

[HIGH COURT OF AUSTRALIA.]

P. J. MAGENNIS PROPRIETARY LIMITED . PLAINTIFF ;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

H. C. OF A. 1949.  
SYDNEY,  
Nov. 23, 24;  
Dec. 21.  
Latham C.J.,  
Rich, Dixon,  
McTiernan,  
Williams and  
Webb J.J.

*Constitutional Law—Rehabilitation of discharged members of the Forces—Settlement on land—Joint scheme—Agreement between Commonwealth and a State—Acquisition of land—Just terms—Compensation—Value as at 10th February 1942—Financial assistance—Commonwealth statute—Validity—State statute—Operation—The Constitution (63 & 64 Vict. c. 12), ss. 51 (vi.), (xxxi.), (xxxix.), 96, 109—War Service Land Settlement Agreements Act 1945 (No. 52 of 1945), s. 3 (1), (2), First Schedule—Re-establishment and Employment Act 1945 (No. 11 of 1945), s. 103—Closer Settlement (Amendment) Act 1907-1948 (N.S.W.) (No. 12 of 1907—No. 48 of 1948), ss. 4, 5 (7) (e), (f), 7, 9—War Service Land Settlement Agreement Act 1945 (N.S.W.) (No. 6 of 1946), Schedule—War Service Land Settlement and Closer Settlement (Amendment) Act 1945-1948 (N.S.W.) (No. 14 of 1946—No. 48 of 1948), s. 3.*

An agreement between the Commonwealth and the State of New South Wales made in order to carry into effect proposals agreed to at a conference of Commonwealth and State Ministers with a view to the settlement on land in the State of discharged members of the Forces and other eligible persons, was approved by the Commonwealth Parliament by the *War Service Land Settlement Agreements Act 1945*, and was approved by the State of New South Wales by the *War Service Land Settlement Agreement Act 1945*. The agreement, under which both parties assumed financial and other obligations, contained a term that, for the purposes of the agreement, land should be acquired compulsorily or by agreement at a value not exceeding that ruling on 10th February 1942. A similar term was contained in a proviso to s. 4 (1) of the *Closer Settlement (Amendment) Act 1907-1948* (N.S.W.) with respect to land acquired for the purpose of the scheme contained in the agreement. A proclamation was, prior to the approval of the agreement by the State, made under s. 4 that it was proposed to consider the advisableness of acquiring the plaintiff's land for purposes of closer settlement. The land had greatly increased in value since February 1942.

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*Held, by Latham C.J., Rich, Williams and Webb J.J. (Dixon and McTiernan J.J. dissenting), (1) that the War Service Land Settlement Agreements Act 1945 (Cth.) was legislation with respect to the acquisition of property upon terms which were not just and was invalid; therefore (2) the War Service Land Settlement Agreement Act 1945 (N.S.W.) and the Closer Settlement (Amendment) Act 1907-1948 (N.S.W.), although not invalid, were inoperative so far as they related to and purported to give powers to resume lands for the purposes of the agreement.*

*Per Latham C.J., Rich, Dixon, Williams and Webb J.J.:* Legislation can be legislation with respect to the acquisition of property even though it also be legislation for other purposes with respect to which the Commonwealth Parliament has power to make laws.

DEMURRER.

In an action brought in the High Court by P. J. Magennis Pty. Ltd. against the Commonwealth of Australia, the Honourable John Johnstone Dedman, the Attorney-General for the Commonwealth of Australia, the State of New South Wales, the Honourable William Francis Sheahan, and the Attorney-General for the State of New South Wales, the statement of claim was substantially as follows:—

1. P. J. Magennis Pty. Ltd. the above-named plaintiff is a company duly incorporated under the law in the State of New South Wales and is entitled to sue in and by its said incorporated name.

2. The plaintiff is duly registered under the provisions of the *Real Property Act, 1900*, (N.S.W.) for an estate in fee simple in the lands hereunder described in the schedule to the proclamation referred to in par. 6 of the statement of claim.

3. The area of the lands described in par. 2 consists of approximately 14,000 acres.

4. For many years past the plaintiff has conducted and still conducts on the whole of those lands the business of grazing. The plaintiff has during that period made large profits from the conduct of its business.

5. During that period and in particular since the month of February 1942 the plaintiff has spent large sums of money on improvements to those lands and for the purchase of sheep for use in the conduct of its business. The said lands have greatly increased in value since the month of February 1942.

6. By proclamation dated 23rd August 1945 and notified in the *New South Wales Government Gazette* No. 88 dated 24th August 1945, his Excellency the Honourable Sir Frederick Richard Jordan K.C.M.G. Lieutenant Governor of the State of New South Wales notified as follows:—

"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.

SCHEDULE

Estate	Land District	Shire	County Area	Shown on	
				Plan	By
Jeir	Queanbeyan, Yass	Goodradigbee Yarowlumla	Murray 14,253	Ms.3385	Red Gbn. edg- ing"

7. The defendant John Johnstone Dedman is the Minister of State for the Commonwealth of Australia at the time being administering the provisions of the *Re-establishment and Employment Act* 1945 (No. 11 of 1945) as amended and the provisions of the *War Service Land Settlement Agreements Act* 1945 (No. 52 of 1945.)

8. The Honourable William Francis Sheahan is the Minister of State for the State of New South Wales for the time being administering the *Closer Settlement (Amendment) Act*, 1907, as amended, the *War Service Land Settlement Agreement Act*, 1945 (No. 6 of 1946) and the *War Service Land Settlement Act* 1941 (No. 43 of 1941) as amended.

9. In or about the year 1945 an agreement was made between the Commonwealth of Australia of the one part and the State of New South Wales of the other part, the terms of which are set forth in the first schedule to the *War Service Land Settlement Agreements Act* 1945 (No. 52 of 1945).

10. By that agreement it was recited that at a conference of Commonwealth and State Ministers on 22nd August, 1945, certain proposals were agreed to with a view to the settlement on land in the State of discharged members of the Forces and other eligible persons and that it was expedient that an agreement be made between the Commonwealth and the State in order to carry into effect those proposals.

11. By the terms of and for the purposes of that agreement the Commonwealth was required to make provision for the payment

of certain moneys to the State and to persons settling on the said lands.

12. By the terms of that agreement the State in addition to providing certain moneys for the purposes of the scheme was also required to resume or otherwise acquire certain land at a value not exceeding that ruling on 10th February 1942.

13. By the *War Service Land Settlement Agreements Act* 1945 (No. 52 of 1945) the Commonwealth purported to authorize that agreement. By the *War Service Land Settlement Agreement Act* 1945 (No. 6 of 1946) the State of New South Wales purported to ratify that agreement.

14. The State of New South Wales has threatened and intends to resume the land hereinbefore described for the purposes of that agreement.

15. The Commonwealth threatens and intends to pay out of Commonwealth funds moneys for the purpose of and in pursuance of the said resumption.

The plaintiff claimed (1) declarations that: (i) the *War Service Land Settlement Agreements Act* 1945 (No. 52 of 1945) (Cth) was *ultra vires* and beyond the powers of the Commonwealth; (ii) the *War Service Land Settlement Agreement Act* 1945 (No. 6 of 1946) (N.S.W.) was invalid; (iii) the War Service Land Settlement Agreement was void and inoperative; and (iv) the *Closer Settlement (Amendment) Act* 1907, as subsequently amended and in particular s. 4 thereof were invalid; and (2) injunctions restraining: (a) the Commonwealth and the defendant John Johnstone Dedman from paying out of the consolidated revenue of the Commonwealth any moneys for the purpose of or in connection with the resumption of the said lands; (b) the Commonwealth and the defendant John Johnstone Dedman from carrying out or taking any further action pursuant to the terms of the alleged War Service Land Settlement Agreement; (c) the State of New South Wales and the defendant William Francis Sheahan from resuming the said lands or taking any further action with the object or intention of resuming those lands.

The defendants the Commonwealth, Dedman and the Attorney-General for the Commonwealth demurred to so much of the statement of claim as related to and claimed relief against them, upon the following grounds: (1) that it disclosed no cause of action; (2) that the Acts and matters therein alleged so far as they respectively purported to depend on or derive authority from the legislative powers of either the Commonwealth or the State of New South Wales were a valid exercise of those powers respectively; (3) that

in particular the *War Service Land Settlement Agreements Act 1945* of the Commonwealth and the *War Service Land Settlement Agreement Act 1945* of New South Wales were each respectively a valid exercise of legislative power and the War Service Land Settlement Agreement respectively authorized and approved by those Acts was in all respects valid and operative; and (4) that the plaintiff so far as the statement of claim related to and claimed relief against them had no sufficient interest in the subject matter of the action to enable it to maintain that action.

The defendants the State of New South Wales, Sheahan, and the Attorney-General for New South Wales demurred to the whole of the statement of claim on, *inter alia*, the following grounds: (a) that the facts alleged therein did not show any cause of action or any ground of relief against them or any of them to which effect could be given by the Court against them or any of them; (b) that the agreement referred to in par. 9 of the statement of claim was validly made and was within the competence of the Commonwealth of Australia and the State of New South Wales; (c) that the *War Service Land Settlement Agreements Act 1945* (Cth.) was a law validly made by the Parliament of the Commonwealth in pursuance of the powers of that Parliament conferred upon it by the Constitution of the Commonwealth; (d) that (i) the *War Service Land Settlement Agreement Act 1945* (N.S.W.), (ii) the *Closer Settlement (Amendment) Act 1907* (N.S.W.) and the amendments thereto, and (iii) the *War Service Land Settlement Act 1941* (N.S.W.) and the amendments thereto, were laws validly made by the Parliament of the State of New South Wales; and (e) that the resumption referred to in par. 14 of the statement of claim was authorized by law.

The provisions of the relevant statutes and the agreement are sufficiently set forth in the judgments hereunder.

*G. E. Barwick* K.C. (with him *B. P. Macfarlan*), for the plaintiff. The agreement contained in the first schedule to Act No. 52 of 1945 (Cth.) shows a scheme for the settlement of discharged members of the Forces chosen by the Commonwealth upon land to be acquired by the State, the land and the scheme of its use to be mutually agreed upon between the Commonwealth and the State. The analysis of that agreement shows that the scheme is a Commonwealth scheme of land settlement seeking to obtain the necessary land upon unjust terms by the use of State machinery for settling thereon such discharged members of the Forces as may be chosen by the Commonwealth. The scheme seeks to avoid the constitutional limitation imposed by s. 51 (xxxi.) of the Constitution. The agreement in the

first schedule to the Act shows a greater degree of State participation in administration and a greater contribution by the State to the cost of the scheme than does the agreement in the second schedule to the Act, otherwise the scheme of the two agreements is the same. The scheme applies to any "eligible person" and it provides that the Commonwealth may choose a class of persons with the concurrence of the State and deem them eligible. There is nothing to identify in any way the persons with the State. Under clause 7 (2) of the agreement the Commonwealth assumes entirely the financial responsibility for the training of, living allowances and transport for the persons who are applicants or who have been accepted as settlers. The agreement assumes that the valuation of the land will always be something lower than the cost of acquisition, development and improvement. There is a direct relationship between the cost of land in resumption or purchase and the Commonwealth's obligation to pay money under the agreement, because the amount written off will vary according to whether the land is cheaply or dearly bought. Under clause 13 of the agreement, so far as the assistance period is concerned, the Commonwealth determines the rate and the conditions under which the living allowance will be paid for the first year, and the Commonwealth alone has the right to determine whether there will be an extension of the period during which the living allowance will be paid, but under clauses 6 and 7 the parties equally bear the rent and interest which is foregone during the period of assistance. So far as advances to settlers are unrecovered and lost, the parties are to bear the loss equally. But the arrangements for the making of the advances must be subject to the approval of the Commonwealth. The proclamation referred to in par. 6 of the statement of claim would be a step taken under clause 10. The date 10th February 1942 was expressly chosen in order to keep down the cost of resumption. Clause 12 refers to the determination and classification of eligible persons by the State "on behalf of the Commonwealth." Broadly, the agreements are a complete scheme for the settlement of discharged members of the Forces. It is noticeable that they are controlled by the Commonwealth at every vital point, and, indeed, as to the persons to be settled, the choice is to be made on behalf of the Commonwealth. Act No. 52 of 1945 in its application to land in New South Wales, is invalid. It is not an Act merely granting financial assistance to a State in connection with some of the activities of the State. It is quite clearly a Commonwealth scheme and in no sense is it a State scheme. The Act is a law with respect to the acquisition of property because there is a Commonwealth purpose. By the Act

who or authority which is given power by Commonwealth legislation (*Jenkins v. The Commonwealth* (1); *McClintock v. The Commonwealth* (2); *Bank of New South Wales v. The Commonwealth* (3)). Only Commonwealth legislation effecting or authorizing an acquisition of property is within the scope of s. 51 (xxxi.). The arguments of Mr. Kitto relating to s. 96 and s. 109 of the Constitution, and also to the meaning of the phrase "eligible person" are adopted on behalf of these defendants.

[DIXON J. referred to *Anderson v. The Commonwealth* (4).]

*F. W. Kitto* K.C., by leave. Even if the agreement were held to be invalid the plaintiff would still not have any interest to maintain the action. Unless the plaintiff has an interest of its own—it not being an Attorney-General to complain of the alleged invalid Act of the Commonwealth—he cannot maintain a suit for a declaration of invalidity. The proclamation alleged in par. 6 of the statement of claim does not show any threatened or intended resumption. It merely states that it is proposed to consider the advisableness of acquiring the land. If the arguments adduced on behalf of the plaintiff do not lead to the conclusion that the resumption will be invalid, then it has no interest to proceed on hypothetical grounds.

*G. E. Barwick* K.C., in reply. If the State has to do justice to the plaintiff it will not take the land. There is a threat to take the land for the purposes of the agreement, and there is not any intention to pay the value of the land. The plaintiff certainly has an "interest" in an action of *declaratur*. If Act No. 52 of 1945 be declared invalid the plaintiff would succeed in the action because the demurrers are too wide. By virtue of amendments made to the State legislation there is not any longer an overall power to resume land. The purpose must be determined before the resumption because the Advisory Board's report is contingent as to its content on that factor. The defendants cannot fall back on any unreal suggestion that they were proposing to take this land for closer settlement and not for the settlement of discharged members of the Forces. They have nominated the purpose for which they desire to resume the land. Upon the disappearance of that purpose the resumption can be restrained under *Municipal Council of Sydney v. Campbell* (5) because a non-existent purpose is just as bad as an unlawful one, or one that is outside the purpose of the Act. "Eligible persons"

(1) (1947) 74 C.L.R., at p. 406.  
(2) (1947) 75 C.L.R., at p. 23.  
(3) (1948) 76 C.L.R., at p. 250.

(4) (1932) 47 C.L.R. 50.  
(5) (1925) A.C. 338.

as defined in clause 2 (1) (b) of the agreement could be persons who had not been engaged on war service, and could be persons outside the defence power. Clause 12 (b) does not narrow the meaning of "eligible persons" in the way suggested by the defendants. The definition of the phrase "eligible person" has been incorporated in the State legislation, therefore "severability" is not applicable. The agreement is bilateral, there is not any intention for partial operation. One of the parties to the agreement has carried its part into execution on the basis of total validity of the agreement. So far as s. 51 (xxxi.) is concerned all that one inquires is: What is the subject matter of the law? Is it a law on the subject matter of acquisition? The argument that the power under this head of power is less than plenary, is untenable. If Commonwealth participation in the agreement is completely destroyed upon the destruction of Act No. 52 of 1945, then the State Act must also be destroyed. The State could not compel the Commonwealth to participate in a State activity. The agreement is not in any sense the provision of financial assistance to a State within the meaning of s. 96 of the Constitution. The purpose of s. 96 is shown in *Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty. Ltd.* (1). The mere fact that an Act is an Act granting financial assistance is not enough; it must not in its purpose and substance be objectionable (*W. R. Moran Pty. Ltd. v. Deputy Federal Commissioner of Taxation (N.S.W.)* (2)). The Commonwealth cannot in effect say to a State: "If you resume property on unjust terms, the Commonwealth will make a grant of financial assistance to you." The agreement does not provide for such assistance to a State.

*Cur. adv. vult.*

The following written judgments were delivered:—

LATHAM C.J. The Commonwealth Parliament and the Commonwealth Government are limited in the exercise of the power to acquire property by the constitutional requirement that any Commonwealth law with respect to the acquisition of property must provide for just terms of acquisition: Commonwealth Constitution, s. 51 (xxxi.). This constitutional provision requires the terms actually to be just and not merely to be terms which the Parliament may consider to be just. State Parliaments are not bound by any similar constitutional limitation. They, if they judge it proper to do so for some reason, may acquire property on any terms which

(1) (1939) 61 C.L.R., at p. 763.

(2) (1940) 63 C.L.R. 338, at pp. 345, 349, 350.

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they may choose to provide in a statute, even though the terms are unjust. The legislation the validity of which is challenged by the plaintiff company in this action is designed to escape from the constitutional limitation contained in the Commonwealth Constitution by using State legislative powers under an agreement made with the Commonwealth and approved by the Commonwealth Parliament for the purpose of acquiring land upon terms set out in the agreement, the Commonwealth subsidizing the State in its expenditure for this purpose. The land is to be acquired for the settlement of ex-servicemen, which is clearly a Commonwealth purpose, being a purpose in respect of which the Commonwealth Parliament has power to make laws under s. 51 (vi.) of the Commonwealth Constitution—power to make laws with respect to defence. The agreement provides that the land is to be paid for at a value not exceeding that ruling on 10th February 1942.

The allegations in the statement of claim in this action must be accepted as true for the purpose of this proceeding by way of demurrer, which is a means of obtaining a decision upon the question whether, if the plaintiff proves the facts alleged, there is a cause of action against a defendant. The statement of claim contains allegations that the State proposes to acquire under its Closer Settlement Acts and in pursuance of the aforesaid agreement land owned by the plaintiff company, that since February 1942 the plaintiff has spent large sums of money on improvements to the land, and that the land has greatly increased in value since February 1942. The plaintiff claims declarations that the Commonwealth and State legislation approving the agreement and the agreement itself and an amendment of the State *Closer Settlement (Amendment) Act* made to give effect to the agreement are invalid, and consequential injunctions. The action is brought against the Commonwealth, the Minister administering the relevant Commonwealth Acts, the Attorney-General of the Commonwealth, and against the State of New South Wales and the Attorney-General thereof. All the defendants have demurred to the statement of claim.

Counsel for the defendants did not argue that such terms of acquisition were just. To acquire land at an under value for soldier settlement cannot be said, however desirable the objective may be, to be acquiring land on just terms. The motives of the respective legislatures are legally unimportant. The only question is whether the Parliaments of the Commonwealth and, in this case, of the State of New South Wales, have by joint action succeeded in evading the constitutional obligation of the Commonwealth Parliament to provide just terms when it makes a law with respect to the

acquisition of property for a purpose for which the Commonwealth Parliament has power to make laws. If the Parliaments have succeeded in acting within the law, the intent of either or both to evade the constitutional limitation of Commonwealth legislative power is immaterial in considering the validity of the legislation.

The Commonwealth and State legislation takes the form of authorization or approval of an agreement between the Commonwealth and the State of New South Wales. The immediately relevant Acts are the Commonwealth *War Service Land Settlement Agreements Act* 1945 and the State *War Service Land Settlement Agreement Act* 1945. The Commonwealth Act, s. 3 (1), provides that: "The execution, by or on behalf of the Commonwealth, of agreements between the Commonwealth and the State of New South Wales, the Commonwealth and the State of Victoria, and the Commonwealth and the State of Queensland, substantially in accordance with the form contained in the First Schedule to this Act, is hereby authorized." Section 3 (2) authorizes the execution, on behalf of the Commonwealth, of agreements substantially in accordance with the form contained in the second schedule with the States of South Australia, Western Australia and Tasmania.

The agreement with the States of New South Wales, Victoria and Queensland contains a clause that land acquired by the State for the purposes of the agreement is to be acquired "compulsorily or by agreement and at a value not exceeding that ruling on the tenth day of February, one thousand nine hundred and forty-two"—clause 11 (1) (b). In the agreement in the second schedule (with the States of South Australia, Western Australia and Tasmania) there is no provision limiting the amount to be paid for land to the value on 10th February 1942.

The agreement with the State of New South Wales, clause 2, defines "eligible person" as meaning—(a) certain discharged members of the Forces; (b) persons included in the class of persons (if any) which the Commonwealth with the concurrence of the State determines shall be deemed eligible to participate in land settlement contained in the agreement. It was argued that provision (b) made it possible to apply the scheme to persons who had no war service and had nothing to do with the Forces, so that the Act went beyond the limits of the defence power.

But clause 12 of the agreement shows that no person can "participate under the scheme" unless he applies to participate. Clause 12 (b) fixes a time limit for applications—"An eligible person may apply to participate under the scheme not more than five years after—(i) the fifteenth day of August, One thousand nine

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engaged on war service, whichever is the later." This provision specifies alternative periods of limitation in the words "whichever is the later." These alternatives are treated as being applicable in the case of every applicant. Every applicant is therefore a person who can specify a date when he ceased to be engaged on war service. He must therefore be a person who was engaged on war service. Provision for the training, selecting and settling of such persons is within the power to make laws with respect to defence.

A further answer to this objection is to be found in the fact that par. (b) of the definition of "eligible person" does not have any effect unless and until the Commonwealth and the State agree upon some class of persons. If they do so agree and provision for such persons is outside the defence power of the Commonwealth Parliament, that further agreement would not be valid as an exercise of that power. On the other hand, such an agreement might be in such terms as to be a valid exercise of that power. But the possibility that such further agreement might be invalid cannot affect the validity of the agreement contained in the schedule to the Act. Clause 2 (1) (b) says only that the Commonwealth and the State may make an agreement to extend the scheme to persons not included within par. (a) of clause 2 (1). If such an agreement should be made a question may perhaps arise as to its validity. But the fact that, if the agreement in the schedule is itself valid, such a question may arise cannot affect the validity of that agreement itself.

Clause 3 of the agreement sets out the principles to be applied in carrying out land settlement under the scheme. Clause 4 provides that the Commonwealth shall provide financial assistance and that the State shall initiate proposals for settlement, but that the Commonwealth may initiate proposals where such proposals "are directly associated with any matter in respect of which the Commonwealth has power to make laws." Clause 5 provides that the State shall provide capital moneys for acquiring, developing and improving land for settlement in accordance with the agreement. Clause 6 provides that the State is to bear the cost of all State administration of the scheme and that the State shall make a certain capital contribution. Clause 7 provides that the Commonwealth shall bear the cost of Commonwealth administration of the scheme, shall provide training and pay living allowances to selected applicants, and that the Commonwealth shall make a capital contribution in respect of each holding of an amount equal to one-half of the excess of the total cost involved in acquiring, developing and

improvements, such valuations to be made in accordance with a stated principle which will enable a person without capital to obtain the benefits of the scheme: clause 6 (5). The substance of clause 11, providing for acquisition on the basis of values as at 10th February 1942, has already been quoted.

The *War Service Land Settlement Agreement Act* 1945 of New South Wales approves and ratifies the agreement in the schedule, which is in the same terms as that contained in the first schedule to the Commonwealth Act.

Section 51 (xxxi.) of the Commonwealth Constitution is in the following terms:—"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to— . . . (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws." The requirement of just terms must be satisfied by any Federal legislation which is a law with respect to the acquisition of property. If Commonwealth legislation with respect to the acquisition of property does not provide just terms, the legislation is invalid: *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd. v. The Commonwealth* (1).

The constitutional provision is not limited in terms to laws providing for the acquisition of property by the Commonwealth itself. The words are general—"with respect to the acquisition of property." It is obvious that the constitutional provision could readily be evaded if it did not apply to acquisition by a corporation constituted by the Commonwealth or by an individual person authorized by a Commonwealth statute to acquire property. Further, the present case shows that the constitutional provision would be quite ineffective if by making an agreement with a State for the acquisition of property upon terms which were not just the Commonwealth Parliament could validly provide for the acquisition of property from any person to whom State legislation could be applied upon terms which paid no attention to justice. The question whether the constitutional requirement applies to acquisitions in pursuance of Commonwealth law other than acquisition by the Commonwealth itself was mentioned in the case of *Real Estate Institute of New South Wales v. Blair* (2). In *McClintock v. The Commonwealth* (3), *Starke J.* and *Williams J.* held that it applied in the case of acquisition of property authorized under Common-

(1) (1943) 87 C.L.R. 314.

(2) (1946) 73 C.L.R. 213, at p. 224.

(3) (1947) 75 C.L.R., at pp. 23, 36.

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wealth law though the Commonwealth itself did not acquire the property. *Williams J.* applied the principle in *Jenkins v. The Commonwealth* (1). See also *Bank of New South Wales v. The Commonwealth* (2), per *Rich and Williams JJ.* I agree that, as legislation with respect to the subject of the acquisition of property can be enacted by the Commonwealth Parliament only by virtue of the power conferred by s. 51 (xxxi.), all such Commonwealth legislation must affirmatively provide just terms for such acquisition whether the acquisition be by the Commonwealth or by a State or by any other person.

The next question which arises is whether the Commonwealth legislation contained in the *War Service Land Settlement Agreements Act 1945* is legislation with respect to the acquisition of property. It is submitted for the defendants that a law cannot fall within this category unless it is either a law which directly acquires property by force of its own terms or creates a previously non-existing power in some person to acquire property or which comes into operation upon the acquisition of property. All such laws doubtless would be laws with respect to the acquisition of property. But there is nothing in the words of s. 51 (xxxi.) of the Constitution which supplies any warrant for limiting the application of this provision to laws which fall within the classes mentioned.

The provisions in the schedule to the Commonwealth Act are provisions of an agreement and not of a statute. It is true that the Act is a law authorizing only the execution of the agreement, but the whole subject matter of the agreement is the acquisition of property upon certain terms and conditions for certain purposes. The provisions of the agreement are directed to the acquisition of property and the agreement becomes effective in achieving its objective of the settlement of discharged servicemen only when property has been acquired. I can see no reason whatever for holding that a law approving an agreement of such a character as this is not a law with respect to the acquisition of property.

It is next said for the defendants that the Commonwealth Act is a law with respect to the re-establishment in civil life of discharged servicemen and is not a law with respect to the acquisition of property. A law providing for such re-establishment is a law which falls within the defence power (*Attorney-General for the Commonwealth v. Balding* (3); *Repatriation Commission v. Kirkland* (4)). The fact that the settlement of ex-servicemen is a defence purpose is the circumstance which makes the law a law for a purpose with

(1) (1947) 74 C.L.R. 400.

(3) (1920) 27 C.L.R. 395.

respect to which the Commonwealth Parliament has power to make laws. But this fact most obviously does not show that it is not also a law with respect to the acquisition of property. All Federal laws for the acquisition of property are required by s. 51 (xxxi.) also to be laws for a purpose in respect of which Parliament has power to make laws. Accordingly there is nothing in the objection that the Act is not an Act with respect to the acquisition of property for the reason (true in itself) that it is an Act with respect to a defence purpose. Similarly there is no substance in the objection that the Act is an Act giving financial assistance to States (Constitution, s. 96) and is therefore not a law with respect to the acquisition of property.

Upon the allegations in the statement of claim it is clear that under the agreement it is intended that land should be acquired for a Commonwealth purpose upon terms which necessitate paying for the land compensation which represents its value in February 1942, which value is less than the present value of the land. It follows that the Act is an Act with respect to the acquisition of property upon terms which are not just and is therefore invalid.

This conclusion makes it unnecessary for me to consider in detail a contention for the plaintiff that the Commonwealth Act is invalid by reason of s. 103 of the Commonwealth *Re-establishment and Employment Act 1945*—No. 11 of 1945. There are in my opinion several effective answers to this argument, but the simplest is that the Act authorizing the execution of the agreement by the Commonwealth (No. 52 of 1945) was passed after Act No. 11 of 1945.

But the legislative power of the State Parliament is not limited by any requirement of just terms and, therefore, it is submitted for the defendants that the State legislation approving and ratifying the agreement, Act No. 6 of 1946, the *War Service Land Settlement Agreement Act 1945*, is valid even if the Commonwealth Act is invalid. But that which the State Act approves is an agreement made between the State and the Commonwealth. If the agreement cannot validly be made by the Commonwealth then it cannot be valid as an agreement between the State and the Commonwealth. The agreement cannot be valid as an agreement in the case of the State and invalid as an agreement in the case of the Commonwealth. The operation of the agreement depends at all points upon action by the Commonwealth in pursuance of the agreement and upon the undertaking and performance by the Commonwealth of definite pecuniary obligations under the agreement. The State Parliament has not enacted the terms of the agreement as provisions of a statute, but has only approved the making of the agreement as an

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agreement. If the agreement completely fails on the side of the Commonwealth it also completely fails as an agreement on the side of the State. The result therefore is that as the State legislation only approved that which was treated by the legislation as amounting to an agreement if executed by both the Commonwealth and the State, and as that agreement is not valid, the State also is not bound by the agreement and the State Act approving the execution of the agreement therefore did not come into operation. The result is not that the State Act is invalid, but simply that it has no effect.

But it is contended that, even if the Commonwealth Act is invalid, the State can acquire the land under its Closer Settlement Acts. This is doubtless true, but the question is whether the State can validly proceed with the resumption of the plaintiff's land, not under the ordinary provisions of State statutes, which provide for payment of the value of the land with an appeal to the Land and Valuation Court, but as under the terms of the agreement with the Commonwealth at the value of 10th February 1942. Machinery for acquiring land for settlement is contained in various Closer Settlement Acts of New South Wales. The *Closer Settlement (Amendment) Act* 1907 provides for the constitution of Closer Settlement Advisory Boards, and s. 4 provides that where an advisory board reports that any land is suitable to be acquired for closer settlement, the Governor may—(a) subject to the Act, purchase it by agreement with the owner; or (b) resume it under the Act. Section 4 (3) provides as follows:—"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." Such a proclamation was made in respect of the plaintiff's land on 23rd August 1945 by the Lieutenant-Governor acting as Governor under s. 4 (3), *i.e.* before the Commonwealth and State Acts relating to the agreement. The Commonwealth Act was assented to on 11th October 1945 and the State Act on 7th January 1946. Section 5 (7) (e) of the *Closer Settlement (Amendment) Act* 1907 provides that in the absence of agreement the compensation to be paid on resumption of land under the Act shall be the value of the land as assessed by the Advisory Board or as determined by the Land and Valuation Court on appeal. After Act No. 6 of 1946, approving the War Service Land Settlement Agreement with the Commonwealth, had been passed, the *War Service Land Settlement and Closer Settlement (Amendment) Act* 1945 was passed. That Act altered the definition of discharged members

of the Forces who were entitled to benefits under prior State legislation and brought the definitions of "discharged member of the Forces," "member of the Forces," "war service" and "eligible person" into line with definitions contained in the agreement with the Commonwealth.

Section 3 of this Act provided that where land was resumed for the purposes of the scheme contained in the agreement with the Commonwealth the value of the land as assessed by the Board or determined by the Land and Valuation Court should not exceed the value which would have been so assessed or determined in respect of an identical resumption as at 10th February 1942 excepting the value of any improvements effected on such land since that date.

Section 3 (d) of this Act provided that when a proclamation had been made under s. 4 by the Governor that he proposed to consider the advisableness of acquiring any land for settlement the land should not, while such proclamation remained in force, be transferred or otherwise dealt with without the consent of the Minister. It has been mentioned that the proclamation in the present case was made before the passing of the State Act approving the agreement with the Commonwealth. Section 3 (d) of the 1946 Act contains a provision that the provision restricting transfer &c. shall apply to land in respect of which such a proclamation was made before the commencement of the Act.

By Act No. 48 of 1948, s. 7, the State amended the provisions of s. 4 so as to make it possible to pay up to fifteen per centum above the value of the land on 10th February 1942 in cases where land-owners agree to transfer their land and to take compensation at not more than the assessed value. In the case, however, of owners who do not so agree the restriction to the value as at 10th February 1942 was retained. If this provision had appeared in Commonwealth legislation it would have been impossible to defend it as providing just terms. But, as already stated, State Parliaments are not subject to any constitutional provision that they must provide just terms upon the acquisition of any property.

There is in my opinion no doubt as to the power of the State Parliament to provide for compensation for land resumed upon any basis which it thinks proper. But in the present case the State proposes to resume the land, not under the general provisions of State statutes which provide for paying the value of the land, but "for the purposes of" the agreement with the Commonwealth and, at present at least, not otherwise: par. 14 of statement of claim. I have stated my reasons for the opinion that the State legislation is inoperative so far as it relates to, and purports to give powers

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to resume lands for the purposes of, the agreement. The result is that the State may proceed with the resumption of the plaintiff's land under the Closer Settlement Acts—but at a value assessed by a Board and subject to appeal to the Land and Valuation Court: Act of 1907, ss. 9, 10. The provisions which limit the amount of compensation for resumed land to the value as at 10th February 1942 (with a possible increase up to fifteen per cent more if the owner does not exercise his right of contesting the assessment) apply only to purchase or resumptions “made for the purpose of the scheme contained in the agreement approved and ratified by the *War Service Land Settlement Agreement Act 1945*”: Act No. 14 of 1946, s. 3 (b) and (c). When a Board assesses or the court, upon appeal, determines the price or value for resumed land, the limitation to value as at 10th February 1942 applies to the assessment of the Board or the decision of the court “where any purchase or resumption is made for the purposes of the scheme” contained in the agreement: Act No. 14 of 1946, s. 3 (b), inserting a proviso to that effect in par. (f) of sub-s. (7) of s. 5 of the *Closer Settlement (Amendment) Act 1907*. As in my opinion there is no such agreement, the direction as to the limit of compensation has no operation in this or in any case.

For the reasons which I have stated I am of opinion that the contention of the defendants that the plaintiff has no cause of action fails and that therefore the demurrers should be overruled.

RICH J. I have had the opportunity of reading the judgment of my brother *Williams* and agree with it.

In my opinion the demurrers should be overruled.

DIXON J. The plaintiff is the owner of a large area of land in respect of which a proclamation has been made under s. 4 (3) of the *Closer Settlement (Amendment) Act 1907* (N.S.W.) as amended. The proclamation is a notification that the Governor in Council proposed to consider the advisableness of acquiring the plaintiff's land for the purposes of closer settlement. Such a proclamation must be made before land is resumed for those purposes. The procedure is for an Advisory Board to report to the Minister, at his request, as to the suitability of the land and upon other matters including the estimated value of the land and the price at which the Board recommends its acquisition: s. 3 (1). Then if it is decided to acquire the land, the resumption is effected by notification in the *Gazette*. On that the land vests in the Crown for the purposes of the Closer Settlement Acts and must be dealt with

thereunder: s. 7. An appeal may be brought to the Land and Valuation Court against the value assessed by the Advisory Board: s. 9. But the assessment of the Board or the Court fixes the amount of compensation.

After the proclamation under s. 4 (3) had appeared, the *Closer Settlement (Amendment) Act 1907* was further amended. It was done by Act No. 14 of 1946 and Act No. 48 of 1948. One amendment made was to add a new sub-section (sub-s. (4)) to s. 4 of the principal Act. Paragraph (b) of the new sub-section provides that “the compensation to be paid in respect of any such resumption shall . . . be the value of the land as assessed by an advisory board, or where an appeal has been made . . . as determined by the Land and Valuation Court.” To this paragraph there is a proviso. The purpose of the suit is to overcome the operation of the proviso. It provides that where any such resumption is made for the purposes of the scheme contained in the agreement approved and ratified by the *War Service Land Settlement Agreement Act 1945* (N.S.W.) certain provisions shall apply which are then set out. The effect of these provisions is to limit the value at which the Advisory Board may assess the land. The limitation is by reference to the value obtaining on 10th February 1942.

If the owner has agreed not to claim compensation in excess of the value assessed by the Board, the value the Board may fix is restricted to not more than fifteen per cent over the value as at that date. If the owner has not so agreed, the value the Board may fix or the Court determine is restricted to the value as at that date, that is, without the addition of fifteen per cent.

The date 10th February 1942 is that mentioned in the *National Security (Economic Organization) Regulations* as a reference point for various purposes, including the control of the price of land.

The plaintiff says that it is intended to resume its land for the purposes of the scheme contained in the agreement to which the proviso refers, and not unnaturally it objects to its land being resumed at a value which doubtless is as remote from the present in amount as it is in time.

The agreement ratified by the *War Service Land Settlement Agreement Act 1945* (N.S.W.) (No. 6 of 1946) is an agreement made on 28th November 1945 between the Commonwealth and the State of New South Wales.

According to recitals contained in the agreement, it was made in order to carry into effect proposals agreed to at a conference of Commonwealth and State Ministers with a view to the settlement

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