[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN APPLE AND PEAR MARKETING BOARD AND ANOTHER } APPELLANTS;
DEFENDANTS,

AND

TONKING . . . . . RESPONDENT.
PLAINTIFF,

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SYDNEY, *Mar.* 31; *April* 1; *May* 7.

Williams J.

SYDNEY, *Aug.* 11-13; MELBOURNE, *Oct.* 1.

Latham C.J., Rich and McTiernan JJ.

National Security—Apple and pear acquisition—Compensation—Enforcement of claim by action in courts—Assessment of compensation—National Security (Apple and Pear Acquisition) Regulations (S.R. 1939 *No.* 148—1940 *No.* 295), *regs.* 12, 17.

Constitutional Law—Acquisition of property—"Just terms"—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (*xxxi.*)—*National Security Act* 1939-1940 (*No.* 15 *of* 1939—*No.* 44 *of* 1940), *sec.* 5 (1)—*National Security (Apple and Pear Acquisition) Regulations (S.R.* 1939 *No.* 148—1940 *No.* 295).

The provision for compensation contained in reg. 17 of the *National Security (Apple and Pear Acquisition) Regulations* does not provide the only means whereby a grower may obtain compensation: if it were the only provision for compensation, then the terms of acquisition would not be just, and the regulations would be beyond the power of the Commonwealth under sec. 51 (xxxi.) of the Constitution. Persons having rights and interests in apples and pears acquired by the Commonwealth may enforce in the ordinary way by action in the courts the claims into which by reg. 12 of the regulations their rights and interests are converted.

So *held* by *Latham* C.J. and *Rich* J. (*McTiernan* J. dissenting).

Andrews v. *Howell*, (1941) 65 C.L.R. 255, discussed and explained.

Decision of *Williams* J. affirmed, subject to an agreed variation as to the amount.

APPEAL from *Williams* J.

Alwyn Uren Tonking was an orchardist and the occupier of an orchard at Nashdale near Orange, New South Wales, and, at all material times, was a grower within the meaning of the *National*

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Security (Apple and Pear Acquisition) Regulations, No. 148 of 1939, as amended by Statutory Rules 1940, Nos. 13, 38, 60, 276, 283 and 295 respectively.

The Australian Apple and Pear Marketing Board was constituted under the *Apple and Pear Organization Act* 1938.

In 1940, Tonking had in his possession cases of apples and cases of pears grown by him at his orchard which the Commonwealth pursuant to the regulations mentioned above purported to acquire. In compliance with a requirement by the Board, and on its behalf, those apples and pears were delivered and consigned by Tonking to a licensed agent.

In common with all growers of apples and pears Tonking received from the Board payment, said to be by way of advances, at the rate of three shillings per case for apples and four shillings per case for pears and no more.

In an action commenced on 14th March 1941 in the High Court by Tonking against the Board and the Commonwealth he alleged that the amount received by him for his apples and pears was not just compensation for the acquisition by the Board of the fruit and claimed declarations, *inter alia*, (*a*) that the regulations were void and of no effect so far as they purported to authorize the acquisition of the plaintiff's fruit by the Commonwealth on the terms mentioned in reg. 17 (1); (*b*) that the plaintiff was entitled to be paid just compensation for the fruit acquired from him by the Commonwealth under reg. 12; (*c*) that the regulations, if valid, entitled the plaintiff to receive as compensation for the acquisition of the fruit the fair and reasonable market value thereof or fair compensation therefor such value or compensation to be determined, in default of agreement, by the Court; and (*d*) that the defendants be ordered to pay to the plaintiff such compensation or damages as was found to be due to him.

The agent gave evidence that the fruit grown by Tonking was of high grade quality and that for considerable quantities of "Granny Smith" and "Delicious" apples, which constituted the greater part of the apples grown and delivered by Tonking, he obtained prices ranging from about thirteen shillings to twenty shillings per bushel case. For some of the other apples delivered by Tonking he only obtained six shillings per bushel case.

The action was heard by *Williams* J., in whose judgment hereunder other material facts are stated. The relevant regulations are sufficiently set forth in the judgments hereunder of the members of the Full Court.

Maughan K.C. and *Asprey*, for the plaintiff.

Teece K.C. and *A. R. Taylor*, for the defendants.

Cur. adv. vult.

WILLIAMS J. delivered the following written judgment:—

Since 1922 the plaintiff has owned an orchard near Orange upon thirty acres of which he has grown apples and upon four acres pears. Towards the end of 1939 he became aware of the *National Security* (*Apple and Pear Acquisition*) *Regulations*, (No. 148 of 1939), made under the provisions of the *National Security Act* 1939 and gazetted on 14th November 1939.

Reg. 9 required every grower to make application to the Board, in accordance with Form A in the schedule, to be registered as a grower. The plaintiff made the necessary application on 18th December 1939.

On 27th February 1940 an order was published in the *Gazette* under these regulations acquiring, *inter alia*, all apples and pears grown by a registered grower harvested in Australia on or after 1st March 1940 and prior to 1st July 1940. Apples are harvested in March, April and May, and pears in March, so that, by virtue of this order, practically the whole of the plaintiff's crop, totalling 3,674 cases of apples and 384 cases of pears, became, upon harvesting, the property of the Commonwealth. In accordance with its directions the plaintiff delivered these apples and pears to the Board in the usual bushel cases on rail or at the cool store at Orange. In previous years he had been in the habit of selling his apples and pears through A. H. Walker, the sole proprietor of the firm of A. H. Walker and Son, a licensed farm and produce agent, who carries on business at the City of Sydney fruit markets; so that the cases which he delivered to the Board were branded with his name and that of A. H. Walker and Son and the Board sold them all through this firm except 556 cases of apples and 19 cases of pears.

Apples and pears grown in the locality of Orange are of the highest quality. 1940 was an excellent season there, and the plaintiff's fruit, as in past years, was as good as any other crop in the district. Apples vary greatly in quality and consequently attract a wide range of prices. Those sold by Walker in 1940 varied from £1 to 2s. 6d. per case. He sold some of the plaintiff's "Delicious" and "Granny Smith" apples for £1 per case.

The proceeds of sale of the plaintiff's apples and pears acquired by the Board, after deducting the selling agent's commission, amounted to £2,040 6s. 1d., against which must be charged the

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marketing costs of the Board amounting to £751 16s. 7d., leaving a net balance of £1,288 9s. 6d. The plaintiff received from the Board payments amounting to £968 so that, if this sum is deducted from £1,288, the balance of the net proceeds of sale received by the Board and not paid to the plaintiff is £320. During the marketing season, which concluded at the end of December, the plaintiff had received his presentation costs and payments by way of first and second advances; and, about 12th December, a progress payment on account of the third advance. About 21st January 1941 he received from the Board a cheque of that date for £89 16s. This was the last payment made in respect of his 1940 crop, except for a small cheque of £3 12s. adjusting the amount paid to him by way of first and second advances, which arrived about 30th January 1942. The payments by way of advance were made in pursuance of the power given to the Minister by reg. 17 (3). Attached to the cheque of 21st January 1941 was a slip containing details of the advance which had stamped upon it in large words "Final Payment." The plaintiff's account for the season in the Board's loose-leaved ledger, which was called for, produced, and tendered, bears entries showing that this cheque was a final payment of the third advance in respect of which the progress payment had been made in December, so that it is possible that the cheque for this earlier payment may have been accompanied by a slip marked "Progress Payment." All the cheques were marked "Advance Account." In cross-examination the plaintiff, in answer to a question as to whether he had ever applied to the Board for compensation, said that he had discussed the matter with Mr. Lane, the secretary and accountant of the Board, and had asked him if there was any further payment coming to him for the 1940 crop and that the reply was in the negative. It was admitted that the Board has not yet made any recommendation, nor has the Minister yet made any determination in pursuance of reg. 17, as to the amount of compensation to be paid to the plaintiff for his apples and pears. Another admission states that the growers generally of apples and pears for the season 1940 were paid by way of advances in pursuance of this regulation a rate of 2s. and 3s. per bushel for apples and pears respectively which were subject to the operation of the regulations; that the total amount of such advances to the growers was calculated on that proportion of the crop of such growers which it was estimated would be of suitable quality for sale; and that, subsequently to the making of the said advances, there was paid to the growers generally by way of further advances in pursuance of the regulation 1s. per bushel for apples and pears of adequate quality delivered by such growers to the Board. No evidence was called on behalf

of the defendants to contradict Mr. Lane's statement. Fifteen months have now elapsed since the final payment of the third advance, during which, apart from the small adjustment already mentioned, there has been no indication that the plaintiff will receive any further payments in respect of the 1940 crop, and I can only conclude that the final payment of the third advance in January 1941 was intended to be the final payment of any compensation moneys for that crop. It appears, therefore, that all growers have received the same recompense, namely 3s. per case for apples and 4s. per case for pears acquired by the Board, presumably calculated by ascertaining the net proceeds of sale of the mass acquisition and dividing those proceeds amongst the growers according to the number of cases of saleable apples and pears they delivered to the Board, without any regard being paid to the quality of the fruit contributed by each individual grower or to the proceeds of sale actually received from the marketing of their respective crops. If I am wrong in this conclusion, the defendants can only thank themselves for not having tendered evidence and given the Court some assistance on matters so peculiarly within their own knowledge, but it is only fair to say that Mr. *Teece's* decision not to call any evidence may have been reached because of the view submitted on behalf of the defendants that the assessment of compensation is a matter for the Minister and not for this Court.

On 1st May 1941 the plaintiff filed his statement of claim praying that the regulations might be declared *ultra vires* the Constitution, and alternatively that he was entitled to receive as compensation for the acquisition of his fruit the fair and reasonable market value thereof or fair compensation therefor; such value or compensation to be determined, in default of agreement, by the Court. The regulations had in the meantime been amended, but not in any manner material to this action, by 1940 Nos. 13, 38, 60, 276, 283 and 295. And, before this hearing, their constitutional validity had come up for determination by the Full Court in *Andrews* v. *Howell* (1). The members of the Full Court, while differing on another point, held unanimously that the regulations contained just terms for the acquisition of the growers' apples and pears so as to satisfy the requirements of sec. 51 (xxxi.) of the Constitution. But, upon my reading of the judgments, my brethren, who comprised the majority of the Court, did not express a final opinion, as Mr. *Teece* contended, that a claimant had no right to have the amount of compensation determined by a court; while my brother *Starke* expressed the definite view that the regulations did confer this right. I do not read the statement of my brother

(1) (1941) 65 C.L.R. 255.

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Rich that "upon a proper understanding of the regulations, they sufficiently confer on the grower an absolute right to compensation determined in a fair manner by a specified administrative body" (1) as finally expressing his view that the right to compensation given to the growers by reg. 17 excluded any application to the Court. He was only dealing, I think, with the obligations of the Board. My brother *Dixon*, with whose judgment on this point my brother *McTiernan* agreed, after a considerable discussion of reg. 17, said that he did not think the Minister was able to determine what he thought fit (as compensation) "after receiving the recommendation of the Board, without adopting it. He may adopt or refuse to adopt a recommendation of the Board, but if he determines compensation it must be in pursuance of the recommendation which the Board finally makes" (2), so that he left open the question of a claimant's rights where the Minister so refused and thereby debarred himself from determining the compensation. The appellant in *Andrews* v. *Howell* (3) had been prosecuted for moving his fruit without permission contrary to amended reg. 15 (*a*). The principal question, upon which the fate of the appeal mainly depended, was whether the scheme as a whole was justified by the defence power (sec. 51 (vi.)); so that it was unnecessary to decide whether regs. 12 and 17 provided for alternative methods of compensation, as my brother *Starke* suggested, or compensation was exclusively provided for by reg. 17; or, in the latter alternative, supposing the terms were not just because this regulation did not give an absolute right to compensation or only provided for its determination by a non-judicial and (in a legal sense) biassed person or body, to decide whether the acquisition could still be valid because, although reg. 17 was *ultra vires*, reg. 12 was *intra vires* and the scheme as a whole saved by sec. 46 (*b*) of the *Acts Interpretation Act* 1901-1937. It appears to me, therefore, that, while I am bound by the decision of the majority of the Court that the scheme is *intra vires* the Constitution, it is still open to me to construe the compensatory provisions of the regulations on the basis that they contain just terms which satisfy placitum xxxi. in order to determine their precise meaning and effect, deriving all the assistance which I can from the relevant observations in the judgments of my brethren in that case.

Placitum xxxi. is taken from the Fifth Amendment of the American Constitution, which provides that private property shall not be taken for public use without just compensation, and it has been held in America that, except where the assessment is made as a

(1) (1941) 65 C.L.R., at p. 264.
(2) (1941) 65 C.L.R., at pp. 283, 284.
(3) (1941) 65 C.L.R. 255.

mere matter of calculation prior to the taking (*United States* v. *Jones* (1); *Bauman* v. *Ross* (2)), just compensation requires that the determination of the amount must be made by a court (*Monongahela Navigation Co.* v. *United States* (3); *Seaboard Air Line Railway Co.* v. *United States* (4)). The assessment of compensation, as it is the determination of a question affecting the rights of subjects, is a judicial function (*R.* v. *Hendon Rural District Council*; *Ex parte Chorley* (5); *Errington* v. *Minister of Health* (6); *Estate and Trust Agencies* (1927) *Ltd.* v. *Singapore Improvement Trust* (7)).

In *Frome United Breweries Co. Ltd.* v. *Bath Justices* (8) Lord *Atkinson* cited with approval the following definition by *May* C.J. in the Irish case of *The Queen* v. *Corporation of Dublin* (9): "The term 'judicial' does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others." In *The King* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (10) my brother *Starke* stated: "Adopting the words of *Griffith* C.J. in *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (11) and cited with approval by the Judicial Committee of the Privy Council in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (12) 'the words "judicial power" as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has a power to give a binding and authoritative decision (whether subject to an appeal or not) is called upon to take action.'" He also said: "Thus the determination of controversies between the sovereign and its subjects, and between subjects, is part of the judicial power of the Commonwealth which from its nature does not fall within the powers of the other departments of government" (13).

Under sec. 71 of the Constitution the judicial power of the Commonwealth can only be vested in this or some other Federal court

(1) (1883) 109 U.S. 513, at p. 519 [27 Law. Ed. 1015, at p. 1017].
(2) (1897) 167 U.S. 548, at p. 593 [42 Law. Ed. 270, at p. 289].
(3) (1893) 148 U.S. 312 [37 Law. Ed. 463].
(4) (1923) 261 U.S. 299, at p. 304 [67 Law. Ed. 664, at p. 669].
(5) (1933) 2 K.B. 696, at p. 704.
(6) (1935) 1 K.B. 249, at p. 259.
(7) (1937) A.C. 898, at p. 914.
(8) (1926) A.C. 586, at p. 602.
(9) (1878) 2 L.R. Ir. 371, at p. 377.
(10) (1938) 59 C.L.R. 556, at pp. 575, 576.
(11) (1908) 8 C.L.R. 330, at p. 357.
(12) (1931) A.C. 275, at p. 295; 44 C.L.R. 530, at p. 542.
(13) (1939) 59 C.L.R., at p. 577.

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or a State court exercising Federal jurisdiction (*British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (1)); but many administrative matters involving quasi-judicial functions have been assigned to bodies other than courts (*Federal Commissioner of Taxation* v. *Munro* (2), on appeal, *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (3)). Moreover, the judgments in *Andrews* v. *Howell* (4) seem to suggest that it may be just, in the event of a dispute, to provide for the assessment of compensation by a person or body other than a court; and there are, of course in countries such as England where parliament has an unlimited jurisdiction, many instances of compensation having been left to the determination of some administrative body or person holding some personal office such as a Minister of the Crown even where such a body or the Crown is a judge in its own cause because it has to pay the amount assessed. In such cases the body or person is exercising quasi-judicial functions, and must assess the compensation on a legal basis, so that, in default, the proceedings can be quashed or restrained by a superior court by the use of the prerogative writs of *certiorari* or prohibition; or it or he can be ordered to do its or his duty by mandamus. Even in the case of parliaments with unlimited powers, the practice has been to leave such questions to be determined out of court only where the title of the claimant is clear, so that in the case of resumption of land, where questions of law relating to the basis of compensation and to title arise, it has always been the practice to have the matter determined by a court, and there is no distinction in principle between the rights of subjects upon the acquisition of any of their property whether real or personal. Assuming, however, that the Commonwealth Parliament, without infringing the judicial power, can provide for compensation for property which it acquires to be assessed otherwise than by a court, it would nevertheless be essential in my opinion for it to lay down some basis for the assessment so that the court can see that " 'just' terms are available by law " (per *Isaacs* J. in *The Commonwealth* v. *New South Wales* (5)). If " the only powers conferred upon a so-called tribunal are in the nature of calculation, or the mere ascertainment of some physical fact or facts, and not the declaration of or giving effect to a controverted matter of legal right, it may be that they do not appertain, except incidentally, to the judicial power " (per *Griffith* C.J. in *Waterside Workers' Federation of Australia* v. *J. W. Alexander*

(1) (1925) 35 C.L.R. 422.
(2) (1926) 38 C.L.R. 153, at pp. 174-180.
(3) (1931) A.C. 275; 44 C.L.R. 530.
(4) (1941) 65 C.L.R. 255.
(5) (1923) 33 C.L.R. 1, at p. 47.

Ltd. (1)). But I am clearly of the opinion that the statute or regulations must provide for the claimant receiving the full value of his property. This has been held over and over again by the Supreme Court of the United States : See the cases cited in *Yearsley* v. *W. A. Ross Construction Co.* (2). In *Richmond Screw Anchor Co.* v. *United States* (3) the Supreme Court said : " We must presume that Congress in the passage of the Act of 1918 intended to secure to the owner of the patent the exact equivalent of what it was taking away from him." In *Jacobs* v. *United States* (4) it said : " The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements 'and no specific command to include interest is necessary when interest or its equivalent is part of such compensation.' " In that case the Supreme Court pointed out that the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate. But reg. 17 fails to give any definite direction to the Minister or the Board as to how the amount is to be determined.

In assessing the compensation under the regulation legal questions would arise (1) as to the basis of compensation generally and in certain events, and (2) as to disputed claims. Possibly the regulations could provide a basis to which the Minister on the recommendation of the Board could in a simple case apply the facts and so determine the compensation as an administrative act, but it would be difficult to frame directions sufficient to cover all the points that might arise in order to ascertain what would be a proper equivalent in every case for the value of the property taken. Even if it was possible to do so, there could still remain for determination questions of law or mixed law and fact relating to title, as, for instance, with respect to the priority of legal mortgages, crop liens or equitable charges, or to the rights of life tenants and remaindermen under wills or settlements, or as to the basis upon which the amount of compensation should be determined in the following cases :— (*a*) reg. 18 provides for cancellation of contracts relating to apples and pears to be acquired under the order and a question of law could arise whether in fixing compensation a grower who had a contract for the sale of his apples and pears at prices likely to be above those obtainable in the open market had a crop with a special " potential value " ; (*b*) reg. 21 imposes wide obligations on the growers to

(1) (1918) 25 C.L.R. 434, at pp. 443, 444.
(2) (1940) 309 U.S. 18, at p. 21 [84 Law. Ed. 555, at p. 557].
(3) (1928) 275 U.S. 331, at p. 345 [72 Law. Ed. 303, at p. 308].
(4) (1933) 290 U.S. 13, at pp. 16, 17 [78 Law. Ed. 142, at p. 143].

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preserve and safeguard apples and pears in their possession or under their care after acquisition by the Commonwealth, and reg. 14 imposes an obligation to deliver or consign them as specified by the Board, but neither regulation makes express provision for the recoupment of any expenses that they may incur in doing so, and a question of law would arise as to whether a grower had any right to such recoupment or whether the only recompense he could obtain for the faithful discharge of his obligations would be from the enhanced value of his fruit. On this point it is to be noted that Mr. Walker said a certain amount of damaged fruit gets into cool storage that should not be there, sometimes because it is exposed to excessive heat during the passage from the orchard to the store, thus giving a concrete example of what would be self-evident in any event, that the marketable quality of the fruit must depend to a substantial degree upon the care with which it is picked, packed, and delivered. So I am strongly inclined to think, although it is unnecessary to express a final view, that, having regard to the variety of questions of law or of mixed law and fact which could arise and which could not be foreseen or covered by " a ' direction ' in law " (per *Isaacs* J. in *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (1)), the terms could only be just if the regulations provided a means of having disputes referred to a court.

It is also a fundamental principal of law that claimants should have a fair opportunity of putting their case before their claims are determined (*Board of Education* v. *Rice* (2) ; *Local Government Board* v. *Arlidge* (3) ; *R.* v. *City of Westminster Assessment Committee* ; *Ex parte Grosvenor House (Park Lane) Ltd.* (4) ; *Mulqueen* v. *Minister for Labour and Industry and Zinc Corporation Ltd.* (5) ; *Ex parte Wilson* ; *Re Cuff* [*No.* 2] (6)). There is no reason to believe that the defendants would not, as they did in this action, supply claimants with information as to the proceeds of sale derived from and of the expenditure incurred in connection with the disposal of the fruit in which they were interested ; but, if the Minister is the sole arbiter of the amount of compensation payable, the regulations provide no express means whereby claimants have any right to put their case before him or the Board orally or otherwise or to obtain such information, which would be indispensable if it was desired to examine the fairness of the Minister's determination. Indeed, the form of claim provided by the amended regulations does not indicate any desire on the part of the defendants to know what value the claimants put on their

(1) (1925) 35 C.L.R., at p. 438.
(2) (1911) A.C. 179, at p. 182.
(3) (1915) A.C. 120.
(4) (1941) 1 K.B. 53, at p. 68.
(5) (1938) 38 S.R. (N.S.W.) 583, at pp. 591-593.
(6) (1940) 40 S.R. (N.S.W.) 559, at pp. 563, 564.

fruit or to hear their views in the matter at all. The whole language of reg. 17 seems to point to an *ex-parte* administrative assessment by the Minister on the recommendation of the Board.

The objects of the regulations are contained in reg. 2, which provides that their purpose "is to minimise the disorganization in the marketing of apples and pears likely to result from the impracticability of exporting sufficient quantities of apples and pears because of the effects upon shipping of the present war and these regulations shall be administered accordingly." So it is clear that the apples and pears were being acquired by the Commonwealth, not for its own use, but in order that they might be disposed of in such a way as not to glut the local market, when it was called upon to absorb a surplus which in times of peace would have been disposed of overseas. The Commonwealth therefore only derived the indirect benefit which would accrue from sustaining the economic front, thereby enabling growers to receive the most favourable prices for their crops possible under the unfavourable conditions; so maintaining them in as affluent circumstances as possible; and giving them an incentive to preserve their orchards so that the supply of a staple product would be assured, their incomes could be assessed for income tax, and if they died their properties would retain their value for the purposes of death duties. Often the compulsory acquisition of property gives rise to an immediate claim for compensation; but, where a perishable product is being acquired in the mass with a view to its disposal as expeditiously and advantageously as possible for the benefit of a large number of owners, it would be just to postpone the determination of the value until an assessment could be made in the light of the amount which it actually realized, and the regulations appear to be framed on this basis. Thus they provide for the acquisition of apples and pears (reg. 12), their preservation by the growers pending instructions as to their disposal (which, as my brother *Dixon* pointed out in *Andrews* v. *Howell* (1) would have to be within a reasonable time) (reg. 14); and the making of a claim for compensation, the determination of which can be postponed until in the opinion of the Minister a sufficient quantity of apples and pears has been disposed of to enable the Board to make a just recommendation, interim distributions (called advances) being made in the meantime on account of the ultimate amount payable.

If, therefore, reg. 17 imposes an absolute duty on the Minister to assess the compensation and upon the Board to make a recommendation which he must accept subject possibly to a reference back

(1) (1941) 65 C.L.R. 255.

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for further consideration, the carrying out of the obligations of the Minister and Board in a proper manner would be enforceable by mandamus, which could be granted by this Court upon an application by a claimant who was interested in a crop which had been disposed of in accordance with the instructions of the Board, and who had made a claim for compensation. But a claimant is not required to make a claim, the right to do so being discretionary. It is unnecessary to make a claim to become entitled to share in the advances, which are really instalments of compensation, and the provision enabling the Commonwealth to recover overpayments means that the Minister would have to determine the compensation, whether any claims had been made or not, in order to decide whether such overpayments had been made. When a claim is made, sub-reg. 2 would at first sight seem to imply that there is an obligation upon the Minister to make a determination and upon the Board to make the necessary recommendation to enable him to do so; because, otherwise, it is difficult to see why express power should be required to enable him to postpone the determination until a sufficient quantity of apples and pears had been disposed of to enable the Board to make a just recommendation, but the contrary view of my brother *Dixon*, that the Minister can reject the recommendation of the Board, is supported by the potent consideration that otherwise the Board, consisting of growers' representatives, could bind the Minister by a recommendation which might seriously affect the consolidated revenue. Once the Minister has made a determination the grower would be entitled to be paid the amount assessed, but there is no express provision binding him to accept this sum. The regulation, therefore, fails to make it mandatory upon the Minister to assess the compensation, or obligatory upon the claimant to accept the amount assessed, or to enunciate the principles upon which the Minister and Board are bound to act in assessing just compensation. It does, however, contemplate that claimants will accept the amount of compensation fixed by the Minister; because, obviously, it was never intended that the effect of the mass acquisition would be to replace the famine of buyers in the market by a feast of litigation in the courts. Where the Board spread the marketing of the crops fairly over the season, allowing all growers to participate in the varying price levels of the different months; where the compensation was fixed by the Minister having regard to the proceeds of sale received by the Board in respect of each separate crop; and where there was no dispute as to the title of the claimants, the assessment of compensation would turn on questions of fact and could be

dealt with administratively; so that, although the right to compensation arose immediately the apples and pears were harvested, the Court, apart from special circumstances, would frown upon any attempt to litigate a claim for compensation prior to the end of the marketing season and would be justified in standing the litigation over until the Minister had an opportunity of making a fair offer in the light of the prices actually realized by the fruit. But reg. 12, standing alone, clearly gives a claimant the right to have the compensation determined by the court, and, as the claim is against the Commonwealth, this Court under sec. 75 of the Constitution has original jurisdiction to hear and determine the claim. Reg. 17 on the other hand seems to contemplate that a claimant might require an urgent assessment. If he did so, he could forward an immediate claim or claims limited to the apples or pears acquired by the Commonwealth which he had by that time dealt with in accordance with the instructions of the Board, and would be entitled to an immediate assessment provided a sufficient quantity of fruit had been disposed of to enable the Board to make a just recommendation and this recommendation was such that the Minister was prepared to accept it.

For these reasons I am of the opinion that, even if it is possible under placitum xxxi. of the Constitution to leave the amount of compensation for property acquired by the Commonwealth, as to which there is a dispute, to be determined by any tribunal other than a court without infringing the judicial power, which I gravely doubt, reg. 12 gives the plaintiff an absolute right to have such a claim settled by the Court; and reg. 17 does not deprive him of that right where, as here, no compensation has been determined by the Minister on the recommendation of the Board and accepted by the plaintiff. If I am wrong in this, then alternatively, I must conclude that reg. 17 is *ultra vires* the Constitution; but, applying the construction placed upon sec. 46 (*b*), *supra*, by my brother *Dixon* in *R.* v. *Poole*; *Ex parte Henry* [*No.* 2] (1), this would not destroy the validity of reg. 12.

It is therefore necessary to determine the amount of compensation to which the plaintiff is entitled, as it is obvious that he has not been paid the fair value of his fruit. He gave evidence that if he had been allowed to market the crop himself, then, because of its keeping qualities, he could have placed it in a cool store and chosen the most favourable dates on which to sell it. He said he would not have suffered from the glut for this reason, and also because in any event there would be sufficient competition to ensure a high price for

(1) (1939) 61 C.L.R. 634, at pp. 651, 652.

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fruit of its quality. But, while satisfied that this evidence represents the bona-fide opinion of an honest witness, I am not prepared to act upon it because any hypothetical conclusion to which I could come as to its value in such a convulsed state of world and local affairs would represent altogether too dangerous a feat of the imagination.

The main part of the plaintiff's fruit was marketed by the Board through Mr. Walker (an agent with fifty years' experience who, as I have said, had previously done the plaintiff's business) during a period beginning on 13th March and ending on 11th November 1940, so that the sales were spread over practically the whole season. There is no evidence to suggest that the Board did not take proper care to sell the fruit to the best advantage or that the expenses were unreasonable. In such circumstances the safest guide to the real value of the fruit is the amount it realized, and cogent evidence would be required to justify a departure from this value.

I therefore fix the compensation at £1,288. Of this amount the plaintiff has already received £968, so that I give judgment against the Commonwealth for the sum of £320 and against both defendants for costs. The Minister should have had ample time to determine the compensation by the end of January 1941 so that I also give judgment against the Commonwealth for simple interest at 4 per cent on the sum of £320 from that date until payment.

From this decision the defendants appealed to the Full Court.

Upon the hearing of the appeal the Court was informed that in respect of Tonking's fruit the total proceeds, after deducting the agent's commission, paid to the Board was the sum of £2,040 6s. 1d.; that the Board's "presentation costs" (i.e., costs of marketing) amounted to £751 16s. 7d.; that it had not been pointed out to the trial Judge that part of the amounts received by Tonking were for out-of-pocket expenses, so that the total amount of compensation received by Tonking was £573. It was agreed by the parties that, if Tonking were entitled to succeed, the judgment should be for the sum of £715 9s. 6d.

Weston K.C. (with him *A. R. Taylor*), for the appellants. When a person's property, e.g. his apples and pears, is acquired under regulations of the nature of the *Apple and Pear Regulations*, the "just compensation" therefor is based upon the familiar principle applied in respect of a resumption of land, that is a willing but not anxious vendor, a hypothetical vendor and purchaser. At the date of the acquisition of the respondent's fruit, the fruit then being on the trees, not matured and perhaps unsaleable at a high price,

a hypothetical purchaser would have given to the respondent for that fruit only the amount thought to be obtainable from the pool. In *Andrews* v. *Howell* (1) the Court was concerned with the question whether the subject regulation was a proper exercise of the power to acquire property of private persons, and it determined that the requirement in sec. 51 (xxxi.) of the Constitution of "just terms" was satisfied by reg. 17 of the *Apple and Pear Regulations*. In addition to sec. 51 (xxxi.) the regulations can be supported as an exercise of the defence power conferred by sec. 51 (vi.). Legislation of the Commonwealth Parliament has deviated from the precedent of the legislation of the United States of America. The Fifth Amendment of the Constitution of the United States of America provides that property shall not be taken from a person without due process of law and without just compensation; therefore the situation thereunder may not be the same as under sec. 51 (xxxi.), which provides that the terms shall be just. Reg. 17 operates in this case. Reg. 12 only applies to cases to which reg. 17 could never apply. If reg. 17 were applied in due time it is the money which is paid pursuant to that regulation and the procedure of that regulation which is alone available. If reg. 17 does operate as it was anticipated that it would then there should be a residual right under reg. 12. Reg. 12 does not state it has to be in force in a particular type of case or in all cases under reg. 17. In the absence of any express cross-reference it is not impossible to construe reg. 12 as limited by reg. 17. There is no evidence and no provision in the regulations that it shall be mandatory upon the Government to subsidize the pool. Having regard to *Andrews* v. *Howell* (1) the Justice in the Court below sitting as a single judge was not at liberty to find that just terms were not provided for in reg. 17. Reg. 17 is the only relevant regulation in assessing compensation. Although there is not any evidence to show that compensation has been assessed or the method of assessing it, the onus is upon the respondent to show that he has received less than he otherwise would have received. The assessing of compensation is not a judicial function and is not part of the judicial power of the Commonwealth. The statements in *United States* v. *Jones* (2), *Bauman* v. *Ross* (3), *Monongahela Navigation Co.* v. *United States* (4), and *Seaboard Air Line Railway Co.* v. *United States* (5) do not support the proposition that the matter of determining the *quantum* of compensation must be remitted to the

(1) (1941) 65 C.L.R. 255.
(2) (1883) 109 U.S., at p. 519 [27 Law. Ed., at p. 1017].
(3) (1897) 167 U.S., at p. 593 [42 Law. Ed., at p. 289].
(4) (1893) 148 U.S., at p. 327 [148 Law. Ed., at p. 468].
(5) (1923) 261 U.S., at p. 304 [67 Law. Ed., at p. 669].

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Court. If for one reason or another reg. 17 does not operate in a particular case then reg. 12 can be read as giving a right to compensation and the Court will find a way of determining the matter. Even though reg. 17 is not applicable to this case, the scheme is valid, and the only question that arises is: What is just compensation in the opinion of the Court? This is not an action by the respondent in the nature of an application for a mandamus to have his legal right, that is, his claim, considered. The right which is being asserted is a right to money, and the onus is upon the respondent to prove that the amount he has received is deficient. It was, or should have been, realized by all concerned that in the circumstances the pool might result in a loss. A loss was actually incurred. The measure of the respondent's right is reg. 17 (1) or reg. 17 (3). The opinion was not indicated in *The Commonwealth* v. *New South Wales* (1) that the just terms must appear in the statute of acquisition. *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (2) establishes that the taking of personal property under a statute *per se* imports a common-law obligation to pay. In *Newcastle Breweries (Ltd.)* v. *The King* (3) there was a statutory obligation to pay. *Yearsley* v. *W. A. Ross Construction Co.* (4), *Richmond Screw Anchor Co.* v. *United States* (5) and *Jacobs* v. *United States* (6) do not support the proposition that the regulations contain or should contain a code of recompense, but, on the contrary, they show that in the United States of America there is no necessity or obligation to deal with the basis of compensation or to provide in general terms for full compensation. Reg. 17 is a sufficient specification for just compensation (*Andrews* v. *Howell* (7)). It also implies that there is a right to be heard. The obligation to give just terms for property acquired does not necessarily apply to an exercise of the defence power under sec. 51 (vi.) of the Constitution. The action should be dismissed. If, however, the judgment stands it should go against the Commonwealth and not against the appellant Board.

Maughan K.C. (with him *Asprey*), for the respondent. The scheme under the regulations was not acquisition on just terms because all the growers were paid on a flat rate and the value of their fruit was completely ignored. If the regulations permit of a scheme under which the payments as made to the respondent were correct it is demonstrably not a sale on just terms. If there has

(1) (1923) 33 C.L.R., at p. 47.
(2) (1920) A.C. 508
(3) (1920) 1 K.B. 854.
(4) (1940) 309 U.S., at p. 21 [84 Law. Ed., at p. 557].
(5) (1928) 275 U.S., at p. 345 [72 Law. Ed., at p. 308].
(6) (1933) 290 U.S., at p. 16 [78 Law. Ed., at p. 143].
(7) (1941) 65 C.L.R. 255.

been a large loss it is not due to the disorganization due to abnormal times and conditions but to the fact that money in excess of value has been paid to the growers of low-grade fruit. "Just terms" under placitum xxxi. of sec. 51 of the Constitution must mean that the amount paid must bear some relation to the value of the property taken. Unless the scheme does give to the contributor an absolute right to compensation proportionately to the value of his property it offends against the Constitution. The facts show that the respondent has not received just terms for the acquisition of his property. Any law passed by Parliament or by the delegate of Parliament, that is, the Governor-General in Council, must be a law for acquisition on just terms; if it were a law for acquisition *simpliciter* it would not be sufficient, or if it were a law leaving compensation to the discretion of an individual or a board it would not be sufficient. It must be a law which provides for acquisition on just terms and if the law does not ensure that the terms will be just then it is not a law which complies with placitum xxxi. of sec. 51. There is nothing in *Andrews* v. *Howell* (1) that prevents the respondent from asserting that the regulations do not provide for just terms. That case should be overruled.

LATHAM C.J. We are all of opinion that we are bound by *Andrews* v. *Howell* (1) and that for obvious reasons we should not reconsider what has been decided in that case. Therefore it will be for you to examine what exactly was decided in *Andrews* v. *Howell* (1) in order to ascertain what it is by which we are bound.

Maughan K.C. The issue in that case was whether the whole regulations were void and was the converse of the issue in this case. The question whether reg. 12 gives a remedy independently of reg. 17 was not argued; it did not arise for decision and it was not in fact decided except by one Justice, who decided that an independent remedy was given by reg. 12. Without the waiver of any rights on the part of the respondent, it is submitted that the result of an examination of *Andrews* v. *Howell* (1) is that it has to be accepted by the Court that reg. 17 is valid and that it provides just terms. It, however, is still open to the Court to hold that reg. 17 is not the exclusive method of obtaining compensation and that reg. 12 gives a right in itself apart from the permitted method of applying under reg. 17. *Starke* J. expressly says so; *Rich* J. does not exclude the possibility in any way to say that reg. 12 does that; *Dixon* and *McTiernan* JJ. do, but the result is that there is not a decision of

(1) (1941) 65 C.L.R. 255.

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a majority excluding the application of reg. 12 in the way in which it was intended. Where a decision is unanimous and the reasons differ it is obvious that if there is not a majority for any reason there cannot be a binding decision on a subsequent court with regard to the reasoning (*Tasmania* v. *Victoria* (1)). It should be noted that the words used in reg. 12 are " converted into claims for compensation ", and that those words are not qualified by any words such as " as hereinafter mentioned." Reg. 17 operates only in two events which are alternative, that is, upon delivery or consignment of apples or pears in accordance with reg. 14 or upon apples or pears being disposed of or dealt with in accordance with instructions from the Board. In many cases which do not come under reg. 17 at all there is no power whatsoever to award compensation, if, as is contended for by the appellants, reg. 17 is the sole provision for compensation. The condition precedent in reg. 17 (1) does not happen if the fruit is destroyed, or stolen, or regarded as unsaleable, or, for any other reason, never disposed of or dealt with, is harvested but still on property sold before the fruit is sold. Further, the interest of a lienee is not provided for. There is no duty upon the Board to give a notice under reg. 14; therefore a mandamus will not lie. The procedure which involves all the possibilities revealed upon a consideration of reg. 17 must be regarded, as a matter of construction, as an alternative procedure to reg. 12 and not as an absolute procedure. It is a procedure which does not give the growers a remedy. The absence of a remedy in a case where the Board and the Minister differ is fatal to the contention that reg. 17 is the only method of obtaining compensation. The principle that should be observed in construing the regulations is stated in *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (2). Under the regulations as amended since this action began the Board makes payment for the fruit not on a flat-rate basis but on a group or grade basis. The words " due process of law " govern the taking of private property under the Fourteenth Amendment of the Constitution of the United States of America, but do not govern the taking of property for public use under the Fifth Amendment. Just compensation should be assessed by a judicial tribunal, and it must be a full and perfect equivalent for the property taken (*United States* v. *Jones* (3); *Monongahela Navigation Co.* v. *United States* (4); *Seaboard Air Line Railway Co.* v. *United States* (5); *Richmond Screw Anchor Co.*

(1) (1935) 52 C.L.R. 157, at pp. 183-185.
(2) (1920) A.C., at p. 543.
(3) (1883) 109 U.S., at pp. 518-520 [27 Law. Ed., at pp. 1017, 1018].
(4) (1893) 148 U.S., at pp. 324-327 [37 Law. Ed., at pp. 467, 468].
(5) (1923) 261 U.S., at pp. 304, 305 [67 Law. Ed., at p. 669].

v. *United States* (1); *Jacobs* v. *United States* (2)). It is not within the power of the Commonwealth to acquire property except for some purpose under the Constitution. Apart from agreement property can only be acquired under a statute that provides for just terms in accordance with the requirements of sec. 51 (xxxi.) of the Constitution. If there be no such provision the property cannot be acquired. The presence of a qualification in the placitum negatives the idea of a power to make a law without the qualification. The best test of the value of the property taken is, firstly, the amount actually obtained on a sale of that property, secondly, comparable sales, and, thirdly, the opinion of experts. This matter was discussed at length in *Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (3). The respondent should not suffer by reason of the fact that the pool had been established. The Court should not act on an assumption that the operation of the pool increased the price of fruit. In the circumstances a verdict in the sum of £715 9s. 6d. should be entered in favour of the respondent against the Commonwealth. The respondent does not press for judgment against the appellant Board.

Weston K.C., in reply. The evidence does not show that growers of low-grade fruit received enhanced prices from the pool to the prejudice of growers of high-grade fruit.

Cur. adv. vult.

Oct. 1.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal by the defendants from a judgment of *Williams* J. in an action in this Court in which the plaintiff Alwyn Uren Tonking claimed compensation from the defendants, the Australian Apple and Pear Marketing Board and the Commonwealth of Australia, for apples and pears acquired by the Commonwealth from the plaintiff. Judgment was given for the plaintiff against the Commonwealth for £320.

The *National Security* (*Apple and Pear Acquisition*) *Regulations* (S.R. No. 148 of 1939) provide for the compulsory acquisition of apples and pears from growers. Reg. 2 is in the following terms : " The purpose of these regulations is to minimize the disorganization in the marketing of apples and pears likely to result from the impracticability of exporting sufficient quantities of apples and pears because of the effects upon shipping of the present war and these regulations shall be administered accordingly." This provision

(1) (1928) 275 U.S. 331 [72 Law. Ed. 303].
(2) (1933) 290 U.S., at pp. 16, 17 [78 Law. Ed., at p. 144].
(3) (1939) A.C. 302, at pp. 312-323.

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shows that the scheme contained in the regulations was intended to deal with a disorganization in marketing which interfered with the export and the sale for export of apples and pears.

The plaintiff, an orchardist, was a grower within the meaning of the regulations. All growers were required to apply for registration (reg. 9). The plaintiff applied and was duly registered. On 27th February 1940 an order was made under reg. 12 making provision for the acquisition of apples and pears harvested after a specified date. This order applied to the plaintiff's apples and pears. In pursuance of the regulations the plaintiff delivered to one A. H. Walker, an agent of the defendant Board, 3,118 cases of apples and 365 cases of pears which were sold by the Board. The fruit was of high quality. The defendant Board sold the fruit for a sum of £2,040 6s. 1d. gross, the net proceeds being £1,288. The Board paid to the plaintiff £573. The defendants refuse to pay any further sum. The parties omitted to point out to the learned trial Judge that a certain further payment to the plaintiff was a reimbursement of expenditure made by the plaintiff on behalf of the Board. It is agreed by the parties that, if the plaintiff is entitled to succeed, the judgment should be for the amount of £715 9s. 6d.

In his case as originally framed the plaintiff alleged that the regulations were invalid as being contrary to sec. 92 of the Constitution of the Commonwealth, which provides that trade, commerce and intercourse between the States shall be absolutely free. The case of *Andrews* v. *Howell* (1) was decided after this action was commenced. It was there held that the regulations were not invalid as infringing sec. 92 or as providing for acquisition of property otherwise than upon just terms: See Constitution, sec. 51 (xxxi.), which provides that the Parliament of the Commonwealth may make laws with respect to "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." It was held that the regulations were within the ambit of the defence power of the Commonwealth Parliament. The plaintiff accordingly abandoned the allegation that the regulations were invalid and presented his case upon the basis that the regulations entitled him to compensation upon just terms, namely, upon payment to him of the value of the property acquired from him.

The learned trial judge examined the reasons for the decision in *Andrews* v. *Howell* (1) and came to the conclusion that he was at liberty to hold that a specific provision for compensation contained in reg. 17 did not provide the only means of obtaining compensation,

(1) (1941) 65 C.L.R. 255.

but that reg. 12 entitled the plaintiff to obtain compensation in the ordinary way through the courts.

The learned judge held that if reg. 12 did not give this right, and if reg. 17 provided the only means of assessing and obtaining compensation, the latter regulation was invalid for various reasons stated by his Honour.

Reg. 12, as amended by Statutory Rule 1940, No. 295, is as follows: "The Minister may, from time to time, by order published in the *Gazette*, make provision for the acquisition by the Commonwealth of any apples and pears described in the order, whether by reference to any contingency or otherwise, and those apples and pears shall, by force of and in accordance with the provisions of the order, become the absolute property of the Commonwealth, freed from all mortgages, charges, liens, pledges, interests and trusts affecting those apples or pears, and the rights and interests of every person in those apples or pears (including any rights or interests arising in respect of any moneys advanced in respect of those apples or pears) shall thereupon be converted into claims for compensation."

The order made by the Minister under this regulation had the effect of converting the plaintiff's rights of property in his apples and pears into a claim for compensation.

Reg. 17, as amended by Statutory Rule 1940, No. 276, contains the following provisions:—"(1) Upon delivery or consignment of any apples or pears in accordance with regulation 14 of these Regulations, or upon any apples or pears being disposed of or dealt with in accordance with instructions from the Board every person having any right or interest in those apples or pears may forward to the Board a claim for compensation in accordance with Form D in the Schedule to these Regulations and shall be entitled to be paid such amount of compensation as the Minister, on the recommendation of the Board, determines. (2.) It shall not be necessary for the Minister to make a determination in pursuance of sub-regulation (1.) of this regulation until, in his opinion, a sufficient quantity of any apples or pears acquired by the Commonwealth has been disposed of to enable the Board to make a just recommendation. (3.) The Minister may, in his absolute discretion, make advances to any grower or to any person having any right or interest in the crop of any grower, in respect of any apples or pears which have been acquired by the Commonwealth and of which the Board has taken delivery."

The applicability of this regulation depends upon the existence of a number of conditions:—(1) That fruit which has been acquired has been delivered or otherwise dealt with in accordance with the

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instructions of the Board. This condition was satisfied in the present case. (2) That the grower has applied for compensation in a prescribed form. It should be noted that the grower is not obliged to make such an application, but the application must be made before he can claim any right to compensation under this regulation. He cannot complain that the regulation gives him no right to compensation simply because he chooses not to make application for compensation. In the present case the plaintiff did not make any application under the regulation. (3) That the Board has made a recommendation to the Minister as to the amount of compensation to be paid in each case. (4) That the Minister has, on that recommendation, made a determination of the amount of compensation.

I agree with *Dixon* J. (*Andrews* v. *Howell* (1)) that the Minister may accept or reject the recommendation, but that he cannot vary it. No compensation can be paid under the regulation unless the Minister agrees with and adopts a recommendation which the Board has made. The Board has made no recommendation, and the Minister has made no determination with respect to compensation to be paid to the plaintiff.

Under reg. 17 (3) the Minister may, in his absolute discretion, make advances to growers. The amount of £573 paid to the plaintiff was made up of such advances. It consisted of payments of 2s. for each case of apples and 3s. for each case of pears acquired under the regulations and a further sum of 1s. for each case of fruit of adequate quality delivered to the Board. These payments were not made as compensation under reg. 17 (1.), but expressly as "advances," i.e., under par 3. of that regulation. These payments were made upon the basis of quantity, no attention being paid to quality. The plaintiff's apples (for example) brought varying prices, some as high as 20s. and 18s. a case. They averaged about 10s. per case. As already stated, he received from the Board only 3s. a case. It seems impossible to say that the payment of £573 for fruit, the net proceeds of which were £1,288, constitutes compensation upon just terms. But if the regulations must be held to provide for just terms and the plaintiff has obtained everything to which he is entitled under the regulations, the fact that an apparently inadequate amount of compensation has been paid in this particular case would not entitle a court to re-assess the *quantum* of compensation. On the other hand reg. 12 gives a right to compensation —which means fair and adequate compensation: Cf. *Jacobs* v. *United States* (2)—and it would seem to follow that the plaintiff is entitled to judgment for the difference between £573 and £1,288.

(1) (1941) 65 C.L.R., at pp. 283, 284.
(2) (1933) 290 U.S., at p. 16 [78 Law. Ed., at p. 144].

The plaintiff however, has to meet an argument founded upon *Andrews* v. *Howell* (1). That argument is that it was decided in that case by a majority of the Court that reg. 17 provided the only method of obtaining compensation for fruit acquired under the regulations. If this were the case then the plaintiff should have made an application under reg. 17, and should have sought to obtain a recommendation from the Board and a determination by the Minister as to the amount of compensation to be paid to him. He would then have been entitled to obtain payment of the amount so determined. Such a procedure would in fact be useless to the plaintiff, because the Board has already made it clear that it is not prepared to recommend the payment to the plaintiff of any amount beyond the amount already paid by way of advances.

Apart from the authority of *Andrews* v. *Howell* (1) I should have thought that reg. 17 could not be regarded as providing to a grower means of obtaining, as of right, compensation upon just terms. The regulation is quite unobjectionable if it is regarded as a means of enabling the Board to assess compensation which the grower is at liberty, but not compellable, to accept. If, however, it is regarded as the only means of obtaining compensation, it is open to the comments which my brother *Rich* makes upon it in his reasons for judgment in this case. The regulation contains no provision which entitles a grower to even the most elementary justice in the assessment of compensation. What has happened in the present case is sufficient to show that reg. 17 does not give to a grower any right to obtain fair and adequate compensation. He can obtain under that regulation only what the Board and the Minister, without necessarily allowing the grower to present evidence or argument, agree to give him, if indeed they agree to give him anything.

Further, there are cases to which reg. 17 cannot be applied even though compensation is payable in those cases. It is at least clear that reg. 12 gives a right to compensation, to be assessed and obtained in some way, in the case of all fruit which is acquired under the regulation. If such fruit should be destroyed by some accident after it had been acquired, the right to compensation would not be destroyed. But, if the Board had given no instructions as to its delivery or other disposition, reg. 17 could not come into operation in relation to that fruit, because the regulation applies only to fruit which is delivered, consigned or otherwise disposed of in accordance with instructions given by the Board. It may be that, as *Dixon* J. says (*Andrews* v. *Howell* (2)) the Board cannot indefinitely withhold instructions to the grower—but, if the fruit had ceased to exist,

(1) (1941) 65 C.L.R. 255.

(2) (1941) 65 C.L.R., at p. 283.

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proceedings by way of mandamus or otherwise could not result in a direction to the Board to give directions to the grower to do what was impossible. Even if, contrary to this view, a court did order the Board to give some instruction to deliver or consign or otherwise deal with the fruit the grower could not comply with it, and so could not bring itself within the initial words of reg. 17, which make it a condition of obtaining compensation under reg. 17 that the fruit shall be delivered, consigned or disposed of in accordance with instructions given by the Board. Thus, in the case supposed of fruit destroyed after acquisition but before instructions given, the grower could obtain no compensation under reg. 17, although reg. 12 had given him a right to compensation. Consideration of this possible case therefore supports the view that, if the regulations are to be regarded as providing just terms for compensation, reg. 17 cannot be regarded as providing the only method of assessing and obtaining compensation.

Consideration of other provisions in reg. 17 reinforces this conclusion. The regulation contemplates separate applications for compensation by separate growers and consideration by the Board of those applications. The Board then makes a recommendation in each case. The Minister may accept or may reject this recommendation. If he accepts it in a particular case then the amount of compensation to the grower concerned is duly determined under the regulation and the grower can recover it, less any advances which may have been made under reg. 17 (3). But if the Board makes no recommendation, or the Minister makes no determination accepting a recommendation, the grower obtains no right under reg. 17 to any compensation. Possibly the Board could be compelled by mandamus to make some recommendation in each case—even though the result might be that the Board recommended that no amount, or only a nominal amount, of compensation should be paid. The Minister might be directed by mandamus to consider and decide whether he should accept or reject a recommendation of the Board. But he certainly could not be compelled to accept any recommendation. Thus the operation of reg. 17 depends upon the concurrence of two independent authorities—the Board and the Minister—and the grower has no means whatever by any kind of proceedings of ensuring or compelling such concurrence. Thus, when the Board and the Minister differed in opinion as to the amount of compensation, the grower could not obtain any compensation under reg. 17. This therefore is another case where reg. 17 cannot operate to give a grower a right to any compensation, though the grower clearly has a right under reg. 12 to obtain compensation.

On the whole I am of opinion that there is no clear decision by a majority of the Court in *Andrews* v. *Howell* (1) that reg. 17 provides the only means of obtaining compensation under the regulations. *Starke* J. plainly states that the right to compensation given by reg. 12 is absolute and that it is not conditioned by reg. 17 (see the report (2)), and the reasons for judgment of my brother *Rich* in this case show that it would be a misunderstanding of his judgment in *Andrews* v. *Howell* (3) to interpret it as meaning that reg. 17 provides the only means of obtaining compensation. Thus I think that I am at liberty to hold (as the learned trial judge held) that the plaintiff is entitled to sue for compensation under reg. 12, independently altogether of reg. 17.

This result does not accord with ordinary ideas of "pooling." In an ordinary "pool" the contributors of goods receive a dividend calculated upon proceeds of sale, less expenses, regard being had to the quality as well as to the quantity of produce put into the pool: Cf. *Hopper* v. *Egg and Egg Pulp Marketing Board* (*Vict.*) (4). Reg. 2 and reg. 17 (2) contain some indications that some undefined kind of pool was in contemplation when the regulations were drafted. But there is a provision in reg. 24 which shows that in the case of this pool it was contemplated that a larger sum of money might be paid to the growers than that which the fruit brought upon sale and that the excess sum should be provided by the Government. Reg. 24 provides:—(1.) "The Board shall open and maintain an account at the Commonwealth Bank of Australia into which it shall pay all moneys received in respect of sales of apples or pears or otherwise, and any moneys appropriated by the Parliament or borrowed by the Minister for use by the Board on behalf of the Commonwealth. (2.) Out of the moneys standing to the credit of the account the Board shall defray all costs and expenses of administering these Regulations and make all payments in respect of compensation and any other payments authorized to be made by these Regulations." Thus compensation is to be provided out of the proceeds of realization plus moneys appropriated by Parliament plus loan moneys.

It is plain, therefore, that it was considered that it might be necessary for the Government to subsidize the pool. In fact Act No. 73 of 1940 provided that £750,000 should be payable out of consolidated revenue for the purpose of repaying to the Commonwealth Bank advances made by the Bank to the Commonwealth for the purposes of these regulations.

(1) (1941) 65 C.L.R. 255.
(2) (1941) 65 C.L.R., at p. 270.
(3) (1941) 65 C.L.R., at pp. 262-264.
(4) (1939) 61 C.L.R. 665, at p. 670.

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Reg. 2 indicates the possibility that some fruit might not be sold at all because it could not be sold—but nevertheless the growers of such fruit, if it was acquired, were entitled to compensation (reg. 12). The regulations were designed to give compensation even in such cases, though, according to normal standards, the fruit was valueless. This could be done only by subsidizing the pool. Thus, under these regulations, the Commonwealth may have to provide moneys in excess of the proceeds of realizations.

I approach this case therefore upon this basis:—The Court is bound by *Andrews* v. *Howell* (1) to hold that the regulations are valid as a whole, that reg. 17 is valid, and that it provides a means whereby compensation upon just terms may be obtained in some cases by growers: but in some cases growers whose fruit has been acquired may not, and in certain cases cannot, obtain just compensation under reg. 17: the regulations therefore cannot be valid if reg. 17 provides the only means of obtaining compensation: they can be valid only if, in the cases mentioned, compensation on just terms can be obtained by other means: the only means possible is by an action to obtain the compensation declared by reg. 12 to be a right of the grower.

Thus the defendant Commonwealth, under these regulations, accepted the responsibility of providing compensation for growers of fruit which had been acquired. As already stated, compensation means adequate compensation—an amount which really is compensation.

The plaintiff in this present case has identified his fruit, he has proved what it realized upon sale, and he has done nothing which can be relied upon as a binding agreement to accept the amount of advances as compensation. He is entitled to receive the value of his fruit. Generally the determination of the value of goods depends upon an estimate of what the goods will bring in the market. In this case, no such estimate is necessary, because the plaintiff has established what they actually brought in due course of selling during the season. It has been argued that the value of the fruit should be determined by taking opinions as to what, in the circumstances of (1) glut in the market (2) the fact that the Board might not sell the plaintiff's fruit at all, a purchaser of the fruit would have been prepared to pay for it. In my opinion the Court is not remitted to any such speculations in this case. The defendants cannot say that the fruit is worth less than the amount for which the defendant Board actually succeeded in selling it. When there is evidence of the price which goods have actually brought when

(1) (1941) 65 C.L.R. 255.

marketed in an ordinary course it would be contrary to common sense, when determining their value, to ignore this direct evidence and to seek evidence consisting of opinions as to what the goods would, upon certain hypotheses, be likely to bring when so marketed. When the fact is known there is no occasion to debate upon probabilities. It will be understood that what I have said upon this aspect of the case relates solely to the ascertainment of the value of the goods in question, and that it has no relation to questions affecting the measure of damages claimable in cases of breach of contract and tort, in some of which other considerations will be relevant. In this case the Court is not considering whether certain consequences of what for some reason is a wrongful act should be considered as being reasonably within the contemplation of the parties or any such question. The only question is: What was the value of the plaintiff's fruit which the defendant Commonwealth lawfully acquired?

In my opinion, therefore, the plaintiff rightly succeeded in this action. In accordance with the agreement of the parties the amount of the judgment should be increased to £715 9s. 6d. The appeal should be dismissed with costs, and, subject to the variation stated, the judgment should be affirmed.

Rich J. In the present appeal, the matter of primary importance is the contention that the learned trial Judge should have held that the only method of assessing compensation payable to the plaintiff was that provided by reg. 17 of the *National Security* (*Apple and Pear Acquisition*) *Regulations*. We are here concerned with acts done in purported exercise of an authority conferred by a legislature whose powers are restricted by law. In a case of this kind, the point, which has been much debated, is in my opinion capable of being resolved by the application of certain elementary considerations. When by law a body is invested with authority which is made subject to limitations, inhibitions, conditions or other qualifications, neither the body itself, nor any other body which is not legally superior to that law can exempt it from compliance with them, or exclude a court of justice having jurisdiction in that behalf from determining whether they have been complied with if an exercise of the power is challenged for non-compliance, unless, of course, the law which imposes the qualifications, provides for its determination in some other way.

By the Australian Constitution the legislative, executive and judicial powers of the Commonwealth are distributed between the Federal Parliament, the Executive, and certain courts, respectively.

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The legislative powers of the Parliament are not plenary, but are restricted to those conferred upon it by the Constitution and are subject to any limitations or conditions imposed by the Constitution. It cannot free itself from such limitations or conditions; only the process provided for by sec. 128 of the Constitution (or, in theory, the Imperial Legislature) can do that; nor can it decide for itself whether a purported exercise of a power is valid; and if an exercise of a power involves any legal consequences prescribed by the Constitution it cannot exempt itself from any of those consequences. The questions whether an Act of the Federal Parliament is valid, and if so whether it involves any and what legal consequences, can be determined only by an exercise of the judicial power, either by this Court, by some other Federal court which the Federal Parliament has created, or by some other court which it has invested with Federal jurisdiction in that behalf, or by some court when the question arises in proceedings before it and is not removed into this Court under secs. 40 and 40A of the *Judiciary Act* 1903-1940. But no body but a court can be invested with such jurisdiction. The power now in question provides that: "The" (Federal) "Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:— . . . The acquisition of property on just terms"— not, it is to be observed, on such terms as to it seem just—"from any State or person for any purpose in respect of which the Parliament has power to make laws" (sec. 51, placitum xxxi. of the Constitution). But "any 'property' specified in the statute may be taken provided 'just terms' are available by law" (per *Isaacs* J. in *The Commonwealth* v. *New South Wales* (1)). This limitation or restriction is an "affirmance of a great doctrine established by the common law for the protection of private property" (*Story* on the *Constitution*, 3rd ed. (1858), vol. II., p. 596, par. 1790) and is in accordance with Magna Carta, which "protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land" (*Blackstone*, 4th ed., vol. IV., p. 417). Sec. 5 (1) of the *National Security Act* 1939-1940 provides that the Governor-General may make regulations (*b*) for authorizing (ii) the acquisition on behalf of the Commonwealth of any property other than land. In purported exercise of this Act the *National Security* (*Apple and Pear Acquisition*) *Regulations* were made. These provide by reg. 12 that the Minister for Commerce may make provision by an order published in the *Gazette* for the acquisition by the Commonwealth of any apples and pears

(1) (1923) 33 C.L.R., at p. 47.

described in the order, and thereupon they are to become the absolute property of the Commonwealth, and the rights and interests of every person therein are converted into claims for compensation. On receipt of a notice from a Board set up by the regulations, a person having in his possession any apples or pears which have been so acquired must deliver or consign them to an agent (reg. 14). Reg. 17 provides that upon any such delivery, or upon any apples or pears being disposed of in accordance with instructions from the Board, every person having any right or interest in them may forward to the Board a claim for compensation and shall be entitled to be paid such amount of compensation as the Minister, on the recommendation of the Board, determines. This regulation provides a simple non-litigious way in which persons who have been deprived of their property may obtain compensation for the loss of its value if they are willing to accept what the Minister on the recommendation of the Board is willing to give, and it provides the Minister with authority to pay them what they are willing to take if he thinks it reasonable to do so; but it does no more, and I see no reason for supposing that it was intended to do more. By virtue of placitum xxxi. their property cannot be taken from them except upon just terms. Reg. 12 expressly provides that upon the acquisition of the property in question the rights of all persons interested "shall thereupon be converted into claims for compensation." The acquisition is in the nature of a compulsory statutory sale and the expropriated party is in the position of a vendor making an agreement for sale on the terms of receiving the value of the article appropriated. This excludes the possibility that the appropriation was not intended to be operative unless the property could be had for nothing; and there is nothing in reg. 12, whether it be read alone or in conjunction with reg. 17, to suggest that the appropriation was intended to be operative only if the persons expropriated were content to take such compensation as might be offered to them by the Minister. The terms of reg. 12 are absolute. The Commonwealth acquires the property and the former owners acquire a right to compensation. These are just terms. If, however, the persons who have been expropriated are not prepared to accept in full satisfaction what the Minister may think fit to offer them pursuant to reg. 17 there is nothing to compel them to do so. By accepting the invitation to make a claim which is put forward by reg. 17 they do not bind themselves by agreement or estoppel to restrict themselves to whatever the Minister may be prepared to give. He has no authority to determine the matter *in invitos*; and the Federal Parliament has no power to invest him with such authority. No doubt it could

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constitute a special court for the purpose; but this would have to be a Federal court, the appointment, tenure and remuneration of whose judges would be subject to sec. 72 of the Constitution, not a person who was or might be subject to the control or influence of the legislature (*New South Wales* v. *The Commonwealth* (1)). The fact that the Federal Parliament in taxation statutes may lawfully set up administrative persons or tribunals to determine the amount of tax payable supplies no analogy, because (apart from the prohibition of discrimination) its powers in respect of taxation are absolute, and it may select any criterion it pleases to determine *quantum* and determine it conclusively. But its power to expropriate is limited by a qualification or inhibition which it has no power to alter. It is by the Constitution itself that the acquisition is required to be on just terms, and, since Parliament is bound by the Constitution, by no artifice or device can it withdraw from the determination by a court of justice the question whether any terms which it has provided are just, that is, terms which secure adequate compensation to those who have been expropriated. In interpreting the words in the Fifth Amendment to the United States Constitution "just compensation", from which the words "just terms" in the Australian Constitution are derived, the Supreme Court of the United States has decided in a number of cases that compensation must be a full and perfect equivalent for the property taken. In *Jacobs* v. *United States* (2) it was said:—"The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, 'and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.' The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value.' Interest at a 'proper rate' is a good measure by which to ascertain the amount so to be added" (*Seaboard Air Line Railway Co.* v. *United States* (3)). And in *Monongahela Navigation Co.* v. *United States* (4) it was stated that the ascertainment of "just compensation" is a judicial inquiry; the determination of what property is to be taken is a question of political and legislative character. Similarly I consider that the ascertainment of what are "just terms" does "produce a *lis*" between the parties (*Errington* v. *Minister of Health* (5); *Estate and Trust Agencies* (1927) *Ltd.* v.

(1) (1915) 20 C.L.R. 54, at p. 62.
(2) (1933) 290 U.S., at pp. 16, 17 [78 Law. Ed., at p. 144].
(3) (1923) 261 U.S., at p. 306 [67 Law. Ed., at p. 669].
(4) (1893) 148 U.S., at p. 327 [37 Law. Ed., at p. 468].
(5) (1935) 1 K.B., at p. 259.

Singapore Improvement Trust (1); *E. Robins & Son Ltd.* v. *Minister of Health* (2)). This is not to say that a tribunal which is technically a court must necessarily be provided for the assessment of compensation. That is a question which does not arise in the case before us, and I prefer not to pass upon it until it does. It is at least clear that legislation which authorized the expropriation of citizens or States on the terms that they should be entitled to receive as compensation only whatever a person or body named or provided for by Parliament or by the Executive, and subject to their control or influence, might, at their otherwise uncontrolled discretion think fit to give would not provide terms capable of being regarded as just. Reg. 17 does not even require that the quality of the fruit is to be taken into consideration so that the Court could not enforce this essential attribute of "just terms" upon the Minister or the Board by a mandamus. In *Reg.* (*Moore*) v. *Abbott* (3) *O'Brien* J. said:—"In the ordinary case of arbitration, the arbitrator is the judge of the law as well as the facts, and it is not easy to see in what respect it is not the ordinary case, *unless the statute under which he acts has laid down a rule or measure of compensation for his guidance.* Therefore, if the Court were to grant a rule, on the ground of his having declined jurisdiction, it could only direct him to decide, *but could not direct the basis of his decision*, which would be to take away the authority of his office": Cf. *Blundell* v. *The King* (4); *Master and Fellows of University College, Oxford* v. *Secretary of State for Air* (5).

Each individual grower has a legal right to be paid the full value of his fruit, and some growers must not be underpaid so that other growers may be overpaid—any regulations which allow this to be done must be unjust. If the Board could show that it has marketed all the fruit as advantageously as possible by spreading it over the season, and that it had then worked out the net proceeds of sale for the various grades of apples and pears and divided these proceeds amongst the owners of these apples and pears according to the number and quality acquired from each owner, this would be strong evidence of the value of the apples and pears. If, in order to achieve these values, some apples and pears in the various grades had to be destroyed, the owners would be entitled to exactly the same compensation as the owners of similar apples and pears which were in fact marketed. Of course the Board and the Minister could use the subsidy as to them seemed just. But the compensation assessed by

(1) (1937) A.C., at p. 914.
(2) (1939) 1 K.B. 520, at p. 533.
(3) (1897) 2 I.R. 362, at p. 396.
(4) (1905) 1 K.B. 516.
(5) (1938) 1 K.B. 648.

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the learned Judge did not include any subsidy. I agree with him that in determining this value the price which, having regard to the objects of the regulations, the fruit actually realized on the market can be taken into account (*In re Bwllfa and Merthyr Dare Steam Collieries* (1891) *and Pontypridd Waterworks Co.* (1))—Cf. *Phillips* v. *Kershaw, Leese & Co.* (2) ; *Williamson* v. *John I. Thornycroft & Co. Ltd.* (3). And if a grower had commenced proceedings under reg. 12 immediately after his fruit had been acquired and before it had been sold, it would have been proper for the Court in the circumstances to have stood the action over until this evidence was available.

Dixon J. in *Andrews* v. *Howell* (4) said that he was not prepared to say that it appeared on the face of the regulations that the terms of the acquisition were unjust, but, as I read his reasons, I do not understand him to have intended to go further than this, or to commit himself to the view that a person who had been expropriated would be precluded by the regulations from enforcing his right to have the amount of his compensation determined by a court of justice or that if the regulations did so preclude him their terms would be just. I do not understand *McTiernan* J. to have gone further than this. Speaking for myself, I certainly did not intend to do so. The case in this respect decided no more than that, in view of the absolute right to compensation provided for by reg. 12, the regulations taken as a whole, and including therefore reg. 12, could not be regarded as providing for acquisition on terms which were not just.

I have not repeated in detail the facts of the case as they are fully set out in the judgment of the learned trial judge, but I consider it necessary to emphasize the following considerations.

It may be that the fruit which was marketed only produced the price it did because other fruit which would otherwise have competed with it had to be destroyed or otherwise utilized for the benefit of the alleged pool as a whole. If this be so it would have been easy for the defendants to have given evidence to this effect, and it would have been a factor for the learned trial Judge to have taken into consideration in assessing the compensation, because the amount of compensation is the potential value of the fruit at the date of acquisition and the only potential value which the fruit could have would be its sale value on the market. But no such evidence was tendered and no attempt was made by the defendants to prove that

(1) (1901) 2 K.B. 798, at pp. 804, 805 ; (1903) A.C. 426, at p. 431.
(2) (1920) 3 K.B. 297.
(3) (1940) 2 K.B. 658.
(4) (1941) 65 C.L.R., at p. 284.

the plaintiff's fruit was sold at an enhanced value because of any such circumstances. There is no evidence that the proceeds of the fruit which was sold have probably been increased by the fact that other fruit of similar grade was not allowed to flood the market and to depress prices. On the contrary the defendants admitted that the advances (which were really instalments of compensation) were paid in respect of the fruit which could be sold. The uncontradicted evidence of the plaintiff was that his apples and pears were of such quality that if he had been allowed to market them himself he could have done better than the Board.

But assuming that growers who have delivered or consigned their fruit to the Board or otherwise dealt with their fruit as provided in reg. 17 can only recover compensation under that regulation, then it would follow that growers enmeshed by reg. 17 have no right to have their claims determined by an impartial tribunal; no right of being heard by written statement or orally by the Board or by the Minister; no right to discovery, particulars or interrogatories for the purpose of ascertaining what their fruit or comparable fruit had brought on the market; and if they could obtain this information from any other source, no right to have their claim to compensation determined in the light of this information; no right to have what the Board considered a just recommendation adopted by the Minister; no right to compensation at all under the regulation on the basis of what the Board considered a just recommendation unless the Minister was prepared to adopt the recommendation; no right to any information as to the basis upon which the Board based its recommendation; no right to challenge the basis however unjust it might be in fact; no right, if the Minister purported to assess compensation, to know whether it was in fact based on the recommendation of the Board. Thus the regulation, if exclusive, provides for all those things which have always been considered to be a violation of natural justice, i.e., (1) the determination of the compensation by (in a legal sense) a biassed tribunal; (2) no right of audience of the claimant before the tribunal; (3) no knowledge of the basis or the evidence upon which the tribunal has acted. So far as the decision in *Andrews* v. *Howell* (1) is concerned the complete application of placitum xxxi. was not considered in all its aspects. The decision centred on the question whether the regulations taken as a whole and including the absolute right to compensation given by reg. 12 were warranted by the defence power. The real meaning of the words used in a judgment must be studied having regard to the subject matter and all the circumstances. No "court should

(1) (1941) 65 C.L.R. 255.

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consider itself fettered by the form of words, as if it were a phrase in an Act of Parliament which must be accepted and construed as it stands" (*Shuttleworth* v. *Cox Brothers & Co. (Maidenhead) Ltd.* (1); *Mills* v. *Mills* (2)). Applying this principle I consider that the decision leaves it open to the plaintiff to sue to enforce the absolute right to compensation vested in him by this regulation. There is nothing to indicate an intention that in particular cases expropriated persons should be restricted to reg. 17. If any such intention were indicated it would be invalid.

For these reasons I am of opinion that the appeal should be dismissed. So far as the order is concerned, although in the argument it was suggested that judgment for compensation had been given against both defendants, it is clear from the order that the learned judge in my opinion rightly ordered the Commonwealth only to pay compensation. But pursuant to an agreement by the parties the amount of compensation should be increased to £715 9s. 6d. Interest at four per cent should run on this sum from 1st February 1941 until the date of payment to the plaintiff.

McTIERNAN J. In the form in which this action was tried the plaintiff sued the defendants for compensation which he claimed under the *National Security* (*Apple and Pear Acquisition*) *Regulations* (Statutory Rules 1939 No. 148—1940 No. 295). The claim for damages which the plaintiff made on the footing that the regulations were invalid was abandoned in consequence of the decision in *Andrews* v. *Howell* (3). The action is founded on reg. 12.

The Australian Apple and Pear Marketing Board, which is constituted by the regulations, issued instructions to growers pursuant to its powers under reg. 14. The plaintiff complied with these instructions and sent the apples and pears in his possession that had been acquired by the Commonwealth to the Board's agents. They sold them for the Board and paid to it the proceeds which amounted to £2,040 6s. 1d. The marketing expenses were £751 16s. 7d. Advances were made by the Minister pursuant to reg. 17 (3). They were at a flat rate per case. At first 2s. for apples and 3s. for pears were paid. The rate did not vary according to the quality of the fruit. The amount advanced to each grower was calculated on that proportion of his crop which it was estimated would be of suitable quality for sale. In addition the sum of 1s. was advanced for apples and pears "of adequate quality" delivered to the Board. The total amount of advances paid to the plaintiff

(1) (1927) 2 K.B. 9, at p. 26.
(2) (1938) 60 C.L.R. 150, at p. 169.
(3) (1941) 65 C.L.R. 255.

was £968. It is agreed that the difference between this sum and the net amount realized by the sale of apples and pears sent by the plaintiff to the Board's agents is £715 9s. 6d. In computing that sum allowance is made for expenses borne by the plaintiff. No further sums have been paid to the plaintiff. He did not make any application under reg. 17 (1) for compensation, and no determination of compensation has been made pursuant to that sub-regulation.

The plaintiff obtained judgment in the action for an amount which was computed to be the difference between the amount of the advances received by the plaintiff and the amount at which the Court assessed the value of the fruit which was acquired from him and sent by him to the Board's agents. The value was assessed at an amount equivalent to the net proceeds of the sale of the fruit.

Reg. 17 consists of the three following sub-regulations :—" (1.) Upon delivery or consignment of any apples or pears in accordance with regulation 14 of these Regulations, or upon any apples or pears being disposed of or dealt with in accordance with instructions from the Board every person having any right or interest in those apples or pears may forward to the Board a claim for compensation in accordance with Form D in the Schedule to these Regulations and shall be entitled to be paid such amount of compensation as the Minister, on the recommendation of the Board, determines. (2.) It shall not be necessary for the Minister to make a determination in pursuance of sub-regulation (1.) of this regulation until, in his opinion, a sufficient quantity of any apples or pears acquired by the Commonwealth has been disposed of to enable the Board to make a just recommendation. (3.) The Minister may, in his absolute discretion, make advances to any grower or to any person having any right or interest in the crop of any grower, in respect of any apples or pears which have been acquired by the Commonwealth and of which the Board has taken delivery."

It is plain that the plaintiff became entitled according to the express provisions of reg. 17 (1) to forward a claim for compensation to the Board. This sub-regulation gives the claimant a right to be paid the amount of compensation which is determined by the Minister. In this action the plaintiff does not sue to recover an amount determined by the Minister, but he sues for the amount which the Court should assess. The regulations do not expressly give a right to sue in a court of law for the assessment and recovery of compensation. If the right exists, it must be drawn by implication from reg. 12. The question to be decided is whether in addition to or alternatively to the remedy given by reg. 17 (1) a person eligible

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to apply under this sub-regulation for a determination may bring an action for the assessment and recovery of compensation. The question turns on the construction of the regulations. Reg. 12 converts the rights and interests of every person in all the apples and pears which by force of the Minister's order became the absolute property of the Commonwealth into claims for compensation. Reg. 17 (1) is expressed to apply upon the delivery or consignment of acquired fruit in accordance with reg. 14, or when it has been dealt with or disposed of, in accordance with the Board's instructions. In the case of *Andrews* v. *Howell* (1) I agreed with my brother *Dixon's* construction that reg. 17 (1) contains a specific provision as to the occasion when compensation should be paid and the authority by whom the measure shall be determined. Further consideration has not caused me to depart from that opinion, and I think it is clearly right, at any rate, so far as it defines the right of any person who like the plaintiff is eligible according to the express provisions of reg. 17 (1) to forward a claim for compensation to the Board. In *Andrews* v. *Howell* (2), *Dixon* J. said :—" Reg. 12 converts all interests in the fruit acquired into claims for compensation. If it stopped there, 'compensation' would doubtless be construed as meaning a full recompense to be recovered in and assessed by a court of law, and there could be no doubt of the justice of such a provision. But the regulations do not stop there. Reg. 17 contains a specific provision as to the occasion when compensation should be paid, and the authority by whom the measure shall be determined." His Honour further said : " Where reg. 12 converts all interests into claims for compensation it necessarily implies that the claim for compensation shall be paid by the Commonwealth, although no doubt in the manner afterwards stated " (3). The manner is stated in reg. 17. His Honour further said :—" The regulations are defective in the expression of a measure of compensation, but that measure is indicated, although somewhat indistinctly, by reg. 17 (2) construed in combination with the general purpose stated in reg. 2. Reg. 17 (2) says that it shall not be necessary for the Minister to make a determination until in his opinion a sufficient quantity of any apples or pears acquired by the Commonwealth had been disposed of to enable the Board to make a just recommendation. This is an indication that the compensation is to be the result of the marketing of the apples and pears and the receipt of the proceeds for distribution, after proper deductions, among the growers " (4).

(1) (1941) 65 C.L.R. 255.
(2) (1941) 65 C.L.R., at p. 282.
(3) (1941) 65 C.L.R., at p. 283.
(4) (1941) 65 C.L.R., at p. 284.

It would not be consistent with this construction to hold that reg. 12 gives by implication a right to sue in a court of law for the assessment and recovery of compensation. The claim for compensation given by this regulation arises upon acquisition. It is a claim for compensation which at the time of acquisition is of an indeterminate amount, as *Rich* J. has pointed out in *Andrews* v. *Howell* (1), where he said: "I think that upon a proper understanding of the regulations, they sufficiently confer upon the grower an absolute right to *a compensation* determined in a fair manner by a specified administrative body. I am therefore of opinion that there is a sufficient compliance with the terms of sec. 51 (xxxi.) of the Constitution". The italics are mine. The Minister may not make a determination except on the recommendation of the Board and he may decline to make any determination until in his opinion a sufficient quantity of apples and pears has been sold to enable the Board to make a just recommendation. As the regulations are valid, it must be presumed that when the Minister is of that opinion a recommendation made by the Board and a determination made by the Minister on that recommendation are just. Reg. 17 (1) intends that the determination of the Minister should be based on a just recommendation. If the supposition be correct that reg. 12 gives a claim for just compensation, the supposition does not make it necessary to imply that the regulation gives a right to enforce the claim by action where the remedy provided by reg. 17 (1) is available to the claimant. Whatever reg. 12 may imply, it does not imply the conditions which reg. 17 (2) shows to be necessary to the making of a just recommendation. Compensation which is just according to the regulations can have one measure only. The measure is indicated by reg. 17 (2) and reg. 2: See *Andrews* v. *Howell* (2), per *Dixon* J. An assessment of compensation made independently of the consideration which reg. 17 shows to be preliminary to a just determination of compensation would necessarily be defective. This is, in my opinion, a reason for denying that reg. 12 necessarily implies a right to receive such an amount of compensation as a court would hold to be just.

Reg. 2 declares that the purpose of the Regulations is "to minimize the disorganization in the marketing of apples and pears likely to result from the impracticability of exporting sufficient quantities of apples and pears because of the effects upon shipping of the present war." This regulation provides that the regulations shall be administered accordingly. If reg. 12 implies a trial of the question of compensation, the Court would be asked to assess the value of property consisting of a right or interest in a quantity of fruit

(1) (1941) 65 C.L.R., at p. 264.

(2) (1941) 65 C.L.R., at p. 284.

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which at the time of acquisition formed part of a total production exceeding the demand. It was acquired by the Commonwealth to minimize the disorganization in the market and for this purpose the Commonwealth is made the sole vendor. The question may be asked by what criterion would the Court assess the value of any quantity of such fruit immediately on acquisition. At that point of time the value of the fruit was that which it had as a commodity that was to be sold within a limited period of time in a market which throughout that period was likely to be disorganized by the causes mentioned in reg. 2. These causes would produce an uneconomic disproportion between the supply, the inflated factor, and the demand. The presumption is that the Executive complied with the directions in reg. 2 and the acquisition was made for the purpose of minimizing the disorganization. If the fruit in respect of which it is supposed that the Court is trying the claim for compensation had in fact been sold by the Board, the sale was made under conditions of order and a better balance between the quantities of fruit being fed to the market, and its digestive capacity. The amount realized by the fruit under better economic conditions which were brought about by the acquisition of the season's crop and the control of its sale by the Commonwealth is not, in my opinion, a true criterion of the value of the fruit at the time of acquisition when the grower was confronted with the likelihood of a disorganized market. If the question is triable by a court, what is the criterion for assessing the compensation payable to a claimant if the fruit acquired from him was not sold by the Board, or if it was destroyed before it was consigned to the Board? The supposition requires that it should be just compensation. It would not be just compensation unless it were based on the value realized by fruit comparable with that of such claimant. The adoption of that measure of compensation would imply that the price obtained by the Board under the conditions brought about by acquisition and control by the Commonwealth could have been obtained by the grower whose fruit was sold or the grower whose fruit was not sold if there had been neither acquisition nor control. This conclusion would involve a denial of the conditions which reg. 2 declares it was the purpose of the regulations to meet.

In my opinion the regulations do not leave by implication to a court of law the duty of laying down the measure of compensation which is payable for the acquisition of the fruit. The word "compensation" implies a measure to be deduced from the regulations and it has a constant meaning in reg. 12 and reg. 17. The regulations must be construed as a whole. They constitute a scheme of which regs. 12 and 17 are interdependent parts. It is not a correct construction of the

regulations that reg. 12 confers by necessary implication on any court of law that has jurisdiction to hear a claim against the Commonwealth jurisdiction to determine what in the opinion of that court is the amount of compensation to be awarded to any person having a claim for compensation under the regulations. If the regulations give such jurisdiction to a court, they are strangely silent about their intention. The true construction is that they leave the question of the determination of compensation, as they expressly say they do, to the administrative body specified in reg. 17.

In *Andrews* v. *Howell* (1), it was decided that acquisition upon the terms that compensation is to be determined and paid in the manner prescribed by reg. 17 is an acquisition upon just terms and complies with the conditions of sec. 51 (xxxi.) of the Constitution. It would not be consistent with this decision to hold that as the regulations comply with these conditions they necessarily imply that a court is open to a claimant who is eligible to apply under reg. 17. There is the further observation to be made that in reaching the decision that the regulations provided for acquisition upon just terms two Justices conceded only for the purpose of argument, but did not decide, that sec. 51 (xxxi.) was the only source from which the Commonwealth derives its power to acquire the fruit for the purposes of the regulations. Are the powers conferred by sec. 51 (vi.) entirely or to any extent limited by sec. 51 (xxxi.)? In the view which I have taken it is unnecessary to pursue this question.

The plaintiff, as already mentioned, did not forward any claim under reg. 17 (1). No determination has been made pursuant to this sub-regulation. The right of the plaintiff is to forward a claim in accordance with reg. 17 (1) and to have it duly considered in accordance with the provisions of the regulations. This action by the plaintiff to recover such amount of compensation as the Court should assess is misconceived.

In my opinion the appeal should be allowed.

Amount of judgment for plaintiff increased from £320 to £715 9s. 6d. Subject to this variation judgment affirmed and appeal dismissed with costs.

Solicitor for the appellants, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Campbell, Condell & Paton*, Orange, by *Campbell, Campbell & Campbell.*

J. B.

(1) (1941) 65 C.L.R. 255.