

[HIGH COURT OF AUSTRALIA.]

SYME PLAINTIFF ;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

Mortgage—National security—Possession of mortgaged land taken by Commonwealth —Compensation paid to mortgagor in possession—Mortgagee’s rights in respect of such compensation—Right of mortgagee to compensation for his own loss or damage—National Security (General) Regulations (S.R. 1939 No. 87—1941 No. 29), regs. 54, 60D. H. C. OF A.
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Oct. 9, 12, 28.

A mortgagee of land has no right to receive any part of the compensation paid by the Commonwealth, in respect of a taking of possession under reg. 54 of the *National Security (General) Regulations*, to the mortgagor who was in possession at the time of the taking. Such compensation is paid for the personal loss or damage suffered by the mortgagor ; it is not in the nature of a payment in respect of an acquisition of the mortgaged property or a deprivation of interest diminishing the security, and it does not represent any part of the capital value of the mortgaged property.

Latham C.J.,
Rich, Starke,
McTiernan and
Williams JJ.

Per Latham C.J., McTiernan and Williams JJ., and semble per Rich J. :
A mortgagee not in possession who suffers loss or damage by reason of the taking of possession by the Commonwealth is within the class of persons entitled to claim compensation under the Regulations.

DEMURRER.

Violet Addison Syme brought an action in the High Court against the Commonwealth and Percy James Rea.

The statement of claim was, in substance, as follows :—

1. By an instrument of mortgage duly executed on 16th April 1928 by Daisy Frederica Brown, William Clarence Brown, Leslie Gordon Brown and Rupert Colhoun Brown as mortgagors and the plaintiff as mortgagee, the mortgagors mortgaged to plaintiff to secure repayment of a sum of £4,000 lent to them by plaintiff certain land under the *Land Transfer Act* 1928 (Vict.) containing

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272 acres, 1 rood and 3 perches or thereabouts on the terms and conditions contained in the instrument of mortgage which was duly registered under the said Act.

2 and 3. On or about 30th June 1934 the persons in whom the land was (subject to the mortgage) then vested by a contract in writing with the defendant Percy James Rea agreed to sell the land to him subject to the mortgage and requested plaintiff to consent to a transfer of the land from them to Rea subject to the mortgage and to the payment of the moneys thereby secured which plaintiff agreed to do in consideration of Rea entering into and executing an indenture with her dated 16th July 1934. The land was thereupon transferred to Rea subject to the mortgage.

4. By the said indenture which was duly executed by Rea on 16th July 1934 he covenanted with plaintiff as mortgagee that he would on 16th April 1938, without plaintiff being obliged to previously make application therefor to the transferors to him or to have recourse to the mortgaged security, pay or cause to be paid to plaintiff the sum of £4,000 being the principal sum secured by the mortgage which sum was due and owing on 16th July 1934, that he would so long as any of the said principal sum remained owing pay to the plaintiff as mortgagee interest at the rate of seven per cent per annum reducible on prompt payment to five per cent by equal half-yearly payments on 16th April and 16th October in every year and that he would duly perform all the other covenants and agreements contained in the indenture and subject to the alterations and modifications introduced by the indenture all the covenants and agreements contained in the mortgage.

5. On or about 15th March 1935 Rea repaid to plaintiff on account of the principal sum due under the mortgage and indenture a sum of £250 but has failed to pay to plaintiff the balance of the principal sum namely £3,750. Since 16th April 1940 Rea has failed to pay the interest due under the mortgage and indenture and the balance of interest owing at 16th May 1942 after giving credit for certain payments was £428 15s.

6. On 22nd September 1941 plaintiff duly gave notice in writing to Rea requiring him to pay plaintiff all principal and interest money secured or intended to be secured by the mortgage which was then due and unpaid.

7. Since the delivery of the notice plaintiff has not received from Rea any sum or sums in payment or part payment of the principal or interest due by him to her under the mortgage or indenture.

8. At all material times until 8th March 1942 Rea was in occupation of the whole of the said land.

9. By and with the authority of the Minister of State for Defence Co-ordination and acting on behalf of the defendant the Commonwealth of Australia Major-General Steele on or about 8th March 1942 took possession of a portion of the said land comprising about thirty acres thereof, and on or about 16th August 1942 of a further portion of the said land comprising about sixty-two acres.

10. In taking possession and authorizing the taking of possession on behalf of the Commonwealth of Australia the Minister and Steele were acting pursuant to and within the powers conferred on them and for the purposes authorized by the *National Security Act* 1939-1940 and/or the *National Security (General) Regulations* of the Commonwealth and were validly and properly exercising the said powers.

11. On 8th March 1942 the defendant the Commonwealth of Australia or some person or persons on its behalf agreed with the defendant Rea to pay to him compensation at the rate of four pounds per week from 8th March 1942 for the said thirty acres, and on or about 16th August 1942 agreed with the defendant Rea to pay to him compensation at the rate of fifty-five pounds per annum payable monthly for the said sixty-two acres. Pursuant to such agreements the said defendant by its servants and agents has paid compensation to the defendant Rea from time to time.

12. Such agreements were made and such compensation paid pursuant to the *National Security Act* 1939-1940 and/or the said Regulations.

13. On 22nd July 1942 the plaintiff by her said duly authorized solicitors and agents gave notice to the defendant the Commonwealth of Australia by a notice in writing duly delivered to its servant or duly authorized agent the Director of Hirings that she required to be paid to her as mortgagee all moneys due and accruing due from time to time as compensation or other consideration for the taking of the thirty acres.

14. On 24th August 1942 plaintiff by her duly authorized solicitors and agents caused a further notice in writing to be delivered to the said Minister and to Steele on behalf of the defendant the Commonwealth of Australia requiring them and it to pay to her as mortgagee all such moneys.

15. On or about 25th August 1942 plaintiff by her duly authorized solicitors and agents caused a further notice in writing to be delivered to the said Minister and to Steele on behalf of the defendant the Commonwealth of Australia requiring them and it to pay to her as mortgagee all moneys due and accruing due from time to time as compensation or other consideration for the taking of the sixty-two acres.

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16. The defendant the Commonwealth of Australia has since 8th March 1942 and 16th August 1942 been and continued in possession of the thirty acres and sixty-two acres of land respectively and is still in possession thereof and will continue in possession thereof. It has failed and refused to pay to plaintiff any of the compensation moneys which have become payable to the defendant Rea under the agreements.

17. There are now payable to the defendant Rea by the defendant the Commonwealth of Australia under the agreements various sums of money which the said defendant has not yet paid to Rea but which the said defendant threatens and intends to pay to the defendant Rea unless restrained.

The plaintiff claimed :—

1. A declaration that as mortgagee she was entitled to be paid all compensation payable by the defendant the Commonwealth of Australia or its servants or agents to the defendant Rea in respect of the portions of land.

2. An account of the compensation which had been paid by the defendant the Commonwealth of Australia its servants or agents to the defendant Rea in respect of the portions of land.

3. An order that the defendant the Commonwealth of Australia its servants or agents pay to plaintiff as mortgagee the amount found on the taking of such accounts to have been paid as compensation to the defendant Rea in respect of the portions of land.

4. An injunction to restrain the defendant the Commonwealth of Australia its servants and agents from paying to the defendant Rea any moneys due and payable to him under the agreements which they had not yet paid over to him.

5. Such further and other relief as to the Court might seem just.

The defendant the Commonwealth of Australia delivered a defence to the statement of claim and demurred thereto.

The grounds of demurrer were as follows :—

(a) That the plaintiff does not disclose in the statement of claim any right or title to be paid any of the moneys agreed to be paid as compensation by the defendant the Commonwealth of Australia to the defendant Percy James Rea, since the plaintiff is not there disclosed to be either party to such agreement or *cestui que trust* or assignee of the rights thereunder.

(b) That upon the true construction of the *National Security (General) Regulations* compensation agreed to be paid by the Commonwealth of Australia pursuant to the Regulations is payable to the person with whom the agreement is made and not otherwise or to any other person and no agreement for the payment of compensation to the plaintiff has been disclosed in the statement of claim.

(c) That compensation is payable pursuant to the Regulations above mentioned to the person who has suffered or suffers loss or damage by reason of certain things done in pursuance of the Regulations and the plaintiff has not disclosed that she has suffered or suffers any such loss or damage.

(d) That the plaintiff has not within the time provided by the Regulations or at all made a claim in writing to the Minister for compensation as provided by the Regulations.

(e) That this action is not an action for the recovery of compensation within the meaning of reg. 60K of the *National Security (General) Regulations* upon the true construction of the Regulations.

(f) That this action is an action in respect of things purporting to have been done in pursuance of reg. 60D of the *National Security (General) Regulations* and is prohibited by the provisions of reg. 60K of the *National Security (General) Regulations*.

The defendant Rea did not deliver any defence.

The relevant regulations are sufficiently set forth in the judgments hereunder.

Phillips, for the defendant Commonwealth, in support of the demurrer. The agreements between the mortgagor and the Commonwealth created only rights *in personam* between them, and the mortgagee is not an assignee or *cestui que trust* in respect of them. Her rights (if any) arise by reason of the relationship of mortgagor and mortgagee. Nothing in that relationship gives her the right claimed in this action. The action is not a claim for compensation, but an attempt to divert money paid by the defendant to the mortgagor as compensation for his being deprived of the possession of the land.

[LATHAM C.J. referred to *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 361.]

If tenants are agreeable to pay rent to a mortgagee, and he accepts it, the mortgagee is not necessarily in possession (*Corbett v. Plowden* (1)). As to the rights of the mortgagee, sec. 156 of the *Transfer of Land Act* throws us back on the general law: See also secs. 145-152. The mortgagor had the right to possession right up to the time when the Commonwealth took possession. In reference to sec. 151 of the *Transfer of Land Act*, see *Towerson v. Jackson* (2). The mortgagee was at liberty either to take possession or to turn the mortgagor out, but she could not succeed to rights under an agreement made between two other people. On the day on which the Commonwealth took possession, the mortgagee's rights were defeated.

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(1) (1884) 25 Ch. D. 678.

(2) (1891) 2 Q.B. 484.

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Her right to take possession had not fructified in possession. The moneys are paid for loss or damage, not for the right to occupy. They are not a profit of the land; they cannot be diverted by a mere notice.

Mulvany, for the plaintiff. The moneys received by the mortgagor from the Commonwealth are equivalent to a profit issuing out of the land. The essence of the transaction is that payment under the agreement is payment for enjoyment of possession. The mortgagee was entitled to enter into possession and receive rents and profits; therefore she is entitled to the moneys paid for dispossession. Rights under an Act should not be held to be taken away unless a clear intention is shown (*Central Control Board (Liquor Traffic) v. Cannon Brewery Co. Ltd.* (1)). Possession was yielded to the Commonwealth pursuant to reg. 54 of the *National Security (General) Regulations* by reason of the overriding command of a paramount law. Reg. 54 and the agreement and the payment of money are facts to be looked at in judging the quality of the payment and the right to payment. There is a difference between "possession" in reg. 54, and "possession" under the *Transfer of Land Act*. The Regulations do not purport to take away possession of land in the sense of taking away profits. The Commonwealth can enjoy what reg. 54 meant to give it, though the mortgagee is in receipt of the rents and profits. The mortgagee may get the profit of four pounds per week without disturbing the possession of the Commonwealth: See *Law Guarantee & Trust Security Ltd. v. Mitcham and Cheam Brewery Co. Ltd.* (2); *Noakes v. Noakes & Co. Ltd.* (3); *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 362.

Phillips, in reply. The respondent's argument rests on two propositions: (1) compensation money is rent, income or profit from the land; (2) notice to pay is equivalent to going into possession. Both propositions rest on a loose analogy. The compensation is not in respect of the mortgagee's rights. The Commonwealth did deprive the mortgagee of a right, namely, the right to enter into possession. She suffered an injury for which she can claim compensation, if she can show any loss.

Cur. adv. vult.

(1) (1919) A.C. 744, at p. 752.

(2) (1906) 2 Ch. 98, at p. 105.

(3) (1907) 1 Ch. 64.

LATHAM C.J. This is a demurrer by the defendant the Commonwealth of Australia to a statement of claim. The statement of claim contains the following allegations :—The plaintiff is the mortgagee under a registered mortgage of land under the *Transfer of Land Act* 1928 (Vict.). The defendant Rea is the registered transferee of the land subject to the mortgage, and he has entered into an indenture with the plaintiff by which he has covenanted to pay principal and interest under the mortgage. Default has been made in payment of both principal and interest at the due dates. The plaintiff on 22nd September 1941 gave notice in writing to Rea requiring him to pay principal and interest then due and unpaid, but Rea remained in default : See *Transfer of Land Act* 1928, secs. 146 et seq. There is no allegation that the plaintiff has exercised the power of sale under sec. 148. Rea was allowed to remain in possession—though the plaintiff might have entered into possession (secs. 151, 156). In March and August 1942 the Commonwealth took possession of parts of the land in the exercise of powers conferred by the *National Security (General) Regulations* made under the *National Security Act* 1939-1940. The Commonwealth agreed with Rea to pay him compensation under the Regulations at the rate of four pounds per week for part of the land and at the rate of fifty-five pounds per annum payable monthly for the other part. The plaintiff subsequently gave notice to the Commonwealth requiring the Commonwealth to pay all such moneys to her as mortgagee. The Commonwealth refused to comply with this demand, and the plaintiff sues for a declaration that she is entitled to be paid all the compensation moneys and for consequential relief. The Commonwealth has demurred to the statement of claim upon the grounds that the plaintiff is not a party, either by original privity or otherwise, to the agreement for compensation, and that the compensation is payable only to the defendant Rea with whom the agreement was made and who was the person who suffered loss or damage by reason of the Commonwealth taking possession of the land. The defendant also relies upon the failure of the plaintiff to make a claim for compensation under the Regulations and upon a provision (reg. 60K) that no action other than an action for the recovery of compensation shall be maintained against any person for anything purporting to be or to have been done in pursuance of (*inter alia*) reg. 54, under which the Commonwealth acted.

Reg. 54 (1) is as follows :—“ If it appears to a Minister to be necessary or expedient so to do in the interests of the public safety, the defence of the Commonwealth or the efficient prosecution of the war or for maintaining supplies and services essential to the life of

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the community, he may, on behalf of the Commonwealth, take possession of any land, and may give such directions as appear to him to be necessary or expedient in connexion with the taking of possession of the land."

Other regulations give power to the Commonwealth to do other acts which may cause loss or damage, e.g., 53 (work &c. on land), 55 (use of land), 56 (entry upon land), 57 (requisition of property other than land), 58 (accommodation in aircraft or public transport vehicles), 59 (4) (control of undertakings). Reg. 60D provides for the payment of compensation to any person who has suffered or suffers loss or damage by reason of anything done in pursuance of the regulations mentioned. It provides that any person who has suffered or suffers loss or damage "in relation to—(a) any property in which he has, or has had, any legal interest, or in respect of which he has, or has had, any legal right; (b) any undertaking in which he has or has had any legal interest; or (c) any contract to which he is or has been a party, shall, if the compensation, or the method of fixing the compensation, in respect of the loss or damage is not prescribed by any regulations other than these Regulations, be paid such compensation as is determined by agreement, or, in the absence of agreement, may, within one month after the commencement of this regulation, or, if the thing is done after the commencement of this regulation, within one month after the doing of the thing on which the claim is based, or, in either case, within such further time as the Minister allows, make a claim in writing to the Minister for compensation"; with a proviso relating to interference with rights which is of a continuing nature.

Other regulations prescribe the method of dealing with a claim for compensation.

The plaintiff does not put her case as a claim for compensation under the Regulations. The plaintiff's claim is based upon her rights as mortgagee, and upon the fact that the Commonwealth has paid and intends to continue paying the moneys mentioned to the defendant Rea.

In the first place it is said that the moneys are analogous to rents and profits of the land which, upon default in payment of principal or interest, the mortgagee is entitled to receive (*Transfer of Land Act* 1928, sec. 151). The Commonwealth, it is suggested, is in substance paying rent for the land and should be treated in the same way as a tenant let in after the mortgage by the mortgagor. But the compensation is not rent. It is compensation for damage suffered by the mortgagor by reason of the Commonwealth taking possession of the land. The payment does not possess the ordinary

incidents of rent. The Commonwealth does not hold of the mortgagor. The Commonwealth has taken possession, not by virtue of any agreement with the mortgagor, but by paramount right created by or under the Regulations. There is no ground for saying that the mortgagor could put in a distress for moneys owing by the Commonwealth under the agreement for compensation.

But even if the Commonwealth were in the same position as a tenant let in by the mortgagor after the mortgage, the mortgagee could not recover from the Commonwealth unless the Commonwealth had become tenant to the mortgagee under a lease from or an agreement (express or implied) with the mortgagee. If a mortgagee enters into possession in such a case he can eject such a tenant or he may make an agreement for a tenancy with him. In the absence of any such agreement the mortgagee cannot recover rent from him (*Evans v. Elliot* (1); notes to *Keech v. Hall* (2), *Smith's Leading Cases*, vol. I, p. 511; *Towerson v. Jackson* (3)).

When compensation is paid for a deprivation of interest which diminishes the mortgagee's security, the compensation is regarded as representing the security *pro tanto* and it must be paid to the mortgagee or preserved to meet his claims under the mortgage (*Ranken v. The East & West India Docks* (4); *Pile v. Pile*; *Ex parte Lambton* (5)). In such a case, as *Kekewich J.* said in *Law Guarantee and Trust Society Ltd. v. Mitcham and Cheam Brewery Co. Ltd.* (6): "The property . . . is not what it was. Something has been taken out of it."

But the compensation in the present case does not represent any part of the capital value of the property to which the mortgagee can properly claim to be entitled. Compensation under the Regulations is not paid in respect of the taking away of any part of the property or of any incident of the property. It is paid for the loss or damage suffered by the person to whom it is paid—in this case, the mortgagor. It is payment to him for loss and damage suffered by him personally. He does not, in relation to this compensation, represent the mortgagee, and he has no authority to bind the mortgagee. If the mortgagee suffers loss or damage by reason of action by the Commonwealth in pursuance of the Regulations, she has a claim for compensation. She has not entered into possession. The Commonwealth is in possession by paramount right. If the mortgagee, endeavouring to enter into possession, is prevented by the Commonwealth from exercising the right so to enter, then she

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(1) (1838) 9 A. & E. 342 [112 E.R. 1242].	(3) (1891) 2 Q.B. 484.
(2) (1778) 1 Doug. K.B. 21 [99 E.R. 17].	(4) (1849) 12 Beav. 298 [50 E.R. 1075].
	(5) (1876) 3 Ch. D. 36.
	(6) (1906) 2 Ch., at p. 103.

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has a right to obtain compensation for any loss or damage which she can show she has thereby suffered. The Commonwealth has not disputed this right, but it is not necessary, for the decision of the present case, to consider the extent to which at any particular time the mortgagee might or might not be able to establish loss or damage.

It is unnecessary to consider other questions to which reference was made in argument. It follows from what has been said that the statement of claim discloses no cause of action. The demurrer should be allowed and judgment in the action should be given for the demurring defendant, the Commonwealth (High Court Rules, Order XXIV., rule 10).

RICH J. I agree with the other members of the Bench in holding that the statement of claim discloses no right on the part of the plaintiff to the moneys claimed by her and that the demurrer should be upheld. From this opinion no inference is to be drawn that the plaintiff may not be entitled to compensation for loss or damage at the hands of the Commonwealth.

Indeed, it would appear that the interference is of a continuing nature and that the plaintiff has a present claim for loss or damage under reg. 60D.

STARKE J. Demurrer to the statement of claim delivered by the plaintiff in this action.

The question raised is whether a mortgagee of lands under the *Transfer of Land Act* 1928 (Vict.) is entitled to be paid the compensation agreed by the Commonwealth to be paid to a registered transferee from the mortgagor of the lands in respect of the possession of portion of the mortgaged lands taken by the Commonwealth pursuant to the *National Security Act* 1939-1940 and the *National Security (General) Regulations*. Default, it is alleged, was made in payment of the principal and interest moneys secured by the mortgage, but the mortgagee has not taken possession of the mortgaged lands, which remained in the possession of the transferee from the mortgagor except that part of the lands of which the Commonwealth took possession under the authority already mentioned. The question depends upon various provisions of the Regulations.

Reg. 54 (1) provides :—" If it appears to a Minister to be necessary or expedient so to do in the interests of the public safety, the defence of the Commonwealth or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community, he may, on behalf of the Commonwealth, take possession of

any land, and may give such directions as appear to him to be necessary or expedient in connexion with the taking of possession of the land.” Reg. 60D (1): “ Any person who has suffered or suffers loss or damage by reason of anything done in pursuance of any of the following regulations and sub-regulations, namely, . . . 54, . . . or in pursuance of any order made under any of those regulations or sub-regulations, in relation to—(a) any property in which he has, or has had, . . . any legal right . . . shall . . . be paid such compensation as is determined by agreement or, in the absence of agreement,” (by a Compensation Board). Reg. 60D (5): “ Where the compensation is determined by agreement, the Minister may execute on behalf of the Commonwealth an instrument setting out the terms and conditions agreed upon.”

The statement of claim alleges in par. 11 that on or about 8th March 1942, pursuant to the *National Security Act* 1939-1940 and/or the said Regulations, that is, the *National Security (General) Regulations* already mentioned, the Commonwealth agreed with the transferee from the mortgagor to pay to him compensation at the rate of four pounds per week from 8th March 1942 for thirty acres of the land and on or about 16th August 1942 agreed with him to pay to him compensation at the rate of fifty-five pounds per annum payable monthly for sixty-two acres for the loss or damage suffered by reason of the taking possession thereof by the Commonwealth. It is to be observed that this form of compensation is contemplated by the Regulations, for in reg. 60E it is provided that the Minister shall, in the case of a claim being made, notify the amount of compensation in the form of a lump sum or in the form of a periodical payment or both.

The statement of claim also alleges that the plaintiff has required the Commonwealth to pay to her the compensation moneys payable under the agreement, which it refuses to do and threatens and intends to pay the same to the transferee from the mortgagor.

It was not argued on behalf of the plaintiff that the compensation moneys bore the character of rents or profits issuing out of the lands, but even if they did the cases establish that the claim on the part of the plaintiff to them could not be supported (*Trent v. Hunt* (1); *Towerson v. Jackson* (2)). But it was suggested that the compensation was analogous to moneys paid for the acquisition of the mortgaged property or part thereof, such as purchase money on a compulsory purchase, or compensation for goodwill which passed with the property (*Pile v. Pile*; *Ex parte Lambton* (3): and cf.

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(1) (1853) 9 Ex. 14, at pp. 22, 23
[156 E.R. 7, at pp. 10, 11].
(2) (1891) 2 Q.B. 484.
(3) (1876) 3 Ch. D. 36.

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Cooper v. Metropolitan Board of Works (1)), or compensation payable in respect of the refusal of a licensing authority to renew the licence of licensed premises (*Law Guarantee and Trust Society Ltd. v. Mitcham and Cheam Brewery Co. Ltd.* (2) ; *Noakes v. Noakes & Co. Ltd.* (3) ; *Dawson v. Braime's Tadcaster Breweries Ltd.* (4) ; *In re Bentley's Yorkshire Breweries Ltd.* (5) ; *In re Bladon* ; *Dando v. Porter* (6)). And the mortgagee, it was said, became entitled to the agreed compensation by force of the *Transfer of Land Act* 1928, secs. 151, 156.

The nature of the compensation payable under the Regulations necessarily determines the question. If the compensation be in the nature of moneys paid for the acquisition of the mortgaged property and for the benefit of the person in possession and all other persons interested in it, then a claim by the mortgagee to some part of the compensation moneys is maintainable (*In re Bladon* (6), and note the provision cited (7) ; *Roadways Transport Development Ltd. v. Attorney-General* (8) ; and cases cited above). On the other hand, if the compensation be for the personal benefit of the person to whom it is paid or for the loss or damage suffered by him, then a claim by the mortgagee to the compensation moneys or part thereof is not maintainable : Cf. *Cooper v. Metropolitan Board of Works* (1) ; *In re Williams' Settlement* ; *Williams Wynn v. Williams* (9)).

The Regulations in the present case provide for compensation to any person who suffers loss or damage by reason of anything done in pursuance of certain regulations, including reg. 54. The natural and ordinary meaning of these words is that compensation is payable in respect of that person's personal loss or damage. The compensation does not represent the mortgaged property, nor is it analogous to compensation on a compulsory purchase of the mortgaged property or any other of the analogies suggested. The Commonwealth was not, in this case, concerned to deny the mortgagee's right to compensation if she suffered or suffers any loss or damage by reason of the interference on the part of the Commonwealth with or the deprivation on the part of the Commonwealth of her right to enter and take possession of the property, and every part thereof, in case of default under the mortgage security, but it was suggested by the Commonwealth that her right to compensation was conditioned upon a claim being made within one month of the taking of the property : See regs. 60D and 60K. But it is unnecessary to pursue

- (1) (1883) 25 Ch. D. 472.
- (2) (1906) 2 Ch. 98.
- (3) (1907) 1 Ch. 64.
- (4) (1907) 2 Ch. 359.
- (5) (1909) 2 Ch. 609.

- (6) (1911) 2 Ch. 350 ; (1912) 1 Ch. 45.
- (7) (1912) 1 Ch., at p. 46.
- (8) (1941) Ch. 392 ; (1942) 1 Ch. 208.
- (9) (1922) 2 Ch. 750.

this topic further, though it is perhaps right to call attention to the fact that the Regulations make no provision for giving notice to persons interested in the property taken that are not in possession or occupation thereof.

The demurrer in this case should be allowed.

McTIERNAN J. The plaintiff, who is the mortgagee of land under the *Transfer of Land Act* (Vict.), claims in this action that she, instead of the mortgagor, is entitled by virtue of her rights as mortgagee to receive from the Commonwealth the compensation which it agreed with the mortgagor pursuant to reg. 60D of the *National Security (General) Regulations* to pay him. The facts alleged to support this claim are briefly that the Minister validly took possession of one parcel of thirty acres and another of sixty-two acres of the mortgaged land pursuant to reg. 54 of those Regulations. The Commonwealth agreed with the mortgagor to pay him "compensation" at the rate of four pounds per week "for the said thirty acres" and fifty-five pounds per annum, payable monthly, "for the said sixty-two acres." The compensation was "for the loss or damage suffered by reason of the taking possession" of these two parcels of the mortgaged land. It is not alleged that the agreement was in writing, and no agreement has been produced. It is assumed for the purpose of the demurrer that the agreement was in the terms alleged by the plaintiff. The other facts which the plaintiff alleges to support her claim are that, before the Commonwealth took possession of the land, the mortgagor had failed to comply with a notice in writing to pay the money owing on the mortgage and default in payment continued and she gave notice to the Commonwealth to pay her, as the mortgagee, all moneys due and accruing due to the mortgagor under the agreement. It is not alleged that before the Commonwealth took possession the plaintiff had taken any steps to enforce the security other than to give the notice; but it is alleged that the mortgagor was in occupation of the land at the time the Commonwealth took possession. The question is whether the moneys which the Commonwealth agreed to pay the mortgagor by way of compensation are bound by the mortgage, or fall within the scope of the plaintiff's powers and remedies to recover the moneys owing on the mortgage. Reg. 54 confers power on the Minister to take possession on behalf of the Commonwealth of any land and to give directions in connection with the taking of possession of the land. This regulation further provides that, while the land is in the possession of the Commonwealth in pursuance of such a direction, it may notwithstanding any restrictions imposed on its use be used

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by or under the authority of the Minister in such manner as he thinks expedient for defence. Broadly the regulation further confers on the Minister the rights of user incident to an unencumbered estate in fee simple. Reg. 60D creates an obligation for the payment of compensation to any person who has suffered or suffers loss or damage "by reason of anything done in pursuance of" a number of regulations including reg. 54 "in relation to . . . any property in which he has, or has had, any legal interest, or in respect of which he has, or has had, any legal right." It allows the amount of compensation to be determined by agreement, and the Regulations also provide alternative procedure for its assessment. Sub-reg. 5 empowers the Minister, where the compensation is determined by agreement, to execute an instrument setting out the terms and conditions agreed upon.

The agreement now in question is alleged to be one that determines the compensation payable for the loss or damage suffered by reason of the taking of possession of the two parcels of land. It is not alleged expressly that it covers loss or damage suffered by reason of the use of the land. The mortgagor is not expressly alleged to be the person who suffered the loss or damage covered by the agreement. But it is not contended that the agreement purported to be one covering compensation for loss or damage suffered by any person other than the mortgagor. The true construction of the amended statement of claim is that the agreement determines the compensation payable to the mortgagor for the loss or damage suffered by him. Subject to the mortgage the mortgagor was the legal and equitable owner of the land and was at the time possession was taken entitled to the possession and user of the land. If the Commonwealth had taken possession without lawful authority, he would have had a right to be compensated in damages for the wrong. His right of action would have been for unliquidated damages and its character a personal action: See *Phillips v. Homfray* (1); *Broom's Legal Maxims*, 9th ed. (1924), pp. 586-588, 591. The money payable under the agreement between the Commonwealth and the mortgagor is in the nature of damages for loss and damage personal to him. The compensation is not rent, nor a profit issuing out of the land, nor the proceeds of part of the land, and as there is no agreement express or implied with the Commonwealth it has not the character of compensation for "use and occupation."

In my opinion a mortgagee is within the class of persons to whom reg. 60D intends that compensation should be paid if the mortgagee

(1) (1883) 24 Ch. D. 439.

has suffered loss or damage for which the regulation provides compensation and makes a claim within the time allowed by it.

In my opinion the statement of claim as amended does not disclose any right in the plaintiff to the moneys which she claims in this action.

The demurrer of the Commonwealth should be allowed and there should be judgment for the Commonwealth in the action.

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WILLIAMS J. This is a demurrer by the Commonwealth of Australia to a statement of claim issued by Violet Addison Syme as plaintiff against the Commonwealth of Australia and Percy James Rea as defendants.

By the statement of claim the plaintiff alleges that she is the registered proprietor of an instrument of mortgage executed on 16th April 1928 whereby 272 acres of land subject to the provisions of the *Transfer of Land Act* 1928 (Vict.) were mortgaged to her to secure the repayment of a sum of £4,000 repayable on 16th July 1934. On 16th July 1934 the mortgagors transferred the mortgaged lands subject to the mortgage to Rea, he entering into an indenture whereby he agreed to pay to the plaintiff the principal sum, £4,000, on 16th April 1938 and to pay interest in the meantime at the rate of seven per cent per annum reducible on prompt payment to five per cent per annum by equal half-yearly payments on the 16th days of April and October in every year. On or about 15th March 1935 Rea paid the sum of £250 on account of principal, but he has failed to pay the balance of principal or to pay interest on the overdue balance since 16th April 1940; the amount of interest owing at 16th April 1942 being £428 15s. Although Rea made default in payment of principal and interest, the plaintiff did not exercise her right under the *Transfer of Land Act* to enter into possession of the mortgaged land or her right under the *Property Law Act* 1928 (Vict.) to appoint a receiver. On 8th March 1942 the Commonwealth of Australia, acting under the powers conferred upon it by reg. 54 of the *National Security (General) Regulations*, made under the authority of the *National Security Act* 1939-1940, entered into possession of thirty acres of the mortgaged land, and, on 16th August, into possession of a further sixty-two acres thereof. On 8th March 1942, pursuant to reg. 60D, the Commonwealth agreed with Rea to pay to him compensation at the rate of four pounds per week from that date for the thirty acres, and, on 16th August 1942, agreed to pay to him compensation at the rate of £55 per annum payable monthly for the sixty-two acres "for the loss or damage suffered pursuant to the taking possession of these two

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parcels of land.” On 22nd July 1942 the plaintiff gave notice in writing to the Commonwealth to pay to her as mortgagee all moneys payable as compensation for the taking of the thirty acres, and, on 25th August 1942, notice to pay to her all moneys payable as compensation for the taking of the sixty-two acres. Since 8th March 1942 the Commonwealth has been in continuous possession of the thirty acres, and since 16th August 1942 of the sixty-two acres, and is still in possession thereof. It has refused to pay to the plaintiff any of the compensation moneys which have become payable under the agreements, but has continued to pay them to Rea.

The plaintiff claims a declaration that as mortgagee she is entitled to be paid all compensation payable by the Commonwealth to Rea in respect of the thirty and sixty-two acres; an account of the amount of compensation which has been paid to him; an order that the Commonwealth pay to her the amount found to have been paid to Rea on the taking of the account; and an injunction restraining the Commonwealth making any further payments to Rea.

The Commonwealth has demurred to the statement of claim on a number of grounds, of which the most important are that upon the true construction of the Regulations the compensation agreed to be paid by the Commonwealth is payable to the person with whom the agreement is made and not otherwise; that compensation is payable to the person who has suffered or suffers loss or damage by reason of things done in pursuance of the Regulations and the plaintiff has not disclosed that she has suffered or suffers any such loss or damage; and that the plaintiff has not within the time provided by the Regulations or at all made a claim in writing to the Minister for compensation as provided by the Regulations.

The legal position is, in my opinion, as follows. In July and August 1942 the plaintiff was entitled, as between herself and Rea, to exercise the powers conferred upon the mortgagee by the *Transfer of Land* and the *Property Law Acts*, including the right to enter into possession conferred upon her by sec. 151 of the former Act. But, if a mortgagee who has a right to enter into possession fails to exercise it, a mortgagor, pending such exercise, can still possess and use the land for his own benefit and is not liable to account to the mortgagee for any rents or profits which he may receive in the meantime. If the Commonwealth had been the tenant of Rea, the plaintiff could have served a notice on the Commonwealth to pay to her the rents which the Commonwealth had agreed to pay to the defendant for the thirty and sixty-two acres. By intercepting the rents and profits in this way and thus taking over the management and control of the ninety-two acres, the plaintiff would have

exercised her right to enter into possession of this land (*Noyes v. Pollock* (1)). As a corollary to this right, if the Commonwealth had refused to pay the rents to her, she would have been entitled to bring an action to eject the Commonwealth from possession. But the Commonwealth is not in any sense a tenant of the land. Its title to possession does not depend upon any express or implied agreement made with any persons interested in the land, but is paramount to and overrides any other statutory or common law or equitable rights existing in any person with respect to possession (*Attorney-General v. De Keyser's Royal Hotel* (2)). It is therefore a right, the exercise of which can cause loss and damage, not only to the person in possession of the land at the date of the entry, but to any persons who become entitled to such possession at any time during the intrusion. The loss or damage arising from time to time from the intrusion is of the same nature as the loss or damage caused from time to time by a continuing trespass.

Reg. 60D provides that any person who has suffered or suffers loss or damage by reason of anything done in pursuance of reg. 54 in relation to any property in respect to which he has or has had any legal right or interest shall be paid such compensation as is determined by agreement, or, in the absence of agreement, may, within one month after the doing of the thing on which the claim is based or within such further time as the Minister allows, make a claim in writing to the Minister for compensation. A mortgagee suffers damage from the entry into or continuance in possession of the mortgaged land by the Commonwealth from the time when such entry or continuance interferes with his rights. If he is in possession at the time, he suffers immediate damage and can make an immediate claim, but, if the mortgagor is in possession, the mortgagee only commences to be damaged, and his claim, therefore, only arises when he becomes entitled to possession and attempts to exercise that right but is prevented from doing so by the Commonwealth. The entry into possession by the Commonwealth might never cause him any damage, as the mortgagor might not default or the Commonwealth might go out of possession before he had a right to enter into possession or he might not desire to exercise the right if it had arisen. The provision that a claim must be made (except where the Minister enlarges the time) within one month after the doing of the thing on which the claim is based, seeing that continuing loss and damage is caused by the continuance of the intrusion, means, in my opinion, that the claim may be made in respect of loss or damage suffered by any person at any time during its continuance,

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(1) (1886) 32 Ch. D. 53.

(2) (1920) A.C. 508.

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but that the claim must be limited to loss or damage suffered within one month of the date upon which it is made (*Whitehouse v. Fellowes* (1); *Wilkes v. Hungerford Market Co.* (2); *Lloyd v. Wigney* (3); *Harrington (Earl of) v. Derby Corporation* (4)). The proviso recognizes that a claim may be made in respect of an interference with rights which is of a continuing nature and which can be compensated for by periodical payments. These payments would be compensation for the loss of the ordinary rents and profits of the land, whilst the further claim for compensation, which can be made within one month after the interference ceases, would be payable in respect of damage caused by acts done upon the land by the Commonwealth during its possession.

The regulation provides for each person damaged by the exercise by the Commonwealth of its rights under reg. 54 making a separate personal claim, whether that claim is settled by ordinary contract (reg. 60D (5)), by the quasi-contractual provisions of reg. 60E, or by adjudication under regs. 60F and 60G, so that any compensation that becomes payable pursuant to the settlement of an individual claim by any of these methods becomes the property of that claimant alone. Mr. *Mulvany* referred us to the case of *Law Guarantee and Trust Society Ltd. v. Mitcham and Cheam Brewery Co. Ltd.* (5), and other similar cases, and submitted that by analogy the compensation agreed to be paid to a mortgagor in respect of the possession by the Commonwealth of the land must be considered to be paid on behalf of all persons interested in the possession of the land; and must therefore belong to the plaintiff, after she had exercised her right to enter into possession, so far as she was able to do so as between herself and the mortgagor, having regard to the paramount title of the Commonwealth. But these cases are all distinguishable, because the compensation moneys in question were paid in respect of the extinction of the licence of licensed premises and in satisfaction of the claims of all persons interested in the licence (*In re Bladon*; *Dando v. Porter* (6)). Such moneys represent a conversion of part of the capital value of the property into money. A mortgagee is entitled to have such moneys applied in discharge of the mortgage debt on its due date. They would, therefore, have to be applied in discharge of the mortgage debt if it was then due, or invested until it became due, the mortgagor being entitled to the income until default. The regulation could, no doubt, have provided that the amount of compensation agreed to be paid by the Commonwealth upon its

(1) (1861) 10 C.B.N.S. 765 [142 E.R. 654].

(2) (1835) 2 Bing. N.C. 281 [132 E.R. 110].

(3) (1830) 6 Bing. 489 [130 E.R. 1369].

(4) (1905) 1 Ch. 205, at p. 227.

(5) (1906) 2 Ch. 98.

(6) (1912) 1 Ch. 45.

taking possession of the land was to be applied for the benefit of the persons entitled *inter se* to the possession from time to time. But, if this had been intended, one would have expected the Regulations to provide for the settlement of the amount of compensation to be made by an agreement to which all parties interested were parties, or at an adjudication of which all such persons were given notice. The amounts agreed to be paid to Rea were compensation for the personal damage he suffered by the Commonwealth taking possession of the land : Cf. *In re Williams' Settlement* ; *Williams Wynn v. Williams* (1) ; *In re Lindsay's Settlement* [No. 1] (2). The plaintiff cannot claim any part of them, either against Rea or against the Commonwealth in respect of any agreement entered into between it and Rea. But she is entitled to make an individual claim for compensation against the Commonwealth in respect of any damage she may suffer by its actions.

The statement of claim does not disclose any right of action against the Commonwealth and the demurrer should be upheld.

*Demurrer allowed with costs. Judgment in action
for Commonwealth of Australia with costs.*

Solicitors for the plaintiff, *Gillott, Moir & Ahern*.
Solicitor for the defendant Commonwealth, *H. F. E. Whitlam*,
Crown Solicitor for the Commonwealth.

B. B. M.

(1) (1922) 2 Ch. 750.

(2) (1941) Ch. 170.

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