreme Court. Let the Land Appeal Court (unless within 21 days of this order the claimants, respondents in the High Court, notify the Registrar of the Land Appeal Court that they elect not to proceed under this part of this order) restate such case in pursuance of s. 36

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of *The Land Acts* setting forth the facts as found by such court and not the evidence, and setting forth the grounds of the decision for appeal to the Full Court of the Supreme Court and in particular setting forth the facts with reference to the following matters, viz. (1) the precise manner in which, in relation to ringbarking the clearing of undergrowth and developmental work in the nature of clearing and any improved condition of the land or increased carrying capacity attributable thereto, ss. 154 and 155 have severally been applied; (2) the precise manner in which the benefit or advantage of any of the leasehold arising from the provisions of s. 72 has been dealt with. Liberty to apply to the Supreme Court as the parties may be advised for further or other relief. No order as to the costs of the hearing in the Full Court of the Supreme Court of the stated case set aside by this order and as to the costs of this appeal.

Appealed allowed. Discharge the order of the Supreme Court. In lieu thereof order as follows :—Set aside the purported case stated of the Land Appeal Court transmitted to the Registrar of the Supreme Court. Let the Land Appeal Court (unless within 21 *days of this order the claimants, respondents in the High Court, notify the Registrar of the Land Appeal Court that they elect not to proceed under this part of this order) restate such case in pursuance of s.* 36 *of The Land Acts setting forth the facts as found by such court and not the evidence, and setting forth the grounds of the decision for appeal to the Full Court of the Supreme Court and in particular setting forth the facts with reference to the following matters, viz.* (1) *the precise manner in which, in relation to ringbarking the clearing of undergrowth and developmental work in the nature of clearing and any improved condition of the land or increased carrying capacity attributable thereto, ss.* 154 *and* 155 *have severally been applied ;* (2) *the precise manner in which the benefit or advantage of any of the leasehold arising from the provisions of s.* 72 *has been dealt with. Liberty to apply to the Supreme Court as the parties may be advised for further or other relief. No order as to the costs of the hearing in the Full Court of the Supreme Court of the stated case set aside by this order and as to the costs of this appeal.*

Solicitor for the appellant, *H. T. O'Driscoll*, Crown Solicitor for Queensland.

Solicitors for the respondents, *Cannan & Peterson.*

R. A. H.