

*Privy Council Appeal No. 88 of 1913.*

**The Chief Commissioner for Railways and  
Tramways** - - - - *Appellant.*

*v.*

**Barbara Telena Hutchinson and another** - *Respondents.*

FROM

**THE SUPREME COURT OF THE STATE OF NEW SOUTH WALES.**

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DECISION OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 6TH MARCH 1914.

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*Present at the Hearing.*

LORD DUNEDIN.

LORD SUMNER.

LORD PARKER OF WADDINGTON.

LORD PARMOOR.

[*Delivered by* LORD SUMNER.]

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The State of New South Wales has from time to time made statutory provision for the compulsory acquisition of land for public purposes. The first Act was in 1858, Act 22 Vict., No. 19. There have been various repeals and re-enactments, with and without substantial change, in 1888, 1900, and 1912. The Act now in force is The Public Works Act, 1912, "an Act to consolidate the Acts relating to public works." The provision, with which this Appeal is concerned, has remained without material alteration since 1888, but in that year the corresponding provision of 1858 was altered both in substance and in form.

Litigation in connection with the compulsory acquisition of land may take place before various tribunals. Where land is acquired by notifi-

cation in the Gazette, the claim for compensation, subject to various formalities, goes to a jury, and Section 106 (1) regulates the incidence of costs according as the amount of the verdict on the one hand equals or falls short of the amount of the valuation notified to the claimant, or on the other exceeds it. When land is acquired by notice to the parties, the question of compensation goes to arbitrators or to justices according as the amount claimed does or does not exceed 100*l*. Justices have the costs in their discretion and settle the amount of them, doubtless because it is expected that proceedings before them will be inexpensive and simple and the costs small. When arbitrators deal with the claim, costs are regulated by Section 118, the Section in question in this Appeal. Furthermore, when arbitrators award 300*l*. or more, either party, if dissatisfied, can have the question of compensation resettled by a jury on certain conditions. In that case Section 123 adjusts the costs according as the verdict is for the same sum as was awarded by the arbitrators, or for a less sum, or for a sum greater than that previously offered by the acquiring authority and awarded by the arbitrators.

The Legislature has neither uniformly left the costs to the discretion of the tribunal nor uniformly regulated them on any one statutory principle. The plan pursued has been to fix in each case a rule as to costs according to the procedure adopted, except when the matter is expressly left to the tribunal's discretion. The rule in each case decides the incidence of costs by simple reference to certain ascertainable amounts. It is not rested on considerations arising on the particular case. The plan is to ensure certainty, so as to enable parties to count the cost before they go to law. No doubt in the vast majority of cases these

provisions achieve their object without difficulty or discussion.

In the present case the claim for compensation came before arbitrators and was not thereafter taken before a jury. The sum awarded to the Claimants, the now Respondents, fell short of the claim lodged by upwards of one-third of it, but exceeded the valuation and offer of the constructing authority by a substantial sum. Section 118 (2) enacts that, if the sum awarded is one-third less than the amount claimed the whole costs of and incidental to the arbitration and award shall be borne by the claimant and the arbitrators shall direct payment of the same accordingly. The arbitrators did so direct payment, holding that Section 118 (2) applied. The Claimants appealed to the Supreme Court. Section 118 (1) enacts that "all the costs of and incident to any such arbitration, as settled by the arbitrators, shall be borne by the constructing authority, unless the sum awarded by the arbitrators is the same or a less sum than was offered by the constructing authority, in which case each party shall bear his own costs incidental to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions." The Supreme Court held that Section 118 (1) applied, and reversed the decision of the arbitrators as to costs. The constructing authority, the Chief Commissioner for Railways and Tramways, now appeals and contends that the arbitrators were right.

Obviously, the Legislature of New South Wales did not intend to make contradictory provisions in two consecutive sub-sections of the Act. The whole question is what is their effect when read together? The Appellant contends that the second prevails, reading Sub-section (2) as a proviso upon or an exception out of Sub-section (1) as a whole. The Respondents, relying on the

reasoning of the majority of the Judges in the Supreme Court, contend that the right construction is to treat Sub-section (2) as a further limitation on the words in Sub-section (1) which commence with "unless the sum awarded . . . ." and to hold that they are in their nature a proviso.

Their Lordships are of opinion that the reasoning of the majority of the Judges in the Supreme Court is correct. The scheme of the section is to place the liability for costs normally on the constructing authority, with an exception which leaves each party to bear his own costs in a particular case, and with a further proviso (designed no doubt to discourage excessive claims) that if the sum awarded is one-third less than the amount claimed then, so far from the claimant having his costs paid or escaping without paying those of his opponent, he shall in this event pay the costs of both sides. The reasonable construction is that, if the claimant justifies his position, by recovering more than was offered to him, he gets his costs under the ordinary rule; but if he loses his costs because he ought to have accepted the offer instead of going to arbitration, and has further been guilty of making an excessive claim, there is added to the loss of his own costs with which the first mistake is visited, the liability to pay the costs of the other side as a penalty for his greed. In the words of Chief Justice Cullen: "Sub-section (2) "should be read . . . . as a proviso only "upon the special direction contained in the "latter part of Sub-section (1), taking out of the "rule there laid down those cases in which the "sum recovered is at once one-third less than "the claim and less than or no more than the "sum offered."

The Appellant relied in argument upon the corresponding provision, Section 36 in the Act of 1858, which differed from that now in force not

only in taking one-fourth as the margin but also in the structure of the enactment, which had no numbered sub-sections but ran on in one sentence, prefacing with a "but" "the words "if the sum awarded shall be one-fourth less than the amount claimed . . . " It was said that this was ambiguous, and that the present provision, which is broken up into several sentences and sub-sections, was intended to avoid this ambiguity. Their Lordships see no ambiguity in the former provision, and think that, so far from assisting the argument, the repealed section tends to defeat it by showing that the intention of the Legislature has throughout been to limit the case, where an award does not exceed an offer, by a further and special provision for a case where not only does the award not exceed the offer but the claim exceeds the award by more than the margin allowed.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed. The Appellant will pay the Respondents' costs of the Appeal.

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In the Privy Council.

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THE CHIEF COMMISSIONER FOR  
RAILWAYS AND TRAMWAYS

v.

BARBARA TELENA HUTCHINSON  
AND ANOTHER.

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DELIVERED BY LORD SUMNER.

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