

H. C. OF A. 6 of 1919, sec. 10c, is to allow the constitution of the Court by means
1921. of the Deputy Judge.

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PRESLEY The appointment of Mr. Gerald Hogan was a lawful one, in my
v. opinion, and leave to appeal should be refused.
GERAGHTY.

[The consent and undertaking mentioned above were given by the Minister for Home and Territories.]

Solicitor for the applicant, *N. W. Barratt*, Darwin, by *McCay & Thwaites*.

Solicitor for the Minister and the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

JAMES FENWICK AND COMPANY LIMITED APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION } RESPONDENT.

H. C. OF A. *Income Tax—Assessment—Income—Source of income—Requisitioning of property by*
1921. *Commonwealth—Compensation—Income Tax Assessment Act 1915-1918 (No.*
~ *34 of 1915—No. 18 of 1918), secs. 3, 10—Defence Act 1903-1915 (No. 20 of*
SYDNEY, *1903—No. 3 of 1915), sec. 67—Regulations under the Defence Act, reg. 627*
April 18. (Statutory Rules 1915, No. 173).

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KNOX C.J.,
Gavan Duffy
and Rich JJ.

Reg. 627 of the *Regulations under the Defence Act* (Statutory Rules 1915, No. 173) provides, by sub-reg. 1, that in time of war the Governor-General may issue a general authority to the Minister of Defence authorizing him to issue an authority to such person as he thinks fit to requisition certain articles, including vessels, for naval and military purposes; by sub-reg. 2, that upon receipt of such an authority from the Minister the person to whom it is issued may require the owner of such articles to deliver them up to him; and, by

sub-reg. 3, that "the compensation payable to an owner in respect of any articles . . . requisitioned in pursuance of this regulation shall in default of agreement be assessed in the first instance by a board of three persons appointed by the Minister, and be determined by the Minister, subject to an appeal to any Judge of the Supreme Court of a State who may finally determine the amount of compensation."

Acting under that regulation, the Minister, on behalf of the British Admiralty, requisitioned two vessels of the appellant which were then in Australian waters. The vessels were delivered up in Australian waters, and were then taken, by order of the Admiralty, to foreign parts beyond Australian waters, and were used there during a certain period. The appellant received in respect of compensation so far as that period was concerned a certain sum of money.

Held, that the source of that sum of money was the requisitioning of the vessels in Australia, and therefore that the income of the appellant so far as it consisted of that sum of money was derived from a source in Australia, and that the appellant was accordingly liable to income tax in respect of it under the *Income Tax Assessment Act*.

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CASE STATED.

On an appeal by James Fenwick & Co. Ltd. from an assessment for Federal income tax for the year 1917-1918, *Knox* C.J. stated a case for the Full Court which was substantially as follows:—

1. The appellant James Fenwick & Co. Ltd., a company duly incorporated in New South Wales and having its registered office in Sydney, carries on in the Commonwealth of Australia the business incidental to the ownership of steam tugs, including the hiring out of tugs at a daily rate.

2. By separate notices of requisition both dated 27th April 1917, made in pursuance of *Statutory Rules* 1915, No. 173, made on 22nd September 1915, the steam tugs *Heroic* and *Heroine* belonging to the appellant were requisitioned by William Clarkson, C.M.G., Esq., Rear Admiral, 3rd Naval Member, Director of Transports, being a person authorized by the Minister so to do, and by the notices of requisition James Fenwick & Co. Ltd. were required to hand over control of the said steam tugs to William Clarkson, on a date to be advised later.

3. On 2nd May 1917 notice was given by the Naval Transport Officer, an officer of the Commonwealth, that the said steam tugs would be required from 1 p.m. that day alongside Garden Island.

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4. The said steam tugs were taken over by the Commonwealth Government at Sydney on 2nd May 1917 at 1 p.m.

5. The said steam tugs were thereafter, on 30th May 1917, taken out of Australian waters and engaged in war service outside Australian waters, and up to 1st July 1917 had not been returned to Australian waters or to the owner. During such period the said steam tugs were not in any way subject to the control of such owner.

6. The said steam tugs are registered at the Port of Sydney under the provisions of the *Merchant Shipping Act* 1894.

7. The Commonwealth Government handed over the said steam tugs to the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland (for and on behalf of His Majesty), hereinafter called the Admiralty.

8. The Department of the Navy of the Commonwealth acted in the matters hereinbefore mentioned at the request of the British Admiralty, and informed the appellant that the conditions in connection with the requisitioning of the said steam tugs must be those which applied to similar requisitions by the Imperial Government.

9. As a result of certain of the letters between the parties an amount of £976 10s. (stated in the appeal against assessment to be £952), being on account of hire at the rate of £15 15s. per day for each tug, was paid by the Commonwealth acting on behalf of the Admiralty to the appellant at Sydney for the use of the said steam tugs during the period between 30th May 1917 and 30th June 1917, both dates inclusive.

11. The respondent has, under the *Income Tax Assessment Act* 1915-1918, included in the assessment of the appellant for income tax for the financial year 1917-1918 the said sum of £976 10s.

12. The appellant claims that the said sum is not part of its taxable income for the purpose of assessment under the said Act; and the respondent claims that the said sum is part of such taxable income, and has included the same in such assessment.

13. I have thought fit to state this case for the opinion of the High Court upon the following question, which is, in my opinion, a question of law, viz. :

Whether the said amount of £976 10s. forms part of the assessable income of the appellant within the meaning of the *Income Tax Assessment Act* 1915-1918.

Weston, for the appellant. The source of the particular sum of money in this case was the use of the tugs outside Australia, and the money is therefore not income from a source in Australia so as to be taxable under the *Income Tax Assessment Act* 1915-1918. The word "sources" in the definitions of income from personal exertion and income from property in sec. 3 means that which a practical man would regard as the real sources of the income (*Nathan v. Federal Commissioner of Taxation* (1)); and in this case the real source is the user of the tugs by the Admiralty in foreign parts. The tugs are the property or capital fund from which the income flows, and the source of the income is not the requisitioning of them. The money was *de facto* paid for the use of the tugs. [Counsel also referred to *Colclough v. Federal Commissioner of Taxation* (2).]

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Leverrier K.C. (with him *Miles*), for the respondent. The income arises from the seizure of the property in Australia. Under reg. 627 of the Regulations under the *Defence Act* (*Statutory Rules* 1915, No. 173), a right of compensation accrues as soon as the property requisitioned is taken over. What happens afterwards to the property taken is immaterial. The payment received by the appellant has nothing to do with the user of the tugs, but is solely referable to the requisitioning of them in Australia. [Counsel was stopped.]

The judgment of the COURT, which was delivered by KNOX C.J., was as follows:—

In this case it appears that in the year 1917 the Commonwealth Government on behalf of the Admiralty, acting under *Statutory Rule No. 173* of 1915, requisitioned two tugs, the *Heroic* and the *Heroine*, belonging to the appellant. At that time the appellant was carrying on business in Australia, the tugs were in Australia, the requisition was notified in Australia and the tugs were in due course handed over in Australia. Under the *Statutory Rule* in question a right is given to the owner of property requisitioned to obtain compensation in respect of the taking, or "requisitioning" as it is called, of the property. The tugs, having been requisitioned in Australia and handed over in Australia, were

(1) 25 C.L.R., 183, at p. 189.

(2) 24 C.L.R., 324.

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taken by order of the Admiralty to foreign parts outside Australian waters, and were used there during the period which is relevant to the consideration of this case, that is, from 30th May to 30th June 1917. Ultimately the appellant received in respect of compensation so far as that period was concerned the sum of £976 10s., which is the subject of the present controversy as to the liability of the appellant to income tax. Because the tugs were taken, and directly they were taken, a right to a sum of money arose by way of compensation for the taking, and the sum of money I have mentioned has been paid in respect of such compensation. As Mr. *Leverrier* pointed out, it was utterly immaterial to the appellant where the tugs were taken, where they were used or whether they were used at all, or what became of them. The appellant had the same right to compensation whatever was done with the tugs, because, and only because, they had been requisitioned by the Commonwealth on behalf of the Admiralty. In that state of facts we think that the real practical source of this income was the taking of the tugs in Australia. Consequently the source of the income is in Australia and the income is taxable.

For these reasons we answer the question submitted in the affirmative.

Question answered in the affirmative.

Solicitors for the appellant, *Sly & Russell*.

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.