

[HIGH COURT OF AUSTRALIA.]

AUSTRALASIAN UNITED STEAM NAVIGATION COMPANY LIMITED . . . } PLAINTIFF ;

AND

THE SHIPPING CONTROL BOARD AND } DEFENDANTS.
ANOTHER }

H. C. OF A. *Constitutional Law (Cth.)*—"Acquisition of property"—"Just terms"—*National security—Regulations—Validity—Requisition of ship—Requisition—Standard time charter party—Whether charter party passes property or possession—Loss of ship—Compensation—The Constitution (63 & 64 Vict. c. 12), s. 51 (xxxi.)—National Security (Shipping Control) Regulations (S.R. 1941 No. 20), reg. 11—National Security (Shipping Requisition) Regulations (S.R. 1941 No. 230).*

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MELBOURNE,

Oct. 11, 12 ;

Dec. 21.

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

Where a ship is requisitioned by the Commonwealth under the *National Security (Shipping Control) Regulations* and becomes subject to the standard time charter party contained in the schedule to the *National Security (Shipping Requisition) Regulations*, the owner retains within his control the management, navigation and handling of the ship and therefore neither property nor possession in the ship is acquired by the Commonwealth, so that no question of compensation for the acquisition of property by the Commonwealth arises within the meaning of s. 51 (xxxi.) of the Constitution.

So held by the whole Court.

DEMURRER.

The plaintiff company brought an action in the High Court against the Shipping Control Board and the Commonwealth, in which the statement of claim was substantially as follows :—

2. The defendant The Shipping Control Board is a body constituted under the *National Security (Shipping Control) Regulations*.

3. At all material times on and prior to 14th July 1941 the plaintiff was the owner and in possession of the steamship *Macumba*, a vessel registered at Melbourne.

4. By an order made by the Minister of State for Commerce of the Commonwealth of Australia on 14th July 1941 and expressed to be made under the *National Security (Shipping Control) Regulations* the ship was requisitioned by the Commonwealth of Australia as from the date when the voyage upon which it was then engaged should be completed.

5. The voyage upon which the ship was on 14th July 1941 engaged was completed on 6th August 1941 whereupon the Shipping Control Board on behalf of the Commonwealth of Australia took possession and control of the ship pursuant to the order referred to in par. 4 hereof and retained such possession until 6th August 1943 when the ship was lost by enemy action.

6. By reason of the matters alleged in pars. 4 and 5 hereof the defendant the Commonwealth of Australia on 6th August 1941 acquired property of the plaintiff.

7. Following upon such requisition the ship was used by the defendants on voyages as directed by the defendant Shipping Control Board on behalf of the defendant Commonwealth including the voyage on which she was lost. The voyages involved the use of the ship in waters in which the ship was subject to attack by enemy ships of war and/or aircraft. On 6th August 1943, whilst under such requisition and whilst being used on a voyage in such waters, the ship was attacked by enemy aircraft and was sunk by a bomb or bombs or torpedo or torpedoes dropped or fired from such aircraft and became a total loss.

8. The loss of the ship by enemy action was occasioned by her requisition and use as aforesaid by the defendants.

9. Under reg. 11 (2) of the *National Security (Shipping Control) Regulations* the plaintiff is entitled to fair compensation for the use of the ship and for loss and damage occasioned by her requisition and use by the defendants and the Commonwealth of Australia is liable to pay such compensation.

10. The sum of £124 per day is fair compensation for the use of the ship but the defendant the Shipping Control Board on behalf of the Commonwealth of Australia has paid to the plaintiff for the use of the said ship the following sums and no more, viz., £79 per day from 6th August 1941 to 30th April 1942 and £87 per day from 1st May 1942 to 6th August 1943.

11. The sum of £85,000 is fair compensation for the loss of the ship and the sum of £20,000 is fair compensation for the plaintiff's loss of profits and disturbance of business but the defendants have not paid to the plaintiff any sum as compensation for either of such items of loss.

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Alternatively—

12. On or about 6th August 1941 the defendants or one of them wrongfully took possession of the said ship and converted it to the use of the defendants or one of them.

Particulars of Damage.

Value of the said ship	£85,000
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Loss of profits and damage due to disturbance of plaintiff's business and compensation in respect of the use of the said ship	49,191
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And the plaintiff claims—

(i) Under pars. 1-11 hereof compensation in the sum of £134,191.

(ii) Under par. 12 hereof damages £134,191.

By their defence the defendants pleaded substantially as follows :—

2. The *National Security (Shipping Control) Regulations* referred to in par. 2 of the statement of claim were repealed by the *National Security (Shipping Co-ordination) Regulations*, made on 2nd June 1944. The defendant Board is a body constituted under the *Shipping Co-ordination Regulations*. All rights property assets obligations and liabilities of the Shipping Control Board constituted under the *Shipping Control Regulations* are vested in or imposed on the defendant Board by the *Shipping Co-ordination Regulations*.

3 & 4. [They admitted pars. 3 and 4 of the statement of claim.]

5. They deny that the Shipping Control Board on behalf of the Commonwealth of Australia took possession and control of the ship and that they or either of them retained such possession until 6th August 1943 or at all. Save as aforesaid they admit par. 5 of the statement of claim.

6. They deny each and every allegation in par. 6 of the statement of claim.

7. They do not admit that the said ship was used by the defendants or either of them but save as aforesaid they admit par. 7 of the statement of claim.

8. They deny each and every allegation in par. 8 of the statement of claim.

9. As to par. 9 of the statement of claim, they say that reg. 11 (2) of the *Shipping Control Regulations* therein referred to is by virtue of reg. 12 of the *National Security (Shipping Requisition) Regulations* to be read subject to the last-mentioned regulations and that by virtue of reg. 11 of the last-mentioned regulations the plaintiff is not entitled to any other compensation from the defendants or either of them than an amount established by or fixed under the last-mentioned regulations. Alternatively, they say that if the plaintiff is

entitled under reg. 11 (2) of the *Shipping Control Regulations* to any other compensation such compensation is required to be settled in the manner in the sub-regulation provided and not otherwise and unless and until it is so settled no action can be maintained therefor.

10. (a) The amount to which the plaintiff is entitled in respect of the loss of the ship was established by or fixed under the *Shipping Requisition Regulations* in manner hereinafter set out.

(b) By the *Shipping Requisition Regulations* it is provided by reg. 4 (2) that unless the order of requisition otherwise provided (as in this case it did not in fact do) all ships in respect of which an order of requisition had been made under reg. 11 of the *Shipping Control Regulations* should be governed by the terms and conditions of the standard time charter party contained in the schedule to the *Shipping Requisition Regulations*.

(c) By clause 27 of the said standard time charter party it is provided, *inter alia* :—

- (i) that the Commonwealth undertakes liability for the risks therein set out, which include loss of the ship caused by mines, torpedoes, bombs or other engines of war ;
- (ii) that for the purpose of the liability so undertaken by the Commonwealth the value of each ship shall be fixed and payable in the manner therein set out ;

(d) The basic value of the s.s. *Macumba* was fixed in the manner therein set out at £50,000, which valuation could be reviewed in manner set out in the said clause 27 but not otherwise, and it has not in fact been reviewed.

11. The whole of the terms and conditions governing the requisitioning of the ship are contained in the standard time charter party and neither of the defendants is liable to pay to the plaintiff any amount not provided for in the standard time charter party.

12. The defendant the Commonwealth admits that it is presently liable to pay to the plaintiff under and in pursuance of the standard time charter party the sum of £50,000 and no more in respect of the loss of the ship and that it may become liable to pay to the plaintiff in respect of such loss the further sum of £12,500, being the “ increased value ” of the said ship at the time, in the manner and upon the conditions provided by the standard time charter party, but denies that it is liable to pay any sum to the plaintiff in respect of loss of profits and disturbance of the plaintiff’s business if any such loss of profits or disturbance of business has taken place, which is not admitted. The defendant the Shipping Control Board denies that it is liable to pay any sum to the plaintiff.

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13. The actual value of the ship at the time of loss did not exceed £50,000.

14. The defendants admit that they have not paid to the plaintiff any sum as compensation for the loss of the ship or for loss of profits or disturbance of business. Save as aforesaid they deny each and every allegation in par. 11 of the statement of claim.

15. The defendant the Commonwealth brings into Court the sum of £50,000 and says that the said sum is sufficient to satisfy the plaintiff's claim in respect of the loss of the ship.

16. As to par. 12 of the statement of claim they say :—

- (a) they deny that they or either of them took possession of the said ship or converted the same to the use of them or either of them ;
- (b) they admit that they requisitioned the use of the said ship but say that such requisition was lawful—
 - (i) by reason of the provisions of reg. 11 of the *Shipping Control Regulations* ;
 - (ii) by virtue of the prerogative power of the Governor-General of the Commonwealth to requisition ships in time of war.

The plaintiff demurred to pars. 9-12 of the defence on the grounds that :—

- (a) (i) The *Shipping Requisition Regulations* and the *Shipping Control Regulations* other than reg. 11 (2) thereof and the said reg. 11 (2) in so far as it provides that the compensation therein referred to shall be settled by a referee or referees appointed by the Governor-General or in such other manner as he directs are invalid and void in that the same are not authorized by the *National Security Act 1939-1943*.
- (ii) Alternatively with par. 1, regs. 4 (2), 11 and 12 of the *Shipping Requisition Regulations* and the terms and conditions of the standard time charter party contained in the schedule to such regulations and reg. 11 (2) of the *Shipping Control Regulations* in so far as it provides that the compensation therein referred to shall be settled by a referee or referees appointed by the Governor-General or in such other manner as he directs are invalid and void in that the same are not authorized by the *National Security Act 1939-1943*.
- (b) The *National Security Act 1939-1943* in so far as it purports to authorize the making of the said regulations is invalid

and void and beyond the powers of the Commonwealth of Australia. H. C. OF A.
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(c) The provisions of the said regulations are contrary to the provisions of the Commonwealth Constitution and are beyond the powers of the Commonwealth.

(d) By reason of the provisions of the Constitution the defendants were not entitled to requisition the use of the said ship save upon just terms and the requisition of the use of the said ship under the provisions of the said regulations was an acquisition of property upon terms other than just terms contrary to the provisions of the Constitution.

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The Court was informed that the plaintiff's claim, so far as it related to the hire of the ship, had been settled.

Reynolds K.C. (with him *Spicer*), for the plaintiff. The ship was requisitioned under reg. 11 of the *Shipping Control Regulations*, which were made in January 1941. In September 1941, after the requisition, the *Shipping (Requisition) Regulations* were made; reg. 4 (2) provided that ships already requisitioned should be subject to the terms and conditions of the standard time charter party set out in the schedule. Those are the Regulations in question here; they were subsequently superseded by the *Shipping Co-ordination Regulations*, but these, except that they reconstitute the Shipping Control Board, are not relevant to this case. By virtue of reg. 11 of the *Control Regulations* the Minister has power to acquire full ownership of a ship, possession of the ship or rights under any charter, whether by demise or otherwise. The word "requisition" is wide enough to cover the acquisition of complete ownership: See *The Broadmayne* (1); *The Sarpen* (2); *The Meandros* (3); *France Fenwick and Co. Ltd. v. The King* (4). It is not contended in this case that the defendants acquired full ownership of the ship, but it is contended that by the requisition they acquired property in, and became temporary owners of, the ship. There was an acquisition of property within the meaning of s. 51 (xxxi.) of the Constitution; the Regulations provide for the acquisition of property, and to the extent that they contain provisions for compensation which do not provide just terms they are invalid. The plaintiff's present claim is put on the basis that the Commonwealth acquired property in the plaintiff's ship; the loss of the ship was a result of the requisition (see *Attorney-General v. Royal Mail Steam Packet Co.* (5)), and the plaintiff must be

(1) (1916) P. 64, at p. 70.

(2) (1916) P. 306, at p. 317.

(3) (1925) P. 61, at p. 65.

(4) (1927) 1 K.B. 458, at p. 467.

(5) (1922) 2 A.C. 279.

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compensated on just terms for that loss : reg. 11 (2) of the *Control Regulations* provides for " fair compensation," but qualifies the right to such compensation by provisions relating to the assessment of the compensation which are invalid as being inconsistent with just terms ; those provisions are severable from the provision for fair compensation : the *Requisition Regulations* purport to qualify that provision for fair compensation ; to that extent they are inconsistent with just terms and are invalid. Accordingly, the plaintiff is entitled in this action to an award of compensation on just terms for the loss of its ship, in disregard of the regulations which profess to limit its right. If the Regulations provided only for the acquisition of some limited right to the use of a ship, so that there was no acquisition of property, there would be no question of their inconsistency with s. 51 (xxx.) of the Constitution ; but, if the plaintiff's contention that the Regulations provide for the acquisition of property is correct, then the question of their validity in relation to just terms arises independently of the facts of any particular case. The provision of reg. 11 (2) for the settlement of compensation by a referee appointed by the Governor-General in Council is invalid because it enables one party to be the judge in its own cause. The provision for settlement " by arbitration " may be open to the same objection ; it does not say how the arbitrator is to be appointed. In any event, it is submitted that the Regulations cannot validly compel the plaintiff to go to arbitration to have the compensation assessed and thus shut out the right, which the plaintiff seeks to enforce in this action, to have just terms determined by the Court. As to the *Requisition Regulations*, reg. 5 empowers the Shipping Control Board to alter the conditions of the charter party, and when read with regs. 4 and 7 appears to empower such an alteration after requisition, so that there is no certainty as to what the terms of requisition are to be from time to time. The effect of regs. 10-12 is that there is merely a charter rate which is paid in respect of the use of a ship, and (apart from clause 27 of the charter party) compensation for other loss or damage under reg. 11 (2) of the *Control Regulations* is excluded. Even the provision for arbitration in reg. 11 (2) is excluded. Under the *Requisition Regulations* the Shipping Control Board is made the judge in its own cause ; reg. 10 empowers the chairman of the Board to fix the charter rate : See also regs. 6, 7, 9. As to the charter party itself, it is expressed in clause 1 that " the owners let, and the charterer hires " the ship. Originally the use of the words " let " and " hire " in a charter party was regarded as effecting a demise of the ship. Latterly the cases show that the words are losing this significance, but that is in cases of agreement between private individuals. Where the charter is

not voluntary, and is a matter between Government and subject, the words might well be given a greater significance than in the case of agreement between individuals. The submission that this charter party does effect a demise is supported by clauses 3, 4, 7, 13, 16, 20, 22, 29, 31. These clauses (particularly clause 13) show that the defendants acquired, for the time, full possession and control of the ship. They acquired a statutory right *in rem*, and this amounted to an acquisition of property within the meaning of s. 51 (xxxi.) of the Constitution. As to what constitutes property, see *Commonwealth v. New South Wales* (1); *Minister of State for the Army v. Dalziel* (2); *Brooks Scanlon Corporation v. United States* (3); *Hearn on Legal Duties and Rights*, 1st ed. (1883), p. 186; and, as to the demise of a ship, see *Encyclopaedia of the Laws of England*, 3rd ed. (1938), vol. 3, p. 53, *sub tit.* Charter-party; *Schuster v. McKellar* (4); *Carl Von Schlicht v. Furness* (5); *Trinity House v. Clark* (6); *Carver, Carriage of Goods by Sea*, 8th ed. (1938), p. 198; *De Mattos v. Gibson* (7); *Lord Strathcona Steamship Co. v. Dominion Coal Co.* (8); *Chinese Mining and Engineering Co. Ltd. v. Sale & Co.* (9). Clause 27 of the charter party under which the Commonwealth undertakes liability for war risks, does not provide just terms; here, again, the Board is made the judge in its own cause, as it is empowered to fix the "basic value" of a ship which has been lost. Just terms should provide for a determination of compensation in a fair manner by an impartial and independent tribunal, and that those dispossessed should be given an opportunity of being heard: See *Australian Apple and Pear Marketing Board v. Tonking* (10); *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd. v. The Commonwealth* (11).

Dean K.C. (with him *Eggleston*), for the defendants. The *Requisition Regulations* and the terms of the standard time charter party are valid, and they govern the plaintiff's rights. If there has been an acquisition of property at all, the property acquired is merely the use of the ship and that use is acquired on just terms which provide for a rate of hire and a proper scheme of insurance; the defendants

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(1) (1923) 33 C.L.R. 1, at pp. 20, 37.

(2) (1944) 68 C.L.R. 261, at pp. 285, 290, 299, 300, 302.

(3) (1923) 265 U.S. 106, at pp. 114, 121, 122 [68 Law. Ed. 934, at pp. 937, 940, 941].

(4) (1857) 7 E. & B. 704, at p. 723 [119 E.R. 1407, at p. 1414].

(5) (1893) A.C. 8, at p. 14.

(6) (1815) 4 M. & S. 188, at p. 196 [105 E.R. 841, at p. 844].

(7) (1859) 4 De G. & J. 276 [45 E.R. 108].

(8) (1926) A.C. 108, at pp. 113, 117, 118, 121-125.

(9) (1917) 2 K.B. 599, at pp. 601, 604.

(10) (1942) 66 C.L.R. 77, at pp. 86, 89, 106, 107, 109.

(11) (1943) 67 C.L.R. 314, at pp. 322-324, 327, 330, 332.

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did not acquire the ship, which was in the same position as if it were working for anybody else. Even if the requisition had the effect of a demise of the ship, the terms of compensation provided are just terms. If for any reason the *Requisition Regulations* are invalid, the *Control Regulations*, by reg. 11 (2), provide a method of compensation on just terms and validly exclude any other method of determining compensation. If reg. 11 (2) provides for the acquisition of property otherwise than on just terms, it is wholly invalid. The plaintiff cannot retain a few words of the regulation so as to obtain the cause of action upon which it at present relies. It cannot rely on the right to fair compensation under reg. 11 (2) without accepting the manner provided for the determination of the compensation. It is submitted, however, that no question of just terms arises, because there has been no acquisition of property within the meaning of s. 51 (xxxi.) of the Constitution; there was no demise of the ship and no interest in it passed to the defendants. To determine whether there has been a demise it is pertinent to inquire: Who has the management and control of the ship; in whose possession is it; who in fact has the personal responsibility for the ship as such? Cases which relate to this question are *Sea and Land Securities Ltd. v. William Dickinson and Co. Ltd.* (1); *Elliott Steam Tug Co. v. Admiralty Commissioners* (2). The terms of the standard time charter party show that there was no demise of the ship and no other right of property acquired. On the modern authorities the words "let" and "hire" are, of course, not conclusive that there is a demise. On the other hand clause 13 of the charter party is conclusive that there was no demise and no taking of possession and control of the ship; the Master was bound to do what the charterer directed as regards the employment of the ship and kindred matters, but, for the management, navigation and handling of the ship, the Master was responsible on behalf of the owners. That is to say, the owners, through the Master, remain in control of the ship, though the use to which it is to be put is for the charterer to determine. The other clauses of the charter party, except, perhaps, clause 27, are consistent with this view. Clause 16 merely means that the Master must have the proper certificate; if the owners have not appointed such a Master, the charterer may do so; but the owners may put an end to this by appointing a Master who has the appropriate certificate. All that clause 31 effects is that the charterer may allow others to use the ship, as, for instance, when the charterer has not a full cargo for a particular trip and someone else has. As to clause 27, insurance is normally a matter for the owner, not the charterer, and under this clause the Commonwealth

(1) (1942) 2 K.B. 65; 167 L.T. 173.

(2) (1921) 1 A.C. 137.

itself becomes the insurer so far as war risks are concerned. War risks, however, are an exceptional matter. To have those risks covered by insurance negotiated in the ordinary business way would involve a very high premium, and that would have to be reflected in the charter rates. It is, therefore, more a matter of finance than anything else; the Commonwealth by undertaking the liability for these exceptional war risks economises in the matter of charter rates. This does not affect the ownership or possession of the ship. It is to be noticed that it is only as to war risks that liability is undertaken. It is left to the owner to insure against marine risks. The *Lord Strathcona Steamship Co.'s Case* (1) is inconsistent with the opinions expressed in many other cases (See, e.g., *Greenhalgh v. Mallard* (2)); but, even if it is accepted, it has no bearing on the facts of the present case. If the requisition did involve the acquisition of property, it is important to see what property was acquired. It clearly was not the ship itself—the complete ownership. At the most it was possession; or, it may be, some proprietary right to the use and hire of the ship. Whichever it may be, the *Requisition Regulations* and the charter party provide just terms of compensation. The only liability which could normally and fairly be imposed on the charterer would be to provide the proper amount of hire. The ship on the sea is always exposed to risk, and it is the owner's concern to insure. As to the assumption of liability by the Commonwealth for war risks under clause 27 of the charter party, it is important to notice that at the material time the *National Security (Marine War Risks Insurance) Regulations* were in force; they placed restrictions on insurance against war risks, and, by comparison, there is no reason to think that clause 27 operated to the prejudice of the shipowner. Clause 27 constitutes a logical and fairly considered scheme, and the Court should not set it aside as not providing just terms merely because the Court thinks there may be some circumstances in which it will not provide as full and ample cover as a shipowner might devise. As to charter rates, if the *Requisition Regulations* have to provide just terms and do not do so, there is still clause 7 of the charter party, which provides that the rate shall be determined under the *Control Regulations* (that is, reg. 11 (2)) “or in some other lawful manner.” The standard time charter party was in existence before the *Requisition Regulations*, and when it was scheduled to them apparently the fact that clause 7 referred to the earlier regulations was overlooked. Even if both sets of regulations are invalid so far as they provide for charter rates, the plaintiff is not precluded from having them determined in “other lawful manner.” As to the objections that the

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(1) (1926) A.C. 108.

(2) (1943) 2 All E.R. 234, at p. 239.

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powers conferred on the Shipping Control Board and its chairman make the Board the judge in its own cause and are therefore invalid by relation to just terms, there is no reason to assume that the members of the Board are government servants who will make biased and unfair determinations. [He referred to *Bauman v. Ross* (1); *United States v. Jones* (2); *Long Island Water Supply Company v. City of Brooklyn* (3).] *Attorney-General v. Royal Mail Steam Packet Co.* (4) does not decide anything that is in question here; it is merely a decision on the facts of the particular case. Ground (a) (i) of the demurrer would leave part of reg. 11 (2) of the *Control Regulations* with nothing for it to operate on. The *Acts Interpretation Act* cannot save any part of it if it is bad in part; the result would be something entirely different in its operation. The result of the plaintiff's argument would therefore be that all the regulations are invalid; this would destroy the foundation of the cause of action upon which it relies for the purposes of this demurrer and leave it to its cause of action at common law as for an unlawful taking.

Reynolds K.C., in reply, referred to *Russian Volunteer Fleet v. United States* (5).

Cur. adv. vult.

Dec. 21

The following written judgments were delivered:—

LATHAM C.J. Under the *National Security (Shipping Control) Regulations* (S.R. 1941 No. 20 as amended), the Commonwealth has power to requisition ships. The *National Security (Shipping Requisition) Regulations* (S.R. 1941 No. 230 as amended) modified the *Shipping Control Regulations* in application to requisitioned ships. The *Shipping Requisition Regulations* provide that the owner of a requisitioned ship shall be bound by the terms and conditions of the standard time charter party set out in the schedule. The plaintiff's ship *Macumba* was requisitioned by the Commonwealth on 14th July 1941 under the *Shipping Control Regulations* and, while under requisition, was lost by enemy action (bombs) in waters north of Australia. The plaintiff in its statement of claim alleges that the Commonwealth, by requisitioning the ship, took possession and control thereof and acquired property of the plaintiff.

The plaintiff has instituted an action in which it claims a sum per day for the use of the ship. This claim has been settled by agreement,

(1) (1896) 167 U.S. 548, at p. 593 [42 Law. Ed. 270, at p. 289].

(2) (1883) 109 U.S. 513, at pp. 518, 519 [27 Law. Ed. 1015, at p. 1017].

(3) (1896) 166 U.S. 685, at p. 694 [41 Law. Ed. 1165, at p. 1168].

(4) (1922) 2 A.C. 279.

(5) (1930) 282 U.S. 481, at p. 489 [75 Law. Ed. 473, at p. 476].

and it is unnecessary to refer to it for the purposes of this case. The plaintiff also claims fair compensation for the loss of the ship under the *Shipping Control Regulations*. Those Regulations provide that fair compensation shall be paid in respect of the use of a ship, the services of which have been requisitioned, and for services rendered during the use thereof, and for loss or damage occasioned thereby. The plaintiff alleges in its statement of claim that the loss of the ship was occasioned by her requisition and use under the Regulations. Regulation 11 (2) provides that the fair compensation "shall be settled by agreement between the Board and the parties interested or, in default of agreement, by arbitration or by a referee or referees appointed by the Governor-General or in such other manner as he directs." The plaintiff claims that these provisions for the method of settling compensation are inconsistent with the provision of just terms for the acquisition of property in the ship and are invalid, though the provision for fair compensation itself, i.e., independently of the manner of assessment, is said to be valid.

The defendants rely upon the *Shipping Requisition Regulations* and upon the terms of the standard time charter party contained in the schedule to those Regulations. Regulation 4 (2) of the *Shipping Requisition Regulations* provides that all ships requisitioned under the *Shipping Control Regulations* shall "be governed by the terms and conditions of the Standard Time Charter Party of the Shipping Control Board which shall be binding upon the owners and other persons concerned and they shall observe and carry out those terms and conditions." Regulation 5 provides that "the Shipping Control Board may, by resolution, modify, vary or add to the terms and conditions of the Standard Time Charter Party." Regulations 11 and 12 are as follows:—

"11. The charter rates and other rates established by or fixed under these Regulations shall bind the owners of ships and other persons concerned, and they shall not be entitled to any other compensation or remuneration from the Commonwealth or the Shipping Control Board.

12. Sub-regulation 2 of regulation 11 of the *National Security (Shipping Control) Regulations* shall be read subject to these Regulations."

Under the standard time charter party the Commonwealth assumes liability for war risks and, in particular, for loss or damage to the ship caused by bombs. The liability in the event of loss due to such risks is limited by reg. 27 (3) to "the established value" of the ship. The established value consists of a "basic value" which is fixed in relation to the amount for which the ship was insured with the

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Marine War Risks Insurance Board before the time of requisitioning, but subject to variation by the Shipping Control Board if, in the opinion of the Board, there was an over-insurance. The basic value is fixed by the Board after considering representations made by the owner, with provision for appointment by the Minister of a referee to review the value if the owner is dissatisfied. The other element of the established value is the "increased value," which is an amount to be paid *in futuro* subject to conditions as to the acquisition of a replacement ship. In the case of the *Macumba*, the basic value was fixed at £50,000, and the increased value is under the Regulations 25 per cent of that amount, viz., £12,500.

By its defence the Commonwealth relies upon the *Shipping Control Regulations*, upon the *Shipping Requisition Regulations* as modifying the *Shipping Control Regulations*, and upon the terms of the standard time charter party. The plaintiff, however, claims fair compensation to be assessed independently of any of these provisions, alleging that they are invalid. The plaintiff alleges that the value of the ship was £85,000, and also claims a further sum for loss of profits and damage due to the disturbance of its business. Alternatively, the plaintiff claims damages for wrongful conversion of the ship. The plaintiff has demurred to those paragraphs of the defence which rely upon the Regulations and the provisions of the standard time charter party.

The plaintiff contends that the requisition of the ship in the present case was an acquisition of property in the ship because, it is said, the possession of the ship passed to the Commonwealth under the standard time charter party in so far as the provisions of that charter party are valid. If the whole of the provisions of the standard time charter party are invalid, or if the compensation provisions contained therein are invalid, then the claim of the plaintiff is simply for fair compensation under the part of reg. 11 (2) of the *Shipping Control Regulations* which it contends is valid, or, alternatively, for damages for wrongful conversion.

The objection to part of reg. 11 (2) of the *Shipping Control Regulations*, to the *Shipping Requisition Regulations*, and to the provisions for compensation contained in the standard time charter party is in each case that those provisions do not provide for just terms for the acquisition of property. Commonwealth legislation for the acquisition of property from any person must make provision for just terms of acquisition: Commonwealth Constitution, s. 51 (xxxi.). If, however, the requisitioning of the ship did not amount to or involve any acquisition of property, the plaintiff's objection must fail and the demurrer should be disallowed.

“Requisition” is not a technical legal term. The word is used to include the taking of property in full ownership, the taking of the possession of property, and the acquisition of a right to use property in a particular manner without any taking of possession. In *The Meandros* (1), a ship was requisitioned and it was held that the terms of requisition in that case did not deprive the defendants of their property in the vessel, but it was said (2)—“A requisition is a process by which the State takes the use or the possession of, or the property in, chattels, and sometimes in land. But it is infinitely various”—and examples are given (3): Cf. *Swift v. Macbean* (4), and *The Steaua Romana*; *The Oltenia* (5)—“Requisitioning may be, and usually is, nothing more than a hiring of the ship which does not take the property in the ship out of the owner.” The same opinion was expressed in *The Broadmayne* (6). Accordingly the requisitioning of a ship may or may not involve the taking of property in the ship, according to the actual terms of the requisition.

It has been decided by this Court that the taking of possession of property is an acquisition of property within the meaning of s. 51 (xxxi.) of the Constitution (*Minister of State for the Army v. Dalziel* (7)). The first question for determination in the present case is whether, by the requisitioning of the *Macumba*, the Commonwealth, though it did not become the registered owner of the ship, acquired property in the ship by taking possession.

All charterers of ships, by virtue of the charter party, have some control over the ship. Such control may relate only to a particular voyage; it may operate during a specified period. If the charter party is by way of demise, property in the ship temporarily passes to the charterer—for the duration of the charter. If possession, as well as some degree of control, passes to the charterer, then the property passes to the charterer and he is *pro tempore* the owner. But no property in the ship passes if possession is not given to the charterer by virtue of the terms of the charter. If the control of master and crew in the navigation of the ship passes to the charterer he has possession. If, on the other hand, he acquires only a right to the use of the ship—a right to use her carrying capacity (*Carver, Carriage by Sea*, 8th ed. (1938), p. 244, par. 153) there is no demise, but only a contract for services—*locatio operis vehendarum mercium* (*Schuster v. McKellar* (8); *Burnard v. Aaron and Sharpley* (9)). Thus the general test is “whose servants the master and crew were”

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(1) (1925) P. 61.

(2) (1925) P., at p. 65.

(3) (1925) P., at p. 66.

(4) (1942) 1 K.B. 375, at p. 379.

(5) (1944) P. 43, at p. 48.

(6) (1916) P. 64, at p. 70.

(7) (1944) 68 C.L.R. 261.

(8) (1857) 7 El. & B. 704 [119 E.R. 1407].

(9) (1862) 31 L.J. C.P. 334.

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(*Fenton v. City of Dublin Steam Packet Co.* (1)). If the owner has the power of appointing and dismissing the master and crew, he remains owner of the ship, while if, under the charter, the charterer obtains that power, possession of the ship passes to him: *The Great Eastern* (2); *Omoa Coal & Iron Co. v. Huntley* (3); *Baumvoll Manufactur von Scheibler v. Gilchrest & Co.* (4), where it is said that a letting or a demise of a ship involves a parting with the whole possession and control of the ship, so that the captain is no longer the captain of the owner, the charterer having "a power and right independent of him (the owner) and without reference to him to do what he pleases with regard to the captain, the crew, and the management and employment of the ship. That has been called a letting or a demise of the ship. The right expression is that it is a parting with the whole possession and control of the ship." See also the same case (5), where Lord *Herschell* L.C. said that the registered owner of a ship may have "so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person, who, during that time, may equally properly be spoken of as the owner. When there is such a person, and that person appoints the master, officers, and crew of the ship, pays them, employs them and gives them the orders, and deals with the vessel in the adventure, during that time all those rights which are spoken of as resting upon the owner of the vessel, rest upon that person who is, for those purposes during that time, in point of law to be regarded as the owner."

In order to determine whether possession of the *Macumba* passed to the Commonwealth by virtue of the requisition, it is necessary to ascertain the terms of the requisition. The plaintiff argued the case by reference to the terms of the charter party (apart from such provisions as were said to be invalid as amounting to an acquisition of property upon terms other than just terms).

Clause 1 of the standard time charter party as set out in the schedule to the *Shipping Requisition Regulations* provides that the owners let and the charterer hires the ship. Clause 2 refers to the ship being placed at the disposal of the charterer, other clauses refer to delivery, clause 7 to re-delivery, and clause 31 to sub-letting by the charterer. Such provisions would suggest a true letting of the ship so as to pass property in her by way of demise, but it has long been settled that the use of such terms, which are derived from forms of charter (namely, charters by demise) which have become almost obsolete, do not

(1) (1838) 8 Ad. & E. 835, at p. 843
 [112 E.R. 1054, at p. 1057].
 (2) (1868) L.R. 2 Ad. & Ec. 88.

(3) (1877) 2 C.P.D. 464.
 (4) (1892) 1 Q.B. 253, at p. 259.
 (5) (1892) A.C. 8, at p. 17.

necessarily bring about this result : *Christie v. Lewis* (1) and *Sea and Land Securities Ltd. v. Dickinson & Co. Ltd.* (2), where *MacKinnon L.J.* says : “ A time charterparty is, in fact, a misleading document, because the real nature of what is undertaken by the shipowner is disguised by the use of language dating from a century or more ago, which was appropriate to a contract of a different character than in use. At that time a time charterparty (now known as a demise charterparty) was an agreement under which possession of the ship was handed by the shipowner to the charterer for the latter to put his servants and crew in her and sail her for his own benefit. A demise charterparty has long been obsolete. The modern form of time charterparty is, in essence, one by which the shipowner agrees with the time charterer that during a certain named period he will render services by his servants and crew to carry the goods which are put on board his ship by the time charterer. But certain phrases which survive in the printed form now used are only pertinent to the older form of demise charterparty. Such phrases, in the charterparty now before the court, are : ‘ the owners agree to let,’ and ‘ the charterers agree to hire ’ the steamer. There was no ‘ letting ’ or ‘ hiring ’ of this steamer. Then it is in terms provided that at the end of the period the vessel shall be ‘ redelivered ’ by the time charterers to the shipowners. ‘ Redelivery ’ is only a pertinent expression if there has been any delivery or handing over of the ship by the shipowner to the charterer. There never had been any such delivery here. The ship at all times was in the possession of the shipowners and they simply undertook to do services with their crew in carrying the goods of the charterers.”

Clause 2 of the charter party provides that the ship shall be delivered to the charterer with master and full complement of officers, engineers and crew. I postpone reference to clause 3. Under clause 4 the owners are to provide and pay for all provisions and ordinary wages (with an exception as to increases in wages—clause 5 (b)) and for all services in connection with the navigation of the ship not otherwise expressly provided for, and clause 5 provides that the charterer is to provide and pay for coal and other fuel. Clause 7 provides for the payment of a hiring rate per day as determined under the *Shipping Control Regulations*. Under clause 10 the whole reach and burthen of the ship is to be at the charterer’s disposal. Under clause 11 the owners are to provide and maintain in a thoroughly efficient state throughout the period of requisition all loading and unloading gear etc. I postpone reference to clause

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(1) (1821) 2 Brod. & B. 410 [129 E.R. 1025].

(2) (1942) 2 K.B. 65, at p. 69.

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13. Clause 14 provides that the master, officers and engineers shall be British subjects, and that the owners shall, so far as practicable, engage only British subjects as members of the crew, and shall not engage any person of enemy nationality. This provision in itself shows that the engagement of the ship's complement is made by the owners, and not by the charterer. Under clause 20, if the charterer has reason to be dissatisfied with the policy or conduct of a master or any officer, engineer or member of the crew, the charterer shall investigate the matter and "if required by the Charterer, the Owners shall make a change in the appointment as soon as practicable."

These clauses are consistent with the possession of the ship being retained by the owner, and in my opinion several of them are quite inconsistent with any other view of the relations of the parties. I refer particularly to clauses 2, 11, 14 and 20. The form of government charter party which was used in the 1914-18 war, known as T99, may be found in the regulations in "His Majesty's Sea Transport Service 1939, to be observed in respect of Ships employed by the Admiralty or Board of Trade as Transports or Freight Ships." T99 included in substantially identical terms the following clauses which are contained in the standard time charter party in the present case: 2, 4, 5, 7, 10, 14, 20. A charter in the form of T99 is not a demise charter: *Halsbury, Laws of England*, 2nd ed., vol. 30, p. 274; *Elliott Steam Tug Co. Ltd. v. The Commissioners for Executing Office of Lord High Admiral of United Kingdom* (1).

Clauses 3 (a) and 13 of the standard time charter party have been added to the clauses which are to be found also in T99. The effect of clauses 3 (a) and 13, in my opinion, is to make it clear beyond question that the possession of the ship should not be delivered to the charterer. Clause 3 (a) provides that the owners shall, throughout the period of requisition, maintain the ship in a thoroughly efficient state in hull machinery equipment and cargo gear with master and full complement of officers, engineers and crew. The obligations of the clause cannot be performed unless the owners have possession of the ship. Clause 13 is as follows:—"The Master shall be solely under and obey the orders and directions of the Charterer or any officer or agent authorized by the Charterer as regards employment of ship, agency, or other arrangements, but he shall be solely responsible (on behalf of the Owners) for the management, navigation, and handling of the ship."

This clause, in my opinion, conclusively shows that possession of the ship was not delivered to the charterer. The owners retain in their control the management, navigation and handling of the ship.

(1) (1921) 1 A.C. 137, at p. 141.

Thus, in my opinion, the Commonwealth did not obtain possession of the ship. The ship remained in the possession of the owners. There was no acquisition of property and no question arises as to whether or not the regulations or the charter party provide just terms for the acquisition of property. The objection to the Regulations and to the charter party fails. The result is that the plaintiff's demurrer to the defence should be disallowed.

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RICH J. This is a demurrer to a statement of claim which seeks compensation or damages in respect of a ship owned by the plaintiff and lost by enemy action on 6th August 1943. By an order of the Minister for Commerce dated 14th July 1941 she had been "requisitioned" under reg. 11 of the *National Security (Shipping Control) Regulations*. Under reg. 4 (2) of the *National Security (Shipping Requisition) Regulations* the ship so requisitioned came to be governed by the provisions of the standard time charter party of the Shipping Control Board. Regulation 45 of the *National Security (Shipping Co-ordination) Regulations* continued the operation upon the ship of the standard time charter. The substance of the plaintiff's case is that the requisition, coupled with the subsequent loss of the vessel, entitles the plaintiff to just terms—that is of compensation—for the acquisition of property. The standard time charter party provides in par. 27 for the assumption by the Commonwealth of the war risk, i.e., loss of the vessel by enemy action. The plaintiff is entitled to the value of the ship as fixed by that paragraph, but is not satisfied apparently either with the valuation or with the division of the established value into two parts and the retention by the authorities of what is called the increased value. The plaintiff therefore falls back on s. 51 (xxxi.) of the Constitution and says that the Commonwealth has acquired property in the ship and could only do so on just terms. Whether the case can be brought within that section depends upon the correctness of the contention that property in the ship was acquired. This in turn rests upon the provisions of the standard time charter party. That is a studied document bearing all the marks of the adaptation of the traditional terms of time charter parties and the terms of the requisition used in the last war, e.g., T99. I think that it is perfectly plain that the document is a charter in respect of the use or services of ships, and not a demise charter. It performs the ordinary function of a charter of affreightment, leaving the possession of the ship in the master as the servant of the owner. The owner has full control of the ship through the master and crew under a time charter of indefinite duration giving the Commonwealth a power of direction as to the voyages to be made and,

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within limits, the cargoes to be carried. It includes, of course, the undertaking of war risk, a responsibility by way rather of insurance than of compensation. The Commonwealth acquired no interest in the ship, whether possessory or proprietary, and the case is, in my opinion, entirely outside the provisions of s. 51 (xxxi.) of the Constitution. It is unnecessary to consider what might have been the consequence had s. 51 (xxxi.) been applicable. It is enough to say that the foundation of the plaintiff's action is wanting and the demurrer should be overruled.

STARKE J. The plaintiff in this action claimed, *inter alia*, compensation for the use of its steamship *Macumba* which was requisitioned pursuant to the *National Security (Shipping Control) Regulations*. The defendants pleaded that the ship had been requisitioned under the *Shipping Control Regulations* and was governed by the terms and conditions of the standard time charter party of the Shipping Control Board which was scheduled to the *National Security (Shipping Requisition) Regulations* and was binding upon the owners and others concerned therein. And it was further alleged that the whole of the terms and conditions governing the requisitioning of the ship were contained in the standard time charter party and that the defendants were not liable to pay any amount not provided for in the standard time charter party.

The plaintiff demurred to this plea on the ground that the *Shipping Requisition* and the *Shipping Control Regulations* were invalid substantially upon the ground that the requisition of the ship was an acquisition of property within the meaning of s. 51 (xxxi.) of the Constitution in respect of which "just terms" had not been provided. The standard time charter party contains many clauses usual in time charters: cf. *Carver, Carriage by Sea*, 5th ed., p. 971.

The owners let and the charterer hires the ship for the period of the requisition upon the terms and conditions of the charter party. The whole reach, burthen, including lawful deck capacity and passenger accommodation, if any, of the ship, is placed at the charterer's disposal, reserving only proper and sufficient space for master, ship's officers, crew, tackle, apparel and so forth. The owners, it is provided, shall maintain the ship in an efficient state with master and full complement of officers, engineers and crew and provide and pay for all provisions and wages of master, officers, engineers and crew subject to certain provisions for refunds. The charter party on its proper construction does not operate as a demise or lease of the ship, but gives the charterer the temporary right to have goods loaded and conveyed in the ship; the ownership and also the possession of the

ship remaining in the owners through the master and crew who continue to be their servants : Cf. *Scrutton on Charterparties and Bills of Lading*, 14th ed. (1939), p. 5. A demise or lease of the ship might, I should think, be described as an acquisition of property (Cf. *Minister of State for the Army v. Dalziel* (1)), but, in my opinion, a temporary right to have goods loaded and conveyed on a ship which confers neither possession nor a right of ownership of the ship cannot be described as an acquisition of property. Consequently the provision in the Constitution, s. 51 (xxxi.), granting power to the Parliament to make laws with respect to the acquisition of property on just terms has no bearing upon this particular case. In any case, I heard no argument which convinced me that the Regulations which have been attacked do not provide just terms of acquisition.

And I would add that the *Shipping Control* and the *Shipping Requisition Regulations* have not been attacked on the ground that they are *ultra vires* the defence power or the powers contained in the *National Security Act 1939-1940*.

The demurrer should be overruled.

McTIERNAN J. In my opinion, the plaintiff's demurrer to the defence should be disallowed.

I agree with the reasons of the Chief Justice.

WILLIAMS J. The s.s. *Macumba*, a ship owned by the plaintiff company, was sunk by enemy action on 6th August 1943. At the time of the loss, the ship was under requisition to the defendant the Shipping Control Board, a body constituted under the *National Security (Shipping Control) Regulations*; and, in accordance with reg. 4 of the *National Security (Shipping Requisition) Regulations*, was governed by the terms and conditions of the standard time charter party set out in the schedule to these Regulations. Under this charter party, the plaintiff company became entitled, in respect of the loss of the ship, in accordance with clause 27, to an immediate payment in respect of her basic value, and it will also become entitled in the future, subject to performing the necessary conditions, to a further payment in respect of her increased value. But the plaintiff company is dissatisfied with these amounts, and claims that the requisition of the ship was an acquisition of property within the meaning of s. 51 (xxxi.) of the Constitution. The placitum does not itself give a right of action. But it requires that legislation of the Commonwealth Parliament providing for the acquisition of property

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shall provide for the acquisition on just terms. Otherwise the legislation will not comply with the Constitution, and will be void, so that, if the Commonwealth takes possession of the property, it will commit a tort for which it will be liable in damages. It is claimed that either the plaintiff company is entitled to sue for compensation under reg. 11 (2) of the *Shipping Control Regulations*, or that the Regulations do not contain just terms, and the requisition was unlawful and the plaintiff is entitled to sue for damages.

Since the action is based on the assumption that the requisition was an acquisition of property within the meaning of s. 51 (xxxi.), it follows that, if this assumption is unfounded, the action fails.

In my opinion, the requisition of a ship upon the terms and conditions of the standard time charter party does not vest any property in the Shipping Control Board. The first clause of this charter party refers to the owner letting and the charterer hiring the ship, and the seventh clause to the delivery of the ship to the charterer and her redelivery to the owner. The words "let" and "hire" by themselves would point to a demise of the ship, and such a demise would be an acquisition of property within the meaning of s. 51 (xxxi.) (*Minister of State for the Army v. Dalziel* (1)). But the whole of the clauses must be considered, and I venture to repeat the statement in *Scanlan's New Neon Ltd. v. Tooheys Ltd.* (2) that "it must be remembered in considering the charter party cases that the modern time charter although often expressed to be a 'lease' of the ship, does not provide for the transfer of the possession of the ship to a charterer who engages his own crew to navigate her, but for the placing of the ship complete with officers and crew at his disposal, so that the owner retains throughout the possession of the vessel through the officers and crew (per Viscount Haldane in *Tamplin's Case* (3); *Herne Bay Steam Boat Co. v. Hutton* (4)). This is made clear in *Sea and Land Securities Ltd. v. William Dickinson and Co. Ltd.* (5), where MacKinnon L.J. pointed out that 'between the old and the modern form of contract there is all the difference between the contract which a man makes when he hires a boat in which to row himself about and the contract he makes with a boatman that he shall take him for a row.' " There is a close correspondence between the standard time charter party and the charter party contained in the form known as T99 used by the Admiralty during the first world war. It was held in *Elliott Steam Tug Co. v. Admiralty Commissioners* (6)

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

(2) (1943) 67 C.L.R. 169, at p. 224.

(3) (1916) 2 A.C., at pp. 408-9.

(4) (1903) 2 K.B. 683, at p. 689.

(5) (1942) 2 K.B., at pp. 69, 70.

(6) (1921) 1 A.C. 137.

that the terms and conditions of this charter party did not constitute a demise of a ship. There is an even closer correspondence between the standard time charter party and the charter party contained in the form T99A used by the Admiralty during the recent world war. We were supplied at the hearing with a copy of this charter party. It provides, *inter alia*, clause 1, that the owners agree to let and the charterer agrees to hire the ship, she being then ready to receive cargo and tight, strong, and in every way fitted for ordinary cargo service, and with a master and full complement of officers and crew, and for the delivery, redelivery and right to sublet the ship. Clause 2, that the owners shall provide for and pay for all the wages, provisions, and all other expenses in connection with the master, officers, and crew, . . . and for all services in connection with the navigation of the ship and for the maintenance of the ship in a thoroughly efficient state in hull machinery and equipment for and during the service. Clause 9, that the master shall prosecute his voyage with the utmost despatch and shall render all possible assistance with ships, officers and crew and boats, cranes, derricks, and winches on board, and although appointed by the owners he shall be under the orders and direction of the charterer as regards employment, agency, and other arrangements. Clause 10, that if the charterer shall have reason to be dissatisfied with the conduct of the master, officers, or crew, the owners shall, on receiving particulars of the complaint, investigate the matter and, if necessary, make a change in the appointments.

Referring to this charter party, Lord Wright said, in *Larrinaga Steamship Co. Ltd. v. The King* (1), that it was not a demise of the ship. The standard time charter party like T99 and T99A is a charter party which provides for the owner placing the ship complete with officers and crew at the disposal of the charterer, he retaining possession of the ship through the officers and crew who are his servants. He is responsible for their wages and the hire is calculated on what is termed in *Elliott's Case* (2) "a gross basis of hire." As in clause 9 of T99A, clause 13 of the standard time charter party provides that the master shall be solely under and obey the orders and directions of the charterer as regards employment of the ship, agency, or other arrangements; but clause 13 also provides that the master shall be solely responsible (on behalf of the owners) for the management, navigation and handling of the ship. These additional words make it even clearer than it is in the case of T99 and T99A that the terms and conditions of the standard time charter party are not a demise of the ship. There was, therefore, no acquisition of property in the

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(1) (1945) 172 L.T. 177, at p. 180.

(2) (1921) 1 A.C. 137.

H. C. OF A. *Macumba* within the meaning of s. 51 (xxxi.) of the Constitution and
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In my opinion, the demurrer should be disallowed.

Demurrer overruled.

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

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

E. F. H.