[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH . . . . . APPELLANT;
DEFENDANT,

AND

HUON TRANSPORT PROPRIETARY LIMITED RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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MELBOURNE, *Mar.* 1, 2, 5.

SYDNEY, *May* 10.

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

Defence—Requisitioning of ships—Statute giving power to officer authorized by regulations—No regulations enacted—Whether requisitioning on basis of compulsory taking or taking by agreement—Assessment of compensation for period of possession—Whether interest allowable—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*xxxi.*)—*Defence Act* 1903-1939 (*No.* 20 *of* 1903—*No.* 13 *of* 1939), *ss.* 67, 124.

Section 67 of the *Defence Act* 1903-1939 provides that "the owner of any . . . boat or vessel . . required for naval or military purposes, shall, when required to do so by an officer authorized in that behalf by the regulations, furnish it for those purposes, and shall be recompensed therefor in the manner prescribed."

Although no regulations had been made with reference to s. 67 of the *Defence Act*, the Commonwealth, purporting to act in pursuance of that section, requisitioned and took possession of two steamers of the H. company.

Held:—By *Latham* C.J. and *McTiernan* J., that the taking of the steamers was upon an implied promise by the Commonwealth to pay a fair hire for them, since s. 67 of the *Defence Act* does not operate until authority is given by regulations to an officer to act thereunder. By *Rich, Starke, Dixon* and *Williams* JJ., that the steamers were lawfully requisitioned under s. 67 of the *Defence Act*, and that, in the absence of regulations prescribing the method of recompense, the compensation payable must be worked out on general legal principles.

Held:—By *Latham* C.J., *Starke, Dixon* and *McTiernan* JJ. (*Rich* and *Williams* JJ. dissenting), that the H. company was not entitled to interest

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on the balances for the time being unpaid in respect of the compensation payable to it from the time the Commonwealth took possession of the steamers. *Per Latham* C.J. and *McTiernan* J.: In respect of the implied contract to pay a fair hire, no liability arose under the *Supreme Court Civil Procedure Act* 1932 (Tas.), ss. 34 or 35 (*Lord Tenterden's Act*). *Per Starke* J.: No interest can be allowed in respect of the requisition of goods unless the statute or regulation authorizing the requisition itself authorizes the allowance of interest. *Swift and Co.* v. *Board of Trade*, (1925) A.C. 520, followed. *Per Dixon* J.: "Just terms" in the Constitution, s. 51 (xxxi.), do not include more than "compensation" as that term is understood in English law, and therefore do not necessarily include interest. *Swift and Co.* v. *Board of Trade*, (1925) A.C. 520, followed. By *Rich* and *Williams* JJ., that s. 67 of the *Defence Act*, construed in the light of s. 51 (xxxi.) of the Constitution, authorized the Court to allow interest where it considered that such an allowance was necessary to make compensation adequate.

Decision of the Supreme Court of Tasmania (*Hutchins* J.) varied.

APPEAL from the Supreme Court of Tasmania.

On 4th September 1939 and 2nd September 1939 respectively, the Commonwealth, purporting to act under s. 67 of the *Defence Act* 1903-1939, requisitioned and took possession of the *Marana* (108 tons) and the *Mongana* (98 tons), two steamers of which Huon Transport Pty. Ltd. was at all material times the charterer and had the use and possession. The Commonwealth retained the *Marana* during the period 4th September 1939 to 10th June 1942, and the *Mongana* during the period 2nd September 1939 to 6th August 1940. At the time of the requisitioning, the two vessels were used by the company, along with other vessels, in carrying on the business of carriers by sea in and around the port of Hobart, Tasmania.

Huon Transport Pty. Ltd. brought an action against the Commonwealth in the Supreme Court of Tasmania, alleging that the amount paid by the Commonwealth to the company, £2,091 3s. 5d., did not amount to just terms for the taking possession and use by the Commonwealth of the steamers and depriving the company of the use thereof. The company claimed the sum of £5,611 13s. 7d., being the sum of £7,702 17s., which it claimed to be just terms for the taking possession and use of the steamers, less the sum of £2,091 3s. 5d. paid by the Commonwealth, and claimed interest at the rate of five per cent per annum. In its particulars, the company showed that £7,702 17s. was the sum payable for hire at the rate of £40 per week for each ship during the period of requisition. By its defence the Commonwealth denied that the sum paid by it did not amount to just terms for the taking possession and use of the steamers and denied that there was any interest due to the company.

The Huon company possessed fourteen vessels in 1939, ranging in tonnage from 95 to 194 tons, but three of these were not used at all at any relevant time, and one was chartered as a dredge. The other vessels were busily engaged at some periods of the year in trade in and about the port of Hobart, but were partly or completely idle during the rest of the year. The company had kept full and accurate accounts. It had a working account for each ship, an expenses of management account, a trading account, and also a general profit and loss account and balance-sheet. There was uncontradicted evidence that the expenses of management were not decreased by the taking over of the two vessels by the Commonwealth.

Some evidence was given that some occasional daily hirings of the company's ships gave a net return of as much as £10. There was also evidence that in 1942, after the outbreak of the Japanese war, the *Mongana* was hired for about eight weeks at £25 per week.

The capital value of the *Mongana* was £3,500 and of the *Marana* between £3,750 and £4,000.

The amount of compensation paid to the company by the Commonwealth was in fact referred to and settled by the Naval Charter Rates Board established under the *National Security* (*Naval Charter Rates*) *Regulations*, but the matter did not fall within those Regulations. Evidence was given by the secretary of the Naval Charter Rates Board that the final result of the determination of the Board in any one instance was costed at 9 per cent on capital value plus establishment charges and that in assessing claims the following matters were looked to: (1) profits of the company, (2) market value of vessel, (3) depreciation, (4) vessel's condition on acquisition, (5) establishment charges, (6) the use or service the vessel was put to by the department.

A ship valuer carrying on business in Sydney gave evidence that the hull charter rate was 15 per cent on pre-war value, plus insurance. He knew nothing of trading conditions in Hobart.

In the Supreme Court, *Hutchins* J. assessed the fair hiring rate for the ships requisitioned by ascertaining the average profit and out-of-pocket expenses of five ships of the company's fleet, the *Cartela* (194 tons), the *Dover* (115 tons), the *Excella* (174 tons), and the two ships subsequently requisitioned, for a period of four years 1936-1939 inclusive, and the average profit and out-of-pocket expenses of the *Cartela*, the *Dover* and the *Excella* during the years 1940-1942 inclusive, and striking an average. This showed the average weekly earnings of each ship over seven years to be £27; from this sum he deducted £1 10s. in respect of certain shore charges, and awarded £2,819 7s. 11d., being £4,910 11s. 4d. less £2,091 3s. 5d.,

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the amount already paid by the Commonwealth. He allowed interest at 4 per cent on payments in arrears for thirty days, and ordered that judgment be entered for £3,312 17s. 3d.

The Commonwealth appealed to the High Court.

Section 67 of the *Defence Act* 1903-1939 provides: "The owner of any . . . boat or vessel . . . required for naval or military purposes, shall, when required to do so by an officer authorized in that behalf by the regulations, furnish it for those purposes, and shall be recompensed therefor in the manner prescribed . . ."

At the time when the vessels of the H. company were taken over by the Commonwealth no regulations had been made under the power conferred by s. 67 and there were no other relevant regulations or statutes.

Further facts appear in the judgments hereunder.

Fullagar K.C., *Alderman* K.C. and *W. Ellis Cox*, for the appellant.

Coppel K.C. and *R. C. Wright*, for the respondent.

Cur. adv. vult.

May 10.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from a judgment of the Supreme Court of Tasmania (*Hutchins* J.) awarding a sum of £3,312 17s. 3d. to the respondent company in respect of what is described as the requisitioning by the Commonwealth of two vessels, the s.s. *Mongana* and the s.s. *Marana*, upon the outbreak of war.

The following paragraph in the statement of claim was admitted in the defence:—"That on or about the Fourth and Second days of September 1939 respectively the defendant requisitioned and took possession of the said Steamers and used the *Mongana* for its purposes until the Sixth day of August 1940 when it was returned to the plaintiff and used the *Marana* for its purposes until the Tenth day of June 1942 when it was returned to the Plaintiff and thereby during the said periods deprived the Plaintiff of the use of the said Steamers in the carrying on of its said business."

A naval officer gave a notice to the respondent company purporting to require the owners of the ships to furnish the ships for naval purposes under s. 67 of the *Defence Act* 1903-1939. Section 67 provides that "the owner of any . . . boat or vessel . . . required for naval or military purposes, shall, when required to do so by an officer authorized in that behalf by the regulations, furnish it for those purposes, and shall be recompensed therefor in the manner prescribed . . ." At the time when the vessels were taken over

for naval purposes, no regulations had been made under the power to make regulations conferred by s. 67, and there were no other relevant regulations or statutes. The absence of regulations providing for the *manner* in which compensation should be assessed would not deprive a person whose property was requisitioned of his right to compensation, and a court can, in my opinion, assess a proper amount of compensation, even though no regulations providing for the manner of assessment may exist. The manner of assessing compensation is a question of procedure, not of substantive right, and a court which has jurisdiction in a matter can supply procedure for the purpose of giving effect to a substantive right. The operation of the section, however, depends upon authority being given to an officer by regulations to require the use of a vessel, &c. As no regulations had been made under the section, it was impossible for that authority to exist. Neither party made any attempt to give evidence that any officer had authority under any statute or regulation to requisition the vessels. The plaintiff company, had it been so disposed, might have resisted the taking (as a taking under the statute), treating the taking as tortious. But the plaintiff did not resist, and neither party has at any time contended that the taking amounted to a trespass, or was in any way unlawful. It was contended for the plaintiff, and in my opinion rightly, that the plaintiff acquiesced in the taking, and that, therefore, the vessels were taken upon the basis of an implied promise on behalf of the Commonwealth to pay a fair hire for them. The parties agreed that, whether the taking should be regarded as a compulsory taking or as a taking by agreement, the first question which arises is the determination of what was a fair hire for the vessels.

The *Mongana* was a ship of 98 tons and was used by the Commonwealth for a period of 48-2/7 weeks. The *Marana* was a ship of 108 tons and was used by the Commonwealth for a period of 144-2/7 weeks. The capital values of the ships were agreed to be—*Mongana* £3,500, *Marana* between £3,750 and £4,000. The case has been conducted upon the basis that the plaintiff company represents all interests in the ships. The value of the ships was not diminished by their use, and accordingly no claim was made for depreciation.

The plaintiff company owned a fleet of fourteen vessels, engaged in river and coastal trade in Tasmania. The whole number of vessels was never in commission at any one time, and, indeed, some three vessels were not used at all during any relevant period. The other vessels were busily engaged at some periods of the year, particularly in the summer and autumn, but were partly or completely idle during the rest of the year.

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The learned judge arrived at a fair hiring rate for the vessels in the following way. He took five vessels, namely, the *Cartela* (194 tons), the *Dover* (115 tons), the *Excella* (174 tons), the *Mongana* (98 tons), and the *Marana* (108 tons), for a period of four years, 1936-1939 inclusive, and ascertained that the average net earnings per vessel were £21 18s. 10d. per week. This amount was reached by taking the revenue earned by each vessel and the expenditure which was incurred in working each separate vessel, and deducting that expenditure from the revenue. His Honour also had evidence showing that the average net earnings for three vessels, namely, the *Cartela*, *Excella* and *Dover*, for the years 1940-1942 inclusive were £33 17s. 11d. per week. It was assumed that the ships were interchangeable, as apparently they were, in the sense that any one ship could have been used to conduct the trade carried on by any other ship. His Honour then took an approximate mean figure, namely, £27, between £21 18s. 10d. and £33 17s. 11d. From this sum, £1 10s. a week was deducted on account of what were called trading expenses, representing expenditure necessarily incurred in running the ships, but not such as could be allotted to any particular ship. There was uncontradicted evidence that the general costs of management of the plaintiff company were not decreased by the taking over of the two ships, and accordingly no deduction was made on this account. Thus his Honour reached a sum of £27 per week, less £1 10s., namely £25 10s., and on this basis awarded in respect of the *Mongana* a sum of £1,231 5s. 8d., and in respect of the *Marana* £3,679 5s. 8d., making a total of £4,910 11s. 4d. The Commonwealth had already paid £2,091 3s. 5d. Accordingly, on these calculations, the amount due was £2,819 7s. 11d. Interest was allowed on this sum on account of delay in payment on the part of the Commonwealth, even of the part of the sum which the Commonwealth admitted was payable. The allowance of interest brought the amount of the judgment up to £3,312 17s. 3d.

In my opinion, the method of assessing a fair hire for the *Mongana* and *Marana* which was adopted by the learned judge was open to some of the comments made upon it on behalf of the defendant. In the first place, while what a vessel can earn is an element which would enter into the calculations of both the owner and a proposing charterer of the vessel as an element in determining what one would take and the other would pay for the use of the vessel, the actual amount of earnings of a vessel in a particular trade is not in itself an index of a fair charter rate. A vessel may be earning nothing when the agreement for charter is made, but the charterer would not therefore expect to get, nor would he ever actually get, the use

of the vessel for nothing. Equally, a vessel might be engaged in a particularly profitable trade, but, if it could be replaced by another available vessel, the earnings in that trade would not be the only element which would be taken into account in fixing a charter rate by agreement.

A further criticism of the basis of the judgment of the Supreme Court is that in the period 1936-1939 only five vessels were taken into account, and that the three vessels which were considered in addition to the *Mongana* and *Marana* themselves were each substantially larger than those vessels. The *Marana* (108 tons) was the larger of the two, but the *Cartela* had a tonnage of 194, the *Dover* 115 tons and the *Excella* 174 tons. Larger vessels could be expected to earn a larger revenue.

This criticism is reinforced by the further comment that, in respect of the three years 1940-1942 inclusive, his Honour took only the three larger vessels and thus arrived at a figure much higher than any which could fairly be regarded as applicable to the smaller vessels, the *Mongana* and the *Marana*. Finally, the award of £3,679 in respect of the *Marana* means that, for the use of the vessel for about 144 weeks, the Commonwealth is required to pay practically the capital value of the ship (£3,750 to £4,000). In the case of the *Mongana* (capital value £3,500) the award of £1,231 represents one-third of the capital value for less than twelve months' use.

On the other side, it is pointed out that it happened that the *Marana* was used largely as a standby vessel, and was not fully employed during the four years in respect of which an average was taken of five vessels, including the *Marana*. In the period of 191 weeks which was taken, the *Marana* happened to have been employed only in 88 weeks. The result was that her net earnings were shown as £7 5s. 6d. a week, whereas the earnings of the *Mongana*, a vessel of substantially the same size and capacity, which happened to work in each of 191 weeks, were nearly £16 per week in that period. Thus £7 5s. 6d. did not fairly represent the earning capacity of the *Marana*. I agree with these criticisms of the method adopted by the learned judge.

The evidence for the defendant, however, did not provide a basis upon which it would have been reasonable to determine the amount of a fair payment in the present case. The evidence for the defendant was that a Board which had the responsibility of advising the Commonwealth as to rates of payment for chartered vessels had adopted a practice of assessing the capital value of a vessel and taking 9 per cent thereon as a fair charter rate plus an allowance for overhead expenses. The Board also attached some degree of

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importance, which was not explained in any detail, to certain other matters, namely, the profits of the owner of the vessel, the market value of the vessel, depreciation, condition of the vessel on acquisition, establishment charges and the use or service which the vessel was put to by the department. In the present case, the Commonwealth had paid a sum ascertained by taking 9 per cent on the capital value of the ships and adding establishment charges at 13s. a day in the case of the *Marana* and 12s. a day in the case of the *Mongana*. Upon this basis the Commonwealth had paid in respect of the *Marana* £11 0s. 6d. per week, and in the case of the *Mongana* £10 6s. 6d. per week.

Other evidence for the plaintiff given by a shipbroker, carrying on his business in Sydney, was that "the hull charter rate was 15 per cent on pre-war value plus insurance." This witness said that he knew nothing of trading conditions in Hobart. The payments made by the Commonwealth worked out at 15 per cent on the capital value of the *Mongana* and 14.4 per cent on the capital value—generously estimated, it was said—of the *Marana*.

The evidence as to 9 per cent plus an allowance for overhead expenses was, as given in the present case, no more than evidence of the practice of a board in unspecified cases, unknown in number and not shown to have any material similarity to or correspondence with the case of the vessels taken in this instance. The present case raises the question of the value of the use of a ship. When the question of ascertaining the value of a ship itself arose, Lord *Wright* in *Liesbosch, Dredger* v. *Edison S.S.* (*Owners*) (1), said:—"I think it impossible to lay down any universal formula. A ship of war, a supply ship, a lightship, a dredger employed by a public authority, a passenger liner, a trawler, a cable ship, a tug boat (to take a few instances), all may raise quite different questions before their true value can be ascertained." Evidence that in some cases 9 per cent plus an allowance for overhead or establishment charges has been fixed by the Board and accepted by the owners, or that 15 per cent on the capital value of the ship in some cases has been accepted and regarded as fair, affords no real guidance in the case of these small Tasmanian river and coastal vessels.

If there were a market in which vessels of this kind could be hired in Tasmania, the market rates would be the best evidence of what it would be fair for the Commonwealth to pay. But there were no market rates, and accordingly some other method, which involves more or less speculative estimates, must be adopted. Where a vessel which was taken could be readily replaced by purchasing

(1) (1933) A.C. 449, at p. 465.

another equivalent vessel, the capital value of the vessel taken would be one useful element in assessing a fair rate of hiring. But where there is no market in which such vessels are commonly purchased or sold, interest on capital value has only a relatively remote relation to the hiring value of the vessel. Consideration of a sufficiently analogous case will illustrate what has been said. It could hardly be said, especially at a time when it was difficult to purchase motor cars, that a fair rate for hiring a motor car worth £300 would be found by calculating interest, say at 5 per cent, on £300, so that the car could be hired for £15 for a whole year plus some allowance for depreciation. Similarly, in the case of vessels, interest on capital value may be an unsatisfactory guide to fair hiring rate. On the other hand, actual earnings are not in themselves a satisfactory criterion to adopt. A motor car worth £300 may "earn" many hundreds of pounds a year. It does not follow that the motor car is worth many hundreds of pounds. A vessel may be completely idle (as in the case of the *Marana* during part of the period 1936-1939) for a considerable time, but it does not follow that her hiring rate is therefore nil. A vessel may be irregularly employed, and if the hire paid for broken periods during a year were aggregated and then divided by fifty-two to reach a weekly figure, that figure might well bear no relation whatever to the fair value of the use of the vessel.

The first question which arises upon this appeal is whether the sum of £3,312 awarded by the learned judge is excessive. The appeal should fail if, on the evidence, the amount awarded is not excessive.

In order to determine whether that amount is excessive, the evidence on behalf of the defendant affords, for reasons which I have stated, no real assistance. Reference has already been made to the evidence for the plaintiff concerning the earnings of five vessels of the plaintiff's fleet, including the *Mongana* and the *Marana*, and of three vessels, excluding those ships. Upon this evidence, making allowance for the fact that the *Cartela*, *Excella* and *Dover* were larger vessels than the *Mongana* and the *Marana*, and that in the period 1940-1942 it is possible that the absence of the *Mongana* and the *Marana*, which were then under requisition, may have increased the earnings of those vessels (which, it should be repeated, were larger than the vessels in question), it is difficult to arrive at as high a figure as £25 a week as the fair estimate of the earnings of the vessels, and, even if that amount were a fair estimate of earnings, it should not be accepted as decisive in fixing a charter

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rate. In my opinion the amount awarded was excessive and should be reduced.

There is other evidence which has some bearing on the question. Although there is no evidence of any market rates for hiring vessels of this type in Hobart, there is evidence of certain hiring rates of these and other ships. This evidence shows what was paid for the ships during periods when they were in fact hired. But what was paid for the use of the ships on infrequent occasions cannot fairly be " multiplied out " and applied to the periods during which the ships were under requisition. The possibility of continuous employment and the probability of periods of idleness are elements which would affect the minds of the owner of a ship, not unwilling, but not anxious, to let the ship, and of a willing charterer : See *Spencer* v. *The Commonwealth* (1).

The evidence as to earnings and charterings is as follows :—As to the *Marana*—in 1942, over a period of twenty-four weeks she earned roughly £18 a week. As to the *Mongana*, at the end of 1942 she was chartered for eight weeks for £25 a week. After the *Mongana* was returned by the Commonwealth, her average net earnings for twenty-one weeks were about £32 per week. Evidence was also given as to the *Bass*, a vessel of 71 tons which earned from June 1941 to December 1943 about £43 a week, and as to the *Maweena*, a vessel of 86 tons, which in 1927 was chartered for £5 daily for 17 or 18 months. There was also evidence as to the charter rates paid for the *Melba*, varying from £90 to £125 a month. But the *Melba* appears to have been a vessel of an entirely different type.

In the present case, for reasons which I have stated, neither the earnings of the ships in a period when trade for them was brisk nor the charter rates occasionally paid for them or for similar ships, though relevant evidence, should be regarded as conclusive evidence of a fair charter rate. The infrequent hirings cannot be regarded as establishing anything like current market rates. On the other hand, the fact that the taking of the ships was over an indefinite period is another factor which is relevant. The Commonwealth could have ended the requisitioning at any time. A compulsory taker of property cannot expect to have the use of the property for an indeterminate term upon the same footing as for a long and definite term.

It is impossible to obtain complete precision in a case such as this, where there is no evidence of ordinary market values, because there is no relevant market. On the whole, taking all the elements which I have mentioned into account, and after considering the

(1) (1907) 5 C.L.R. 418.

reasons for judgment of the other members of the Court, I am of opinion that the plaintiff will be adequately remunerated if paid for each vessel at the rate of £14 per week. At the rate of £14 per week, the plaintiff should have been paid for the *Marana* £2,020 and for the *Mongana* £676—an amount of £2,696 in all. The Commonwealth paid £2,091, leaving a deficiency of £605, the whole of which sum has been outstanding since about June 1942.

The learned trial judge allowed interest upon the amount finally held to be due, and upon amounts due from time to time and unpaid. The case, in my opinion, is one of implied contract—an implied contract to pay a reasonable compensation for the use of the vessels, i.e., a fair hire for the vessels—and is not a case of either tort or lawful statutory taking. Upon such a contract, no liability to pay interest arises at common law or in equity. *Lord Tenterden's Act* has been enacted in Tasmania—*Supreme Court Civil Procedure Act* 1932, ss. 34 and 35, as amended in 1934. But the contract was not in writing and no demand of payment was made in writing giving notice to the debtor that interest would be claimed. Accordingly interest cannot be allowed under s. 34. Dr. *Coppel* for the plaintiff endeavoured to obtain the benefit of s. 35 of the Act by arguing that, in a case of trespass, damages in the nature of interest may be awarded under s. 35, and that a person who was entitled to recompense ought, in order to be given adequate recompense, to be placed in at least as good a position as if his goods had been taken by trespass. Apart, however, from the consideration that, for the reasons stated, the case should be treated on the basis of implied contract and not of trespass, it may be replied that what s. 35 authorizes is the giving of damages " over and above the value of the goods at the time of the conversion." The section is therefore apparently limited to cases where a plaintiff gets judgment for the value of goods converted—and this is not such a case.

If I were of opinion that the case was one of compulsory taking of property under the *Defence Act*, s. 67, then it would have been necessary for me to consider whether the reference to recompense in that section complied with the requirement of the Constitution, s. 51 (xxxi.), which authorizes the Commonwealth Parliament to make laws with respect to the acquisition of property upon just terms from any State or person for any purpose in respect of which the Parliament has power to make laws. Then it would have been necessary to decide whether provision for allowance of interest upon compensation moneys (in all cases or in certain cases) was necessarily involved in the conception of just terms. Before deciding whether the conception of just terms in relation to compensation for requisitioned

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property necessarily involves an allowance for interest in case of delay in payment, I should desire to hear the question fully argued. Upon the view, however, that the implied contract has no special characteristics because the Commonwealth was a party to it, but was a contract which might equally well have been made between two private persons, namely, an agreement to pay a fair hire, these questions do not arise. The Commonwealth may make an agreement for the acquisition of property. The rights of the parties under such an agreement depend upon its actual terms. The constitutional provision that the Parliament may make laws in respect to the acquisition of property upon just terms applies only to statutes made by the Parliament, and not to contracts voluntarily made between the Commonwealth and other persons. That provision does not entitle the courts to add a term to contracts made between the Commonwealth and other persons for the purpose of making the terms of the contracts " just " in the opinion of the court. Thus, in the present case, the court can, in my opinion, do nothing more than give effect to the contract between the plaintiff and the defendant—namely, a contract to pay a fair hire—and that contract is not a contract to pay also interest upon that hire. The contrary view would bring about the consequence that, whenever the Commonwealth agreed to purchase any property, it would become subject to an obligation to pay interest which would not have arisen in the case of a contract in identical terms made between other persons. No such result can, in my opinion, be extracted from the constitutional provision which gives to Parliament a power to legislate for the compulsory acquisition of property. If an owner of property is not prepared to accept terms proposed by the Commonwealth Government for the acquisition of his property (e.g., if he desires to include a provision for the payment of interest to which the Government refuses to agree) then he can refuse to make any agreement, thus compelling the Government to have resort to compulsory powers. A law conferring such compulsory powers must provide or allow for just terms of acquisition, but if the owner agrees on the payment to be made no question of " just terms " arises—whether the agreement is for a stated sum or for such payment as may be fair.

Comparison may be made with cases which have arisen in the United States of America, where property has been taken by the Government without observance of the relevant statutory requirements. In such cases, the taking is either under an agreement (express or implied) with the owner of the property, or is tortious. If it is tortious, as a general rule the owner has, in the United States,

no remedy against the Government (*Schillinger* v. *United States* (1); *Tempel* v. *United States* (2)). If the title of the owner is not disputed and he consents to the taking (as in the present case), the taking is under a contract—implied if not express. The implied contract is a contract by the Government to pay the fair value of the property taken (*United States* v. *Lynah* (3); *United States* v. *Russell* (4) —a case of the taking of ships, for use by the Government for war purposes in time of emergency, without objection by the owner, where it was held that the facts raised an implied promise on the part of the United States to pay the owner a reasonable compensation for the use of his ships and (in that case) for his own services). It has been held that where a plaintiff sues upon an implied contract to pay the fair value of the property taken, interest should not (in the absence of an applicable statute) be allowed on the compensation awarded, even though it might have been the case that "interest could be collected as a part of the just compensation in condemnation proceedings brought by the Government" (*United States* v. *North American Transportation and Trading Co.* (5)). A contract to pay the value of property is not a contract to pay also interest upon that value. Similarly, a contract to pay hire for a vessel is not a contract to pay also interest upon that hire.

In my opinion, therefore, the amount of the judgment should be reduced from £3,312 to £605, with no addition by way of interest.

RICH J. The questions which fall to be determined in the present case are concerned with two matters, first, the amount which a shipowner is entitled to receive by virtue of s. 67 of the *Defence Act* 1903, as amended, in respect of recompense for the use of two ships furnished upon requisition for naval purposes, and, second, with whether interest on the moneys receivable by way of hire, from the time when they became payable to the time when they are paid, should be included in such recompense. As I agree as to the amount to which the shipowner is entitled in respect of hire, I shall confine myself to the question of interest. The ships in question were obtained by the Commonwealth under a notice of requisition given by a naval officer in purported pursuance of s. 67 of the *Defence Act*. The respondent company capitulated to the notice and handed over the ships. It is true that s. 67 provides for regulations and that none was made. But I am unable to think that the legislature

(1) (1894) 155 U.S. 163 [39 Law. Ed. 108].
(2) (1918) 248 U.S. 121 [63 Law. Ed. 162].
(3) (1903) 188 U.S. 445, at p. 464 [47 Law. Ed. 539, at p. 546].
(4) (1871) 80 U.S. 623 [20 Law. Ed. 474].
(5) (1920) 253 U.S. 330, at p. 337 [64 Law. Ed. 935, at p. 939].

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intended to suspend the operation of so important a power until regulations laying down procedure and scales of compensation were forthcoming. Still less am I able to regard the parties as having entered into a contract supposing s. 67 to be inoperative. The Navy thought it was exercising a power, not making a promise. The shipowners thought they were submitting to the exercise of a power. No doubt they hoped they would be paid, and speedily, but their hopes were founded, not on a negotiated contract, but on the expectation of punctual fulfilment of the obligations laid upon the Commonwealth by the law. In my opinion, the relevant provision is contained in s. 67 of the *Defence Act*. With respect to the contention that it was sought to raise, that the action should be regarded as one by which the plaintiff company seeks to recover moneys payable to it by the defendant pursuant to an implied promise in a contract between the plaintiff company and the defendant, it is sufficient to say that the pleadings contain no allegation or suggestion of any such contract or of any promise express or implied, there is nothing to suggest that at the trial the parties agreed to abandon the pleadings and treat the action as based upon the implied provisions of some unformulated contract, and there is no evidence of any such contract, and no evidence that anyone on behalf of the defendant had authority to enter into such a contract. The action from its inception has been one to enforce a statutory right to compensation conceded to arise by virtue of an expropriation made, and treated as lawfully made, under s. 67 of the *Defence Act* 1903-1939.

Section 67 of the *Defence Act* 1903-1939 provides that the owner shall be recompensed in the manner prescribed. No manner has been prescribed, but the statutory right to be recompensed stands. This being so, to determine the basis upon which the amount of the recompense should be fixed, it is necessary to take account of placitum 51 (xxxi.) of the Constitution, and it must be assumed, in the absence of any indication to the contrary, that the legislature intended the provisions of the Constitution to be complied with. Placitum 51 (xxxi.) confers on the Commonwealth Parliament 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. The acquisition must be on just terms. When a person is deprived of property, no terms can be regarded as just which do not provide for payment to him of the value of the property as at date of expropriation, together with the amount of any damage sustained by him by reason of the expropriation, over and above the loss of the value of the property taken.

The amount so ascertained is no more than the just equivalent of the property of which he has been deprived. If it is paid to him synchronously with the act of deprivation, he receives full recompense. If, however, as is invariably the case, the property is taken in the first instance, and a considerable time elapses before any payment of compensation is made, the expropriation 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. Just terms therefore involve, as a matter of elementary fairness, the payment to him of interest on the money to which he is entitled for the time during which it is withheld from him. In the United States of America, where by the Fifth Amendment of the Constitution it is provided that private property shall not be taken for public use without just compensation, it has been said that "the settled and fundamental doctrine is, that government has *no right* to take private property for public purposes without giving a *just compensation*; and it seems to be necessarily implied, that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception concurrently in point of time with the actual exercise of the right of eminent domain" (*Kent's Commentaries*, II., 339, note). "Where," however, "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 taking; he is entitled to such addition as will produce the full equivalent of that value, paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added" (*Seaboard Air Line Railway Co.* v. *United States* (1)). In such a case, interest is allowed, not by virtue of State statute, but as constituting a part of the just compensation safeguarded by the Constitution; and the general rule, that, in the absence of agreement to pay or statute allowing it, the United States will not be held liable for interest on unpaid accounts and claims, does not apply. I have no doubt that in this respect there is no difference between the conceptions of justice obtaining in Australia and in the United States. This Court has already so held in *Australian Apple and Pear Marketing Board* v. *Tonking* (2), where, in my reasons, I referred to the *Seaboard Case* (3), and the Court allowed interest at the rate of 4 per cent per annum.

(1) (1923) 261 U.S. 299, at p. 306, [67 Law. Ed. 664, at p. 670].
(2) (1942) 66 C.L.R. 77.
(3) (1923) 261 U.S. 299 [67 Law. Ed. 664].

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It has been suggested that interest should not be allowed, because it has been held in the United States of America that interest is not recoverable against the Federal Government in proceedings to obtain payment for private property taken for public use, notwithstanding the provisions of the Fifth Amendment. The authorities which so decide are, however, referable to certain technical rules which hamper tribunals in awarding just compensation against the Government of the United States. In that country, a *de facto* expropriation of private property purported to be made on behalf of the Federal Government may or may not have been authorized by Congress. In neither case does an action lie against the Government by virtue of the Fifth Amendment *per se* (*Schillinger* v. *United States* (1)). If the expropriation was unauthorized, remedy must be sought against the officials concerned, since no action can be maintained against the United States in tort. If the expropriation was duly authorized, an action can be brought only by means of the general machinery provided by Congress for proceedings against the Federal Government, that is, by proceedings in the Court of Claims. That Court, however, has jurisdiction only in contract, and its hands are also tied by a provision that " no interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest " (*United States* v. *North American Transportation & Trading Co.* (2)). To make possible the recovery of compensation through the only available machinery, courts have been constrained to construct the fiction of an implied contract on the part of the Federal Government to pay the value of the property taken whenever the taking is authorized (*United States* v. *Lynah* (3)). Since, however, the Court of Claims is precluded by an express enactment which is of general operation from allowing interest in any class of case, it cannot allow interest. It is for this reason, and not because interest should not be included in just compensation, that interest cannot be obtained in actions for compensation against the Federal Government. Indeed, the Supreme Court of the United States has stated that " it is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation " (*Langford* v. *United States* (4)) ; and has expressed the view that interest is allowable in compensation proceedings when the form of the proceedings does not preclude it (*United States*

(1) (1894) 155 U.S. 163, at pp. 167-169 [39 Law. Ed. 108, at p. 110].
(2) (1920) 253 U.S., at p. 336 [64 Law. Ed. 935, at p. 938].
(3) (1903) 188 U.S. 445, at p. 465 [47 Law Ed. 539, at pp. 546, 547].
(4) (1880) 101 U.S. 341, at p. 343 [25 Law. Ed. 1010, at p. 1011].

v. *North American Transportation and Trading Co.* (1)). No similar fetters upon just terms exist in the general law of England or of Australia. " An intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms " (*Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co. Ltd.* (2)). The Australian Constitution confers upon the Commonwealth legislature power to acquire property, but only on just terms. When that legislature authorizes the acquisition of property, it should be presumed to intend to confer upon the expropriated State or person a legal right to obtain just compensation, unless an intention to deprive the State or person of just compensation in whole or part is expressed in unequivocal language.

It has been urged, however, that there are certain technical rules of the English common law which make it generally impossible for a person, from whom money due has been withheld, to obtain compensation by way of interest in a court of common law for having been kept out of his money. With all respect, I fail to see what light the technical rules of one branch of a particular system of municipal law can be regarded as throwing on a non-technical phrase, such as " just terms," when found in a constitutional charter. It is true that at common law, where liability to pay money ordinarily arose from a credit transaction or a loan, there was a general rule that such a liability did not give rise to interest in the absence of express or implied agreement or of a usage. It is true also that this rule was extended to liabilities which did not arise *ex contractu*, such as liabilities for money had and received. But it rested upon no principle. In *De Havilland* v. *Bowerbank* (3), it having been submitted that a creditor had a right to recover the amount to which he was damnified by the money being withheld from him, this being something which he had suffered, Lord *Ellenborough* contented himself with replying that " if the party lost the use of his money, it was his own fault for not suing for it." No such general rule was applicable in equity. In the case of the purchase of land, for example, the vendor became entitled in equity to interest on the unpaid purchase money as from the time when the purchaser went into possession. And the allowance of interest in equity was not restricted to this class of case. The tendency of the legislature has been to relax the common rule as productive of hardship. The relaxation

(1) (1920) 253 U.S., at p. 337 [64 Law. Ed., at p. 939].
(2) (1919) A.C. 744, at p. 752.
(3) (1807) 1 Camp. 50, at p. 52 [170 E.R. 872, at p. 873].

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provided for by *Lord Tenterden's Act* (3 & 4 Wm. IV., c. 42, s. 28) has been generally adopted throughout the British dominions. When the topic was considered by the House of Lords in *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* (1), the House applied the common law rule in a common law case, not because it regarded it as just, but because it was a long-established rule which ought not to be departed from. Their Lordships did not conceal their view that they regarded it as other than just. Lord *Herschell* expressed dissatisfaction with the reasons given by Lord *Tenterden* in *Page* v. *Newman* (2), for the denial of interest at common law, and said: "I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings 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" (3). Lord *Herschell* added that the relaxations of the common law rule provided for by *Lord Tenterden's Act* seemed to be too narrow for the purposes of justice. Lord *Shand* said that he regretted that the law of England in regard to the running of interest was not like the law of Scotland where, if money is shown to be due and to have been demanded, interest runs if the demand is not acceded to. He, too, thought *Lord Tenterden's Act* too narrow, and expressed the opinion that it was desirable that no such strict law as that expressed in the Act should continue to be the rule in England (4). Forty years elapsed before effect was given to these views in England, where a general relaxation of the common law rule is now provided for by the *Law Reform (Miscellaneous Provisions) Act* 1934 (24 & 25 Geo. V., c. 41), s. 3. An instance of what a legislature, though unconstrained by any such provision as placitum 51 (xxxi.), regards as just in this respect is supplied by s. 126 of the *Public Works Act* 1912 (N.S.W.), which provides that compensation for land acquired by *Gazette* notification shall bear interest from the time of such notification. The case of *Swift & Co.* v. *Board of Trade* (5) is clearly not a decision upon what is just in respect of payment of interest. It decides only that, where a statutory regulation, uncontrolled by any such provision as is contained in the Australian Constitution, provides for the payment of "compensation," but makes no provision for payment of interest, interest cannot be allowed. It throws no light on the question now before us.

(1) (1893) A.C. 429.
(2) (1829) 9 B. & C. 378 [109 E.R. 140].
(3) (1893) A.C., at p. 437.
(4) (1893) A.C., at pp 443, 444.
(5) (1925) A.C. 520.

In the present case, the moneys in respect of which interest is claimed are due for the hire of ships of which the Commonwealth assumed possession, but not property. I see no reason in principle why interest should not be paid upon the money which " ought to be in the possession of the other party who is entitled to its use." It is not the fact that money which has been kept from a claimant will be capital rather than income in his hands when it reaches him which makes interest payable as a matter of justice. It is the fact that he has been kept out of it when he should have been in possession of it so as to be able to turn it to account. There is no rule even of municipal law that in no circumstances can interest be obtained in respect of non-payment of income moneys (*In re Salvin* ; *Worseley* v. *Marshall* (1)), even apart from the English *Law Reform* (*Miscellaneous Provisions*) *Act* 1934.

In conclusion, I would add this on the subject of implied contract. It is true that in the United States of America the courts, in compensation cases where the Government of the United States is concerned, have invented the fiction of an implied contract, and treated claimants as suing to enforce such a contract. It is true, also, that, partly as the result of having been constrained to employ this fiction, courts find themselves in many cases prevented from assessing compensation upon terms which are fully just. But I can see no possible justification for importing this fiction into the law of Australia, a fiction invented in the land of its birth in an attempt to do justice, but which is here not only unnecessary but positively mischievous, because here it would obstruct and prevent the doing of justice.

For the reasons I have stated, I am of opinion that we should adhere to our decision in the *Tonking Case* (2), and that interest is recoverable.

STARKE J. Appeal from a judgment of the Supreme Court of Tasmania in favour of the respondent for £3,312 in round figures.

The respondent was possessed of the ships *Marana* and *Mongana*, of 108 and 98 tons, of the values of about £4,000 and £3,500 respectively, which it used in carrying on its business of carriers by sea in and about the port of Hobart. In September 1939, the Commonwealth requisitioned and took possession of the ships. And the respondent claimed £40 per week for the use of each of the ships and interest on balances unpaid. The naval officer who requisitioned the ships acted or purported to act pursuant to s. 67 of the *Defence Act*, but the Commonwealth suggested, at the Bar, that he was not

(1) (1912) 1 Ch. 332. (2) (1942) 66 C.L.R. 77.

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properly authorized. But the respondent's claim is put forward on the footing that the ships were requisitioned, and the Commonwealth admitted that allegation in its defence.

In my opinion, the claim must be examined on the basis that the ships were lawfully requisitioned and not on the basis of some implied agreement or an unauthorized trespass. It may be, as the Commonwealth suggested, that the result would not differ materially. Further, it should be observed that the provisions of reg. 57 of the *National Security* (*General*) *Regulations* were not in force when the ships were requisitioned. The Commonwealth retained the *Marana* in its possession from 4th September 1939 to 10th June 1942, 1,010-7/24 days or 144-2/7 weeks, and the *Mongana* from 2nd September 1939 to 6th August 1940, 338-23/24 days or 48-2/7 weeks. It has paid to the respondent the sum of £2,091 3s. 5d., which represents 31s. 6d. per day or £11 0s. 6d. per week for the *Marana* and 14.4 per cent on a capital value of £3,750, and 29s. 6d. per day or £10 6s. 6d. per week for the *Mongana* and 14.4 per cent on a capital value of £3,500, which it claims is sufficient to recompense the respondent for the taking and use of its ships. These rates were fixed by a Board called the Naval Charter Rates Board established under the *National Security* (*Naval Charter Rates*) *Regulations*, which were not in existence when the ships were requisitioned. In these circumstances, the Commonwealth has not claimed that the respondent is bound by these rates. Various facts were considered in fixing these rates, but the evidence does not give any detailed calculation of the rates.

Returning, therefore, to s. 67 of the *Defence Act*, we find that the owner of any boat or vessel required for naval purposes is required to furnish it for those purposes and shall be "recompensed therefor in the manner prescribed." But no manner has been prescribed; but the Commonwealth conceded, and, in my opinion, rightly conceded, that default in prescribing the manner of recompense does not deprive the respondent of its right and leaves competent courts of law with jurisdiction to determine that amount. The Supreme Court of Tasmania determined that amount to be £25 10s. per week and interest thereon, which, after allowing for the payment of £2,091 3s. 5d. by the Commonwealth, amounted with interest to the sum of £3,312, the amount of the judgment. The recompense to which the respondent is entitled is the value of the ships to it during the period of requisition. Ordinarily, the charter rates prevailing in the market for ships of the description requisitioned would afford an accurate measure of that value. But, if there be little or no such market, then recourse must be had to other methods as a guide to

the ascertainment of the value, such as the opinion of persons acquainted with the trade and the ships of what they might ordinarily and fairly be expected to earn, not necessarily what they actually earned; or to the earnings of the ships themselves and so to a determination of the recompense that should be paid.

In the present case there is evidence that the ship *Mongana* was chartered at the outbreak of the present war for a period of eight weeks at £25 per week and there was also evidence of a Hobart ferry manager who deposed that £5 per day for each ship was a fair charge. And there was the evidence of the secretary of the Naval Charter Rates Board, who said that market value usually worked out at 9 per cent on capital value. But apparently this evidence did not afford the trial judge a satisfactory basis for estimating the recompense that should be made to the respondent for the use of the ships, and he turned to the earnings of the ships themselves. The respondent had a fleet of small ships, ranging in tonnage from 85 to 194 tons, which it used in its trade in and about the port of Hobart. And it had kept full and accurate accounts. It had a working account for each ship, an expenses of management account, a trading account, and also a general profit and loss account and balance-sheet. And the trial judge worked out an average from these accounts whereby he estimated the earnings of the requisitioned ships at £25 10s. per week. He did not, however, average the earnings of the whole fleet, but he selected five ships and averaged their earnings. He found that the earnings of each of the five vessels, from 1936 to 1939 inclusive, was £21 18s. 10d. a calendar week and that the average earnings of three of these vessels from 1940 to 1942 was £33 17s. 11d. And he said that, assuming all the ships could have replaced each other with equal profit to the respondent, the average weekly earnings over seven years was approximately £27, apparently £21 18s. 10d. plus £33 17s. 11d. divided by two, and from this weekly sum of £27 was deducted a sum of £1 10s. for what was called shore charges. It is, of course, possible that earnings of a number of ships must in some cases be averaged if any estimate at all is to be made of the earnings of a particular ship. But it is plain that the method adopted by the trial judge in this case does not give a true average and also that the average is heavily weighted in favour of the *Marana* and *Mongana*, which, on the figures adopted by the judge, averaged per week £7.27 in the case of the *Marana* and £15.64 in the case of the *Mongana*. The judge's method of ascertaining the recompense that should be paid to the respondent for the use of the ships during the period of requisition cannot, therefore, be supported and should be set aside. But it is possible to make an approximation of the

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earnings of the two ships on agreed figures over a period of four years, 1936-1939, both inclusive, exclusive of overhead or establishment charges.

Marana: Average net weekly earnings per working week, £15 15s. 11d.

Mongana: Average net weekly earnings per working week, £15 16s. 11d.

or £16 per week to the nearest pound.

That average is calculated, as appears, on the weeks the ships were working and not on the calendar week. It is a fair approximation of what the ships might ordinarily and fairly be expected to earn if employed, but not what they actually did earn per calendar week. And from these sums must be deducted establishment and overhead charges. The trial judge estimated these at £1 10s. per week, but gives no supporting figures. The Commonwealth suggests that they should be £2 10s. per week in the case of the *Marana* and £5 12s. 9d. per week in the case of the *Mongana*, apportioned on a gross revenue basis over the four-year period. This estimate of the Commonwealth, however, depends upon assumed trading expenses over the four years 1936-1939 and management expenses for 1938. But it is impossible on the materials before the Court to dissect these expenses and ascertain what proportion should be charged against the ships requisitioned. The manager of the respondent deposed that about £2 weekly should be added for each ship to the working account for overhead and establishment charges, which amounts for both ships to an aggregate sum of £385 for the period of requisition, whilst the Commonwealth's figures bring out a sum of £634 for the same period. The manager's figures were not exact but "about," and the Commonwealth figures are equally inexact though more detailed. Somewhere about the mean of these figures appears to me as fair an approximation of the true establishment and overhead charges as can be made on the materials before the Court. The result would be to the nearest pound:

Marana: 144-2/7 weeks at £16 per week	£2,308
Mongana: 48-2/7 weeks at £16 per week	772
	3,080
Less establishment, &c., charges	509
	£2,571
Paid by the Commonwealth	2,091
Balance ..	£480

In my opinion the sum of £2,571 is about—and it is necessarily only an approximation—the sum that the respondent might ordinarily and fairly be expected to earn from the ships during the period of requisition and accordingly the value to the respondent of the ships during that period. And it also claims interest on the balances of that sum for the time being unpaid from the time possession was taken of the ships. On its face this is a fair claim. The Commonwealth has had the use of the ships, and the respondent will not receive full compensation or recompense if possession is taken of the ships and it does not receive any payment for their use for some time thereafter (*Swift & Co.* v. *Board of Trade* (1)). Had the ships been requisitioned under the *National Security* (*General*) *Regulations*, the Minister might under reg. 60J authorize payment of interest in certain cases. And on the purchase of land, the compulsory taking of land, and in some cases on the purchase of goods, interest is allowed (*International Railway Co.* v. *Niagara Parks Commission* (2)). And interest might have been allowed had the claim been in respect of an unauthorized seizure of the ships. But in *Swift & Co.* v. *Board of Trade* (3) the House of Lords held, contrary to the opinion of *Scrutton* L.J., that no interest can be allowed in respect of the requisition of goods unless the statute or the regulation authorizing the requisition itself authorizes the allowance of interest. In this case, the *Defence Act*, s. 67, does not authorize such an allowance. Consequently this claim should be rejected, though the Commonwealth will, I hope, see its way to do what is fair and just in the circumstances.

The appeal should be allowed: the judgment set aside and judgment now entered for £480 and costs of action to be taxed. Neither party has wholly succeeded on this appeal, and, in my opinion, each should bear its own costs of the appeal.

DIXON J. By the judgment under appeal, *Hutchins* J. awarded to the plaintiff in the action a sum by way of compensation for the temporary use of two small craft which had been requisitioned by the Navy at the beginning of the present war. The sum greatly exceeded the amount paid by the Navy. The plaintiff company is not itself the owner of either of the vessels. They are owned by companies which appear to be closely associated with the plaintiff and the plaintiff held the craft under a hull time charter of indefinite duration, the hire being calculated as a share of the profits. The plaintiff, however, sues representing all interests, and with the tacit

(1) (1924) 93 L.J. K.B. 529, *per Scrutton* L.J., at pp. 534, 535.
(2) (1941) A.C. 328.
(3) (1925) A.C. 520.

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consent of all concerned the assessment of compensation has been made upon the footing that the plaintiff should receive whatever an owner would be entitled to.

One of the vessels, the *Mongana* by name, was requisitioned the day before the actual declaration of war; the other, the *Marana*, on the day after. The *National Security Act* had not been passed and the requisitioning was based on s. 67 of the *Defence Act* 1903-1939. That section imposes an obligation upon the owner of various things required for naval or military purposes, including a boat or vessel, to furnish them for these purposes when required to do so by an officer authorized in that behalf by regulations. The section goes on to say that the owner shall be recompensed therefor in manner prescribed. Unfortunately, no regulation under the provision can be discovered. However, in the first week of September 1939, a naval officer gave notices as under the section to the plaintiff and obtained delivery of the vessels. There is no difficulty in treating the plaintiff as the " owner " for the purpose of this provision: See *Sir John Jackson Ltd.* v. *S.S. Blanche* (*Owners*) (1). There is more difficulty, however, in giving an operation to the section in the absence of regulations made under it. The provision is expressed in a form which might perhaps be thought to suggest that regulations authorizing officers to act under it and prescribing the manner of recompense to the owners are indispensable to its operation. But the nature and purpose of the power conferred by the section furnish strong reasons against so interpreting it. The section gives naval and military officers a power of impressing various forms of transport by water, land and air: vehicles, animals, boats, vessels and " aerial machines," for use in the actual conduct of war. It is an authority conferred in advance against a sudden and perhaps unexpected emergency of great urgency and clear words alone should lead us to regard such a power as in abeyance until there had been time for the production from the *officina ordinatorum* of a suitable regulation.

A better interpretation to place upon s. 67 is that it empowers the executive to regulate the use of the authority it gives to naval and military officers and to prescribe the manner of compensating owners of property taken, but that it does not intend its operation to await the making of the regulations. If regulations are not made, the responsibility for the exercise of the authority it confers must be a matter of naval or military discipline and the recompense must be worked out upon general legal principles. The situation is analogous to that which arises when a new jurisdiction or power

(1) (1908) A.C. 126, particularly at pp. 132, 133.

is given to a court or tribunal to be exercised according to a procedure to be prescribed by rules or regulations and no rules or regulations are made. Prima facie the court or tribunal, in such a case, must work out some appropriate and reasonable procedure for giving effect to the enactment: See *R.* v. *Justices of Central Bailiwick*; *Ex parte M'Evoy* (1); *R.* v. *Chomley*; *Ex parte Hand* (2); *Hill* v. *Johnston* (3).

The amount of compensation which the Naval Board caused to be paid to the plaintiff was in fact referred to and settled by the Naval Charter Rates Board established under the *National Security* (*Naval Charter Rates*) *Regulations*. But the Commonwealth has taken the view that the case does not fall within those Regulations because the requisition was not "by the Minister": See reg. 3. Accordingly no objection is taken under reg. 10 to the maintenance of the present action. Nor is it contended that it is not maintainable in the Supreme Court under Part IX. of the *Judiciary Act*. The duty of the Naval Charter Rates Board under reg. 6 of the *Naval Charter Rates Regulations* is to inquire into and fix the charter rates which ought fairly to be paid by the Commonwealth in respect of the use or services of ships and craft requisitioned for naval purposes, and the amount or rates (if any) which ought to be paid to the owner of every such ship or craft on account of establishment charges. This being its duty, not unnaturally the Board conformed to the distinction between charter rates and rates on account of establishment charges in approaching the task of saying what the plaintiff should receive by way of recompense. It is a well-understood distinction and in most cases where there is a requisitioning for a fixed or indefinite time, and, under the terms of the requisition, the shore establishment of the shipowner is not employed in relation to the ship at a remuneration, as it normally is not in a hull or bare-boat requisitioning, it is probably sounder to separate the two heads of compensation, and it certainly tends to greater clearness. To separate them recognizes that usually, though not invariably, the shipowner from whom a vessel is taken is conducting a business employing a number of ships the earnings of each of which contribute to the support of his establishment ashore, which is essential not only to the direction and control of the fleet but to the manning, victualling, employment, berthing, loading, discharge, docking, servicing and maintenance of the ships. The cost of the shore establishment is made necessary by the ownership of all the ships considered in the aggregate, but though it is borne by the earnings

(1) (1881) 7 V.L.R. (L.) 90. (2) (1904) 29 V.L.R. 562.
(3) (1930) V.L.R. 35.

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of all of them, the temporary withdrawal of one or a few of them will not reduce the cost of maintaining the establishment. Recurrent shore expenditure directly incurred by a ship is, of course, clearly referable to her and does not form part of the establishment charges to which I refer. Such expenditure follows the ship, so to speak.

In fixing the hire or charter rate for the hull, an attempt is made to ascertain for what the ship could have been chartered commercially. As the hypothetical charterer would in all probability himself be a shipowner with a shore establishment to the support of which the earnings of the chartered ship in his hands would be expected to contribute, he would be unlikely to pay a charter rate sufficient to cover the owner's establishment charges as well as the working value of the ship. He would probably be prepared to undertake the charges that follow the ship, so to speak, and pay a charter rate sufficient to cover depreciation and give a proper return to the owner, having proper regard to the capital value of the ship, its efficiency, its profit-earning capabilities, and the prevailing demand for tonnage, if that were uncontrolled. But, beyond that, the reasoning of the hypothetical charterer ought not to be supposed to take him. In practice, and in theory too perhaps, the question whether the owner would part with his ship at a rate so arrived at would depend on what other employment he had for his ship, and, in many cases, that would be only another way of saying that he would consider whether the volume and nature of the trade he had was such that it could be carried by his other ships, so that there would be no important reduction in the total revenue from freights and charter moneys by which the expenses of his business, including those of his shore establishment, were borne and a profit returned. But, in the case of a requisition, he cannot make this choice. He is compelled to hand over his ship, and so, to recompense him, the basal hire rate must be increased to include some appropriate substitute for the ship's proper contribution to the continuing charges of the shore establishment, that is, of course, if the ship actually did make such a contribution and its withdrawal means the loss to the owner of the amount contributed. To do this is not to award anything for loss of profits. The establishment charges run on as an incident of the continued ownership of the ship as part of the undertaking. So, in a collision case, where the criterion is, in a sense, loss of profits, loss of what the ship would have earned during the period of detention but for the casualty, crews' wages properly running on are added and management charges are allowed for, that is not deducted, in making up the account of net earnings :

See *Roscoe, Measure of Damages in Maritime Collisions*, 2nd ed. (1920), pp. 100-102.

In the present case the Naval Charter Rates Board fixed a hire or charter rate for the *Marana* of 18s. 6d. a day and a rate on account of establishment charges of 13s. a day. For the *Mongana*, the Board fixed 17s. 6d. a day as the charter rate and 12s. a day as the rate on account of establishment charges. In doing so, they are said to have taken into account the market value of the vessels, their condition at the time of requisition, depreciation, the use to which the Navy put the vessels, viz., examination service and transport, the profits of the company and the charges for the company's shore establishment. The capital value of neither vessel is disputed. That of the *Mongana* is fixed at £3,500 and for the *Marana* a figure of £4,000 is put forward by the plaintiff and accepted by the defendant. The charter rates were obtained by applying 9 per cent per annum of those values. This percentage is apparently meant to cover both depreciation and the owners' net return. There is, I think, some confusion about marine and war risk insurance. The plaintiff and, it would seem, the owners behind the plaintiff, did not insure the vessels against marine or war risks. The fact that they bore the marine risk themselves would not, however, relieve the Commonwealth from taking the cost of insurance into account in the hire rate. But the evidence, as it appears in the rather imperfect record before us, is open to the construction that the Commonwealth itself assumed the liability for marine risk as well as for war risks as part of the conditions of requisition, and I think we should assume this to be so. At all events, no point was made on the subject by the plaintiff appellant. Upon what basis the Naval Charter Rates Board adopted 9 per cent per annum on value as the rate which would furnish a fair hire or charter rate does not appear from the evidence. Doubtless it is the product of their own experience and practice. No attempt was made to prove either the foundation, or the correctness, of this practice, if it be a practice. Indeed, once the Commonwealth adopted the view that the Board's assessment or fixation of the rates had no binding force, the course pursued by the Board became no more than part of the narrative explaining the case. It fell to the court to determine whether the plaintiff should have any and what amount, in excess of the sum named by the Board and already paid, in other words, to assess the recompense for the requisition under s. 67 of the *Defence Act*.

In performing this task, the Supreme Court might have taken the same course as the Charter Rates Board and distinguished

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between the two possible components, the rates of hire and the rates on account of shore establishment charges, fixing the rates of hire, or charter rates, on the basis of the fair value of the use of the vessels. On the other hand, it was open to the court, without separating these components, to award a rate for each vessel estimated as a fair return to the plaintiffs for the temporary taking by the Navy of their vessels, having regard to all the circumstances, including the employment made of them by the plaintiff: Cp. per *Scott* L.J., *Horn* v. *Sunderland Corporation* (1), in relation to land. This is another way of reaching the same result, or achieving the same purpose, the purpose of arriving at a recompense representing the value of the ship to the owner. *Hutchins* J., however, in the Supreme Court took a third course, one that appears to me inadmissible, or, at all events, one that, as a matter of general reasoning, is not likely to produce a sound result. He sought to ascertain over the period of seven years from 1936 to 1942 the average earnings of several ships employed by the plaintiff with the requisitioned ships in the same trade, or same class of trade, including, except for the period of requisition, the requisitioned ships. In estimating the average earnings, he did not deduct the costs of management, that is, in effect, the shore establishment charges, except for some not very important costs, shown in the accounts, which he thought would be saved.

The plaintiff traded from Hobart up and down the Derwent, the D'Entrecasteaux Channel, the Huon River and Storm Bay. It possessed fourteen small vessels, but three of them appear not to have been employed at any time really material, and one of them, the *Melba*, was chartered as a dredge. The *Mongana* is a small steamship of 98 tons built in 1905, and the *Marana* a somewhat similar ship of 108 tons built in 1908.

The learned judge took three other vessels besides these and adopted a figure as the average weekly earnings of a ship calculated from the earnings of the five vessels for a period of four years, ending 31st December 1939. The additional three vessels were the *Cartela*, a ship of 194 tons, the *Excella*, 174 tons, and the *Dover*, 115 tons. He took also a figure as the average weekly earnings of a ship based on the earnings of these three ships for the ensuing three years. He then averaged these two figures and, after the deduction of a small sum for savings in management charges, he treated the balance as representing a proper rate of recompense to the plaintiff for the compulsory hire of each of its two ships. The course so pursued is open to many objections, but it is enough to

(1) (1941) 2 K.B. 26, at pp. 48, 49.

mention three. First, the method appears to be aimed at showing, not what is a fair hiring rate to the plaintiff, but what would be the average loss of profit from the withdrawal of a ship—an " average " ship, and, even so, not an average of the plaintiff's fleet but of selected ships of the plaintiff.

Secondly, the ships are not comparable in their tonnage, in their earning capacity, in their separate average earnings over either of the two periods, or the specific trade, or " trips " in which they were employed; and the direct averaging of two averages for different periods, based on a different range of ships, cannot be defended.

Thirdly, in the years 1940-1942 the earnings of the *Carlela* and *Excella* increased markedly. These years include the periods of requisition for both the *Mongana* and the *Marana*, viz., 2nd September 1939 to 6th August 1940 and 2nd September 1939 to 10th June 1942, respectively, and a period of seven or eight months in 1942, after the plaintiff had sold the *Mongana*. There is nothing to show that the increase in earnings does not represent, to an extent, some of the trade liberated by the withdrawal of one or both of these ships, and there is some basis for conjecture that it does represent it. In any case, the figures for the period form no proper basis from which to reason to a conclusion as to the earnings to be ascribed to the requisitioned ships as at September 1939. This is shown by contrasting the sum assessed by his Honour, viz., £25 10s. a week for each vessel, with the actual average earnings of the ships over the 191 weeks ending 31st August 1941. The average for the *Mongana*, whose earnings were seasonal, was £7 5s. 6d. and for the *Marana*, £15 16s. 11d.

In my opinion, the assessment made in the Supreme Court cannot stand. It, therefore, becomes necessary either to remit the cause for rehearing, or for this Court now to do the best it can to fix the amount to be awarded to the plaintiff. Notwithstanding the very unsatisfactory materials available to us, the latter appears to be the better course. It, at least, should put an end to the litigation. The best starting point for the inquiry would be to turn to some reliable information as to the hire or charter rates which, in 1939, could be obtained for vessels of the class in question. Unfortunately upon this subject the evidence is deficient. An opinion was deposed to that hull charter rates were about 15 per cent on pre-war capital value, together with insurance. But it was given as a general proposition by a valuer and broker, whose experience did not extend to Hobart, and its application to such craft as here are in question is, to say the least, dubious. Some evidence was given that some

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occasional daily hirings of the services of one or other of the plaintiff's ships gave a net return of as much as £10. In 1942, after the opening of the Japanese war, the *Mongana* was hired for about eight weeks at £25 a week for a special purpose in case the smelting works at Risden were attacked. But that seems an exceptional case, and at a different and exceptional period. In the next place, a satisfactory basis might be found if it were possible to ascertain the percentage return that might generally be expected of the capital value of ships employed in the trade to cover depreciation and profit. But, for this purpose, it would not be safe to rely on a few instances only, and that is all the evidence discloses. But, from the materials proved, it has been possible to gain some information concerning the relation to capital value of the earnings of some of the plaintiff's ships, the value of which happened to be given. Unfortunately, the dissection of or allocation from the management account is unsatisfactory, and, moreover, it would seem that some general revenue items ought to have been thrown against the expenses of that account if they are used in estimating the element in the recompense represented by the burden of establishment charges. However, it is possible to gain an impression of the limits within which the percentage in question lies, and that is of some assistance, as a check at all events. Thirdly, it is proper to consider the profit which, over relevant times, the plaintiff gained from the specific ships requisitioned and also from comparable ships. As to the two ships requisitioned, there is a good deal of material, though again the management account causes a difficulty. With respect to other ships the information is unsatisfactory, because the figures are summarized only and the evidence insufficiently discusses the character and capabilities and the actual employment of the vessels.

Fourthly, we know enough about the establishment charges for a series of years, including 1938 and 1939, and about the revenue from the ships in question and of other ships employed by the plaintiff, to form a rough estimate of the establishment charges to be provided for. There is some doubt whether revenue was really prejudiced by the withdrawal of the ships from the plaintiff's employment, but it amounts scarcely to more than a reason for caution in the estimate.

In the result, I think that we can but assess the amounts to be awarded by combining the foregoing considerations and applying the figures, as a jury might, to guide us in forming as sound and just an estimate as we can of what the plaintiff should be paid. We cannot do it by calculation, and precision in the application of such relevant figures as the materials do supply is made neither easier

nor safer by the fact that in this Court a plurality of minds must determine the final sum.

On the whole, I think that, on the meagre information we have as to the comparative merits of the two ships, the reasons for distinguishing between them in the amount awarded are somewhat artificial, depending, as in truth they apparently do, on the service to which the *Marana* was put, and on the accident of a sale of the *Mongana* to the United States authorities. Again, I think it is unnecessary for us to specify exactly what we consider a proper charter rate and how much we award as a rate on account of establishment charges, although, in my consideration of the case, I have endeavoured to bear the distinction in mind. My conclusion is that a fair rate of recompense, covering both charter rate proper and a rate on account of establishment charges for each vessel, would be £14 a week.

This conclusion means that the Commonwealth has paid less than the amount the plaintiff should receive. It appears also that the last payment made to the plaintiff was after the writ was issued and that there was some delay in making earlier payments. The plaintiff claims interest at 5 per cent per annum upon overdue hire. When hire is to be treated for this purpose as accruing due has not been made clear. But, in any case, I do not think that the claim for interest can be sustained. It is true that, in the absence of any statutory indication to the contrary, moneys payable as compensation for land compulsorily acquired bear interest from the time of dispossession (*In re Pigott and The Great Western Railway Co.* (1); *Inglewood Pulp & Paper Co. Ltd.* v. *New Brunswick Electric Power Commission* (2)). The rule springs from the doctrine that a notice of acquisition, or a notice to treat, establishes the relation of vendor and purchaser and it rests upon the view that "the right to receive interest takes the place of the right to retain possession" (3). The purchaser cannot retain the purchase money and at the same time be placed in occupation of the land or in receipt of the rent and profits, unless he pays interest on the purchase money, representing, as it does, the capital contained in the land. "From the time at which the purchaser was to take possession of the estate he would be deemed its owner, and he would be entitled as owner to the rents of the estate, and would have kept them without account. From the same period the seller would have been deemed owner of the purchase-money, and that purchase-money not being paid by the man who received the rents, would have carried interest, and that

(1) (1881) 18 Ch. D. 146. (2) (1928) A.C. 492.
(3) (1928) A.C., at p. 499.

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interest would have belonged to the seller as part of his property. A court of equity, as a general rule, considers this to follow. The parties change characters; the property remains at law just where it was, the purchaser has the money in his pocket, and the seller still has the estate vested in him; but they exchange characters in a court of equity, the seller becomes the owner of the money, and the purchaser becomes the owner of the estate. That is the settled rule of a court of equity " (per Lord *St. Leonards*, *Birch* v. *Joy* (1)). That being the ground of the rule, applying alike to voluntary and compulsory sales, it does not extend to compensation for injurious affection, upon which interest is not payable unless an intention to give interest upon unpaid compensation appears in the statute (*In re Richard and Great Western Railway Co.* (2) and per *Bankes* L.J. in *Swift & Co.* v. *Board of Trade* (3)).

In the recent case of *James Patrick & Co. Pty. Ltd.* v. *Minister of State for the Navy* (4), in the original jurisdiction of this Court, *Williams* J. awarded interest on compensation representing the capital value of a ship the full property in which had been compulsorily acquired by the Navy. His Honour had allowed interest on the price or value of the apples and pears in *Tonking's Case* (5), and on the appeal, which was dismissed by the Full Court, subject to an increase in the amount awarded, no one questioned the direction to pay interest, which was applied to the larger sum: See per *Rich* J. (6). In giving interest on the value of the ship, *Williams* J. followed this precedent. But he was also guided by the principles governing in America the ascertainment of the " just compensation " to which the citizen whose property is taken by the Government becomes entitled under the interpretation there placed upon the Fifth Amendment of the Constitution of the United States. In *Tonking's Case* (7), those principles are referred to and discussed. The considerations upon which courts of equity have proceeded in allowing interest in the compulsory purchase of land appeared to his Honour to be applicable. Indeed, it might possibly have been enough for him to hold in *Patrick's Case* (4) that the equitable rule applied directly to the compulsory purchase of a ship. For the rule in equity which Lord *St. Leonards* expresses in *Birch* v. *Joy* (8) applies to all contracts of sale of which courts of equity would decree specific performance and not merely to those in which the subject matter is an interest in land. It has been applied to compulsory purchases, too, in the same sense: See *International Railway Co.* v. *Niagara Parks Commission* (9), to which

(1) (1852) 3 H.L.C. 565, at pp. 590, 591 [10 E.R. 222, at p. 233].
(2) (1905) 1 K.B. 68.
(3) (1924) 40 T.L.R. 424, at p. 427.
(4) (1944) A.L.R. 254.
(5) (1942) 66 C.L.R. 77, at p. 90.
(6) (1942) 66 C.L.R., at p. 110.
(7) (1942) 66 C.L.R. 77.
(8) (1852) 3 H.L.C. 565 [10 E.R. 222].
(9) (1941) A.C. 328.

I have been referred by *Williams* J. The sale of a ship is enforceable by specific performance: See *Lynn* v. *Chaters* (1); *Hart* v. *Herwig* (2); *Claringbould* v. *Curtis* (3); *Behnke* v. *Bede Shipping Co. Ltd.* (4). *Swift's Case* (5) was cited by counsel in the *Niagara Parks Case* (6), but it was not discussed in the judgment. Probably it was regarded as dealing with what amounts to "compensation," while the question before their Lordships depended on the equitable principles governing vendor and purchaser.

It is to be noticed in the present case that the compensation represents, not the income-producing corpus, the capital value of the ships, but hire or charter moneys, a revenue item forming the income produced by the corpus. I do not think that even the American Fifth Amendment makes it necessary to add interest to compensation on revenue account while outstanding; and, whether the principle governing compensation for land can be applied to ships or not, it would not give interest on hire or charter money. As to the position in the United States with respect to interest on compensation, see the notes in the Lawyers Edition, vol. 68, at p. 171, to *Brown* v. *United States* (7) and in the Lawyers Edition, vol. 67, at p. 665, to *Seaboard Air Line Railway Co.* v. *United States* (8), and a paper by *C. T. McCormick* on the "Measure of Compensation in Eminent Domain," *Selected Essays on Constitutional Law*, at p. 963. The question whether, in the absence of an express provision giving it, interest was payable upon unpaid compensation in respect of commodities requisitioned was decided specifically by the House of Lords in *Swift & Co.* v. *Board of Trade* (5). Affirming the decision of *Bankes* and *Sargant* L.JJ. (*Scrutton* L.J. dissenting) in the Court of Appeal (9), the House of Lords negatived the possibility of including interest. In a sense, the case depended upon the interpretation of the *Defence of the Realm Regulations*; for they might have directed otherwise. But their Lordships proceeded upon general principles. "No doubt," said Viscount *Cave* L.C., "the rule is well established in the case of sales of land; but there is no authority in English law for applying it to a requisition of goods by the State, and there appears to be no sufficient reason why in such a case the provisions of *Lord Tenterden's Act* should not apply" (10). Lord *Sumner* said: "Unless the regulation itself authorizes the allowance of interest none can be given" (11).

(1) (1837) 2 Keen. 521 [48 E.R. 728].
(2) (1873) 8 Ch. App. 860.
(3) (1852) 21 L.J. Ch. 541.
(4) (1927) 1 K.B. 649, at p. 661.
(5) (1925) A.C. 520.
(6) (1941) A.C., at p. 341.
(7) (1923) 263 U.S. 78 [68 Law. Ed. 171].
(8) (1923) 261 U.S. 299 [67 Law. Ed. 664].
(9) (1924) 40 T.L.R. 424.
(10) (1925) A.C., at p. 532.
(11) (1925) A.C., at p. 548.

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In the present case, it is probably true that regulations made under s. 67 and s. 124 of the *Defence Act* might have given interest. But can we extract from the word " recompense " in s. 67 an authority to award it ? If we work out the implications of the word " recompense " according to ordinary legal principles, we have the decision in *Swift's Case* (1) for our guidance upon the place interest takes in the conception of compensation in English law. As *Starke* J. has pointed out in his judgment, the argument was fully stated by *Scrutton* L.J. (2) that, as his Lordship put it, " the owner of property seized does not receive full compensation, if he loses the property in one year and only receives the value of the property at the time of loss five years afterwards." Moreover, the Lord Justice referred to the decision of the Supreme Court of the United States in the *Seaboard Airline Railway Case* (3). His dissenting judgment, however, did not prevail and the House of Lords plainly rejected the argument. Our Constitution, when it refers to " just terms ", is placing a qualification on the legislative power it bestows to acquire property compulsorily. But it is, I think, difficult to say that it makes it necessary for the legislature to give more than the full content of " compensation," as compensation is understood in English law, and we know from the House of Lords that a right to interest on the amount payable for the thing is not always or necessarily included. Section 51 (xxxi.) has not the effect of transferring into our Constitution the Fifth Amendment, nor all the glosses placed upon it. But, whatever may be the correct view of compensation forming a replacement of income-producing capital assets, I do not think that we can find in s. 67, interpreted in the light of s. 51 (xxxi.), enough to enable us to award interest upon the recompense we now hold to be payable.

In my opinion, the appeal should be allowed and judgment should be given for the plaintiff for the excess of £14 a week for each vessel for the respective periods of requisition over the amount already paid to the plaintiff. I think that the plaintiff is entitled to his costs of the suit. As the Commonwealth supported the appeal by maintaining simply that the plaintiff had, in any view, received enough and that it was unnecessary to make an assessment, I think there should be no order as to the costs of the appeal.

McTIERNAN J. The statement of claim in this action is drawn in terms which appear to require the assumption that s. 51 (xxxi.) of the Constitution gives a right of action for compensation for the

(1) (1925) A.C. 520.
(2) (1924) 40 T.L.R., at p. 429.
(3) (1922) 261 U.S. 299 [67 Law. Ed. 664].

acquisition of property, for, according to the terms of the statement of claim, the plaintiff sued for a sum of money which it claimed to be " just terms " for the taking possession and use of the two steamers with which the case is concerned. But the above-mentioned placitum is a power to legislate for the acquisition of property. A right of action for compensation arises not from this legislative power but from the law providing for acquisition passed in pursuance of the power : Compare *Andrews* v. *Howell* (1).

It may be observed in this connection that the American Fifth Amendment is not a power but a restriction upon the power of eminent domain inherent in the United States, and there is no express power parallel with s. 51 (xxxi.) vested in the Congress. It is necessary to bear these differences in mind in considering the American decisions dealing with the taking of property for public purposes.

It appears from the learned trial judge's notes that the plaintiff did not formulate its claim at the trial in the way in which it was pleaded in the statement of claim. The notes begin with this statement : " The plaintiff claims for payment by way of hire for two ships." The names of the ships are stated ; also the fact that the Commonwealth paid £1,604 before action. There is then a reference to *Tonking's Case* (2) " as to interest."

A claim for " payment by way of hire " imports an obligation to pay arising from a promise to pay hire, not an obligation to pay compensation arising from a compulsory taking.

The plaintiff furnished the ships for defence purposes upon a requisition expressed to be given under s. 67 of the *Defence Act*, but there was a defect in the requisition for the reason that the officer who gave it was not authorized by any regulations to issue the requisition. If the taking of the ships was not lawfully authorized, the plaintiff waived the tort involved in the taking of them. It is not easy to gather what was the legal basis of the requisition which the parties adopted for the purposes of the trial. The notes of the trial appear to me to show that the trial was conducted on the footing that the ships were requisitioned with the plaintiff's acquiescence upon the condition, an implied one, that the Commonwealth would pay a reasonable sum " by way of hire." In the case of such a transaction, there being no agreement as to amount, the amount of the hire falls to be determined by a court. I think that would be a reasonable sum which the court would assess by applying the rule in *Spencer* v. *The Commonwealth* (3), to a temporary charter or hiring. In other words, the court must ascertain, stating

(1) (1941) 65 C.L.R. 255, at pp. 264, 269, 282.
(2) (1942) 66 C.L.R., at p. 90.
(3) (1907) 5 C.L.R. 418.

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the matter shortly, what a willing though not anxious charterer and an equally willing and no more anxious owner would agree upon in friendly negotiations. Ordinarily, of course, market rate would be agreed upon.

In this case, however, there is no evidence of any appropriate market. There is evidence of hirings of comparable vessels; but those hirings were for short or for intermittent periods. They are, therefore, not comparable hirings. The hirings in this case were for indeterminate periods of substantial length terminable at the will of the Commonwealth. Such hirings must be rare. It is not surprising, therefore, that there is no comparable market.

The court must approach the matter in the same way as an owner and a charterer would discuss or debate it in the absence of such a market. We have in this case all the facts and factors which would influence owner and charterer, including, as regards each vessel, capital value, earnings, trading profits, the period of hire, the management expenses and evidence of other vessels which might be used in place of the vessels chartered. An owner and a charterer would take into account all those factors and also the fact that the hiring of the vessel was terminable at will. None of these facts or factors is irrelevant, but none of them is conclusive as to amount.

The Chief Justice has dealt with most if not all of the considerations which I think should be weighed in assessing the hire. I think it unnecessary to repeat what his Honour has said. It is sufficient for me to say that I find myself able to agree to his Honour's assessment for each steamer; although, sitting alone, it is hardly probable that I should have arrived at precisely the same figure.

I do not agree with the method of assessment adopted in the Supreme Court. Apart from other criticisms, I think that too much attention was paid to the profits being made by the respondent from the use of the vessels, and the facts were overlooked that a prudent charterer expects to make profits for himself by the use of the vessel, and a prudent owner, willing to charter his vessel, would not insist upon an indemnification against loss of profits.

In the view which I have taken that the requisition was treated as a taking with the acquiescence of the plaintiff, subject to the condition of the payment of a reasonable hire, it is not now necessary to decide whether compulsory acquisition on just terms pursuant to statutory authority necessarily imports in every case an obligation on the part of the Commonwealth to pay interest on the amount assessed by the court from the date of acquisition.

I do not regard the case as one which raises the question whether interest was properly allowed in *Tonking's Case* (1). In this Court,

(1) (1942) 66 C.L.R. 77.

counsel for the Commonwealth argued that no question of just terms arises in the present case, as the steamers were taken with the plaintiff's acquiescence subject to an implied condition that reasonable hire would be paid. Counsel for the plaintiff relied in this Court on s. 35 of the Tasmanian *Supreme Court Civil Procedure Act* 1932 to sustain a claim for interest on the amount awarded by the court from the time of requisition, but this way of putting the claim for interest involves the supposition that the action is for damages for an unlawful taking. I do not apprehend that such was the basis of the claim made in the action. In these circumstances, the question whether " just terms " implies that interest should be allowed was not fully argued.

In the view that the claim was litigated as a claim resting upon an implied promise to pay hire, no interest is payable from the respective dates on which the ships were taken on the amounts which the plaintiff is held to be entitled to recover or the difference between them and what the Commonwealth paid from time to time.

In the result, the judgment of the Supreme Court should be set aside and judgment entered for the plaintiff for £605.

This sum is £2,700 less than the sum awarded in the Supreme Court. I should give the Commonwealth its costs of the appeal as the principle upon which it contended that the amount payable to the plaintiff should be determined is correct, and it has substantially succeeded upon the amount. In the Court below the plaintiff claimed £6,332 above the amount paid by the Commonwealth before the hearing of the action. It recovers only £605 more than the Commonwealth paid : but as the plaintiff had to sue to recover this amount in addition to what it received before action, I should allow the order for costs in the Supreme Court to stand.

WILLIAMS J. This is an appeal by the defendant from a judgment given by *Hutchins* J. in the Supreme Court of Tasmania by which his Honour awarded the plaintiff the sum of £25 10s. per week in respect of the requisitioning by the defendant of each of two steamships, the *Mongana* of 98 gross tons which was acquired on 2nd September 1939 and retained until 6th August 1940, a period of 48 and 2/7th weeks, and the *Marana* of 108 gross tons which was acquired on 4th September 1939, and retained until 10th June 1942, a period of 144 and 2/7th weeks. His Honour also ordered that the defendant should pay interest at the rate of 4 per cent on amounts in arrears after 30 days.

The defendant purported to requisition the ships under s. 67 of the *Defence Act* 1903-1939, which provides, so far as material, that

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the owner of any vessel required for naval purposes, shall, when required to do so by an officer authorized in that behalf by the regulations, furnish it for those purposes, and shall be recompensed therefor in the manner prescribed. No regulations have been made which authorized the officer concerned to make the requisition, but neither party has raised any objection on this ground ; the requisition has been treated throughout as being lawful and the action must be considered to be one to recover the recompense provided for by the section.

To dispose of the action on any other basis is opposed to the allegation in the statement of claim, admitted by the defendant, that the ships were requisitioned, and the further allegation, denied by the defendant, that the amount offered by the defendant did not contain just terms for the taking possession and use of the ships. It is also opposed to the conduct of the action, the plaintiff giving evidence, in accordance with the statement of claim, that the ships were requisitioned, and the secretary of the Naval Charter Rates Board, the one witness called for the defence (after the defendant's counsel had opened by citing s. 67 and submitting that the recompense is to be on just terms) stating that the Board had endeavoured to assess just compensation. It is true that no manner has been prescribed by regulations made under s. 124 of the Act for assessing the recompense, but that would not defeat the action. The Constitution, s. 51, placitum 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. The defence of the Commonwealth is, of course, a purpose for which the Commonwealth Parliament can legislate and the *Defence Act* is legislation for that purpose. Section 67 provides for the acquisition of property for the purpose of defence, and that property can only be lawfully acquired under legislation which provides just terms. The section must therefore intend to create a lawful right to compensation. It is the manner of enforcing the right that is left to be prescribed by regulations. It is a right which, in the absence of a valid regulation prescribing the manner of assessment, can be enforced in an appropriate court. The proceedings bear an analogy to those which came before the Court of Appeal in *John Robinson & Co. Ltd.* v. *The King* (1). There the legislation provided for compensation, but did not provide a particular tribunal for assessing it, and it was held that the plaintiff was entitled to sue in the High Court. As the action is against the Commonwealth, the plaintiff

(1) (1921) 3 K.B. 183.

could have sued in the original jurisdiction of this Court, but the jurisdiction is not exclusive, so that under s. 39 of the *Judiciary Act* 1903-1940 the action was equally competent in the Supreme Court.

I have read the judgments of the Chief Justice and my brother *Dixon*, and I agree with them that the compensation awarded by the learned trial judge was excessive. I also agree with them that it is advisable for this Court, in order to bring the proceedings to finality, to endeavour to assess the compensation itself in lieu of remitting the action to the Supreme Court for that purpose. The correct basis of assessment is, in my opinion, that the owner is entitled to be compensated for the value to him of the property taken. See the authorities collected in *James Patrick & Co. Pty. Ltd.* v. *Minister of State for the Navy* (1). Here the ships were acquired for a temporary purpose, the acquisition resembling, so far as a statutory title can resemble one at common law, a demise of the ships. In order to determine the compensation in such a case it is necessary to assume that the owner was, at the date of requisition, willing to demise the ships for a fair and reasonable hire, having regard to the value of the ships to him, and that the requisitioning authority was willing to pay such hire as a prudent charterer would have been willing to give for the ships sooner than fail to obtain them. If there had been a recognized market rate for charters for small ships like the subject ships engaged in the coastal trade in Tasmania at the date of the requisition, this rate would have given an obvious starting point and would probably have provided an adequate hire, because the ships do not appear to have had a particular value to the owner. On the contrary, the plaintiff appears to have had more ships than were required for its business, so that some of the fleet were generally standing by. But the evidence on this point and also the expert evidence as to what would have been a fair market rate of hire was meagre and scanty and quite insufficient for his Honour to act upon. I will not refer to this evidence as it has already been discussed in the judgments of the Chief Justice and my brother *Dixon*. His Honour was therefore forced, I think, to examine the previous earnings of the ships to see if that would provide any assistance. But his Honour, instead of confining his attention to the *Mongana* and the *Marana*, took two periods, and in the first period ascertained the average earnings of five ships comprising these two ships, the *Cartela* of 194 gross tons, the *Dover* of 115 gross tons, and the *Excella* of 174 gross tons, and in the second period took the average of the three last-mentioned ships, the resulting figures for the first period being £21 18s. 10d. per week and for the second

(1) (1944) A.L.R., at pp. 256, 257.

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period £33 17s. 11d. per week. He then averaged the two averages, which resulted in the figure of £27 per week. The accounts of the plaintiff have been kept on the basis that there is a working account for each ship, showing the revenue earned by and the expenses specifically referable to that ship; a trading account to which is debited such items as cartage, sundry ships' stores, sundry wages and wharfage which are not specifically attributable to any ship; and an expenses of management account to which is debited such items as country agencies, insurance, office rent, printing and advertising, and salaries. In the first period his Honour took the four years 1936 to 1939 inclusive of 208 calendar weeks, for the *Cartela*, *Dover* and *Excella*, and 191 calendar weeks, being the period up to the date of requisition, for the *Mongana* and *Marana*. In the second period his Honour took the three years 1940 to 1942 inclusive of 156 calendar weeks for the *Cartela* and *Excella* and 121 weeks for the *Dover*, which was sold on 30th April 1942. His Honour appears to have taken these three other ships into account in addition to the two requisitioned ships because, to quote from his judgment, "at the period of acquisition both ships were being used in conjunction with three others engaged in a similar class of trade and for efficient working there were periods in each year when one or more ships were acting as relief or standby vessels." But the accounts show quite clearly, to my mind, that, although the five ships were engaged in the same trade, the earning capacity of the other three ships, particularly the *Cartela* and *Dover*, was considerably in excess of that of the *Mongana* and *Marana*. Further, in the first period, the *Marana* only worked for 88 weeks out of the 191 weeks, so that her earnings per calendar week appear to me to be of little value to ascertain what would be a fair rate for a continuous hiring. I am unable to agree with his Honour that it was proper to ascertain the earnings of the ships on the basis of a calendar week and to reject the figures for a working week. The latter are, to my mind, the important weeks. In the first period the *Marana* worked for 88 weeks, which is quite sufficient to estimate her earning capacity when at work. When these weeks are taken, in the first period the net earnings of the respective ships are as follows:—*Cartela* £36 2s. 1d., *Dover* £39 4s., *Excella* £18 10s. 1d., *Mongana* £15 16s. 11d., *Marana* £15 15s. 11d. In the second period the figures are as follows:—*Cartela* £60 1s. 6d., *Dover* £20 15s. 2d., *Excella* £22 5s. 9d. I have on several previous occasions expressed the opinion that the method of averaging sales of land or shares alleged to have elements of comparability to arrive at the value of the subject land or shares leads to unsound conclusions, and the present instance is still another

example of the same thing. It has caused his Honour to reach an excessive rate for the requisitioned ships, just as it would have caused his Honour to reach too low a rate for the *Cartela* if she had been requisitioned. But the net earnings for the working weeks of the *Mongana* and *Marana* in the first period are useful. They show that the two ships had approximately the same earning capacity at the date of requisition. I agree with his Honour that from the net earnings there should be deducted a share of the expenses debited to the trading account. This amount was worked out on a tonnage basis at £1 7s. 10d., and his Honour in his judgment used the figure of 30s. Accepting this figure (it would be approximately the same on a revenue basis) the net contribution to the revenue of the company of each ship when at work, after deducting the expenses specifically attributable to that ship and her share of the expenses debited to the trading account, was approximately £14 5s. per week. If this was their full earning capacity the plaintiff could not have reasonably expected a charterer in 1939 to pay this rate of hire for the ships upon a time charter. The latter could only have been reasonably expected to pay a rate which would allow some profit for himself. But a charterer would have hired the ships for some definite period, whereas the defendant was entitled to redeliver them at any time. There is also evidence that at a period subsequent to that of the requisition the *Mongana* was chartered for a period of eight weeks at £25 per week, and that in a period of five months she showed net earnings in her working account of over £30 per week. As the requisitions were for an indefinite period and there is evidence that the plaintiff was unable to make any savings in its management expenses, I agree with his Honour that no deduction should be made on this account. It is admitted that the ships were returned to the plaintiff in as good condition as when they were taken over, so that in fixing a fair rate of hire no allowance need be made for depreciation. Further, I agree with my brother *Dixon* that no allowance should in the circumstances be made for marine insurance. On the whole, giving the best consideration to the matter that I can upon evidence which is in many respects incomplete, I agree that a fair weekly rate of hire for each ship would be £14 per week.

His Honour ordered the defendant to pay interest at 4 per cent on payments in arrears for 30 days. It has been contended on behalf of the appellant that his Honour was not authorized to order the payment of interest. The decision of the House of Lords in *Swift & Co.* v. *Board of Trade* (1) was relied upon. In that case certain goods were acquired compulsorily on behalf of the Crown under one

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

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of the *Defence of the Realm Regulations* made under the Imperial *Defence of the Realm Acts* during the last war. The regulation provided that such compensation should be paid for any article or stock requisitioned as should, in default of agreement, be determined by arbitration. It was held that interest could only be allowed from the date of the arbitrator's award and not from the date of requisition. The gist of the decision appears in the speech of Lord *Sumner* where he said :—" As to interest, I think the common law rules, which are now perfectly well settled, do not assist the claimants, and the law of other countries and the rules by which Courts of equity give interest in connection with purchases and sales of land, have no bearing on the present case. Unless the regulation itself authorizes the allowance of interest none can be given. Now, not only is ' compensation ' the word used and not ' interest ' but there is nothing in the regulation to attach an allowance of interest to." His Lordship went on to say that " to give interest is really to give additional compensation for being the victim of war legislation, and this subject of compensation is not within the regulation " (1). Viscount *Cave* L.C. had said that the rule was well established by analogy to the practice of the Court of Chancery in the case of contracts for the sale and purchase of land that interest could be allowed in the case of the compulsory acquisition of land from the date the resuming authority entered into possession (2).

In *Inglewood Pulp and Paper Co. Ltd.* v. *New Brunswick Electric Power Commissioner* (3) Lord *Warrington of Clyffe*, delivering the judgment of the Privy Council, said :—" The last question is that of the allowance 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* (4). The law on the point has also been extended to cases under the *Lands Clauses Consolidation Act* 1845 (Imp.).

Their Lordships can see no good reason for distinguishing the present case 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

(1) (1925) A.C., at p. 548.
(2) (1925) A.C., at p. 532.
(3) (1928) A.C. 492, at p. 498.
(4) (1925) A.C. 520, at p. 532.

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.*" (The italics are mine.)

In *International Railway Co.* v. *Niagara Parks Commission* (1), *Luxmoore* L.J., delivering the judgment of the Privy Council, pointed out that the equitable practice is not confined to cases of the sale and purchase of land but applies to all contracts of which the court of equity can grant specific performance. It is clear, therefore, 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, then the court, in assessing compensation can, in the absence of a statutory prohibition, by analogy to the equitable practice, without any statutory authority, order the payment of interest on the amount awarded from the date that the resuming authority entered into possession. Section 51, placitum xxxi., of the Constitution, if it is not taken from, has at least a close affinity in language to that portion of the Fifth Amendment to the Constitution of the United States of America, which provides that private property shall not be taken for public use without just compensation. It has been frequently held by the Supreme Court of that country that the words " just compensation " were intended to provide that when a subject was deprived of his property by compulsory process he was entitled to be placed, so far as money could do so, in exactly the same position as though he had not been dispossessed. In both England and the United States of America, therefore, it is recognized that in the case of the acquisition of the absolute ownership of property the compensation, to be fair and adequate, requires that the owner should be constructively placed in possession, as from the date of dispossession, of a sum of money representing the capital value of the property of which he has been deprived ; so that, if there is any delay, either because the amount is disputed and has to be assessed, or because, although the amount is agreed upon, it is not immediately paid, it is necessary, if he is to be fully compensated, that he should be paid interest from the date of dispossession until he receives the principal sum. The attitude of the courts is well stated by *Bacon* V.C. in *Rhys* v. *Dare Valley Railway Co.* (2) in a judgment which was cited with approval by *Buckley* J. (as he then was) in *Fletcher* v. *Lancashire and Yorkshire Railway Co.* (3). He there said : " If I were to withhold payment of interest I should not only be going against the cases

(1) (1941) A.C., at pp. 344, 345. (2) (1874) L.R. 19 Eq. 93, at p. 95.
(3) (1902) 1 Ch. 901, at p. 908.

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which have been cited, but I should be going against common sense, justice, and honesty.

The Imperial Parliament is a legislature with untrammelled powers, and can legislate to acquire property on any terms it thinks fit. *Swift's Case* (1) is simply a decision that if Imperial legislation provides for the compulsory acquisition of property on the terms that the owner is to be compensated for the value of the property, the legislation does not itself authorize the payment of interest, so that the body assessing the compensation can only award interest if it can find some authority for doing so dehors the legislation. It is in no sense an authority that legislation which does not provide for the payment of interest upon the amount of compensation from the date that an owner is dispossessed of his property is legislation which contains just terms for the acquisition of property, and it throws no real light, therefore, upon the proper interpretation to be placed upon these words in the placitum. It is clear from the speeches of practically every member of the House of Lords in *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* (2) that they did not consider that the common law rules relating to the allowance of interest were just or that *Lord Tenterden's Act* went far enough. It is also clear from the judgments of the Privy Council to which I have referred that the instances are few in which, in the absence of a statutory prohibition, the English courts cannot engraft the equitable practice onto a statute which only provides for the payment of principal in order to award interest which it is obvious they consider is required to make the compensation fair and just.

Decisions of the Supreme Court of the United States of America bearing upon the interpretation placed upon the words of the Fifth Amendment by that Court are referred to in *Tonking's Case* (3) in my own judgment and that of my brother *Rich* (4) respectively. It is true that there was no appeal against the direction for payment of interest upon the appeal to the Full Court, but it is clear from the reference to these decisions in the judgment of my brother *Rich* that the correctness of the order in this respect was not taken for granted. It has been suggested that the order in *Tonking's Case* (3) could be justified as allowing interest on equitable principles because the Board had wrongfully withheld payment after the amount of compensation payable to the plaintiff should have been ascertained and paid: Cf. *Cook* v. *Fowler* (5); *Nixon* v. *Furphy* (6),

(1) (1925) A.C. 520.
(2) (1893) A.C. 429.
(3) (1942) 66 C.L.R. 77.
(4) (1942) 66 C.L.R., at pp. 83, 106.
(5) (1874) L.R. 7 H.L. 27, at p. 37.
(6) (1926) 26 S.R. (N.S.W.) 409; 43 W.N. 108.

and that the order in the *Corrimal Case* (1) could be justified in accordance with the equitable practice because a contract for the sale of a ship would be specifically enforceable in equity. Assuming that the orders could be justified on these grounds, they were in fact based on the broader ground that the payment of interest was required to make the compensation just. The reason why interest was only allowed in *Tonking's Case* (2) from 31st January 1941, although the plaintiff's fruit was acquired early in 1940, was because, in order to convert the plaintiff's fruit into money which could earn interest or, in other words, into income-producing property, it was necessary that the fruit should be sold. If the plaintiff had not been dispossessed he would have been engaged in selling it throughout the marketing season, or in other words during the period between the date when the fruit was acquired and the end of the year 1940. No doubt he would have sold some of the fruit and received the proceeds of sale from time to time during this period, but it was impossible to estimate when these sales would have taken place, so that the order only provided that interest should run from a date when it was clear that the whole of the fruit should have been sold and the compensation determined. Placitum xxxi., as one would expect, makes no distinction in the condition that the terms must be just whether the legislation authorizes the acquisition of real or personal property or both. " It requires that just terms should be available by law " (per *Isaacs* J. in *The Commonwealth* v. *New South Wales* (3)). Each Act must be judged on its merits (*Minister of State for the Army* v. *Dalziel* (4)). The words are even wider than " just compensation." They bear, like the words of any other statute, their ordinary natural grammatical meaning ; but they should not be construed " in a narrow and pedantic sense " (per Lord *Wright* when delivering the judgment of the Privy Council in *James* v. *The Commonwealth* (5)). The question does not arise on the present appeal whether legislation for the acquisition of property could in any circumstances be just which forbade the allowance of interest. The Court is here construing the meaning of the word " recompense " in s. 67 of the *Defence Act* on the supposition that the section provides just terms for the acquisition of all or any chattels to which it applies, " because in each case the Constitution is the ultimate basis of title " (per *Isaacs* J. in *Commonwealth* v. *New South Wales* (6)). It is sufficient to say, therefore, that in the absence of a clear statutory prohibition it is proper to construe a word intended to

(1) (1944) A.L.R. 254.
(2) (1942) 66 C.L.R. 77.
(3) (1923) 33 C.L.R. 1, at p. 47.
(4) (1944) 68 C.L.R. 261, at p. 308.
(5) (1936) A.C. 578, at p. 614 ; 55 C.L.R. 1, at p. 43.
(6) (1923) 33 C.L.R., at p. 47.

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provide just terms as including authority for the court to allow interest where it considers that such an allowance is necessary to make the compensation adequate. Further, I can see no distinction between the necessity to award interest where there is delay in the payment of compensation for the acquisition of capital assets and where there is delay in the payment of compensation for the acquisition of the temporary use of property. In each case, the State remains entitled to the possession of the property whether it pays the compensation, if agreed upon, punctually or not, or, if the compensation is not agreed upon, however long the assessment may take.

For these reasons I am of opinion that the Court should allow the plaintiff simple interest at 4 per cent payable on the amounts of compensation unpaid after the end of each month.

Judgment of Supreme Court varied by striking out, wherever appearing, the figures £3,312 17*s.* 3*d. and inserting in lieu thereof the figures* £605. *No order as to costs of appeal.*

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

Solicitors for the respondent, *Page, Seager, Doyle, Crisp & Wright*, Hobart, by *Rylah & Anderson.*

J. M.