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BOND
v.
GEORGE A.
BOND & Co.
LTD. AND
BOND'S
INDUSTRIES
LTD.

think that the amendment has achieved its purpose. I am content to accept their view. Consequently, in my opinion, and for reasons which I stated in *Le Mesurier v. Connor* (1) and need not repeat, the bankruptcy notice and the sequestration order in question on this appeal have been lawfully issued and made.

Appeals dismissed with costs.

Solicitors for the appellant, *J. Stuart Thom & Co.*
Solicitors for the respondents, *Dawson, Waldron, Edwards & Nicholls.*
Solicitor for the Commonwealth, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1929) 42 C.L.R. 481.

App 20 ATR 1293

Appl FCT v Hurley Holdings (NSW) Pty Ltd 23 FCR 435	Foll A A T Case 30/93; No 8854 (1993) 26 ATR 1174	Dist Northum- berland Development Co Pty Ltd v FCT (1994) 126 ALR 97	Dist Northum- berland Development Co Pty Ltd v FCT (1994) 29 ATR 395	Foll Haig v. Commissioner of Taxation (1994) 29 ATR 619	Dist FCT v North- umberland Development Co Pty Ltd (1995) 138 ALR 89	Expl/Appl Whitaker v Federal Commissioner of Taxation (1996) 33 ATR 394	Appl Whitaker v Federal Commissioner of Taxation (1996) 63 FCR 1
Appl Whitaker v Federal Commissioner of Taxation (1996) 140 ALR 257	Dist Whitaker v Comr of Taxation (1998) 82 FCR 261						

[HIGH COURT OF AUSTRALIA.]

FEDERAL WHARF COMPANY LIMITED . APPELLANT;

AND

THE DEPUTY FEDERAL COMMISSIONER }
OF TAXATION } RESPONDENT.

H. C. OF A. *Income Tax (Cth.)—Compulsory acquisition of land—Interest on amount of com-
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of 1915—No. 32 of 1921)—Income Tax Assessment Act 1922-1928 (No. 37 of
1922—No. 46 of 1928)—Harbors Act 1913 (S.A.) (No. 1149), sec. 26.*
ADELAIDE,
Sept. 20, 22.
Rich J.

Sec. 26 of the *Harbors Act* 1913 (S.A.) provides that when property is com-
pulsorily acquired, interest computed from the time when the Minister enters
into occupation thereof on behalf of the Crown to the time when the com-
pensation is paid “shall be added to the amount of any compensation to be
paid in respect thereof.”

Held, that such interest is income for the purpose of the *Income Tax Assessment Act 1915-1921* and the *Income Tax Assessment Act 1922-1928*. H. C. OF A.
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Hudson's Bay Co. v. Thew, (1919) 7 Tax Cas. 206, applied; *Commissioners of Inland Revenue v. Ballantine*, (1924) 8 Tax Cas. 595, distinguished. FEDERAL
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APPEALS from the Deputy Federal Commissioner of Taxation.

The Federal Wharf Co. Ltd. appealed to the High Court from the assessments of the Company by the Deputy Federal Commissioner of Taxation of South Australia, under the *Income Tax Assessment Act 1915-1921* and the *Income Tax Assessment Act 1922-1928*, for the years ending 30th June 1920 to 30th June 1928. The appeals were heard by *Rich J.*, in whose judgment the material facts are fully stated.

Ligertwood K.C. (with him *A. M. Moulden*), for the appellant.

Mayo K.C. (with him *Powers*), for the respondent.

Cur. adv. vult.

RICH J. delivered the following written judgment:—These are appeals from assessments to Federal income tax for the years ending 30th June 1920 to 30th June 1928. The question in each of them is whether the Commissioner was right in including sums payable to the taxpayer pursuant to sec. 26 of the *Harbors Act 1913* of South Australia. That section provides that “when any property is acquired by proclamation under this Part, interest at the rate of four pounds per centum per annum, or at such other rate as agreed, computed from the time when the Minister enters into occupation thereof on behalf of the Crown to the time when the compensation is paid, shall be added to the amount of any compensation to be paid in respect thereof.” By a proclamation in the *Government Gazette* on 26th March 1919 property of the taxpayer was compulsorily acquired pursuant to Part I. of that Act, and on 2nd July 1919 the Minister entered into occupation. The amount of compensation, however, was not fixed until 24th April 1928, when an award was made assessing the value of the property as at 2nd

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July 1919 at £159,580. But in the meantime an arrangement had been made between the taxpayer and the Minister by which, without prejudice to the ultimate result of the negotiations and proceedings to settle compensation, the Minister paid interest upon a tentative amount of £125,000. When the assessments for income tax came to be made, the Commissioner drew no distinction between the sum actually received by the taxpayer in the year of income in respect of which the assessment was made and sums paid on account of interest after the date of the award. He distributed the interest over the whole period, attributing the sum paid in respect of a given year of income to that year, and assessed the taxpayer for income tax accordingly. No point was made by the taxpayer in respect of this method of allocation, which probably operated in favour of and not against the taxpayer. The contention on behalf of the taxpayer is that the sums payable pursuant to sec. 26 are not income. It is argued that, however they may be described, they form in substance part of the compensation intended to rehabilitate the taxpayer and put it pecuniarily in the same position as it would have been if its land had not been acquired. In support of this view *Commissioners of Inland Revenue v. Ballantine* (1) was relied upon. In that case interest awarded upon a sum of damages was held not to fall within the words "any interest of money, whether yearly or otherwise," in Case III., Rule 1, of Schedule D of the *Income Tax Act* 1918 of Great Britain. The reason for this decision is summed up in the statement of Lord *Clyde* (2):—"In all such cases, however—whether the allowance is wrapped up in a slump award or is separately stated in the decree—the interest calculation is used *in modum æstimationis* only. The interest is such merely in name, for it truly constitutes that part of the compensation decerned for which is attributable to the fact that the claimant has been kept out of his due for a long period of time. It is not, therefore, 'interest of money' chargeable under Case III. of Schedule D"; and Lord *Sands* said (3) that he was not satisfied "that there was, during the period in respect of which the claim is made, any sum of money bearing interest within the meaning of the income tax legislation." The point of

(1) (1924) 8 Tax Cas. 595.

(2) (1924) 8 Tax Cas., at pp. 611-612.

(3) (1924) 8 Tax Cas., at p. 612.

the case, therefore, lies not in a discrimination between capital and income, but in the fact that damages by way of interest on a sum not ascertained before the date of the award do not answer the description "interest of money." As Mr. *Konstam* says in his book on *Income Tax*, 4th ed., p. 179, in citing this case: "Interest included with damages in an award may be . . . a part of the damages, and, if so, is not taxable as interest," i.e., of money. Under the *Income Tax Assessment Acts* 1915-1921 and 1922-1928 the question is whether the sum is income. This question is affected little, if at all, by the express mention of interest upon money secured by mortgage of property in Australia in the definition of "income" in sec. 4 or the exclusion of interest from the definition in the same section of income from personal exertion. The true question is whether sums received pursuant to sec. 26 of the *Harbors Act* 1913 are of a capital nature or of an income nature. In considering this question it is important to observe, first, that the sum is calculated and payable in respect of time; second, that the time in respect of which it is so calculated commences when the owner is deprived of the actual profitable enjoyment of his property by the entry of the Minister; third, that the period ends with the payment of the compensation which represents the capital of that property; and fourth, that the interest is calculated upon the sum ascertained to represent the capital value of the property of which the owner has been deprived. It is true that sec. 26 says that the interest is to be added to the amount of any compensation to be paid, but this statement manifests no intention that it shall be considered capital whether as against the revenue or between life-tenant and remainderman, or for the purposes of the internal management of a company. Indeed, for the purposes of the Federal tax it would matter little if it did, for such an intention could not alter its true character. In truth, sec. 26 does little more than express in precise legislative form the rule established by *In re Pigott and Great Western Railway Co.* (1) that an authority compulsorily acquiring land is in the position of a purchaser in the absence of statutory provision to the contrary, and must pay interest upon the compensation as if it were purchase-money, from the date of

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(1) (1881) 18 Ch. D. 146.

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possession until payment. It is quite clear that interest upon the balance of purchase-money payable upon a sale of real property is income (*Hudson's Bay Co. v. Thew* (1)). The observation made by Rowlatt J. in that case (2) that if the vendors "had collected the money and had been paid it, they would have invested it and got interest," and that "the purchaser has not paid it, and he therefore pays interest instead until he does pay it," is a simple proposition which seems equally applicable to the payment of compensation. In my opinion, the character of the interest payable under sec. 26 is that of recompense for loss of the use of capital during a period of time in which it would earn income. It represents the annual value of capital. It is paid because the owner has been deprived of a capital asset which he had and has not received the fund which is to be substituted for the capital asset. The interest is the flow of that fund. In my opinion it is income. For these reasons the appeal fails.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Baker, McEwin, Ligertwood & Millhouse*.

Solicitors for the respondent, *Fisher, Powers & Jeffries*, for *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

C. C. B.

(1) (1919) 7 Tax Cas. 206.

(2) (1919) 7 Tax Cas., at p. 217.