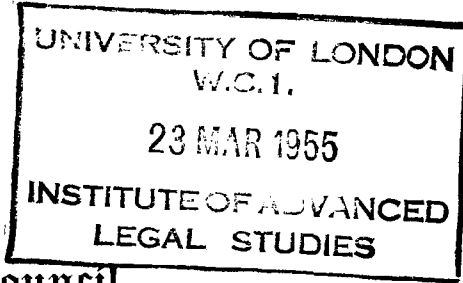


~~Got. & B.~~

34, 1954



38072

No. 3 of 1954.

In the Privy Council.

ON APPEAL

FROM THE FULL COURT OF THE HIGH COURT OF AUSTRALIA
(Appeals Numbered 49, 50 and 51 of 1952).

BETWEEN:—

RICHARD JAMES PYE, RICHARD ANTHONY
PYE and HENRY WARD PYE *Appellants*

— AND —

10

THE MINISTER FOR LANDS FOR NEW SOUTH
WALES *Respondent.*

C A S E

FOR THE RESPONDENT ON THE APPELLANTS' APPEAL.

INTRODUCTORY.

RECORD.

1. This is an appeal from a judgment of the Full Court of the High Court of Australia given on the 10th March, 1953, in which the High Court reversed the decision of the Supreme Court of New South Wales and restored the decision of the Land & Valuation Court of New South Wales on certain questions arising under the Closer Settlement (Amendment) Act, 1907 (as amended).

pp. 43-52

pp. 28-38

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2. The question for decision in this appeal is whether certain provisions of the Closer Settlement (Amendment) Act, 1907, of New South Wales relating to the resumption of land for the settlement thereon of Ex-Servicemen have the effect of limiting the compensation payable to the dispossessed owner to the value of the resumed land as at 10th February, 1942. The material sections of the said Act are set forth in paragraph 20 hereof, but it is convenient to set out at once the proviso to Section 4 (4) (b) of the said Act sub-paragraph (ii) of which deals

directly with the point at issue between the parties. The said proviso is in the following terms:—

“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; 10

“(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.” 20

3. The attack upon the effectiveness of the said proviso made by the Appellants is based, not upon any lack of legislative power in the Parliament of New South Wales, but upon the ground that the statutory directions contained therein are completely unworkable.

4. The Justice of the Supreme Court—who exercises the jurisdiction of the Land and Valuation Court—and the High Court of Australia—on appeal from the Supreme Court of New South Wales—held that the proviso was an operative and effective one; and accordingly that it limited the compensation to which the Appellants were entitled in respect of the resumption of their land referred to in paragraphs 5, 6, 7 and 8 hereof to values obtaining as at 10th February, 1942. The Supreme Court of New South Wales—on appeal by way of case stated from the decision of the Land and Valuation Court—held that the proviso was unworkable and accordingly completely ineffective and that it had no effect upon or in relation to the assessment of compensation payable to the Appellants in respect of the said resumption. 40

CIRCUMSTANCES OUT OF WHICH THE APPEAL ARISES.

p. 1, ll. 28-31.

5. Prior to and until the seventh day of September, 1945, the above-named Appellant, Richard James Pye, was the owner of 20,274 acres of land or thereabouts situate in various parishes in the County of

Pottinger and Land District of Gunnedah in the State of New South Wales.

6. On the seventh day of September, 1945, the said Richard James Pye by a Memorandum of Transfer under the Real Property Act, 1900, which was registered on the seventh day of November, 1945, transferred 11,930 acres of his said land to the Appellant, Richard Anthony Pye. p. 2, ll. 1-4.

7. From the said seventh day of September, 1945, and at all material times thereafter, the said Richard James Pye was the owner of the balance of the land referred to in paragraph 5 hereof, namely, 8,344 acres and the said Richard Anthony Pye was the owner of the said 11,930 acres transferred to him. p. 2, ll. 5-8.

8. The Appellant, Henry Ward Pye, was at all material times the owner of 20,925 acres of land or thereabouts situate in the County and Land District aforesaid. p. 2, ll. 9-11.

9. All of the aforesaid lands are adjoining and at all material times were worked as one pastoral and agricultural property and together were and are known as "Ghoolendaadi" p. 2, ll. 12-14.

10. On the fifth day of October, 1945, there was published in the New South Wales Government Gazette No. 102 of the said date, a proclamation which so far as relevant was in the words and figures following that is to say:— p. 2, ll. 15-36.

"CLOSER SETTLEMENT

"PROCLAMATION OF INTENTION TO CONSIDER

"THE ADVISABLENESS OF ACQUIRING ESTATES

"FOR CLOSER SETTLEMENT UNDER SECTION 4,

"CLOSER SETTLEMENT AMENDMENT ACT, 1907.

30 "I, the Honourable Sir Frederick Richard Jordan, Lieutenant-Governor of the State of New South Wales, with the advice of the Executive Council of the said State, in pursuance of the provisions of Section 4 of the Closer Settlement (Amendment) Act, 1907, as subsequently amended, do notify by this Proclamation to be published in the Government Gazette, that I propose to consider the advisableness of acquiring the parcels of land described in the Schedule hereunder for the purposes of closer settlement.

"(Ad.Bd. 45-1, 465).

"Signed and sealed at Sydney, this 4th day of October 1945.

"(L.S.) F. R. JORDAN,

"Lieutenant-Governor

"By His Excellency's Command,

"J. M. TULLY,

"Minister for Lands.

"GOD SAVE THE KING!"

- p. 2, ll. 46-47. The Schedule to the said proclamation described the whole of the lands referred to in paragraphs 5, 6, 7 and 8 of this Case and no other lands.
- p. 3, ll. 1-5. 11. After the publication of the said proclamation the said Richard Anthony Pye elected in pursuance of Section 13 of the Closer Settlement (Amendment) Act, 1907, as amended, to retain an area of 3,631 acres or thereabouts, being part of the said area of 11,930 acres referred to in paragraph 6 of this Case.
- p. 3, ll. 6-8. 12. On the fourth day of May, 1950, a Closer Settlement Advisory Board made a report pursuant to the Closer Settlement (Amendment) Act, 1907, in respect of the said lands, the material portions of the said report being set forth in sub-paragraphs (i) and (ii) hereof:— 10
- p. 3, ll. 43-44. (i) "All attempts to reach agreement with the owners having
p. 4, ll. 1-3. "failed, it is proposed to resume an area of about 37,568 acres, being
"the whole of the Estate exclusive of the retention area claimed by
"R. A. Pye, under the provisions of Section 4(1)(b) of the Closer
"Settlement (Amendment) Act, 1907. The Board's valuations of
"the subject lands, on a freehold basis, inclusive of improvements,
"are as follows:
- | | | | | | | |
|---------------------------|---|-----|-----|---|----------|----|
| "Lands owned by H. W. PYE | — | £6. | 1. | 9 | per acre | |
| " " " " R. J. PYE | — | £4. | 15. | 0 | " " | 20 |
| " " " " R. A. PYE | — | £5. | 0. | 0 | " " | |
- "(exclusive of retention area).
- p. 1, ll. 5-16. "These values have been assessed by this Board in accordance with
"sub-section 4(b)(2) of Section 4 of the Closer Settlement
"(Amendment) Act, 1907, as amended, and do not exceed the values
"which would have been so assessed in respect of identical resump-
"tions as at the tenth day of February 1942, excepting the values of
"any improvements effected on the lands since that date."
- p. 5, ll. 30-40. (ii) "The Estate is capable of subdivision into about thirty (30)
"farms, exclusive of the retention area claimed by Richard Anthony
"Pye. 30
- "It is RECOMMENDED that:—
- "(A) Richard Anthony Pye be allowed to retain an area of
"about 3,631 acres, as shown by blue hatching on helio here-
"with:
- "(B) action be taken to resume an area of about 37,568
"acres, being the whole of "Ghoolendaadi" Estate exclusive of
"the retention area mentioned in (A) above, in accordance with
"the provisions of the Closer Settlement (Amendment) Act,
"1907, as amended, and 40
- p. 6, ll. 1-8. "(c) compensation be paid at the rates set out below, on a
"freehold basis, being the values assessed by this Board in

“accordance with sub-section 4(b)(2) of Section 4, Closer Settlement (Amendment) Act, 1907, as amended.

“Lands owned by H. W. PYE — £6. 1. 9 per acre
 “ ” ” ” R. J. PYE — £4. 15. 0. „ „
 “ ” ” ” R. A. PYE — £5. 0. 0. „ „
 “(exclusive of retention area).”

The lands referred to in the above report are the whole of the lands referred to in paragraphs 5, 6, 7 and 8 of this Case. p. 6, ll. 15-16.

13. On the ninth day of May, 1950, both Houses of the Parliament of New South Wales passed resolutions pursuant to section 4(2) of the Closer Settlement (Amendment) Act, 1907, approving of the resumption of the said lands. p. 6, ll. 15-16.
p. 7, l. 1.

10 14. In the month of July, 1950, each of the Appellants commenced a suit in the Equitable Jurisdiction of the Supreme Court claiming injunctions to restrain the Minister from proceeding with the proposed resumptions of the said lands and on the twenty-fourth day of August, 1950, an application by the Appellants for interlocutory injunctions restraining the proposed resumptions came on for hearing before the Chief Judge in Equity. The said Chief Judge in Equity upheld demurrers to the Statements of Claim of the Appellants, and accordingly refused to grant any injunction. In the course of his judgment—which is unreported—on the said demurrers, the said Chief Judge said:

20 “The Statement of Claim discloses that steps have been taken
 “to resume the land for the purposes of the Closer Settlement Act
 “of 1907, and in particular it is claimed that steps have been taken
 “in accordance with Section 4 sub-section 4(b)(ii) of that Act as
 “amended, and that the resumption is being effected as at the value
 “of the land on the 10th February, 1942. . . No defect has been
 “found or has been put before me as existing in the State legisla-
 “tion under which the resumption is proposed, and in fact there
 “can be no such defect. The legislation is clear as to its purpose:
 30 “the fact that the land is to be resumed at a value at some earlier
 “date is perfectly clear on its face, and the legislation is that of a
 “State in respect of a subject as to which the State is a supreme
 “sovereign State.”

15. The Appellants appealed against the said judgment of the Chief Judge in Equity to the High Court of Australia and on the eighth day of October, 1951, the High Court dismissed the said appeals, the judgment of the High Court being reported as *Pye v Renshaw*, 84 C.L.R.58.

40 16. Following upon the decision of the Chief Judge in Equity referred to in paragraph 14 hereof, namely, on the first day of September, 1950, there was published in the New South Wales Government Gazette No. 141 of the said date a notification of resumption of the said lands under the Closer Settlement (Amendment) Act, 1907. The said notification contained a recital that “the resumption to be effected by p. 6, ll. 17-16.
p. 7, ll. 1-35.
p. 7, ll. 1-4.

“this notification is made for the purposes of Section 3 of the War
“Service Land Settlement Act, 1941, as amended by subsequent Acts.”

p. 7, ll. 36-39.

17. The lands the subject of the said Notification comprise the whole of the lands mentioned in paragraphs 5, 6, 7 and 8 of this Case with the exception of the area of 3,631 acres or thereabouts referred to in paragraph 11 hereof.

p. 8, ll. 1-3.

18. On the twenty-eighth day of September, 1950, the Appellants lodged notices of appeal to the Land and Valuation Court, against the assessments of value of the resumed land made by the Closer Settlement Advisory Board.

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19. Each of the said Notices of Appeal set out the grounds of appeal as follows:—

p. 8, ll. 25-34.

1. That the value of the land assessed by the Closer Settlement Advisory Board is too low.
2. That the said Advisory Board arrived at the value of the land on an incorrect basis.
3. That the said Advisory Board did not have proper regard to the items going to make up the value of the land in accordance with the relevant Act.
4. That the said Advisory Board in arriving at the value of the land did not have proper regard to the productive capacity of the land.

20

RELEVANT STATUTORY PROVISIONS.

20. Before dealing with the course which the proceedings took before the Land and Valuation Court and the decisions given by that Court, by the Supreme Court, and by the High Court, it is proposed to set out the text of the relevant statutory provisions.

A. THE CLOSER SETTLEMENT (AMENDMENT) ACT, 1907.

SECTION 2:

(1) The Governor may, for the purposes of this Act, constitute three boards to be called Closer Settlement Advisory Boards, and may dissolve and reconstitute any such board.

30

Any such board is hereinafter in this Act referred to as an “Advisory Board.”

(2) The Governor may appoint a Chairman of Closer Settlement Advisory Boards.

(3) Each advisory board shall comprise the Chairman of Closer Settlement Advisory Boards and two other members appointed by the Governor.

(4) In case of the absence or illness of the Chairman or any other member of any such board the Governor may appoint a deputy who, during such absence or illness, shall have and may exercise and discharge all the powers, authorities, duties and functions of such chairman or member, as the case may be.

40

SECTION 3:

(1) Every such board shall, at the request of the Minister and within such time or extended time as he may appoint, report to him as follows:—

(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 such land.

10 (c) The price at which the board recommends the acquisition of the land, and the method of arriving at such price.

(d) In the event of the board recommending the acquisition of part only of any property, it shall state the estimated value of the residue thereof and whether the value of such residue will be depreciated by such acquisition, and, if so, by what amount.

20 (e) The use to which the land may be put, and the capacity of the land for carrying stock, or for agriculture or other profitable use, the number of farms into which it could be suitably subdivided, and the possibilities of irrigating, and such other particulars as the Minister requires.

(f) On any matter as to which the Minister requires a report.

(2) For the above purposes the board, or any member of the board, or any person authorised in writing by the chairman of the board, may, on giving the prescribed notice to the owner, enter any property and inspect the same.

30 (3) Where an advisory board is required by this section to report upon the estimated value of any land such board shall have regard to the productive capacity of such land under fair average seasons, prices and conditions. Sales of land similar in quality, locality and other respects to the land in respect of which such estimated value is to be made shall not be taken into account unless such board is satisfied that the value reflected by any such sale is fair and reasonable having regard to the productive capacity of the land under fair average seasons, prices and conditions.

40 (4) Where an advisory board is required by the Closer Settlement Acts to report upon the estimated value or to make a valuation of any lands which are held under homestead selection, homestead grant, or lease in perpetuity title (other than closer settlement lease, settlement purchase lease or group purchase lease) the capital value or annual rent of which is not subject to re-appraisalment the board may for the purpose of arriving at such estimated value or making such valuation deduct from the freehold value of the land as determined by the board an amount arrived at by capitalising the annual rent of such homestead selection, homestead grant, or lease in perpetuity title, at such rate as may be prescribed.

SECTION 4:

(1) Where an advisory board reports that any land is suitable to be acquired for closer settlement, the Governor may:—

(a) subject to this Act, purchase it by agreement with the owner; or

(b) resume it under this Act.

(2) Every purchase or resumption shall be subject to approval by resolutions of both Houses of Parliament.

(3) Before resuming any land, the Governor shall, by proclamation in the Gazette, notify that he proposes to consider the advisableness of acquiring such land for the purposes of closer settlement. 10

This sub-section shall not apply in respect of any resumption where the owner has agreed not to claim compensation in excess of the value of the land as assessed by an advisory board.

(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. 20

(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: 30

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: 40

(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.

10 (c) In the case of any such purchase or resumption a recital or other appropriate statement in the instrument of conveyance or surrender or in the notification in the Gazette of the resumption, as the case may be, to the effect that the purchase or resumption is made for the purposes of section three of the War Service Land Settlement Act, 1941, as amended by subsequent Acts, shall be conclusive evidence that the purchase or resumption is made for such purposes, and the provisions of paragraph (a) or (b) of this sub-section, as the case may be, shall apply accordingly.

5.

20 SECTION 6:

(1) Where the Governor by proclamation under section four or section five of this Act notifies that he proposes to consider the advisableness of acquiring any land for the purposes of closer settlement, such land shall not, while such proclamation remains in force, be transferred or otherwise dealt with unless the consent of the Minister to such transfer or other dealing has been first obtained.

Application for such consent shall be made in the prescribed form and shall be accompanied by the prescribed fee.

30 The provisions of this sub-section shall apply to land in respect of which any such proclamation was made before the date of commencement of the War Service Land Settlement and Closer Settlement (Amendment) Act, 1945, as well as to land in respect of which any such proclamation may be made after that date.

(1A) Any restriction upon transfer imposed by sub-section one of this section shall cease in respect of any land at the expiration of eleven years from the commencement of the War Service Land Settlement and Closer Settlement (Amendment) Act, 1945, or at the expiration of six years from the date of notification of any such proclamation in respect of such land, whichever is the later.

40 (2) The Governor, by proclamation published in the Gazette, may cancel or amend any proclamation under section four or section five of this Act, as to the whole or any part of the land affected thereby.

SECTION 7:

(1) The resumption of land under this Act shall be effected by notification in the Gazette.

On such notification being made, the land shall, subject to the right of retainer hereinafter provided, vest in His Majesty for the purposes of the Closer Settlement Acts, and be dealt with thereunder.

(2) Where the Governor has purchased land under this Act, such land shall be conveyed to His Majesty for the purposes of the Closer Settlement Acts and shall be dealt with thereunder. 10

SECTION 9:

(1) Where any land is resumed under this Act, any person interested in such land who is dissatisfied with the value of the land as assessed by the advisory board may appeal to the Land and Valuation Court against such assessment in accordance with rules of court of that Court.

(2) Notice of appeal shall be lodged within twenty-eight days after the date of publication in the Gazette of the notification of resumption or within such further time as the Land and Valuation Court may, either generally or in any particular case, allow. 20

SECTION 10:

The Land and Valuation Court shall have jurisdiction to hear and determine the appeal.

SECTION 10A:

When any resumption is made under the Closer Settlement Acts and compensation for such resumption is payable, the Minister shall for a period of one month after the amount of such compensation has been finally determined by the Land and Valuation Court have the right to elect whether the Crown will pay such amount or discontinue such resumption. 30

If the Minister, after determination of value by the Land and Valuation Court, elects to continue such resumption, the owner shall be entitled to remain in occupation under conditions to be approved by the Minister for a period of not more than six months or such further period or periods as may be approved by the Minister after the decision of the Minister has been communicated to such owner.

Within fourteen days thereafter the owner shall notify to the Minister the period for which he desires to obtain the use of the land. During such period the owner shall effectively safeguard all improvements and at the expiration of such period shall give vacant and peaceful possession. 40

If the Minister before the expiration of the aforesaid period of one month, by notification in the Gazette, elects to discontinue such resumption, the proclamation of the resumption and all proceedings thereon or thereafter relating to the resumption shall be treated as a nullity, and in any case where the Minister so elects,

no further proclamation or notification under sections four or five of this Act shall be made for a period of five years from the date of such election.

The claimant shall be entitled to payment of the proper costs and expenses incurred up to the date of the discontinuance and the amount thereof shall, when necessary, be fixed by the Land and Valuation Court.

SECTION 11:

10 The Governor may, notwithstanding the resumption of any land and any proceedings consequent thereon, at any time agree with the owner as to the price to be paid for the land:

Provided that the conditions and restrictions of this Act shall apply to such agreement as if the same were a purchase under this Act.

SECTION 13:

20 (1) The owner of any land proposed to be resumed under this Act may retain out of such land a part thereof, but so that the value of such part, together with the value of the land forming the residue, if any, of the same property, and worked with it, and of any other land held in the same interest, shall not exceed Fourteen Thousand Pounds; such value in each case being exclusive of the value of any buildings on the land.

Where such land is held by more than one owner, only one such right may be exercised, and any other lands held by each of such owners shall be taken into account, in all respects as if the land proposed to be resumed and all such other lands were held by the one owner.

30 Such right shall be deemed to be waived unless the owner asserts the same in the prescribed manner within three months after the proclamation notifying that the Governor proposes to consider the advisableness of acquiring the land for the purposes of closer settlement, specifying the area, situation, boundaries, and value (without buildings) of the land which he proposes to retain.

For the purposes of this sub-section the following provisions shall apply:—

(a) Lands held by the spouse of the owner of any land proposed to be resumed under this Act shall be taken into account as if such lands were lands held by such owner.

40 (b) Lands owned by a company and used for pastoral, agricultural or the like purpose shall be deemed to be owned by the shareholders of the company as joint owners in the proportions of their interests in the paid-up capital of the company.

(c) Where separate parcels of land proposed to be resumed under this Act are held by different owners, and an advisory

board reports that such parcels are occupied, controlled or used substantially in the interests of one of such owners, all such owners shall be deemed to be joint owners of all such parcels, and they shall be entitled to exercise only one right of retainer in respect of the whole of the land comprised in such parcels.

(2) The area, situation, and boundaries of the land to be so retained shall be determined by the Minister on the recommendation of an advisory board.

But if the owner is dissatisfied with such determination he may, within one week after service on him of notice of such determination, waive the exercise of his right of retainer by notice served 10 on the Minister.

(3) This section shall apply in any case in which the land proposed to be resumed is land referred to in a proclamation (not being a proclamation under section five of this Act) published in the Gazette before the commencement of the War Service Land Settlement and Closer Settlement (Amendment) Act, 1945, as well as to land referred to in a proclamation (not being as aforesaid) published after such commencement, but shall not apply in any case in which the land proposed to be resumed is land referred to in a proclamation published under section five of this Act, or additional land 20 which the Governor is authorised by that section to resume.

B. THE WAR SERVICE LAND SETTLEMENT ACT, 1941.

SECTION 3(1):

The Minister may, by notification published in the Gazette, set apart any area of Crown land or of land acquired under the Closer Settlement Acts or the Murrumbidgee Irrigation Act, 1910, or any of those Acts as amended by subsequent Acts, or otherwise, to be disposed of in accordance with this section under the Crown Lands Consolidation Act, 1913, the Closer Settlement Acts or the Western Lands Act of 1901, or any of those Acts as amended by subsequent Acts, exclusively to any one or more of the following classes of persons:— 30

- (a) members of the forces;
- (b) discharged members of the forces;
- (c) discharged soldiers;
- (d) other eligible persons;

Provided that where any land acquired as aforesaid has been conveyed or transferred or surrendered to the Crown—

- (i) by way of gift, or
- (ii) by way of sale and in respect of the purchase money 40 for which the vendor has agreed to apply the whole or such part as the Minister may approve for the benefit, relief, education or advancement of members of the forces and discharged members of the forces or their dependents,

and such gift or sale has been made upon a condition that such land shall be disposed of to members of the forces or discharged members of the forces whose war service has been of a particular class or nature specified by the donor or vendor, as the case may be, the Minister may, in the notification setting such land apart, restrict the disposal of such land in accordance with such condition.

Any notification under this section may be amended or revoked by the Minister by a notification published in the Gazette.

10 "Minister" in this section in the case of lands within an irrigation area shall be read as Minister for the time being charged with the administration of the Irrigation Act, 1912.

PROCEEDINGS BEFORE AND DECISION OF LAND AND VALUATION COURT:

21. The said appeals came on to be heard by the Land and Valuation Court on the twenty-third day of April, 1952, and following days, and were by consent of the parties heard together. p. 8, ll. 38-40.

22. (a) At the hearing of the said Appeals it was agreed by and between the Appellants and the Respondent that if the values of the resumed lands should be determined as at the tenth day of February, 1942, the values of such lands should be determined at the following amounts, namely: Henry Ward Pye—£128,035 17. 0, Richard James Pye—£40,675 9. 9, Richard Anthony Pye—£42,917 19. 1, and that these amounts included all claims for compensation in respect of the said resumptions howsoever arising. p. 8, ll. 41-43.
20 p. 9, ll. 1-1.

(b) At the hearing it was submitted, however, on behalf of the Appellants that the values should be determined not as at the tenth day of February, 1942, but as at the first day of September, 1950, being the date of the Gazette notification referred to in paragraph 16 of this Case. p. 9, ll. 5-8.

30 (c) It was conceded by Counsel for the Respondent, and the appeals were conducted on the basis that, the values of the resumed lands as at the date of resumption were greater than as at the tenth day of February, 1942, but without any concession or admission as to the extent of such excess. p. 9, ll. 12-16.

23. At the said hearing Counsel for the Appellants called as a witness Herbert Bede Corlis who had been a member of the Closer Settlement Advisory Board which made the report referred to in paragraph 12 hereof. Counsel for the Appellants sought to elicit facts from the said witness leading up to the making of the said report. The Court refused to admit such evidence. p. 9, l. 17
to p. 11, l. 11.

40 24. At the said hearing Counsel for the Appellants also called as a witness a valuer, Marcus Michael Hyndes. Counsel for the Appellants sought to lead evidence as to the said witness' opinion of the value of p. 11, l. 12
to p. 12, l. 23.

p. 12, l. 20. the said lands as at 1st September, 1950. The Court refused to admit such evidence.

25. In the course of his reasons for rejecting the evidence referred to in paragraphs 23 and 24 hereof, His Honour Mr. Justice Sugerman held as follows:—

p. 23, ll. 45-50.
p. 23, ll. 1-10. (a) That when the question of compensation comes before the Land and Valuation Court pursuant to the relevant provisions of the Closer Settlement (Amendment) Act, the Court is obliged to determine the value of the resumed land and to do so as on a re-hearing of the question of value. 10

p. 23, ll. 5-9.
p. 23, ll. 27-30. (b) That the Court must, independently of the procedure in fact adopted by, or the procedure laid down by the Legislature for adoption by, the Closer Settlement Advisory Board, follow the path pointed out for it by sub-paragraph (ii) of the proviso to section 4(4)(b) of the said Act if it finds that the conditions necessary for the application of that paragraph exist.

p. 16, ll. 17-28. (c) That every condition or prerequisite for giving effect to and applying the statutory directions contained in the said proviso existed in the instant case, and accordingly compensation should be assessed on the basis of values as at 10th February, 1942. 20

p. 23, ll. 10-30. (d) That it was unnecessary to examine the question as to whether the statutory direction contained in the proviso could be put into effect and acted upon by the Closer Settlement Advisory Board.

p. 12, ll. 24-33. 26. The Court having rejected the evidence referred to in paragraphs 23 and 24 of this Case, held that the values of the said lands should be determined as at the tenth day of February, 1942, and assessed the said values and the said compensation at following amounts: Henry Ward Pye—£128,035 17. 0, Richard James Pye—£40,675 9. 9, Richard Anthony Pye—£42,917. 19. 1, being the amounts agreed upon between the parties as set forth in paragraph 22 (a) of this case. 30

APPEAL TO AND DECISION OF SUPREME COURT:

p. 13, ll. 1-5. 27. Pursuant to section 17 of the Land and Valuation Court Act, 1921, the Appellants appealed by way of stated case from the decision of the Land and Valuation Court, the material question of law submitted to the Supreme Court being whether, on the hearing, the Land and Valuation Court should have determined values and assessed compensation on the basis of values ruling as at 10th February, 1942, or on the basis of values ruling as at the date of resumption, namely, 1st September, 1950. 40

p. 28, ll. 5, 22. 28. The Supreme Court of New South Wales held that it was the duty of the Land and Valuation Court to assess the value of the lands as at the date of resumption and not as at 10th February, 1942.

29. In the course of its reasons for judgment, the Supreme Court held that the proviso was intended only to operate where the dispossessed owner has an opportunity to elect whether or not to agree not to claim compensation in excess of the value of the land as assessed by the Advisory Board and that, having regard to the language of the Act, it was impossible for any such opportunity to be given to the owner. In other words, the Supreme Court read into the proviso an implied term or condition, the effect of which, in the view of the Supreme Court, was to destroy the whole effectiveness and operation of the proviso. p. 35, ll. 9-39.

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APPEAL TO AND DECISION OF HIGH COURT:

30. The Respondent to this appeal appealed from the judgment of the Supreme Court to the High Court of Australia, by leave of that Court, which held that compensation should be determined on the basis of 1942 values and not values prevailing as at the date of resumption. pp. 38-39.
p. 52, ll. 41-45.

31. In the course of its reasons for judgment, which were unanimous, the High Court held that there was no ground for reading into sub-paragraph (i) of the proviso an implied term or condition that it should not operate unless the owner was given an opportunity of deciding whether or not to agree to be bound by the value fixed by the Advisory Board. It pointed out that the material amendment to the proviso effected by Act No. 48 of 1948—had not been made in the interests of the dispossessed owner, but 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.” p. 52.
p. 51, ll. 32-40.

p. 51, ll. 27-32.

RESPONDENT’S ARGUMENT.

The Respondent’s argument may shortly be stated as follows:—

32. (a) Sub-paragraph (ii) of the proviso to section 4 (4) (b) of the Closer Settlement (Amendment) Act, 1907, comes into operation automatically and without qualification when two conditions are satisfied, namely, where a resumption is made for the purposes of section 3 of the War Service Land Settlement Act, 1941, and where there has been no agreement by the owner not to claim compensation in excess of the value of the resumed land as assessed by an Advisory Board. p. 7, ll. 1-4.

(b) The recital in the Notification of Resumption that the resumption was made for the purposes of Section 3 of the War Service Land Settlement Act, 1941, is by virtue of Section 4 (4) (c) of the Closer Settlement (Amendment) Act, 1907—inserted by Act No. 40 of 1951—conclusive evidence that the first condition set out above has been satisfied.

(c) The institution and prosecution by the Appellants of the appeals against the assessments of value by the Advisory Board establish

the second condition set out above, namely, that the owner has not made any such agreement.

(d) The statute does not express or suggest any other conditions precedent to the application or operation of sub-paragraph (ii) of the proviso, further, there is no room for implying any other condition, as the Supreme Court did.

33. (a) The language of the proviso negatives any intention on the part of the Legislature to confer upon the dispossessed owner any such option as was held by the Supreme Court to have been conferred. Sub-paragraph (ii) of the proviso to Section 4 (4) (b) does not deal with cases where the owner has not agreed, in the sense of refusing to agree. Sub-paragraph (ii) deals with all cases other than those where the owner has made such an agreement as is referred to therein. When it is established, as in the instant case, by the conduct of the parties that there was no such agreement made by the owner, then the statutory direction to the Court contained in sub-paragraph (ii) comes into operation and the Court has a clear duty to give effect to such statutory direction. 10

(b) Even if the proviso conferred such an option as is referred to in sub-paragraph (a) hereof and it appeared that the dispossessed owner did not have an opportunity of exercising the option, those considerations would not alter or in any way affect the basis on which compensation should have been assessed by the Advisory Board or by the Land and Valuation Court. 20

34. (a) For the purposes of this appeal it is unnecessary, it is submitted, for the reasons developed in the judgment of the Land and Valuation Court, to determine the precise meaning and effect in relation to the assessment to be made by the Advisory Board of the words "where any such resumption is made" appearing at the beginning of the proviso. Should, however, it be necessary to reach a decision as to the meaning of those words, it is submitted that they should be construed as equivalent to "is being made" or "is in the course of being made". It is erroneous, it is submitted, to treat the words as meaning "has been made". The argument in support of the former contention receives support from the language used in the proviso to Section 4 (4) (b) in the original form in which it was introduced by Act No. 14 of 1946 and in the various amendments to the proviso made from time to time. It is also supported, it is submitted, by the use of the phrase "where any such purchase is made" in the opening portion of the proviso to Section 4 (4) (a). 30

(b) A resumption is being made or is in the course of being made, for the purposes of the proviso, from the point of time at which the Minister sets in motion the machinery of the statute by requesting a report from the Advisory Board. 40

(c) If the phrase "where any such resumption is made" is to be construed as meaning "where any such resumption has been made",

the proviso is nevertheless fully effective and operative for the reasons set out in the judgment of the High Court.

35. The fact that portion of the resumed land was transferred by one of the Appellants to another one of the Appellants after 10th February, 1942, and before the publication in the Government Gazette of the Notification of Resumption does not prevent the Land and Valuation Court from, or place any difficulty in the way of that Court, determining "the value which would have been determined "in respect of an identical resumption as at 10th February, 1942".

10 36. The Legislature has emphatically and unequivocally prescribed a formula for determining value and assessing compensation in the case of a resumption such as that under consideration, such formula being based on values obtaining as at 10th February, 1942.

37. The reasoning of the Supreme Court by which it reached the conclusion that the legislation under review was ineffective is contrary to well settled principles of construction; in particular, it is basically unsound in that it invokes the principle of implying a term or condition into a statute, not for the purpose of giving effect to an intention which Parliament has disclosed but not fully expressed, but for the purpose of
20 destroying completely the legislative enactment under consideration.

38. The Minister for Lands as Respondent humbly submits that this Appeal should be dismissed with costs for the following, amongst other

REASONS.

- 30 (A) BECAUSE the resumptions were made for the purposes of Section 3 of the War Service Land Settlement Act, 1941, and were expressed to be so made in the Gazette Notification, so that by virtue of the provisions of Section 4 (4) (c) of the Closer Settlement (Amendment) Act, 1907—inserted by Section 8 (1) (a) of the War Service Land Settlement and Closer Settlement (Amendment) Act, 1951—the proviso to Section 4 (4) (b) of the Closer Settlement (Amendment) Act, 1907, applied:
- (B) BECAUSE the assessment of compensation by the Advisory Board and the Land and Valuation Court was properly made as at the 10th February, 1942:
- 40 (C) BECAUSE, apart from the duties of the Advisory Board, the Land and Valuation Court on appeal was bound to determine compensation on the basis of values as at the 10th February, 1942:

(D) BECAUSE Section 4 (4) (b) of the Closer Settlement (Amendment) Act, 1907, does not confer an option upon the dispossessed owner to agree or not to agree to the assessment by the Advisory Board of the value of the resumed land:

and for the reasons set out in more details in paragraphs 32 to 37 hereof.

M. F. HARDIE.

In the Privy Council.

ON APPEAL

FROM THE FULL COURT OF THE HIGH COURT
OF AUSTRALIA.

(Appeals Numbered 49, 50 and 51 of 1952).

BETWEEN—

**RICHARD JAMES PYE, RICHARD
ANTHONY PYE and HENRY WARD
PYE** *Appellants*

— AND —

**THE MINISTER FOR LANDS FOR
NEW SOUTH WALES** - *Respondent.*

CASE

**FOR THE RESPONDENT ON
APPELLANTS' APPEAL.**

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