

[HIGH COURT OF AUSTRALIA.]

MARINE BOARD OF LAUNCESTON . . . APPLICANT ;

AND

MINISTER OF STATE FOR THE NAVY . . . RESPONDENT.

H. C. OF A. *Constitutional Law (Cth.)—Acquisition of property—"Just terms"—National*
1945. *Security Regulations—Requisitioning of ship—Assessment of compensation—*
MELBOURNE, *Jurisdiction of Court to allow interest—"Compensation which it thinks just"*
Oct. 3. *—The Constitution (63 & 64 Vict. c. 12), s. 51 (xxvi.)—National Security (General)*
Regulations, regs. 57, 60D-60M (S.R. 1940 No. 119—1945 No. 50.)

SYDNEY,
Dec. 14.

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

On an assessment of compensation for the requisitioning of a ship the property in which is acquired under reg. 57 of the *National Security (General) Regulations* the Court has power to order that interest be paid on the amount of the compensation from the date of acquisition to the date of payment of the compensation.

So held, by Rich, Dixon, McTiernan and Williams JJ. (Latham C.J. and Starke J. dissenting).

QUESTION of law reserved for Full Court.

On a review of an assessment of compensation in respect of the requisition of a tug, *Starke J.* reserved, substantially in the following terms, a question of law for the consideration of the Full Court :—

1. In September 1942 the Minister of State for Commerce duly requisitioned the tug *James Wallace* belonging to the Marine Board of Launceston pursuant to the provisions of reg. 57 of the *National Security (General) Regulations* and took possession of her accordingly.

2. The Marine Board made a claim in writing to the Minister for compensation in accordance with the provisions of the Regulations.

3. The claim was duly referred to a Compensation Board, appointed pursuant to the Regulations, which assessed the compensation payable to the Marine Board in accordance with the provisions of the Regulations.

4. The Marine Board was dissatisfied with the assessment of the Compensation Board and applied to this Court, pursuant to the Regulations, for a review of the assessment.

5. This application to review came on for hearing before me, and on 19th June 1945 the compensation payable to the Marine Board, in respect of the taking of the tug, was assessed and determined by me, pursuant to the Regulations, at the sum of £24,000.

6. About January 1943 a progress payment of £8,000 in respect of the taking of the tug was made to the Marine Board by or on behalf of the requisitioning authority pending finality in the assessment of its claim.

7. The Marine Board claims that an order should be made directing that interest be paid to it on the balance of compensation from the date of acquisition of the tug to the date of payment.

The question reserved was :—

Whether the Court has any authority or jurisdiction under the Regulations or at all to determine and order that interest be paid to the Marine Board on the balance of compensation from the date of acquisition of the tug to the date of payment or for any other and what period of time.

Reynolds K.C. (with him *Tredinnick*), for the applicant. The Constitution, s. 51 (xxxi.), requires that the compensation shall be “on just terms,” and English cases, such as *Swift & Co. v. Board of Trade* (1), decided under other legislation do not apply. In *Australian Apple and Pear Marketing Board v. Tonking* (2) and in *James Patrick and Co. Pty. Ltd. v. Minister of State for the Navy* (3) *Williams* J. allowed interest on compensation, as did *Roper* J. in the Supreme Court of New South Wales in *Grace Bros. Pty. Ltd. v. Minister for the Army* (4)—see also *The Commonwealth v. Huon Transport Pty. Ltd.* (5), in which *Rich* and *Williams* JJ. took the same view. In the United States it has been held that interest should be included in compensation (*Phelps v. United States* (6)); See also *Liggett & Myers Tobacco Co. v. United States* (7); *Russian Volunteer Fleet v. United States* (8). A court of equity would award interest from the date of acquisition to the date of payment: See *Minister of State for the Navy v. Rae* (9); *Huon Transport Company's Case* (10). [He also referred to

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(1) (1925) A.C. 520.

(2) (1942) 66 C.L.R. 77: See per *Williams* J. at pp. 79, 90, and, on appeal, per *Rich* J., at p. 106.

(3) (1944) A.L.R. 254.

(4) Unreported.

(5) *Ante*, p. 293, at pp. 306, 307, 315, 324, 333-336.

(6) (1927) 274 U.S. 341, at p. 343 [71 Law. Ed. 1083, at p. 1084].

(7) (1927) 274 U.S. 215 [71 Law. Ed. 1006].

(8) (1931) 282 U.S. 481, at p. 489 [75 Law. Ed. 473, at p. 476].

(9) *Ante*, p. 339.

(10) *Ante*, p. 293.

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Toronto City Corporation v. Toronto Railway Corporation (1); *International Railway Co. v. Niagara Parks Commission* (2); *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd. v. The Commonwealth* (3).]

Alderman K.C. (with him *Eggleston*), for the respondent. The power of the Minister under reg. 60J to authorize the payment of interest on compensation makes it clear that the compensation under these Regulations does not include interest. The actual acquisition of property does not *cause* any delay there may be in payment of compensation. If interest is allowed, it must be by way of compensation for the delay, not for the acquisition. [He referred to *Inland Revenue Commissioners v. Glasgow and South-Western Railway Co.* (4); *MacDermott v. Corrie* (5); *Horne v. Sunderland Corporation* (6).] Circumstances vary so much that there could not be an absolute rule that interest must be paid from the date of acquisition; equity has no such absolute rule. [He referred to *Newcastle Breweries Ltd. v. The King* (7); *R. v. MacKay* (8); *Behnke v. Bede Shipping Co. Ltd.* (9); *Skinners' Company v. Knight* (10); *Borthwick v. Elderslie Steamship Co. (No. 2)* (11).]

Reynolds K.C., in reply, referred to *In re Pigott and Great Western Railway Co.* (12); *Claringbould v. Curtis* (13).

Cur. adv. vult.

Dec. 14.

The following written judgments were delivered:—

LATHAM C.J. Question of law reserved by *Starke J.* for the consideration of the Full Court pursuant to the *Judiciary Act* 1903-1940.

In September 1942, the Minister of State for Commerce duly requisitioned the tug *James Wallace* under reg. 57 of the *National Security (General) Regulations* and took possession of her. The parties were unable to agree upon the compensation payable and the Marine Board, being dissatisfied with an assessment made by a Compensation Board, applied to the High Court for a review of the assessment. The learned judge states that upon the review "the compensation payable to the Marine Board in respect of the taking of the tug was assessed and determined by me, pursuant to the Regulations, at the sum of £24,000." A progress payment of £8,000

(1) (1925) A.C. 177, at p. 193.

(2) (1941) A.C. 328, at p. 344.

(3) (1944) 67 C.L.R. 314.

(4) (1887) 12 App. Cas. 315, at p. 322.

(5) (1913) 17 C.L.R. 223, at p. 247.

(6) (1941) 2 K.B. 26, at p. 32.

(7) (1920) 1 K.B. 854.

(8) (1930) S.C.R. (Can.) 130.

(9) (1927) 1 K.B. 649.

(10) (1891) 2 Q.B. 542.

(11) (1905) 2 K.B. 516.

(12) (1881) 18 Ch. D. 146.

(13) (1852) 21 L.J. Ch. 541

had been made on account of compensation. The Marine Board claimed that an order should be made directing that interest be paid to it on the balance of compensation from the date of acquisition of the tug to the date of payment. The question reserved for the Full Court is stated in the following terms :—

“Whether the Court has any authority or jurisdiction under the Regulations or at all to determine and order that interest be paid to the Marine Board on the balance of compensation from the date of acquisition of the tug to the date of payment or for any other and what period of time.”

The *National Security (General) Regulations*, reg. 57 (1), provide that a Minister may by order requisition any property, including ships. Regulation 60D provides that any person who suffered or suffers loss or damage by reason of anything done under reg. 57 (1) in relation to—“(a) any property in which he has, or has had, any legal interest, or in respect of which he has, or has had, any legal right; (b) any undertaking in which he has or has had, any legal interest; or (c) any contract to which he is or has been a party,” shall be paid compensation to be determined by agreement or, in the absence of agreement (reg. 60F), by a Compensation Board, and if either party is dissatisfied with the assessment of the Board by a competent court. The duty of the court (reg. 60G (5)) is “to determine whether any compensation is payable and, if so, the compensation which it thinks just.” Regulation 60J is as follows :—“In any case where compensation, or part thereof, has not been paid within three months after the loss or damage in respect of which the compensation is payable was suffered, the Minister may, if in his discretion he thinks fit, authorize the payment of interest at such rate (not exceeding five per centum per annum) as he determines on the compensation or part thereof for the period commencing three months after that loss or damage was suffered and ending on the date of payment.”

Upon a strict reading of the question submitted to the Court, I think it is clear that the question must be answered in the negative. If compensation has duly been determined pursuant to the Regulations, then the Court has completely performed its function of determining the amount of compensation which it thinks just, and the Court has no authority to add any sum to the compensation so authorized to be awarded. Interest will be payable upon the compensation so awarded, from the date of the entry of the order, because the award is an order made in the original jurisdiction of the High Court and carries interest under s. 26A of the *High Court Procedure Act* 1903-1933. But under the Regulations the Court plainly has no authority

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to award more than "compensation" (whatever "compensation" may mean) without any addition thereto.

Regulation 60J expressly provides that interest may be allowed by the Minister "on compensation." This regulation shows that the "compensation" itself does not include interest on the compensation authorized to be awarded under the Regulations.

But the real matter in contest between the parties is whether interest should be awarded upon the amount of compensation assessed as at the time of taking so as to produce at the time of payment full and adequate compensation for the taking, i.e. whether interest should actually be *included in* the compensation—not *added to it*.

It has been decided by the House of Lords that under a provision requiring the payment of compensation for the compulsory acquisition of chattels interest cannot be allowed from a date anterior to the award of compensation (*Swift & Co. v. Board of Trade* (1)). Viscount *Cave* L.C. (2) referred to the established equitable rule that on a contract for the sale of land a purchaser is required to pay interest on the purchase price from the date when he took, or might safely have taken, possession of the land. The reason for the rule was said to be that the act of taking possession was an implied agreement to pay interest. There is no room for such an implied agreement where property is taken under the Regulations now under consideration. The obligations of the parties depend upon the terms of the Regulations, properly interpreted, and not upon any agreement express or implied. But in *Swift's Case* (1) the Lord Chancellor also referred to the fact that the equitable rule had been extended by judicial decision to cases of compulsory purchase of land, because they were treated in equity as creating the relation of vendor and purchaser. The question there was whether the rule judicially developed in the Court of Chancery in relation to compensation for the compulsory taking of land should be applied also to the compulsory taking of chattels. The decision was that it should not be so applied. The Lord Chancellor said—"There is no authority in English law for applying" (the rule) "to a requisition of goods by the State," and he added: "To hold otherwise is to give compensation, not for the goods themselves, but for the time occupied in ascertaining their value in accordance with the law." So also Lord *Sumner* said that the regulations required compensation to be ascertained by arbitration, which involved delay and caused a claimant "to be out of his compensation for a substantial time," postponing the date at which his compensation can be fixed and become payable; and "to give interest is

(1) (1925) A.C. 520.

(2) (1925) A.C., at pp. 532, 533.

really to give additional compensation for being the victim of war legislation, and this subject of compensation is not within the regulation" (1).

I apply the decision in *Swift's Case* (2) for the purpose of interpreting the word "compensation" in the Regulations in the present case, and not as an authority binding this Court to hold that justice in awarding compensation does not require the payment of interest. *Swift's Case* (2) *prima facie* requires us to hold that the word "compensation" in itself, when applied to compulsory acquisition of chattels, does not require or authorize the allowance of interest on the amount assessed as representing the value of the chattels at the time of taking.

But it is contended for the claimant that *Swift's Case* (2) only interpreted a particular regulation and that, in the case of Federal legislation, there are special reasons which should lead the Court to attach a more generous meaning to the word "compensation." If there is delay in payment of compensation, the Commonwealth has had the benefit of the possession of the property taken, and also the benefit of the use of the money which ought to have been paid by the Commonwealth to the claimant. It would therefore appear to be just that an allowance should be made to the claimant for the purpose of putting him in as good a position as if his property had not been taken. This proposition is the basis of the argument for the claimant in the present case.

This proposition, however, itself depends upon a contention that the term "compensation" in these Regulations should be interpreted, if possible, so as to prevent the Regulations being held to be invalid by reason of failure to comply with the constitutional requirement imposed by s. 51 (xxxi.) of the Constitution. Section 51 (xxxi.) provides that the Commonwealth Parliament shall have power to 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. This constitutional provision does not in itself give a right to any person to obtain just terms upon the acquisition of his property. It is a provision which limits the power of the Commonwealth Parliament to make laws for the acquisition of property. If the provisions in the *National Security Regulations* do not provide for compensation on just terms, then they cannot be valid legislation providing for the acquisition of property. It is contended for the claimant that the word "compensation," read in the light of the constitutional requirement of "just terms", involves provision for payment

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(1) (1925) A.C., at p. 548.

(2) (1925) A.C. 520.

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of interest where there is delay in payment of money found to be due as compensation.

Regulation 60D applies to three cases of loss or damage in respect of which compensation may be awarded—(a) in respect of property, (b) in respect of undertakings, (c) in respect of contract. If interest can be awarded as part of “compensation” in the case of property, it can also be awarded as compensation in the case of undertakings and of contracts.

In this Court, in the cases of *James Patrick & Son v. Minister of State for the Navy* (1) and *Australian Apple and Pear Marketing Board v. Tonking* (2), interest was allowed by my brother Williams, and this allowance was not disputed upon appeal in the latter case. In *The Commonwealth v. Huon Transport Pty. Ltd.* (3), *Rich and Williams JJ.* held that interest should be allowed. In the Supreme Court of New South Wales, *Roper J.* has taken the same view in *Grace Bros. Pty. Ltd. v. Minister of State for the Army* (4).

This view receives powerful support from American cases in which it has been held that in the exercise of the power of eminent domain, subject to the constitutional provision “nor shall private property be taken for public use without just compensation,” interest should be allowed where there was delay in payment. The principle was clearly stated in *Seaboard Air Line Railway Co. v. United States* (5):—
“The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. . . . It rests on equitable principles, and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. . . . Where the United States condemns and takes possession of land before ascertaining or paying 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, paid contemporaneously with the taking.” This rule has been applied in many cases: See *De Witt Garrison Brown v. United States* (6), and the full note to that case; *Phelps v. United States* (7); *Jacobs v. United States* (8). This Court is not bound by the decisions of the Supreme Court of the United States, but the authorities mentioned must be recognized as affording very strong persuasive support for the view submitted on behalf of the claimant.

(1) (1944) A.L.R. 254.

(2) (1942) 66 C.L.R. 77.

(3) *Ante*, p. 293.

(4) Unreported.

(5) (1923) 261 U.S. 299, at pp. 304, 306 [67 Law. Ed. 664, at pp. 669, 670].

(6) (1923) 263 U.S. 78 [68 Law. Ed. 171].

(7) (1927) 274 U.S. 341 [71 Law. Ed. 1083].

(8) (1933) 290 U.S. 13 [78 Law. Ed. 142].

The rule of English law is that, in general, interest is not payable by reason of delay in the payment of money due. There may be a contract to pay interest, or there may be a usage, as in the case of bills of exchange, by reason of which interest is payable. Otherwise the general rule is that no damages are given for non-payment of money. Many of the authorities are referred to in *Westminster Bank Ltd. v. Riches* (1): See *Halsbury's Laws of England*, 2nd ed. (1936), vol. 23, pp. 174-5.

In *London, Chatham & Dover Railway Co. v. South Eastern Railway Co.* (2), Lord *Herschell* L.C. commented upon the injustice of the prevailing law with respect to the payment of interest:—"I think that when money is owing from one party to another and that other is driven to have recourse to legal proceeding in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use." See also pp. 441-443. Substantial effect has now been given in the United Kingdom to this opinion by the *Law Reform (Miscellaneous Provisions) Act* 1934, s. 3.

I agree, if I may respectfully say so, with the statement of the Lord Chancellor. This statement, however, relates to the justice of allowing interest in all cases where there is a delay in the payment of money which is due. It is a statement that interest should be allowed as a matter of justice for the delay in payment, but it is not a statement that the original liability, whatever it may be, whether in contract, in tort, or by reason of a statute, includes a liability to pay interest. When an action is brought for damages for breach of contract or for tort, the amount of damages is never increased (apart from some statutory provision, e.g., *Lord Tenterden's Act*) because there has been delay caused by negotiation and litigation or by other circumstances. The loss of the use of the money ultimately awarded as damages is not part of the loss occasioned by the tort or breach of contract itself. It is a loss due entirely to delay in the payment of money ultimately held to be due, and is not recoverable as part of the damages.

What is the question for a court when it is required to determine fair compensation for the taking of property? Upon one view, the duty of the court is to determine what was fair compensation for the taking and to award that amount. Upon the other view, it is the duty of the court to determine what, at the time of the decision, is fair compensation for the taking and for delay in payment thereof. In

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(1) (1945) 61 T.L.R. 344.

(2) (1893) A.C. 429, at p. 437.

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my opinion, the delay in payment, though causing loss, is not something which is itself the subject matter of compensation for the taking. If an employer was bound to pay fair wages to an employee, he would be bound only to pay the amount assessed as fair wages, and not to pay as part of the wages an additional sum because he had delayed in the payment of the amount representing fair wages. The position appears to me to be exactly the same in the case of fair compensation. It was pointed out by Rich J. in *The Commonwealth v. Huon Transport Pty. Ltd.* (1) that, where there is delay in payment, the expropriation of the dispossessed owner involves him in further loss "because he is deprived both of the opportunity of obtaining revenue from the property that once was his and of earning income or getting benefits by the use of the money to which he has become entitled in place of the property." His Honour drew the inference that just terms, therefore, involve as a matter of elementary fairness the payment of interest on the money to which the owner was entitled for the time during which it was withheld from him. But, in my opinion, this statement of principle (which is plainly a just principle) shows that interest in such a case ought, as a matter of justice, to be paid, not in respect of the loss caused by the expropriation, but in respect of the loss caused by failure to pay promptly for the expropriation. The proposition of which justice may be said to require the acceptance is a proposition that, when money is owing, on whatever ground, by one person to another, and there is a delay in payment, the person who is under liability to pay should pay interest to the other person as compensation for any wrongful delay in payment. This, however, is a general proposition relating to the requirements of justice as affecting the payment of money owing on whatever account. It is a proposition relating not to the subject of liability to pay on just terms for property taken, but to the indemnification of the owner of the property against loss arising from delay in payment. I agree that it may not be just that the Commonwealth should at the same time have both the use of the vessel and the use of the money which should have been paid to the owner of the vessel. The delay may be the fault of the Commonwealth or it may be the fault of the claimant. But in either case the damage caused by the delay and measured by the assessment of interest is due to the delay and not to the acquisition.

The cases which show that interest may be allowed when specific performance of a contract relating to the acquisition of a chattel (e.g. a ship) can be ordered are, I consider, only illustrations of the principle that it is equitable to give compensation for delay in the

(1) *Ante*, p. 293, at pp. 306, 307.

payment of money. It remains true, in my opinion, that a sum so awarded for interest is allowed, not as compensation for acquisition of property, but as compensation for delay in making payment for property. It was said in *Inglewood Pulp and Paper Co. v. New Brunswick Electric Power Commission* (1) that "the right to receive interest takes the place of the right to retain possession." But surely a sum representing the full value of the property at the time of acquisition takes the place of the right to retain possession during all future time, so that any addition by way of interest must represent compensation for delay in payment and not compensation for the taking of the property.

Accordingly, I am of opinion that a provision for the payment of interest in case of delay in payment is not a necessary part of any scheme for the acquisition of property on just terms. I therefore answer the question referred to the Court in the negative.

RICH J. The crucial phrase in the present case is "just compensation", whereas in *The Commonwealth v. Huon Transport Pty. Ltd.* (2) the crucial word was "recompense." Each expression is intended, I think, to embody and give effect to the meaning of the words "just terms" contained in s. 51 (xxxi.) of the Constitution. I adhere to the opinion I expressed in that case, and, in view of the similarity of the expressions, consider that the principles of construction there stated are applicable in the instant case. Accordingly, I think that interest should be allowed in accordance with these principles. Further I consider that a contract for the sale of a ship is a contract capable of specific performance in equity, and that upon the compulsory acquisition of a ship interest is allowable by analogy to these principles.

I would therefore answer the question asked in the affirmative.

STARKE J. Case stated.

The question is whether the Court can order that interest be paid to the Marine Board of Launceston upon the balance of compensation payable to it under a determination of this Court in respect of the requisitioning of a tug pursuant to reg. 57, sub-reg. 1, of the *National Security (General) Regulations*. The question has been agitated on several occasions but there is no clear decision upon it: See *The Commonwealth v. Huon Transport Pty. Ltd.* (2).

The assessment of the compensation is provided for in regs. 60D to 60M, both inclusive. Regulation 60J provides that, in any case where compensation, or part thereof, has not been paid within three

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(1) (1928) A.C. 492, at p. 499.

(2) *Ante*, p. 293.

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months after the loss or damage in respect of which the compensation is payable was suffered, the Minister may, if in his discretion he thinks fit, authorize the payment of interest at such rate (not exceeding five per cent per annum) as he determines on the compensation or part thereof for the period commencing three months after that loss or damage was suffered and ending on the date of payment.

Despite this provision, the Marine Board claims that the Court has authority and jurisdiction to order that interest be paid to it on the balance of compensation which the Court ordered to be paid to it in respect of the requisitioning of the tug.

Regulation 60D provides that any person who has suffered or suffers loss or damage by reason of anything done in pursuance of reg. 57, sub-reg. 1, shall be paid compensation as determined pursuant to the regulation.

This Court has held that the measure of compensation under this regulation is not the pecuniary loss or damage sustained by reason of anything done pursuant to the regulation but the value of the thing taken, acquired or requisitioned (*Minister of State for the Army v. Dalziel* (1); *Minister for the Army v. Parbury Henty & Co. Pty. Ltd.* (2)). It "is not given," to cite a passage from the speech of Lord Sumner in *Swift v. Board of Trade* (3), "for the lapse of time between the original requisition and the publication of the award, and as the entire transaction is *sui generis*, these things must either be expressly given by the regulation or they are not given at all." *Swift's Case* (4) appears to me a clear decision that interest cannot be allowed as compensation: See also *Toronto City Corporation v. Toronto Railway Corporation* (5); *R. v. MacKay* (6); *The Canadian Drug Company v. Board of the Lieutenant-Governor in Council* (7). And indeed the provision of reg. 60J providing for interest on compensation renders the opposite view untenable as a matter of construction. It was said that the legislative authority conferred upon the Parliament to acquire property on just terms makes it probable, if not necessary, that interest should be included in compensation or the terms would not be just. The argument is untenable. It cannot be said that terms are unjust if the full value of the property taken or requisitioned is given especially having regard to the common law rules relating to interest upon legal claims. In any case, the natural and ordinary meaning should be given to the words of the regulation in the sense given to them by this Court.

(1) (1944) 68 C.L.R. 261.

(2) *Ante*, p. 459.

(3) (1925) A.C. 520, at p. 545.

(4) (1925) A.C. 520.

(5) (1925) A.C. 177, at p. 193.

(6) (1930) S.C.R. (Can.) 130.

(7) (1925) S.C.R. (Can.) 23, at p. 39.

Next equitable rules were called in aid. Equity, however, follows the law in respect of legal claims (*London, Chatham, and Dover Railway Co. v. South Eastern Railway Co.* (1)). And it is clear, I think, that no authority can be found in the common law for the allowance of interest in this case. But equitable principles are attracted, it is said, because the respondent, by means of the requisition, acquired the tug compulsorily and therefore its acquisition should be regarded in the nature of a compulsory purchase (*International Railway Co. v. Niagara Parks Commission* (2); *Behnke v. Bede Shipping Co. Ltd.* (3)). Interest may, according to the authorities, be awarded in equity in respect of any money becoming due under any contract specifically enforceable, such, for instance, as a contract to purchase a ship. But the requisitioning of a ship or tug under the Regulations is not comparable to a compulsory purchase. It is a procedure for obtaining the immediate possession of the property for the deprivation whereof any person who is deprived of the thing taken is compensated. And I fail to understand how equitable jurisdiction or principles are attracted to the requisitioning of property of which the person to whom the requisition is addressed is required to deliver up possession in accordance with the terms of the requisition (reg. 57 (1B)), and which may be seized or removed for the purpose of giving effect to the requisition (reg. 57 (1A)). Moreover, the express provision in reg. 60J for interest on compensation renders equitable principles inapplicable. American authorities were referred to, but it is enough to say that the Court is governed by English law and, as was said by Lord Sumner in *Swift's Case* (4), the law of other countries has no bearing upon the case in hand.

The question stated should be answered in the negative.

DIXON J. As I understand the special case, the Commonwealth compulsorily acquired the full property in the Marine Board's tug. In this respect, the case is unlike that of the *Huon Transport Pty. Ltd.* (5), where the requisition was of the possession of the craft there in question and not the property in her. In that case, therefore, the Court was concerned only with hire rates payable on the footing of a hull charter. Hire rates are payments on account of revenue or income and so, prima facie, would not be regarded as an income-bearing or interest-bearing fund. The question, however, of the allowance of interest upon compensation payable in respect of the requisition of ships was considered by the Court in *Rae's Case* (6); there was a requisition of the property in the ship and the question of

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(1) (1892) 1 Ch. 120; (1893) A.C. 429.

(2) (1941) A.C. 328.

(3) (1927) 1 K.B. 649.

(4) (1925) A.C. 520.

(5) *Ante*, p. 293.

(6) *Ante*, p. 339.

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interest necessarily arose, but, because of the circumstances of the case, the payment of interest was not contested. Here the matter is directly raised. For the compensation must include or represent the capital value of the vessel, not hire or charter moneys. In *Rae's Case* (1) and *Huon Transport Company's Case* (2), I suggested that, when the full property in a ship is compulsorily acquired, the equitable principle applies under which interest is given upon the compensation or purchase money payable in respect of the compulsory acquisition of property of such a nature that, if it were the subject of a contract of sale, a court of equity would decree specific performance. A ship is property of that character. I shall not repeat what I said in those two cases nor refer to the authorities there cited. It is enough to say that I desire the passages relating to the matter to be considered as here incorporated by reference. Apart from any limitation upon the Court's authority arising from the Regulations, it follows that I should regard the purchase money or compensation payable in respect of a ship of which the Government had taken possession as carrying interest from the date of possession taken until payment. All I need add to the authorities to which I referred in the two cases cited is a passage from the judgment of *Jessell M.R.* in *In re Pigott and Great Western Railway Co.* (3). The purpose is to show that the equitable right to interest does not depend on the bringing of a suit for specific performance, but on the fact that the transaction, whether a sale by contract or compulsory purchase, falls within the cognizance of a court of equity as proper for the application of the remedy of specific performance. The passage is as follows:—"It has always been said that if you have the right to compel a thing to be done by action, the right can never depend on the mere bringing of the action. The action does not create the right; it only enforces the right previously existing; and if, therefore, a vendor is entitled to maintain an action for specific performance against a railway company under the ordinary rules as to specific performance, he is entitled, independently of bringing an action to enforce it, to the benefit of those rules which govern specific performance, including the rule as to payment of interest on unpaid purchase-money."

There are, however, two serious questions arising on the provisions of the Regulations applying to this case, namely, the *National Security (General) Regulations*, regs. 57 and 60B to 60M.

The first is whether the authority of the Court acting under reg. 60G is limited to awarding the capital sum for compensation and does not extend to the inclusion in the Court's determination of a

(1) *Ante*, p. 339, at p. 349.

(2) *Ante*, p. 293, at p. 323.

(3) (1881) 18 Ch. D. 146, at p. 153.

direction to pay interest. The material words of the regulation are as follows—"the Court may . . . proceed to hear the application and to determine whether any compensation is payable and, if so, the compensation which it thinks just, and may make an order for the compensation so determined" (sub-reg. 5).

Sub-regulation 7 provides—"In any matter not provided for in these Regulations the powers, practice and procedure of the court shall be as nearly as may be in accordance with the powers, practice and procedure of the court in civil actions or appeals."

I have some doubt, as I explained in *Rae's Case* (1), whether these regulations apply to the High Court, because of the definition of "competent court" in sub-reg. 8. If the matter is treated as one over which we are exercising jurisdiction in virtue of s. 75 (iii.) of the Constitution, the parties having waived compliance with procedural requirements, as it was treated in *Rae's Case* (1) and by *Williams J.* in *James Patrick and Co.'s Case* (2), then, as the Court would be exercising full jurisdiction over a matter to which the Commonwealth or person sued on its behalf is a party, it would not be material what limitation was involved in the use by the regulation of the term "compensation."

In *Toronto City Corporation v. Toronto Railway Corporation* (3) and in *International Railway Co. v. Niagara Parks Commission* 1937 (4) referred to in *International Railway Co. v. Niagara Parks Commission* (5) the Privy Council decided that arbitrators appointed to assess "value" only could not deal with interest in their award, notwithstanding that on equitable principles the sum they awarded would carry interest. In the case of *In re Pigott and Great Western Railway Co.* (6) the proceeding upon which interest was ordered was a summons in the Chancery Division. It was not done by the award of compensation. On the other hand, in *Inglewood Pulp and Paper Co. v. New Brunswick Electric Power Commission* (7), Lord Warrington for the Privy Council dealt with a statutory proceeding in which a judge of the Supreme Court of New Brunswick was the sole arbitrator for determining the compensation to be paid for a compulsory acquisition and held that he had rightly included interest in his award. The interest, which was made part of the award determining compensation, was not given by statute. It was the result of the application of the equitable rule. Lord Warrington said (8):—"The last question is that of the allowance

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(1) *Ante*, p. 339.

(2) (1944) A.L.R. 254.

(3) (1925) A.C. 177, at pp. 183, 189,
190, 193.

(4) (1937) Unreported.

(5) (1941) A.C. 328, at pp. 333, 334.

(6) (1881) 18 Ch. D. 146.

(7) (1928) A.C. 492, at pp. 494, 498.

(8) (1928) A.C., at pp. 498, 499.

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of interest, and it is a serious one. It is now well established that on a contract for sale and purchase of land it is the practice to require the purchaser to pay interest on his purchase money from the date when he took possession (per Lord Cave L.C. in *Swift & Co. v. Board of Trade* (1)). The law on the point has also been extended to cases under the *Lands Clauses Consolidation Act*, 1845. Their Lordships can see no good reason for distinguishing the present from such cases. It is true that the expropriation under the Act in question is not effected for private gain, but for the good of the public at large, but for all that, the owner is deprived of his property in this case as much as in the other, and the rule has long been accepted in the interpretation of statutes that they are not to be held to deprive individuals of property without compensation unless the intention to do so is made quite clear. The statute in the present case contains nothing which indicates such an intention. The right to receive interest takes the place of the right to retain possession and is within the rule."

In *Swift & Co. v. Board of Trade* (2), Lord Cave said the rule in Chancery "has been extended to cases of compulsory purchase under the *Lands Clauses Consolidation Act*, 1845." His Lordship cites *In re Pigott and Great Western Railway Co.* (3) where interest was not included in the award and *Fletcher v. Lancashire and Yorkshire Railway Co.* (4) where it was so included, though the arbitration was to some extent by submission by the parties. Lord Cave appears, however, clearly to contemplate the award of interest by the authority assessing compensation and this is in accordance with the actual decision of Scrutton L.J. who dissented in the Court of Appeal (*Swift and Co. v. Board of Trade* (5)); see, further, the order in *Raja Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatam* (6).

The difference, I think, is quite clear between the sum awarded or assessed as compensation as at the date of acquisition for loss of property and a sum awarded for interest or compensation because the acquisition deprived the claimant of the profitable occupation or use of the property without any immediate recoupment of capital in money. But, where a legislative instrument empowers a court or tribunal to deal with the question of compensation, it is a question of interpretation whether its jurisdiction is extensive enough to cover incidental matters and so to enable the court or tribunal to

(1) (1925) A.C. 520, 532.

(2) (1925) A.C. 520, at p. 532.

(3) (1881) 18 Ch. D. 146.

(4) (1902) 1 Ch. 901.

(5) (1924) 40 T.L.R. 424, at p. 428.

(6) (1939) A.C. 302, at p. 331.

order that interest shall be paid on the compensation assessed and awarded, where according to legal or equitable principles it is payable. Though in America the reparation expressed by the word compensation is considered incomplete unless pending payment it includes interest on the capital sum arrived at, in English law I should not think that without context the primary meaning of the word would go so far. But the jurisdiction to determine compensation may be readily interpreted as extending to what is consequential upon or incidental to the award. Where the sum awarded carries interest according to the substantive law, including in that expression the doctrines of equity, it is no great step to say that the tribunal dealing with the matter may so declare.

In the regulations under consideration, power is given, not only to determine the amount of compensation, but also to make an order for payment (reg. 60G (5)). There is also a provision that the court's powers in civil actions shall be applicable (reg. 60G (7)). Even if, on its terms, reg. 60G applies to this Court, it can only operate to give rise to a matter falling within the Court's jurisdiction and not to create jurisdiction. For jurisdiction already exists over all matters to which the Commonwealth is a party. In relation to the Supreme Court, the same result arises under s. 39 of the *Judiciary Act*: See *Minister for the Army v. Parbury Henty & Co. Pty. Ltd.* (1). Then under ss. 79 and 80 of the *Judiciary Act* we are to apply the appropriate law of a State when we exercise our jurisdiction. In view of these considerations, I think that we are justified in concluding that the Court may include in its order a provision for the payment of interest where, as in this case, interest is independently payable under the principles of equity. In other words, it may dispose of the particular matter in its entirety by doing complete justice instead of dividing the question involved between two proceedings.

The second question is whether reg. 60J does not imply that interest is only to be payable under the authority of the Minister. Regulation 60J is as follows:—"In any case where compensation, or part thereof, has not been paid within three months after the loss or damage in respect of which the compensation is payable was suffered, the Minister may, if in his discretion he thinks fit, authorize the payment of interest at such rate (not exceeding five per centum per annum) as he determines on the compensation or part thereof for the period commencing three months after that loss or damage was suffered and ending on the date of payment."

(1) *Ante*, p. 459, at pp. 504-505.

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It is expressed as a power to the Minister, not as a restriction on the rights otherwise existing in the claimant. On the whole, though not without some doubt, I have come to the conclusion that we should not hold that it is intended to be exhaustive and that we should not read into it an implication that interest is not otherwise to be paid, even in the exceptional case where under the general law it would be payable.

On these grounds, I think that the question of law reserved by the special case should be answered : Yes.

McTIERNAN J. The provisions of the Regulations under which the question reserved has to be decided are set out by the Chief Justice. The Regulations depend upon s. 5 (1) (b) of the *National Security Act* 1939-1943, and these provisions of this Act depend upon s. 51 (xxxi.) of the Constitution of the Commonwealth. Regulation 60g gives jurisdiction to the Court to determine whether any compensation is payable and, if so, the compensation which it thinks just. There is no provision which expressly authorizes the Court to order the payment of interest on compensation. Regulation 60j gives power to the Minister to authorize such payment subject to the conditions in that regulation.

I think that we are bound by the authority of *Swift & Co. v. Board of Trade* (1) to hold that interest on compensation is not generally an element in the compensation. It follows from that case that reg. 60g does not authorize the Court to order the payment of interest as compensation for requisitioned goods in general, and compensation but without interest may represent the full content of the word "compensation," in the sense which the word has in English law. But a law like reg. 60g, which in terms confers jurisdiction upon the Court to determine just compensation, could not be held to exceed the qualification which the words, "just terms" put upon the legislative power in s. 51 (xxxi.), in so far as those words require that compensation should be provided. Further, in construing such a law regard must be had to a settled rule that in certain cases it would be inequitable to deny interest to an expropriated owner on the compensation payable to him and in those cases it is regarded as an incident of the jurisdiction to determine the compensation payable to the owner to order the payment of interest on the compensation awarded. The compulsory purchase of land is one of these cases : See *Swift & Co. v. Board of Trade* (2). The cases in which this rule comes into play are described in the case

of *International Railway Co. v. Niagara Parks Commission* (1): "The true rule is that if in cases where the courts of equity would grant specific performance the purchaser obtains possession of the subject-matter of the contract before the payment of the purchase price, he must, in the absence of express agreement to the contrary, pay interest on his purchase money as from the date when he gets possession until the date of payment, because it would be inequitable for him to have the benefit of possession of the subject-matter of the contract and also of the purchase money."

The Regulations are not to be construed as authorizing the confiscation of any property—either a total or a partial confiscation. Compare *Attorney-General v. De Keyser's Royal Hotel* (2); *Newcastle Breweries Ltd. v. The King* (3); *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd. v. The Commonwealth* (4). If in the case of any property compulsorily acquired there would be a right in equity to receive interest on the compensation, it would be a partial compensation to deny that right. In my opinion, according to the proper construction of reg. 60G, it is an incident of the jurisdiction which it confers upon the Court to determine and award just compensation, to order payment of interest on the compensation.

The question, then, is whether the Court would order specific performance of a contract to purchase a tug, the thing requisitioned in the present case.

In *Behnke v. Bede Shipping Co. Ltd.* (5), the court made an order under s. 52 of the *Sale of Goods Act* 1893 for the specific performance of a contract for the sale of a ship. Wright J. said (6): "It is curious how little guidance there is on the question whether specific performance should be granted of a contract for the sale of a ship. . . . *Hart v. Herwig* (7) seems to imply that a man who has contracted to purchase a ship is prima facie entitled to have it—that is, by an order for specific performance." There are other authorities on this point referred to in *Seton, Judgments and Orders*, 6th ed. (1901), vol. 3, p. 2211.

I should therefore hold that under the Regulations the Court has jurisdiction to determine and order that interest be paid from the date possession was taken of the tug. The construction which I place upon reg. 60G is not prevented by the presence of reg. 60J. The jurisdiction implied in reg. 60G to allow interest on compensation is not inconsistent with the authority which reg. 60J expressly confers.

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(1) (1941) A.C. 328, at p. 345.

(2) (1920) A.C. 508, at p. 542.

(3) (1920) 36 T.L.R. 276, at p. 281.

(4) (1944) 67 C.L.R. 314, at p. 329.

(5) (1927) 1 K.B. 649.

(6) (1927) 1 K.B., at pp. 660, 661.

(7) (1873) 8 Ch. App. 860.

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The answer which I give to the question of law reserved is governed by the construction of the Regulations. In my opinion there is implied in the words conferring jurisdiction upon the Court to determine the compensation which the Court thinks just, to order in this case that interest be paid on the compensation. I should answer the question "Yes."

WILLIAMS J. The question of law reserved for the Full Court by *Starke J.* under s. 18 of the *Judiciary Act* 1903-1940 is whether the Court has any authority or jurisdiction under the Regulations or at all to determine and order that interest be paid to the Marine Board on the balance of compensation from the date of acquisition of the tug to the date of payment or for any other and what period of time.

The question arises out of the compulsory acquisition by the Commonwealth of a tug, the property of the applicant, in September 1942, under reg. 57 of the *National Security (General) Regulations*. £8,000 on account of the compensation for the acquisition was paid to the applicant in January 1943. On 19th June 1945, his Honour assessed and determined the compensation pursuant to the Regulations at the sum of £24,000, and the question asked relates to the allowance of interest, not as part of the compensation for the taking of the tug, but as interest on the balance of compensation as assessed and determined. The compensation was assessed and determined upon a review under reg. 60G of the Regulations. This regulation authorizes the Court to determine whether any compensation is payable and, if so, the compensation which it thinks just. The compensation which can be assessed under this regulation may be compensation in respect of any of the matters specified in reg. 60D. The Regulations contain reg. 60J, which provides that in any case where compensation, or part thereof, has not been paid within three months after the loss or damage in respect of which compensation is payable was suffered, the Minister may, if in his discretion he thinks fit, authorize the payment of interest at a rate not exceeding five per cent per annum on the compensation or part thereof for the period commencing three months after the loss or damage was suffered and ending on the date of payment.

In *The Commonwealth v. Huon Transport Pty. Ltd.* (1), I set out at some length my reasons for holding that interest should be allowed on payments of hire in arrears for more than thirty days. In that case, the legislation which provided for the payment of compensation was s. 67 of the *Defence Act* 1903-1939 and the property acquired was the

(1) *Ante*, p. 293, at pp. 333-336.

temporary possession of two ships. Section 67 refers to "recompense", whereas reg. 60G refers to "just compensation." But there is no difference in substance between the expressions, each of which must have been intended to embody "just terms" within the meaning of s. 51 (xxxi.) of the Constitution. Nothing has been said during the present argument which has caused me to alter the opinion expressed in the *Huon Case* (1). In accordance with that opinion, I consider that the applicant should be paid interest on the balance of compensation for the tug because the payment of interest is required to make the compensation full and adequate, or in other words "just," and the words "just compensation" in the regulation are sufficient to authorize the Court to award interest. I also consider that the applicant should be paid interest even if the word "just" in the expression "just compensation" should, for some obscure reason, be discarded as mere surplusage, and the word "compensation" be construed, as it was construed in the regulations before the House of Lords in *Swift & Co. v. Board of Trade* (2), as not in itself sufficient to authorize the award of interest, because interest should still be allowed in accordance with the equitable practice referred to by the Privy Council in *Toronto City Corporation v. Toronto Railway Corporation* (3), *Inglewood Pulp and Paper Co. Ltd. v. New Brunswick Electric Power Commission* (4), *Raja Vyricherla Narayana Gajapatiraju v. The Revenue Divisional Officer, Vizagapatam* (5), and *International Railway Co. v. Niagara Parks Commission* (6). In the *Toronto Case* (3), Viscount Cave said that "the general rule under which a purchaser who takes possession is charged with interest on his purchase money from that time until it is paid is well established, and has on many occasions been applied to compulsory purchases." This statement is couched in slightly different terms to that of Lord Warrington of Clyffe in *Inglewood Pulp and Paper Co. Ltd. v. New Brunswick Electric Power Commission* (7) that "the right to receive interest takes the place of the right to retain possession and is within the rule." The former statement refers to the interest as interest on the compensation, whereas the latter statement includes the interest in the compensation. But the two statements are alike in all substantial respects. The former is perhaps more appropriate to the form of the present question than the latter. Both statements make it clear that, if there is a compulsory purchase of property of such a nature that, if it had been purchased under a contract, the court of equity could have ordered specific performance,

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(1) *Ante*, p. 293.

(2) (1925) A.C. 520.

(3) (1925) A.C. 177, at p. 193.

(4) (1928) A.C. 492, at pp. 498, 499.

(5) (1939) A.C. 302, at p. 331.

(6) (1941) A.C. 328, at pp. 344, 345.

(7) (1928) A.C. 492, at p. 499.

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then the court, in assessing compensation, can, in the absence of a statutory prohibition, by analogy to the general equitable rule, without any statutory authority, order the payment of interest on the amount awarded from the date that the resuming authority entered into possession.

A contract for the sale of a ship is a contract which the court of equity can specifically enforce: *Halsbury's Laws of England*, 2nd ed., vol. 31, p. 340, note (k). The compulsory acquisition of a ship is, therefore, within the general rule, so that, unless there is some provision in the *National Security (General) Regulations* which prevents the Court applying the rule, we are bound to follow the Privy Council and award interest in respect of the acquisition of the tug. There is no such express provision, but it is contended that the authority conferred upon the Minister by reg. 60J to award interest indicates that the legislature did not intend that the Court should apply the general rule. But compensation under reg. 60D can be awarded in respect of loss or damage to which the general rule would not apply, and, where it would not apply, the Minister alone could award interest. There is, in my opinion, nothing in reg. 60J which implies that the legislature intended to deprive the Court of its right to award interest in cases where the general rule of equity would otherwise be applicable. As Lord Warrington of Clyffe said in *Inglewood Pulp and Paper Co. v. New Brunswick Electric Power Commission* (1), an intention to do so should be made quite clear. Mr. Alderman referred us to the decision of the Supreme Court of Canada in *R. v. MacKay* (2). In that case, the Supreme Court held that the general rule only applied to compulsory purchases of land, but this view is inconsistent with the later decision of the Privy Council in *International Railway Co. v. Niagara Parks Commission* (3).

For these reasons, I would answer the question asked in the affirmative.

Question answered: Yes, from the date of acquisition of the tug. Case remitted to Starke J. Costs of case to be costs in the review.

Solicitors for the applicant, *Malleson, Stewart & Co.*

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

E. F. H.

(1) (1928) A.C. 492, at p. 499.

(2) (1930) 1 D.L.R. 1005.

(3) (1941) A.C. 328.