[HIGH COURT OF AUSTRALIA.]

THE MINISTER OF STATE FOR THE INTERIOR . . . . . } APPELLANT;
RESPONDENT,

AND

THE BRISBANE AMATEUR TURF CLUB . RESPONDENT.
CLAIMANT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1949.

BRISBANE, *June* 15, 16, 17, 20, 21.

SYDNEY, *Aug.* 8.

Latham C.J., Dixon and McTiernan JJ.

Resumption and Acquisition of Property—Occupation by Commonwealth for period—Compensation—Methods of assessment—Racecourse leased to claimant—Lease renewed during occupation—Determination of compensation—Whether determination accepted by claimant—Further claim—Whether claim out of time—National Security (General) Regulations (*S.R.* 1939 *No.* 87—1944 *No.* 113), *regs.* 54, 60D, 60E.

In December 1941 notice was given to a racing club as lessee of a racecourse that in pursuance of reg. 54 of the *National Security (General) Regulations* the racecourse was required for Commonwealth purposes. The Commonwealth remained in occupation until July 1944 when it surrendered the main racecourse but retained part of the lands which were subsequently acquired for an aerodrome. As the result of damage caused during the occupation the racecourse could not be used for racing until June 1946. Racing in Queensland was restricted by statute and the lessee was allowed twelve meetings a year, which were conducted on another racecourse at a cost of £125 per meeting. During the occupation the lessee continued to pay the owner £6,000 per annum the rent reserved under the lease, which expired in May 1942, but was extended for another year. In May 1943 the owner granted the club a new lease. Municipal rates were not payable during the occupation, but were paid by the lessee, in accordance with the lease, after the racecourse was handed back. On 17th September 1942 the lessee made a claim for compensation for £5,975 which included rent, rates, insurance and services over a period of nine months up to 14th September 1942. The Director of

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Hirings on 16th August 1943 informed the club that compensation had been determined at £2,691, consisting of £125 paid for every meeting held at the other racecourse together with £33 as half the wages of a caretaker and plumber and insurance. By this determination the amount payable was described as periodical compensation. On 25th September following the club requested that the claim be referred to a Compensation Board, but on 19th April 1944, before the claim was heard, withdrew the request. Further claims were made including one on 19th October 1945, which claimed compensation over the whole period from December 1941. This claim was dealt with by the Central Hirings Committee and the Minister and was finally referred to a Compensation Board during the year 1948, when the point was taken that the claim was out of time not having been made within two months as required by reg. 60D of the *National Security* (*General*) *Regulations*. On a review before a judge of the Supreme Court the matter was dealt with as a claim in respect of the period from December 1941 to June 1946 when the course was ready for racing.

On appeal to the High Court,

Held, by the whole Court: (1) That from 14th September 1942 to 31st July 1944, when occupation ceased, compensation should be assessed on the basis of an acquisition of property and that for this period the value of the occupation might fairly be assessed at the rental value of £6,000 per annum—*Minister of State for the Army* v. *Parbury Henty & Co. Pty. Ltd.* (1945) 70 C.L.R. 459, followed and applied; (2) That from 31st July 1944 to 1st June 1946, when the racecourse was ready for racing, the claimant was not entitled to the value of the occupation as an acquisition, but to compensation for the loss or damage consequential on the occupation; (3) That the principle of alternative re-instatement did not apply to the taking of a racecourse; (4) That it was competent for the owner of the racecourse to grant a further lease to the claimant during the occupation by the Commonwealth. *Neale* v. *Mackenzie*, (1836) 1 M. & W. 747 [150 E.R. 635]), distinguished.

Held by *Dixon* and *McTiernan* JJ. (*Latham* C.J. dissenting): That the loss to the claimant for the period from 31st July 1944 to 1st June 1946 was the amount of £158 per month as determined by the Central Hirings Committee and an additional £200 per month totalling £8,448.

Per Latham C.J.: The consequential damage for this period was the rental value at the rate of £6,000 per annum plus £2,083 paid for municipal rates.

Held, further, by the whole Court: (1) That the withdrawal by the claimant of its request to refer the claim of 17th September 1942 to a Compensation Board placed the club in the same position as if no request were made and the claimant was therefore deemed to have accepted the determination of compensation at £2,691 by the Central Hirings Committee for the period from December 1941 to 14th September 1942; (2) That the claim made on 17th September 1942 was not a claim for periodical compensation and the determination was not of a periodical payment but of a lump sum representing moneys expended over a particular past period and did not fall within the

proviso of reg. 60D and the acceptance of this determination did not preclude the claimant from making a claim over the whole period up to 1st June 1946; (3) That so long as the Commonwealth retained part of the property taken the interference had not ceased and even if the claim came within the proviso to reg. 60D it was not out of time; (4) That as the Central Hirings Committee and the Minister had dealt with the claim, made a determination and referred the matter to a Compensation Board, either the time had been extended by conduct or it was not open to the Commonwealth to raise the objection that the claim was out of time.

Decision of the Supreme Court of Queensland (*Mansfield* S.P.J.) affirmed in part, varied in part.

APPEAL from the Supreme Court of Queensland.

On 18th December 1941, the Assistant Director of Hirings gave notice to the Brisbane Amateur Turf Club, then the lessee of the Doomben Racecourse, Brisbane, that in pursuance of reg. 54 of the *National Security* (*General*) *Regulations* the whole of the property was required for Commonwealth purposes as from 15th December 1941. The Commonwealth remained in occupation until 31st July 1944, when the racecourse, eighty-seven acres, was handed back, and part of the property, fifty acres known as the Straight Six, retained and later acquired for an aerodrome. Owing to damage caused during the occupation the racecourse could not be used for racing until 1st June 1946. Under the lease the rent payable was £6,000 per annum, the lessee being bound to pay municipal rates. During the occupation no rates were payable and the club continued as lessee to pay the rent, and after the occupation ceased also paid rates. In Queensland racing is restricted by *The Racing and Coursing Regulation Acts* 1930 *to* 1936 and the Brisbane Amateur Turf Club was permitted to hold twelve race meetings a year. By arrangement with the Queensland Turf Club these meetings were held during the period of occupation at the Albion Park Racecourse at a cost of £125 per meeting. The lease expired in May 1942 but was extended by the lessor for one year and in May 1943 a new lease was granted by the lessor at the same rental.

The first claim for compensation was made by the club on 17th September 1942, when £5,975 was claimed for a period of nine months to 14th September 1942, representing expenditure for rent, rates, wages and insurance. This claim was determined by the Central Hirings Committee at £2,691 13s. 2d., which was arrived at by allowing £125 per race meeting, half the wages of a caretaker and plumber and moneys paid in insurance premiums. On 16th August 1943 the claimant was informed of this determination which was described as periodical compensation. Being dissatisfied with

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this determination the club on 25th September following requested that the matter be referred to a Compensation Board, but subsequently on 19th April 1944 withdrew this request. Various claims were made from time to time and on 19th October 1945 a claim was made in respect of the period from 15th December 1941. Later an amended claim was asked for by the Commonwealth authorities and this was made on 27th November 1947 for the whole period from 15th December 1941 to 1st June 1946. This claim was dealt with by the Central Hirings Committee and the Minister for the Interior and was determined at £5,242 5s. 8d. At the request of the claimant it was referred to a Compensation Board. On 7th May 1948 the Crown Solicitor for the Commonwealth informed the claimant that it would be contended that periodical payments of compensation had already been determined and accepted and added that it would also be contended that the claim was out of time. The Compensation Board awarded an additional amount of £3,500 to that already paid.

The club then applied to the Supreme Court for a review of this assessment and the claim was then heard by *Mansfield* S.P.J., who awarded additional compensation of £32,579 14s. 6d. *Mansfield* S.P.J. held that the claim was not out of time on the ground that by reason of the Commonwealth remaining in occupation of the Straight Six, the interference had not ceased when the claim was made. His assessment of compensation was based on the amount of rental paid, as evidence of the annual value of the occupation together with additional amounts paid for insurance and rates.

From this decision the Minister of State for the Interior appealed to the High Court.

Before the hearing of the appeal commenced it was agreed by the claimant, that, owing to certain payments made by the Commonwealth not being taken into account and the claim for rates during the period of occupation being abandoned, the amount awarded by *Mansfield* S.P.J. should be reduced to £20,703 8s. 6d.

A. L. Bennett K.C. (with him *M. B. Hoare*) for the appellant. A racecourse has no market value and under the legislation of Queensland is entirely non-commercial. The principle of alternative re-instatement should be applied. The club was allowed twelve race meetings per year at Albion Park, for which it paid £125 per meeting. Its loss therefore amounts to no more than £125 for each meeting. The payment which it accepted was a periodical payment. It was accepted in full satisfaction. After the acceptance there was a change of front on the part of the club. The acceptance has

operated as an abandonment of this claim—regs. 60D and 60E (3). The statutory offer flows from the giving of the notice and the law operates so that there is deemed to be an acceptance. Furthermore by withdrawing the claim the club has at common law precluded itself from proceeding with the new claim. As far as any claim to an amount by way of rent or a periodic nature is concerned after the occupation ceased there can be only one possible basis to justify it, namely, physical damage. That is, that the physical damage was such as to deny to a person the full use of a property for a time. The basis of any claim on that footing must be physical damage. There is no longer any occupation and the interference has ceased. After the land was taken over by the Commonwealth the landlord was incapable of granting a further lease. There was an occupancy which took over the rights of possession not only of the tenant but also of the landlord. As there was no power to grant a lease, there was no obligation on the tenant to pay rent and the club had nothing to do with the premises whatever. The club was therefore the lessee no longer and therefore not entitled to any compensation: *Neale* v. *MacKenzie* (1); *Hughes* v. *Mockbell* (2); *Dove* v. *Williot* (3). The only value of the place to the club was as a place to hold twelve race meetings per year. If a person agrees to an amount it is just terms and, if he accepts what is offered and the amount of damages is made good with money, it is a lump-sum payment. If he accepts it, and the periodic payment is made good by the amount of periodical compensation, that period is covered if he so accepts that amount. A claim for periodical compensation would have to be made every two months. The whole basis of the claim and of the determination was that it was to cover the compensation for the occupancy by the Commonwealth. If it was not periodical in the sense of recurring it was periodical in the sense of covering a period. The only possible claim was one made within two months after interference ceased. The claim is out of time. There has been no extension of time and no election by the Commonwealth to proceed under the regulations. There was something in the nature of a concession or gratuitous offer, but nothing in the nature of a waiver. The Commonwealth acquired possession of the owner's rights which were in the nature of a reversion, and also became the holder of the club's lease. The reversion and the lease then merged. There was an acquisition of both of these rights by the Commonwealth: *Minister of State for the Army* v. *Dalziel* (4). Furthermore there is another

(1) (1836) 1 M. & W. 747 [150 E.R. 635].
(2) (1909) 9 S.R. (N.S.W.) 343; 26 W.N. 72.
(3) (1589) Cro. Eliz. 160 [78 E.R. 418].
(4) (1944) 68 C.L.R. 261.

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ground on which it became impossible to grant a new lease by the owner. There was no right of possession which might revert to the owner at the end of the lease. That was the very thing acquired within the meaning of *Dalziel's Case* (1) and the owner having no right of possession himself cannot confer a right of possession on anyone else. *Mansfield* S.P.J. misapplied *Dove* v. *Williot* (2); *Hill & Redman's Law of Landlord and Tenant*, 10th ed. (1946), pp. 145, 146. In *Mercer* v. *Liverpool, St. Helens and South Lancashire Railway Co.* (3) it was held that notice having been served there was an absolute acquisition of rights and that therefore no new rights could be set up after that date, and a person who was granted rights after the notice had no rights by way of compensation. That case was followed in *Zick* v. *London United Tramways Ltd.* (4). The principle of reasonable alternative re-instatement should be applied to the present case. This principle was recognized in *Minister of State for the Army* v. *Parbury Henty and Co. Pty. Ltd.* (5). The club should be re-instated in the same activity, i.e. replaced in some other racecourse for a period. It really accords with the general principle of the value of the claimant's rights: *Cripps* on *Compensation*, 8th ed. (1938), p. 180; *A and B Taxis, Ltd.* v. *Secretary of State for Air* (6). Commercially this racecourse is but a great open paddock. The rent flows from the peculiar nature of the premises and the right to race in relation to the nature of the premises. That rent cannot be taken to represent the real annual value of the premises. The only real value to the club was the exercise of the right to hold twelve meetings a year. The possession for the rest of the time was merely for the purpose of maintenance for those meetings. The club now makes a claim on the ground that it cannot race for some time. It has not been deprived of its right to race which was exercised elsewhere. The payments have enabled it to do that, but it now makes a claim which would put it into the position of making a substantial profit from the situation. In Queensland there is a prohibition on proprietary racing and unregistered racing: *The Racing and Coursing Regulation Acts*, 1930 *to* 1936, ss. 17, 18, 20, 21. Thus there is ordinarily no market for racecourses and the right to use the same is restricted. These factors have to be kept in mind in determining the rental value. Having regard to the nature of the course, the use made of it, the relationship of landlord and tenant and

(1) (1944) 68 C.L.R. 261.
(2) (1589) Cro. Eliz. 160 [78 E.R. 418].
(3) (1903) 1 K.B. 652; (1904) A.C. 461.
(4) (1908) 1 K.B. 611; (1908) 2 K.B. 126.
(5) (1945) 70 C.L.R. 459.
(6) (1922) 2 K.B. 328.

the restrictions on racing, the sum of £6,000 is no reasonable criterion of the rental value of the course. The actual value can be measured only by the right to hold twelve race meetings at an equivalent course. As no municipal rates were payable whilst the Commonwealth was in occupation, the question of rates does not come into the matter.

A. D. McGill K.C. (with him *A. D. Lynam*). Under reg. 60D (1) the claimant has to wait until the interference has ceased, whatever the interference is and within two months may make a claim for all the damage suffered by reason of anything done during the period of interference. As the regulation fixes a time as within two months after the doing of the act, the reasonable inference is that it is two months after the owner becomes aware of the act. Under the proviso the claimant has an alternative. Instead of waiting to make his claim until after the doing of the act, if it is continued possession, he can get paid something for the use of the land by means of periodical payment. In this way the claimant can get payment for the occupation of the land at once. Therefore the limitation of two months in the regulation does not apply to the provision in the proviso for a claim for periodical payment, which may be made at any time and from time to time. The proviso contains an exception from the main provision, which deals with the end of the time when the acts are completed. Within two months of that time a claimant may make a claim for a lump sum. Under the proviso the claimant may make added interim claims in the form of periodic payments. There is no limitation in the time within which the claim for periodical payment must be made, but it is implied from its very nature that it would be made before the period of interference ceased. The aid of reg. 60E (2) can only be invoked where there is a claim which can be accepted in full satisfaction of all claims. The whole of the dealings between the Commonwealth and the claimant showed informality in the procedures followed and neither party paid any attention to the provisions of the regulations. One party cannot therefore take advantage of the absence of any formality to the detriment of the other party. The provision in reg. 60D requiring that a claim be made within such further time as the Minister allows does not mean that there must be an expressed extension of time by the Minister, but that such an extension may be inferred from conduct. Under reg. 60F the function of the Compensation Board is to assess the compensation payable. The Board has nothing to do with the validity of the claim. If the Minister refers a claim then the

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Minister has referred a valid claim and the sole function of the Board is to assess the compensation. If the claim is out of time and for that reason the claimant is not entitled to compensation then there is no ground for referring the matter to the Board. By assessing the compensation and referring the claim to the Board the Minister thereby allowed an extension of time. The claim was not for a periodical payment and the assessment was never treated as the determination of a periodical payment. If reg. 60E (2) applies there was no offer and no acceptance within the meaning of the regulation as the claim was withdrawn. In determining whether there was an agreement, the whole of the circumstances must be regarded. It was competent for the claimant to withdraw the claim and make a more comprehensive claim. In order to succeed the Commonwealth must establish a contract or estoppel. There was no contract and no representation made to the Minister to prejudice him which would found an estoppel. The claim was made within time. Under reg. 60D time begins to run from the time the thing is done, which is the taking and continuing in possession. As long as the Commonwealth retains part of the property it continues in possession. The Commonwealth took the racecourse as one property and has retained a part of it, known as the Straight Six. Furthermore the claimant was asked to submit a further claim. The owner was entitled to grant a new lease to the lessee. The Commonwealth had an overriding claim to possession by virtue of statutory power under reg. 54. The lessee is still bound by the lease and entitled to possession subject to the rights of the Commonwealth. The lease with its obligations co-exist with the rights to possession of the Commonwealth. There is no reason why a lease cannot be created during the possession of the Commonwealth. There are not two concurrent leases. The rights of the Commonwealth are not those of a tenant or lessee. There has been no grant of a lease to the Commonwealth. That distinguishes the case *Neale* v. *MacKenzie* (1) where the owner by making one grant put it out of his power to make another grant. The principle of re-instatement is something resorted to by the necessity of the case, such as where there is no market value or other criterion of value. There is no necessity to apply the principle here, where there is a racecourse leased at a reasonable rental. The value of the lessee's interest is represented by the rental he pays, viz. £6,000 per annum. It is not to the point that racing is restricted by statute. The claimant has a right to race twelve days in the year on its own course prepared and maintained to the standard it wants. This

(1) (1836) 1 M. & W. 747; [150 E.R. 635].

right for which the claimant pays £6,000 per annum has been taken away and it has been deprived of the only use for which it wanted the racecourse and for which it has paid. On this basis it is entitled to compensation at the rate of the rental and municipal rates when payable.

A. L. Bennett K.C. in reply. The effect of the respondent's argument is to stultify reg. 60E (2), which contemplates finality in respect of claims, whether for lump sums or for periodical payments. The Commonwealth adhered strictly to all formalities and the requirements of the regulations. By withdrawing this claim the respondent agreed to the amount of compensation: *Dean* v. *Badham* (1). With regard to the claim being out of time the concessions made by the Commonwealth do not alter the matter. There was no waiver and no estoppel: *Grundt* v. *Great Boulder Pty. Gold Mine Ltd.* (2). The respondent did not act to his hurt. His only action has been to pursue his claims. The mere fact that the claims receive consideration and an amount is offered is not to his hurt. The owner could not grant a new lease as the Commonwealth had acquired possession from and held it from the owner: *Minister of State for the Army* v. *Dalziel* (3). The rental paid by the claimant is not a criterion of value because from the very nature of the property there is no market by which the real value can be determined. The amount of £6,000 per annum is no more than an arbitrary figure.

Cur. adv. vult.

Aug. 8.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from an order made upon a review by the Supreme Court of Queensland (*Mansfield* S.P.J.) of a determination of a Compensation Board made under reg. 60F of the *National Security* (*General*) *Regulations* which, with associated regs. 60B to 60M, were continued in force during 1948 by the *Defence* (*Transitional Provisions*) *Act* 1946 as amended in 1947. Regulation 54 of those regulations as in force in 1941 provided that if it appeared to the Minister of State for the Army to be necessary or expedient "in the interests of the public safety, the defence of the Commonwealth or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community, he may, on behalf of the Commonwealth, take possession of any

(1) (1908) W.N. (Eng.) 100.
(2) (1937) 59 C.L.R. 641, at pp. 674. 675.
(3) (1944) 68 C.L.R. 261.

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land. . . . " This regulation has now been repealed but reg. 60D and the other regulations above-mentioned providing for assessment of compensation have been continued in operation.

By letter dated 18th December 1941 the Assistant Director of Hirings, First Military District, gave notice to the Brisbane Amateur Turf Club, the lessee of the Doomben racecourse at Brisbane, that in pursuance of reg. 54 the whole of the premises known as the Doomben Racecourse would be required for Commonwealth purposes as from the 15th day of December 1941. The notification stated that " Such compensation as is determined by agreement will be paid to you in respect of damage or loss sustained by you by reason of the Commonwealth's taking possession of the property or of anything done in relation to the said property in pursuance of the said Regulation 54." By letter from the Assistant Director of Hirings dated 19th December 1941 a similar notice was given to the owner of the racecourse, the Doomben Park Recreation Ground Pty. Ltd. The latter letter contained the following statement :— " One condition of the occupation of the premises is that any item of physical damage thereto caused through Military occupation will be made good by or at the expense of the Commonwealth when the premises are vacated." The lessee paid to the owner the rent reserved by the lease, and claims for compensation have been made by the club as the lessee. No claim has been made by the owner, the rent reserved by the lease having been duly paid and other obligations thereunder having been performed.

The Commonwealth authorities remained in occupation of the whole area (137 acres) until 31st July 1944. Eighty-seven acres constituted a racecourse and fifty acres, called the Straight Six, provided a six furlong course which was also part of the complete racecourse as theretofore used. The Commonwealth authorities surrendered possession of the racecourse proper to the club on 31st July 1944, but retained possession of the Straight Six. The Court was informed that on some date in 1948 the Commonwealth acquired the title to the Straight Six, which is now being used as part of the Eagle Farm Aerodrome. The occupation by the Commonwealth authorities resulted in damage to the course which prevented it being used for racing until 1st June 1946. Claims in respect of the physical damage done to the course and buildings have been adjusted, and no question now arises as to moneys expended in restoring the course to a condition fit for racing.

The club made various claims from time to time and certain sums were paid by the Commonwealth in respect of such claims. The lease under which the club held the land provided that the

club should pay £6,000 rent per annum, together with municipal rates. During the period of Commonwealth occupation no municipal rates were payable, though this fact was not established to the satisfaction of all the parties until the Commonwealth had gone out of possession. The claims with which *Mansfield* S.P.J. dealt were claims for payment for occupation from 15th December 1941 to 1st June 1946. The claim in respect of the period between the cessation of Commonwealth occupation on 31st July 1944 and the resumption of racing on 1st June 1946 was presented not as a claim for actual occupation by the Commonwealth but as a claim for the value of the occupation of the land lost by the club, the club being unable to use the land during that period by reason of the restoration operations which were taking place. The claim for rates during the same period is put on the basis that the club was bound under its lease to pay the rates and therefore the rental plus the rates fairly represented the value of the occupation of the land.

The claims made by the club were considered by a Central Hirings Committee established under the *National Security* (*Hirings Administration*) *Regulations*. This committee had the duty of considering claims for compensation under reg. 60D of the *National Security* (*General*) *Regulations* by reason of the exercise of any power under reg. 54 of those regulations and of determining the amount (if any) of compensation to be paid : see Hirings Administration Regulations, reg. 6 (definition of " hiring ") and reg. 21. The amount claimed by an amended claim made on 27th November 1947 was £38,454 12s. 6d. Certain claims were not considered and the assessment with respect to them was postponed, namely, claims with respect to physical damage to the Straight Six and for rent of the Straight Six after 1st June 1946. The club claimed for rental from 14th December 1941 to 13th September 1945 at £6,000 per annum (giving credit for amount received of £2,375) and for further rent from 13th September 1945 to 1st June 1946, for certain outgoings for insurance and upkeep and wages of caretaker, plumber and gardener. The club also claimed what was described as the amount of rates assessed on the property from 15th December 1941 to 1st June 1946. On 1st January 1948 the Commonwealth notified the claimant of the determination of the Minister for the Interior (to whose department the subject of hirings had been transferred) that a sum of £5,242 5s. 8d. should be paid as compensation for loss or damage suffered by reason of the occupation. This sum was paid and was accepted without prejudice to the legal position of the claimant club.

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The club was dissatisfied with the amount of compensation determined by the Minister and requested the Minister to refer the claim to a Compensation Board—*National Security* (*General*) *Regulations*, reg. 60E. The claim was so referred and the Compensation Board by a determination made on 27th May 1948 added £3,500 to the amount already paid to the claimant. The Board left outstanding the question of rates. On 17th June 1948 the Board by a majority increased the assessment of compensation by £2,000 on account of rates paid.

The claimants then applied to the Supreme Court for a review of the assessment. The review was by consent conducted upon the basis of the evidence placed before the Compensation Board. *Mansfield* S.P.J., giving credit for amounts already paid, awarded as additional compensation the sum of £32,579 14s. 6d. It has been agreed by the parties upon the appeal that in any event the amount awarded should be reduced by £6,419 18s. 11d. by reason of the omission of his Honour to take into account certain payments which had been made by the Commonwealth and, further, by reason of the abandonment by the club of any claim for rates in respect of the period of Commonwealth occupation, it now being clear that no rates were payable by any person in respect of that period. The result is that the respondent club agrees that the amount of compensation should be reduced, for the reasons stated, to £20,703 8s. 6d.

The main controversy between the parties is as to the basis of compensation for occupation as distinct from compensation for physical damage and as to the period in respect of which such compensation should be paid. I postpone for the present consideration of arguments of the appellant which are directed to show that no compensation at all is payable in the present case by reason of an earlier determination or of an alleged agreement of the claimant, or because of alleged non-compliance with the regulations in relation to the time when the claim now under consideration was made.

The terms of reg. 54 have already been stated. In *Minister of State for the Army* v. *Dalziel* (1) it was decided that when the Minister for the Army took possession, for an indefinite period, of land under reg. 54 there was an acquisition of property by the Commonwealth and that the Commonwealth was bound to pay compensation upon just terms for the property taken. Upon compulsory acquisition the basis upon which compensation is assessed is the value of what is taken, such value being generally described

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

as value to the owner. In cases where there is a market for that which is taken the market value is generally a fair measure of value. But where the market value is accepted as a criterion it is so accepted only because it normally shows what a willing but not anxious buyer would be prepared to pay and a seller of similar disposition and outlook would be prepared to take for the subject matter of acquisition. Where premises are leased the rent paid is, in the absence of special circumstances, a fair measure of the value of the occupation. People do not normally pay money except in return for value, and if a court finds a tenant paying a certain rent, then prima facie that fact shows that the occupation of the premises is worth the rent paid. The fact that a person who is in occupation at a certain rent of premises A would be able to reside or to carry on his business at a lower cost in premises B has no bearing upon the question of the value of premises A. In *Minister of State for the Army* v. *Parbury Henty & Co.* (1) the Commonwealth had acquired business premises and the owner then carried on business in other premises for which a lower rent was charged. This fact did not show that the occupation of the premises acquired was not worth the rent which was paid for them. The fact that the business could be carried on more cheaply in other premises had no bearing whatever on the value of the premises which the Commonwealth had acquired.

On 7th March 1932 the club took a lease from the owner of the land, the Doomben Park Recreation Ground Pty. Ltd., for a term of seven years to begin on 1st May 1933. The rental increased from £2,000 in the first four years to £5,000 in the seventh year. On 30th April 1940 a further lease was granted for one year at a rental of £6,000 per annum. On 31st May 1941 it was extended for a period of twelve months and the club continued to hold under further extensions throughout the period in respect of which compensation is claimed—i.e. up to 1st June 1946. Under these leases the rent was £6,000 per annum and the tenant was bound to pay municipal rates.

There is in my opinion no reason for disregarding in this case the ordinary rule that the amount of money paid for the right to occupy land is prima-facie evidence of the value of the occupation of premises. That amount was £6,000 per annum plus rates when payable. On 16th January 1948 the delegate of the Commonwealth Treasurer approved a lease of the racecourse proper at a rental of £6,430 per annum which it was stated could be increased to £7,280 per annum on restoration of the Straight Six. (The lease provided

(1) (1945) 70 C.L.R. 459.

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for payment of rates by the lessee.) This fact gives some additional support to the proposition that £6,000 per annum was a not unreasonable rent for the whole of the land in 1941 and following years.

Racing was controlled in accordance with statute in 1941 and thereafter, and the number of race meetings was limited. It is objected by the appellant that only loss or damage is payable to a claimant under reg. 60D, and that as the club was able to make arrangements to conduct the permitted number of meetings (twelve per annum) on another racecourse owned by the club (Albion Park) there was no evidence of any loss or damage beyond at most the amount of money (£125 per meeting) which was paid by other clubs for the use of the racecourse. The evidence did not show (it was said) that there was any loss of profit on the meetings by reason of their being held at Albion Park instead of at Doomben. It is true that there was no evidence of such loss. Therefore, strictly, it is argued for the Commonwealth, no compensation at all is payable under the regulations. In fact the Commonwealth has paid compensation for past occupation on the basis that other clubs were allowed to race at Albion Park upon payment of £125 per day. Payment has been made to this club by the Commonwealth at that rate, together with certain costs of keeping the course and buildings at Doomben in order during the Commonwealth occupation. These payments, it is argued, are really moneys to which the claimant was not strictly entitled.

In estimating the amount of compensation properly payable I omit all questions relating to the repair of physical damage, these claims having already been adjusted.

In my opinion it is immaterial that it is not shown that the club lost money by racing at Albion Park rather than at Doomben. If land is occupied by the Commonwealth under reg. 54 an interest in property is acquired, and it is for the value of that interest to the owner that the Commonwealth must pay. It is immaterial, if it be the case, that the owner was using the property in such a way that he made no profit or only a small profit by reason of the use of the premises. The value of the occupation of Doomben during twelve months of occupation by the Commonwealth is not measured by the estimated cost to the club of holding twelve race meetings at Albion Park. That amount has no relation whatever to the value of the interest acquired by the Commonwealth, namely, the right to occupy Doomben for 365 days per annum. The capital value of Doomben was £200,000. The rent payable was £6,000 per annum, and municipal rates were also, under the lease, payable

by the tenant. No such rates, however, were chargeable while the Commonwealth was in occupation. The value of the occupation by the Commonwealth may fairly be assessed at £6,000 per annum, the claim for rates during the period of such occupation having been abandoned.

The occupation by the Commonwealth ceased on 31st July 1944. The club was not able to use the land for the purpose of racing until 1st June 1946. I agree with my brothers *Dixon* and *McTiernan* JJ. that the basis of compensation, as a matter of legal principle, is shown by *Dalziel's Case* (1) not to be the same for this period as for the period when the Commonwealth was in occupation. What is to be assessed in respect of this latter period is not the value of the occupation, but the damage to the club which was consequential upon the prior Commonwealth occupation. The club, however, was not a freeholder but was a tenant, and was bound by the terms of its lease to go on paying rent at £6,000 per annum and also to pay municipal rates, which during this period amounted to £2,083. The club, it is true, was in occupation again, but the occupation, in the circumstances, was worth nothing because, as the result of the Commonwealth occupation, the racecourse could not be used for the only purpose for which it could be used, namely, for racing. No evidence was given to show that the club could have mitigated its loss by using the racecourse for any other purpose. It is with hesitation that I differ from the decision upon this question of both of my colleagues, but I am of opinion that the payments mentioned represented an unavoidable outgoing for which no value was received as a consequence of the Commonwealth occupation, and that therefore they may properly be taken as the measure of loss caused by that occupation for the purpose of determining the compensation which should be awarded for damage suffered by the club after the Commonwealth occupation had ceased.

Thus in my opinion the value of the occupation by the Commonwealth may fairly be assessed at £6,000 per annum in respect of the period of occupation, and the loss to the club during the period 1st July 1944 to 1st June 1946 at £6,000 per annum plus £2,083, the amount paid under the lease in respect of rates.

But it has been argued for the Commonwealth that, for various reasons, no compensation, or a smaller amount only, is payable in the circumstances of this case.

In the first place it is contended that a racecourse is a non-commercial asset which has no market value and that therefore the rule of what is called alternative re-instatement should be

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

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applied. A church, for example, is not ordinarily saleable for use as a church, and compensation may be awarded upon the basis of the cost of providing an equivalent church. But, in the first place, the fact that a particular owner does not use an asset for commercial purposes has no bearing upon the value of the asset. In the next place, the racecourse was not conducted as a philanthropic enterprise—though, for the reason just stated, that fact is irrelevant in any assessment of the value of property acquired. Further, "reinstatement" is not provided by allowing the assumed or proved cost of holding race meetings on another course. If a house is worth £10,000 but the owner used it only for twelve days in a year, and a public authority takes possession of it by compulsion for one year, the owner is not compensated for such loss of possession by being paid the cost of bed and board for twelve days. Thus, subject to the consideration of certain further arguments for the Commonwealth, the club is entitled to compensation on the basis that occupation of the racecourse was worth £6,000 per annum plus municipal rates when such rates were payable.

It is further contended that the claimant is precluded from making any claim by reason of circumstances which have happened during and since the occupation. In the first place, it is argued that the claimant is precluded from making the claim which was dealt with by the Compensation Board and reviewed by *Mansfield* S.P.J. by an earlier determination of the Compensation Board. As to this determination it is contended, first, that the determination in itself bound the plaintiff, and secondly, that the plaintiff by its conduct accepted the determination and therefore agreed to be bound by it. This was a determination made upon a claim dated 17th September 1942. The claim was forwarded with a letter which stated that the writer (the club's solicitor) was instructed by the club to forward "a list of the amounts expended by and on behalf of the club since the occupation thereof for Commonwealth purposes together with a notification of items of physical damages caused through military occupation of the property." The total claim was £5,975, and the writer asked that a cheque be forwarded in payment of the amount. The particulars of the list enclosed with the letter were headed "Amounts expended by the Brisbane Amateur Turf Club in connection with the Doomben Racecourse since the occupation thereof for Commonwealth purposes." The first item in the claim was for rent from 15th December 1941 to 14th September 1942, nine months at £1,500 per quarter—£4,500. The next was a claim for rates to Brisbane City Council, £1,519 18s. 10d. per annum for nine months —£1,139 19s. 1d. There was then a claim for insurance and for

certain servicing and cleaning work on the course. (It may here be stated that by a letter dated 18th December 1941 the Assistant Director of Hirings informed the club that the Commonwealth would not accept responsibility for insurable losses in respect of property and that the owner should therefore keep the property insured. This was done, and the Commonwealth has re-imbursed the claimant the amounts of premiums for insurance paid throughout the period of occupation and up to 1st June 1946. The same observation applies to expenses of keeping the course in order and preventing damage to it during the same period. No question now arises as to these matters or as to restoration of physical damage.)

By a letter dated 16th August 1943 the club was informed by the Director of Hirings that a determination had been made by the Central Hirings Committee with reference to the list mentioned in the claim and that the Committee had determined that the sum of £2,691 13s. 2d. should be paid to the club. The letter called the attention of the club to reg. 60E (2) of the *National Security* (*General*) *Regulations*, the substance of which was set out. Regulation 60E (1) provides that where a claim for compensation is made the Minister shall serve on the claimant a notice stating—" (*a*) the amount of compensation in the form of a lump sum, or in the form of a periodical payment, or both, which he considers just and reasonable ; or (*b*) that, in his opinion, the claimant is not entitled to any compensation." (Under the Hirings Administration Regulations (reg. 21 (2)) the Central Hirings Committee is authorized to perform these functions of the Minister.) Regulation 60E (2) is as follows :— " Where a notice in pursuance of paragraph (*a*) of sub-regulation (1) of this regulation is served on the claimant, it shall, subject to any right of the claimant to make a further claim by virtue of the proviso to sub-regulation (1) of regulation 60D of these Regulations, be deemed to be an offer accepted by the claimant in full satisfaction of all claims for loss or damage suffered by reason of the doing of the thing out of which his claim arose, and the amount, periodical payment, or both, as the case may be, shall be payable to him by the Commonwealth according to the tenor of the notification, unless, within one month or such further time as the Minister allows after receipt of the notice, he requests the Minister, by notice served personally or by post at the address given in the notice served on the claimant, to refer the claim to a Compensation Board."

On 27th August 1943 information was forwarded to the club of the grounds of the reasons for the determination in the following terms :—" In this matter it is decided that periodical compensation should be based upon the amount of rent which the claimant would

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have had to pay for the meetings held at Albion Park instead of Doomben if it had not been itself the owners of such alternative course. On the information now before the Committee the rent charged to other Clubs for racing at Albion Park was £125 a meeting and it is decided that compensation should be based upon this and an amount of £125 allowed to the claimant in respect of every meeting held at Albion Park which would have been held on Doomben but for the occupation. On this basis there being one of such meetings in 1941, 12 meetings in 1942 and 6 meetings in 1943 up to 30/6/1943, the amount payable up to the latter date is £2,375." In addition, wages of caretaker and plumber were allowed. The letter concluded by stating that " Payment at the rate determined will be made to you at an early date, and it is advised that the acceptance of such payment will in no way prejudice your clients' rights to refer the matter to the Compensation Board. . . . " On 25th September the club forwarded a request to have the claim referred to a Compensation Board—reg. 60E (2).

On 19th April 1944 the club's solicitors wrote to the Hiring Authorities forwarding a claim for £340 10s. 2d. in respect of caretaker's and plumber's wages and mentioning a claim for insurance. The letter concluded in the following terms :—" We also have to advise that we have been instructed to withdraw the Claim made for further compensation in respect of the occupation of the said Doomben Racecourse and would ask you to please be good enough to take this letter as a withdrawal of our request to refer the Claim lodged on behalf of the Brisbane Amateur Turf Club for compensation to a Compensation Board."

Several arguments for the Commonwealth are based upon the above-stated facts. In the first place it is argued that the claim of 17th September 1942 was a claim for periodical compensation under the proviso to reg. 60D, that it was finally determined by the Compensation Board and that it therefore fixed the amount of such compensation for the whole period of occupation and for any further period in relation to which a payment based on the value of occupation could be made (from 31st July 1944, date of going out of occupation, to 1st June 1946, when the course became usable again as a racecourse).

Regulation 60D (1) is in the following terms :—" Any person who has suffered or suffers loss or damage by reason of anything done in pursuance of any of the following regulations and sub-regulations, namely, regulations 53, 54, 55, 56, sub-regulations (1) and (2) of regulation 57, regulation 58 and sub-regulation (4) of regulation 59 of these Regulations, or in pursuance of any order made under any

of those regulations or sub-regulations, while those regulations and sub-regulations were in force, in relation to—(*a*) any property in which he has, or has had, any legal interest, or in respect of which he has, or has had, any legal right; (*b*) any undertaking in which he has or has had any legal interest; or (*c*) any contract to which he is or has been a party, shall, if the compensation, or the method of fixing the compensation, in respect of the loss or damage is not prescribed by any regulations other than these Regulations, be paid such compensation as is determined by agreement or, in the absence of agreement, may, within two months after the doing of the thing on which the claim is based, or, within such further time as the Minister allows, make a claim in writing to the Minister for compensation: Provided that, where the claim is in respect of an interference with rights which is of a continuing nature, the claimant may claim as compensation a periodical payment during the continuance of the interference, and may, within two months after the date upon which the interference ceases, submit a further claim in respect of any loss or damage suffered by reason of anything done during the period of the interference (except damage resulting from war operations) which has not been made good and is not covered by the periodical payment." The proviso to this regulation requires that a claim for compensation for interference which has not been made good and is not covered by the periodical payment must be made within two months of the cessation of the interference.

It is argued for the Commonwealth that the club claimed a periodical payment and that the Compensation Board determined a periodical payment—a periodical payment of £158 per month. This amount is reached in the following manner. The Board allowed £125 per meeting for each of twelve meetings in a year (£1,500), together with £319 in the same period as representing half of the wages of caretaker and plumber, and £79 as representing insurance premiums. The total of these sums is £1,898. This amount has been divided by twelve, and it is said that the result is that the determination of the Compensation Board is a determination of a periodical payment of £158 a month. Then any claim for any amount beyond the periodical payment must be made within two months of the cessation of the interference. The claim now under consideration was not made until 27th November 1947, more than three years after the Commonwealth went out of possession and more than one year after resumption of racing.

But the claim made on 17th September 1942 was not a claim for a periodical payment. It was a claim for a lump sum of £5,975, not at any rate per year or per month, but as representing moneys

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which the club had actually expended during the period covered by the claim. Accordingly, the claim was not a claim which fell within the proviso to reg. 60D. The claim was not a claim with respect to the future, but was only a claim with respect to sums actually expended up to the date of the claim which were claimed as representing expenditure for which, owing to the occupation of the course by the Commonwealth, the club had received no return. As will be seen, the determination made an assessment up to 30th June 1943 and this was accepted by the club, but only in relation to claims up to that date.

Further, the determination, although it concluded with a statement that compensation would be paid " at the rate " determined, was not a determination of a sum to be paid periodically—by the week, by the month or by the year. The award was an award of a lump sum of £2,691, which sum was determined by the number of meetings held at Albion Park upon the basis that the club was entitled only to recompense for what could be regarded as extra expenditure by reason of the use of Albion Park for those meetings which had already been held. In fact no payments were made periodically at the rate of £158 per month or at any other rate.

But the determination was a determination of a claim made in respect of a particular past period. A determination notified under reg. 60E takes effect as an offer deemed to be accepted by the claimant in full satisfaction unless there is a request within one month or such further time as the Minister allows to refer the claim to a Compensation Board. The regulation expressly preserves the right of the claimant to make a further claim by reason of the proviso to reg. 60D (1), but, for the reasons which have been stated, the claim made on 17th September 1942 was not a claim made under the proviso. If there had been no request to refer the determination to a Compensation Board the amount determined by the Central Hirings Board would be deemed to be accepted, but there was such a request, and therefore reg. 60E (2) did not operate so as to produce the result that the determination was accepted.

The claim was referred to a Compensation Board under reg. 60F and thereupon it became the duty of a board to assess the compensation. In the present case, however, the board did not do this because the club withdrew the claim in the terms of the letter of 19th April 1944, and not only withdrew the claim, but also asked that the letter should be taken as a withdrawal of the request to refer the claim to a Compensation Board. Neither the Minister nor any Army authority nor the club sought to prosecute any proceedings before a Compensation Board in relation to the claim.

It is a fair inference from the conduct of the parties that they proceeded upon the basis that the determination as communicated was accepted by the club.

When the Commonwealth authorities were asked to take the letter of 19th April 1944 from the club as a withdrawal of the request to refer the claim to a Compensation Board they were entitled to regard the club as voluntarily placing itself in the same position as if there had been no request to the Minister to refer the claim to a board, that is to say, in the same position as if reg. 60E (2) had come into operation. If reg. 60E (2) had come into operation the determination of the Minister would have been deemed to be accepted. The attention of the club had been expressly called to reg. 60E (2) and the request to forward the claim to a Compensation Board made on 25th September 1943 was a request expressed to be "in accordance with Regulation 60E of the *National Security (General) Regulations*."

The letter of withdrawal either had no effect or it was a deliberate request by the club to be treated as if no request for compensation had been made, the necessary result of the absence of any such request being under reg. 60E that the determination was accepted. Accordingly, I am of opinion that, as both parties acted upon the basis that the request to refer had been withdrawn, the club agreed to accept the compensation as determined and to abandon any request for further consideration by a Board or otherwise. Regulation 60D provides that such compensation shall be paid as is determined by agreement or by proceedings under the regulations. The club, in my opinion, agreed to accept as a proper assessment of compensation the amount determined by the Central Hirings Committee and, by virtue of reg. 60D, is bound by its agreement.

But the determination was accepted only in respect of the claim made on 17th September 1942. The communication dated 16th August 1943 from the Central Hirings Committee begins with the following words:—"With reference to the Claim dated the 17th day of September 1942, made by you pursuant to reg. 60D of the *National Security (General) Regulations*" &c. The determination did not refer to periodical payments to be made throughout the period of occupation. It was made only in relation to the period ending on 30th June 1943, the date mentioned in a letter from the Assistant Director of Hirings of 27th August 1943. Thus the withdrawal of the request to refer to a Compensation Board did not, in my opinion, affect the rights of the club in relation to any period after 30th June 1943.

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A further question arises in relation to the determination made upon the claim dated 17th September 1942. Various claims were made from time to time. These were accompanied or supported by answers to questions contained in a printed form—A.A. Form p. 110. Such a form dated 15th September 1944 contained the following questions and answers :—

"16. (*a*) State whether Agreement was executed between the Claimant and the Commonwealth of Australia with respect to the Use or Occupation

Yes

(*b*) If yes, show—

(i) The date thereof 18 Sep. 42

(ii) The amount of compensation or other moneys paid or payable thereunder £158 per calendar month (round figures)

(iii) Date of Expiration thereof 31 July 1944."

This statement was repeated in substantially identical language in answer to the same questions in claims made on 21st July 1945, and on 27th March 1946.

It is contended for the Commonwealth that these answers show that an agreement was made between the Commonwealth and the claimant on 18th September 1942 for periodical compensation in respect of the whole period of occupation for payment at the rate of £158 a month, and that if such an agreement were made it would be applicable as a measure of the amount properly to be paid for the delay in resumption of racing due to the damage which was repaired in the period between 31st July 1944 and 1st June 1946.

It is plain, however, that though these answers were made on behalf of the company, they were inaccurate in fact. No agreement was made on 18th September 1942. That date was the day after the first claim had been submitted and that claim remained as a claim until a determination upon it was made on 16th August 1943. It is not suggested by the Commonwealth that any agreement was in fact "executed" on 18th September 1942. Any agreement that was made between the parties was made in 1944 upon the withdrawal of the claim for further compensation other than that determined by the Minister, and the withdrawal of the request for reference to a Board of Compensation. That agreement, as already stated, related only to the past and not to the future. Accordingly it has no bearing on a claim in respect of a period after the end of the period to which the last-mentioned determination related. There is no suggestion that the Commonwealth authorities were

misled by the erroneous answers, and in my opinion they do not prejudice the rights of the claimant club.

Various other claims were made by the club from time to time, and determinations were made in respect of them. These claims related to physical damage and expenses incurred in keeping the course and the buildings thereon in repair. Thus on 19th April 1944 a claim was made based on wages paid. It was allowed on 24th May 1944. On 24th October 1944 another claim was allowed at £1,446 15s. 2d. On 17th September 1945 an amount of £2,489 was allowed.

The claim upon which the Compensation Board made the determination which was reviewed by *Mansfield* S.P.J. and which is the subject matter of this appeal was first made on 19th October 1945. The claim was forwarded with a letter which stated that a further claim was forwarded on behalf of the club and continued "should it be necessary we herewith make application for the time to be extended for the lodging of this Claim to bring it within the provisions of 60D of the *National Security* (*General*) *Regulations*."

Regulation 60D provides that the Minister may extend the time for making a claim. Regulation 21 (1B) (*a*) gives the same power to the Central Hirings Committee. No reply was sent to the request for an extension of time. The regulations contain no provision with respect to the manner in which such an extension of time may be given. But no objection that the claim was out of time was taken until May 1948, when the claim had been dealt with by the Central Hirings Committee and the Minister and a Compensation Board. The action of the Committee in dealing with the claim, and the subsequent reference of the claim to a board should, in my opinion, be taken as an implied assent to the request for extension of time. No other view is consistent with the consideration and determination of the claim by the committee. Accordingly, in my opinion it should not be held that this claim should be rejected on the ground that it is out of time.

The claim related to many items of physical damage to the course and to necessary repairs. It also included claims in respect of the Straight Six (determination upon which has been postponed) for insurance and upkeep and wages, as in the case of earlier claims. The principal claim was for £20,125 for rental of property paid to Doomben Park Recreation Ground Pty. Ltd. from 14th September 1941 to 13th September 1945 at £6,000 per year—£22,500 (less amounts received—£2,375). It will be remembered that £2,375 was the amount which was determined as payable by way of compensation (at £125 per meeting for thirteen meetings) upon the first claim of the plaintiff made on 17th September 1942.

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The claim of 19th October 1945 included :—" Amount of rates assessed on the property from 15th December 1941 to 13th September 1945 in respect of which no amount has been paid. Plus interest—£7,839 3s. 7d." As already stated, the claim in respect of rates for the period during which the Commonwealth was in occupation has now been abandoned. On 17th June 1947 the club informed the Army authorities that the claim in respect of occupation of the racecourse would be extended to 1st June 1946, which was the date when the racecourse again became fit for use as a racecourse.

There was a change in the organization of Commonwealth departments and the Hirings Section, instead of belonging to the Northern Command, Australian Military Forces, became a branch of the Department of the Interior. The claim of 19th October 1945 could not be found by the Commonwealth authorities and a copy was forwarded to the Property and Survey Branch, Department of the Interior, on 4th September 1947.

Apparently the Commonwealth authorities asked for an amendment in order to bring the claim up to date, and on 27th November 1947 the claim was made in its ultimate form, rental and rates being claimed from 15th December 1941 to 1st June 1946. Claims in respect of wages and insurance were made in relation to the same period, while claims in respect of the Straight Six were mentioned, but no figure was stated. The Minister for the Interior " or his delegate " determined that £5,242 5s. 8d. should be paid as compensation with respect to all the claims except those which related to the Straight Six. A request was duly made that the claim be referred to a Compensation Board. The amount stated was paid and accepted without prejudice to the legal rights of the club. On 5th May 1948 the basis of the assessment of compensation was explained in a letter to the club's solicitors from the Acting Deputy Crown Solicitor. The allowance in respect of item No. 2, relating to rental, was explained in this letter in the following terms :— " Periodical compensation from 1st July, 1943 to 31st May, 1946, 35 race meetings at £125 per meeting £4,375." No amount of compensation was allowed in respect of the claim based on rates.

On 7th May 1948 the Commonwealth Crown Solicitor wrote to the club stating that it would be contended before the Compensation Board that periodical payments of compensation had been already the subject of earlier determination, which apparently was accepted by the club—that is, the determination of 16th August 1943. The letter added that it would also be contended that the club was out

of time in making "the claim for periodical compensation which has been referred to the Board for assessment."

These objections, namely, (1) that the earlier assessment of compensation was an assessment of periodical compensation in respect of the whole period, from 15th December 1941 to 1st June 1946, and (2) that the claim was out of time, should, in my opinion, be overruled for reasons which have already been stated.

Mansfield S.P.J. held that the claim was not out of time because if the claim were regarded as a claim which could be made after and only after the cessation of interference with rights of a continuing nature under the proviso to reg. 60D the fact was that the interference with the property of which the club was the tenant had not ceased at the time when the club made the claim because the Commonwealth was then still in occupation of the Straight Six. His Honour held that the continued occupation of the Straight Six was an interference with rights which was of a continuing nature, that it had not ceased, and that therefore the claim was rather premature than out of time. The regulations make no provision for piece-meal restoration of land of which possession has been taken under reg. 54. It may be that the Commonwealth could have terminated possession of the whole 137 acres and then re-entered into the fifty acres constituting the Straight Six immediately after the 31st July 1944. If this had been done there would have been a separate authority under which possession of the Straight Six could lawfully be held. This course was not followed. The action of the Commonwealth in relation to the Straight Six after July 1944 was authorized only by the notice with respect to the occupation of "The Doomben Racecourse" which was given in December 1941. There was still occupation of part of the racecourse up to a date in 1948. Any occupation of any part of the racecourse, including the Straight Six, must be regarded as referable to that notice. Thus I agree with the learned judge that the interference which reg. 54 authorized had not ceased as long as the Commonwealth occupied by virtue of the notice and that for this reason the claim, if it should be regarded as made under the proviso to reg. 60D, should not be regarded as made later than two months after the interference had ceased. Further, I repeat, for reasons already stated, that the Minister had extended the time for making the claim.

It is further objected on behalf of the Commonwealth that after the expiration of the lease which was current at the commencement of the occupation by the Army the club had no title to the said property and no right to claim compensation in respect of the

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occupation thereof. As already stated, in December 1941 the club was holding under a lease which expired in May 1942. That lease contained an option for renewal for twelve months and it was renewed so that the term was extended to 1st May 1943. The Commonwealth contends that after May 1943 the owner of the land could not grant a new lease. In fact on 9th April 1943 the lease was extended for a further period of two years at the previous rental of £6,000, together with the condition for payment of rates by the tenant. On 30th April 1945 the lease was renewed for a further period of two years upon the same terms.

It is therefore contended for the Commonwealth that the exclusive possession of the land was in the Commonwealth during the period of occupation and that the owner had no power to grant a lease to any tenant because the owner could not give possession of the land to the tenant, and that the result is that leases for periods after May 1943 were void, and the club, having no title to the land, therefore had no claim for compensation.

The Commonwealth depends upon an analogy derived from the law with respect to concurrent leases. Where a concurrent lease is made by deed it operates at common law as an estoppel and as an assignment of the reversion upon the already existing term. But where it is not made by deed it is void as to any excess over the residue of an existing term. Where the parol lease is for a term less than the residue of an existing term it is void : *Neale* v. *MacKenzie* (1).

In this case the Commonwealth has no lease. The law as above-stated is therefore not directly applicable, but it is contended that it is applicable by analogy and that this is the case even though the occupation of the Commonwealth was an occupation for a period of indefinite duration. In my opinion no satisfactory analogy can be established between this case and the case of concurrent leases. The law with respect to concurrent leases is based on the simple fact that the owner of the land who has granted a lease for, say, three years, cannot effectively grant another lease to another person for the same three years : see *Neale* v. *MacKenzie* (2). But in the present case the Commonwealth comes in by paramount right for an indefinite period without and independently of any grant by the owner. In my opinion there is no principle of law which prevents the owner granting a lease which will be subject to the rights of the Commonwealth under the regulations. A further answer to this objection by the Commonwealth is that the later leases are in

(1) (1836) 1 M. & W. 747 [150 E.R. 635].

(2) (1836) 1 M. & W., at pp. 759-760 [150 E.R. 635].

fact under the seal of the company, and were not parol leases. The company treated itself as bound by them by allowing the tenant to act as tenant in all dealings with the Commonwealth. There is therefore sufficient evidence of delivery as well as of sealing: see cases cited in *Norton* on *Deeds*, 2nd ed., pp. 13-14. Accordingly, in my opinion this objection of the Commonwealth fails.

The result is that in my opinion the amount awarded in the Supreme Court should be reduced by disallowing, as an element in determining the value of the occupation of the land, rent at the rate of £6,000 per annum in respect of the period from 15th December 1941 to 30th June 1943, that is, to the date in respect of which compensation was assessed by the determination of 16th August 1943, the request to refer which to a Compensation Board was withdrawn. The period mentioned is a period of about eighteen months, representing £9,000 in rent. For this period the Supreme Court allowed £9,000 (on the basis of £6,000 per annum) less £2,375. The difference between these sums is £6,625. The amount awarded should therefore be reduced by £6,625 on this account. Municipal rates became payable by the club after the Commonwealth went out of occupation and the amount actually paid by the club was £2,083. Allowance for the payment of this amount should be included as an element in determining the value of the occupation. By agreement of the parties the assessed amount of £32,579 14s. 6d. should be reduced to £20,703 8s. 6d. in any event. This calculation provides for the abandonment of the claim for rates from 15th December 1941 to 31st July 1944. A further reduction should be made of £6,625, leaving the amount of compensation at £14,078. I would therefore allow the appeal with costs and would vary the order of the Supreme Court in the manner stated.

DIXON J. This is an appeal from an order of the Supreme Court of Queensland made in the exercise of Federal jurisdiction.

The matter came before the Supreme Court pursuant to reg. 60G of the *National Security (General) Regulations*. It is not material in this case whether the provision be regarded as procedural or as jurisdictional: cf. *Minister for the Army* v. *Parbury Henty & Co.* (1); *Minister of State for the Navy* v. *Rae* (2); *Marine Board of Launceston* v. *Minister of State for the Navy* (3). For in either case an appeal lies to this Court. The order, which was made by *Mansfield* S.P.J., determined an amount of compensation to be payable by the Commonwealth in respect of a claim made by the respondents the

(1) (1945) 70 C.L.R. 459.
(2) (1945) 70 C.L.R. 339, at p. 349.
(3) (1945) 70 C.L.R. 518, at p. 533.

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Brisbane Amateur Turf Club. The order fixed the amount at £32,579 14s. 6d. and ordered payment of that sum accordingly, together with the taxed costs of the proceedings in the Supreme Court. The claim was for compensation for the occupation by the Commonwealth of the respondent club's racecourse, called Doomben Park, from 15th December 1941 to 31st July 1944 and for certain consequential loss. The course suffered considerable physical damage, but this had either been made good or paid for. No question remained outstanding on that score, except that, because, owing to its condition, the course could not be used for racing until 31st May 1946, compensation for the loss of the use of the course did not stop at 31st July 1944 but was awarded to the respondent club up to the later date.

The respondent club did not own the racecourse but occupied it as lessees at an annual rent. As lessees they assumed responsibility for the municipal rates. *Mansfield* S.P.J. based his assessment of compensation on the view that the amount of the rent together with the rates provided evidence of the annual value to the respondent club of the occupation of the racecourse of which the Commonwealth had deprived them and, in the absence of evidence to the contrary, his Honour measured that value accordingly adding a small amount in respect of premiums for insurance.

By an oversight, however, credit was not given to the Commonwealth for a sum or sums which the Commonwealth had paid in respect of the occupation of the racecourse. The amount for which the Commonwealth is entitled to credit is, after a minor adjustment, £5,456 7s. 5d. Further, under the ordinances of the City of Brisbane relating to rating " land in the occupation of the Crown, whether of any Department of the Commonwealth or of any Department of the State of Queensland " is excepted from rateability. From 15th December 1941 to 31st July 1944, therefore, the land was not liable for rates. Moreover there was a considerable area of land, part of the course used as a straight six furlongs, which the Commonwealth never handed back, and eventually, on 10th June 1948 we were told, resumed altogether so that it might be incorporated in the Eagle Farm aerodrome. Counsel for the respondent club, throughout the proceedings, had adopted the attitude that the savings to the club of rates must be taken into account and he conceded before us that the order must be further reduced because the saving of rates had not been so taken into account. We are told that the amount by which, on this ground, it is conceded the assessment should be reduced is £6,419 18s. 7d. After the two foregoing sums are

deducted the assessment of compensation by *Mansfield* S.P.J. is reduced to £20,703 8s. 6d.

The Commonwealth, however, complains that this sum is excessive and appeals against the order.

The respondents are a Racing Club consisting of about forty members. The club is managed by a committee of eight. Its property is vested in two trustees. The owner in fee simple of the racecourse is a company called Doomben Park Recreation Grounds Proprietary Ltd. By *The Racing and Coursing Regulation Acts* 1930 *to* 1936 (Qld. Acts, vol. 3, p. 725) race meetings cannot be conducted for private gain. The company could not therefore carry on the business of racing on the Doomben Park course. By a lease granted on 7th March 1932 the company leased the course to the respondent club for a term of seven years from a date to be fixed by events, a date which seems to have been ascertained as 1st May 1932. The club covenanted to erect a number of structures at a cost not exceeding £25,000. For the first four years the rent reserved was £2,000 per annum. It then went up by a thousand pounds a year until for the seventh year it was £5,000. A new lease was granted or new leases were granted for the years ending 1st May 1940 and 1st May 1941 at a rent of £6,000 per annum. The lease was renewed by an informal agreement for the year ending 1st May 1941. The agreement gave an option of renewal for another year. While this term was on foot, on 15th December 1941, the Commonwealth took over the racecourse, which was used as a camp for American troops. The respondent club owned another racecourse, called Albion Park. Unlike the Doomben Park course, Albion Park course was not a grass track but a dirt track. It could therefore be used with great frequency. A given number of race days were assigned under the legislation to Doomben Park course. The racing for these days was transferred to Albion Park. Two or three other racing clubs whose racecourses were taken for the purposes of the war were also allowed to race at Albion Park. The respondent club, after some demur, accepted a fee from the chief of these clubs for each day's racing. It was fixed at £125. The same charge was then made to the other two clubs. The racing drew large crowds and there was not a decrease but an increase in the net returns from the racing days at Albion Park course representing the meetings which would have been held at Doomben Park course. Regulation 60D of the *National Security (General) Regulations* prescribes how a claim for compensation is to be made. If the compensation is not determined by agreement, then within two months after the doing of the thing on which the claim is based,

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or within such further time as the Minister allows, the person suffering loss or damage may make a claim in writing to the Minister. There is a proviso. The proviso relates to an interference with rights which is of a continuing nature. In such a case the claimant may claim as compensation a periodical payment during the continuance of the interference. Two months after it ceases the claimant may then submit a further claim in respect of any loss or damage suffered by reason of anything done during the period of the interference which has not been made good and is not covered by the periodical payment. On 17th September 1942 the respondent club submitted a claim covering the period of nine months from 15th December 1941 to 14th September 1942. The claim was based upon expenditure. The items were rent, rates, insurance, some small items of maintenance and half the wages of a caretaker and a plumber. There seems to have been an arrangement that the employment of the caretaker and the plumber should be continued but that the Commonwealth should bear half the wages. This item is therefore scarcely part of the compensation. On the day following the date of this claim, namely on 18th September 1942, the *National Security* (*Hirings Administration*) *Regulations* came into operation. The claim was dealt with under those regulations. Regulation 21 (2) provides that, where a claim in respect of a hiring (an expression defined to cover an exercise of power under the General Regulations such as that in question) is made in pursuance of reg. 60D of the General Regulations, the Central Hirings Committee or its delegate shall determine (*inter alia*) the amount of compensation in the form of a lump sum or in the form of a periodical payment or both which the committee or its delegate, as the case may be, considers just and reasonable. The Central Hirings Committee sought from the respondent club and obtained information concerning the number of race meetings held in the period in question and the cost to the club of using Albion Park course as an alternative.

On 27th August 1943 a formal determination of the Central Hirings Committee was sent to the respondent club accompanied by a letter setting out for the club's information what was described as the " full determination " of the Committee. This stated that it had been decided that periodical compensation should be based upon the amount of rent the club would have had to pay for holding at Albion Park course the meetings belonging to Doomben Park course, had the club not itself been the owner of the Albion Park course. The committee took the figure of £125 a meeting because it was the charge made to other clubs. It took a period up to 30th June 1943 and did not stop at the date up to which the actual

claim had gone, viz. 15th September 1942. After the date when the Commonwealth had gone into occupation there had been one such meeting in 1941, twelve in 1942 and six in the first six months of 1943. So for the occupation of the Doomben Park racecourse during the period up to 30th June 1943 the Central Hirings Committee decided that the amount payable was £2,375, that is £125 for each of the nineteen race meetings transferred to Albion Park course. The Committee also allowed half the wages of the plumber and caretaker; but for the wages they had only the figures for the nine months to which the claim related and they calculated the amount no further than that period.

It will be seen that the Central Hirings Committee professed to decide what the periodical compensation should be, although the respondent club's claim was not expressed as a claim for a periodical payment. Regulation 21 (2) of the Hirings Administration Regulations is open to an interpretation by which the power of the Committee to determine an amount of compensation in the form of a periodical payment would apply whether the claim is for a periodical payment or not. Possibly that is the interpretation the Central Hirings Committee placed upon the clause. But I think that reg. 21 (2) of the Hirings Administration Regulations must be read with reg. 60D of the General Regulations. The purpose of the former clause is to replace sub-reg. (1) of the latter. The better interpretation is to refer the power to fix a periodical payment given by either clause to the choice given by reg. 60D (1) to the claimant. He is given a choice enabling him to claim a periodical payment. If he does so reg. 60E (1) of the General Regulations where it applies and reg. 21 (2) of the Hirings Administration Regulations where it applies enable the Minister in the one case and the Central Hirings Committee in the other to determine compensation in the form of a periodical payment. But where the claimant does not seek a periodical payment there is no power to award one.

Upon this view the determination of the Central Hirings Committee was inefficacious as a determination of a periodical payment. But I think that it was capable of a valid operation as a determination of an amount of compensation payable in respect of the occupation of the premises up to 15th September 1942. There is, no doubt, a plausible argument upon the text of reg. 60D (1) which would deny validity to such an operation of the determination. The argument is that on its proper construction the clause presents a choice, where the interference is of a continuing nature, between making a claim when all the interference is over and the "doing of the thing" to which the clause refers is complete and making a

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claim for a periodic payment. That is to say it does not allow of a third course, namely, taking a period of occupation or interference up to date and making a claim for compensation for that period, without regard to what may happen afterwards. "Periodical payment" implies that it shall be payable for the future as well as the past.

I think that the argument depends upon the meaning of the words "anything done" and "doing of the thing" contained in reg. 60D (1). To require that continuous occupation of a piece of land shall be terminated before it can be said that loss or damage has been suffered by reason of "anything done" or the "doing of a thing," appears to me to place an inconvenient and unnecessarily rigid construction upon the clause. It is not an easy question of construction. But I think that substantial considerations make it proper to give a wide meaning and flexible application to the very general words of the clause.

Accordingly I take the notification of the Central Hirings Committee as amounting to a determination of compensation payable to the respondent club for the occupation by the Commonwealth of the racecourse up to and including 30th June 1943. The fact that the period went beyond the claim might be important, were it not for what next happened.

Regulation 60E (2) of the General Regulations, as affected by reg. 21 (4) of the Hirings Administration Regulations, provides in effect that if notice of a determination is served on a claimant, it is to be deemed an offer accepted in full satisfaction of all claims for loss or damage suffered by reason of the doing of the thing out of which his claim arose unless within a month or such further time as is allowed he requests the Minister to refer the claim to a Compensation Board. At first the respondent club protected themselves by a request to refer the claim to a Compensation Board. But some six months later, on 19th April 1944, they withdrew the request. This was done in a letter which began by referring to the notice of determination and to the request to refer. It then proceeded to state the amount of the wages of the caretaker and the plumber for the twelve months ending 18th September 1943. Except that the determination took 14th September 1942, not 18th September, as the ending date of the previous period of nine months, these are the wages for the twelve months following the determination. The letter then went on to state the annual amount of the insurance premium, which had been included in the claim but not in the determination, and to ask that it be taken into consideration. The letter concluded with a withdrawal of "the claim made for

further compensation in respect of the Doomben Racecourse" and a withdrawal of the request to refer the claim to a Compensation Board. This in my opinion amounts to an intimation that except for the annual insurance premium the respondent club is satisfied with the basis of compensation adopted in the determination and accordingly desires that the request to refer shall be considered as if it were not made.

The intimation was acted on by the Minister abstaining from referring the claim to a Board and by the Central Hirings Committee giving another determination in respect of the insurance premiums and half the wages of the caretaker and the plumber. The premiums were awarded as from the date of occupation, 15th December 1941, to 18th September 1943, and the wages for the twelve months ended 18th September 1943. This was done by a determination dated 24th May 1944. The determination was transmitted by a letter expressly referring to the communication of 19th April 1944, that by which the withdrawal was made.

In my opinion the withdrawal of the request to refer the claim to a Compensation Board operated to place the respondent club in the same position as if the request had never been made. For the purpose of giving finality to the determination it invited the adoption of a conventional assumption that the request had not been made. The assumption was adopted and the respondent club cannot now depart from it. It follows that reg. 60E (2) applied to the determination of 27th August 1943 so as to require that it should be deemed to be an offer accepted by the claimant. The fact that the determination covered a period beyond that of the claim is an objection which the respondent club plainly waived both by the withdrawal and by the acceptance of payment of the amount of the determination. The payment was made on 7th September 1943, actually before the request to refer. But the acceptance and retention of the amount is inconsistent with a complaint that the determination goes beyond the period of the claim. It is, I think, a question of some doubt whether the respondent club did not also preclude itself from asserting a claim for future compensation in respect of the Commonwealth's bare occupation of the land, as distinguished from physical damage, on any other basis than the periodical payment which it is fairly plain the Central Hirings Committee had in mind. The withdrawal of the request to refer and of further claims is of course one factor. But in addition, at subsequent dates, in putting forward claims for physical damage the respondent club asserted on three occasions that a periodical compensation had been agreed. This was stated in a claim dated

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15th September 1944, in another dated 21st July 1945 and in a third dated 27th March 1946. The claims were made on departmental forms containing questions. They were signed by the secretary of the respondent club who was also its solicitor. Information responsive to the questions was given, including the statement that an agreement was executed between the claimant and the Commonwealth the date of which was 18th September 1942, that the amount of compensation or other moneys payable thereunder was £158 per calendar month in round figures, and that it expired on 31st July 1944. On the third occasion, that is in the claim of 27th March 1946, the word " recommended " is introduced before the words " round figures " and after them the words " subject to a further claim." The date 18th September 1942 was that of the formal establishment of the Central Hirings Board, which dealt with the claim of the club bearing the previous day's date. The sum of £158 is arrived at, clearly enough, by adding £33 to the £125 fixed as the compensation for each of the twelve race meetings of the year transferred to Albion Park. The amount of £33 added represents the monthly average total of half the wages of the caretaker and the plumber and the insurance premium. Of course no such formal agreement was executed. But it is the question that speaks of an agreement " being executed " and the answer is simply " Yes." It seems a certain inference that for a very long time the respondent club was content to proceed on the basis that compensation for the occupation of the course had been agreed at the rate of £125 for twelve meetings a year lost, together with insurance and half the wages of the caretaker and plumber. Before 27th March 1946, namely, on 19th October 1945, the respondent club had formulated a much more extensive claim, in fact the claim which is now before us. The qualifying words " subject to a further claim " were doubtless introduced for that reason in setting down on the form the answers to the questions which on the two earlier occasions had been answered absolutely.

But in spite of the weight of these considerations I have come to the conclusion that there is not enough to conclude the respondent club from advancing a greater claim in respect of the period of the Commonwealth's occupancy after 30th June 1943. To be effective as a settlement of the claim an agreement of the nature suggested must involve an exchange of promises by which the Commonwealth agreed to pay and the respondent club agreed to accept, for the use and occupation of the premises, £158 a month so long as the occupancy continued. The Commonwealth called no oral evidence to prove that any express agreement took place. The secretary of

the club did give evidence but he disclaimed any such agreement. The transition from £125 a race meeting together with half the wages of caretaker and plumber to the fixed figure of £158 a month, though perhaps natural, stands unexplained by evidence. The date suggests that the "agreement" referred to is an agreement by construction of law, consisting in the claim, the determination by the newly-born Central Hirings Committee and by its subsequent acceptance. On the whole I think that an agreement to accept for the period after 30th June 1943 a periodical payment of £158 a month or £125 a month or £125 for every racing meeting transferred to Albion Park course, as periodical compensation for the occupancy of Doomben Park course, has not been established by the Commonwealth. It was suggested, however, that the respondent club was precluded or estopped from denying that a periodical payment had been fixed or determined to cover the period. There are, I think, two answers to this suggestion. One is that estoppels must be certain and there is not sufficient certainty about the intention of the formal determination to fix a periodical rate binding in the future or about the rate intended to be fixed. That is to say there is an uncertainty whether it was intended to fix a monthly rate of £125 because there had been twelve meetings a year transferred or to fix a rate depending in the future upon the number of meetings actually held, and it is uncertain how far the wages entered into the periodical compensation.

The second answer is that the Commonwealth does not appear to have acted upon any assumption that for the period after 30th June 1943 compensation consisted in a fixed periodical payment. No payment was made for that period until 22nd January 1948. By that time the whole matter was in dispute and in fact the payment was accepted without prejudice to the claims the determination of which was pending. It is therefore necessary to consider the assessment of compensation for the occupancy of the racecourse by the Commonwealth for the period after 30th June 1943. *Mansfield* S.P.J. made such an assessment for the whole period of occupation and for the subsequent period from 31st July 1944 to 31st May 1946 during which the course was not fit for use.

The claim for such compensation, which formed the foundation of the reference to the Compensation Board and the review by the Supreme Court was, as has already been stated, made on 19th October 1945. The claim included among the particulars rental at £6,000 a year and a contingent liability for rates. The decision of this Court in the case of *Minister of State for the Army* v. *Parbury*

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Henty & Co. Pty. Ltd. (1) had been pronounced on 10th August 1945 and it is possible that it was responsible for the change of front which the claim of the respondent club of 19th October 1945 showed. For the decision must have made it plain that the measure of the compensation to which the club was entitled in respect of the occupation of the racecourse by the Commonwealth was not simply recoupment of the financial prejudice the club suffered in its business of racing, but the value of the interest in property or the proprietary rights of which it had been deprived. In fact the net earnings from the race meetings held at Albion Park course had been greater than they formerly were at Doomben Park course. The amount for which the respondent club was prepared to let the Albion Park course to other clubs for a day's racing did not necessarily show what was the value of the club's occupation of Doomben Park course, of which it had been deprived by the Commonwealth. No doubt the ability to obtain elsewhere accommodation for the conduct of the enterprise is a circumstance to be taken into account. But the view that it is equivalent to a re-instatement, the cost of which may be a controlling consideration in assessing value, appears to me to be misconceived.

The measure of value required by the decision to which I have referred, a decision itself founded upon *Minister of the Army* v. *Dalziel* (2) is one not easily applied to a piece of land equipped as a racecourse in a place where racing for individual profit is not permitted. *Mansfield* S.P.J. began from the prima-facie position that the rent and rates the respondent club as tenant was prepared to pay afford evidence of the annual value to the club of its occupation as lessee. As the entry by the Commonwealth relieved the respondent club of rates for the period of the Commonwealth's occupancy, this relief must be taken into consideration on the other side of the account, with the practical consequence that rates can for that period be neglected. No doubt the position from which *Mansfield* S.P.J. began is legally unassailable. But it is based on the assumption that the rent is fixed as an ordinary business transaction between parties with opposing interests. Many of the circumstances of the present case make this a very dubious assumption. But I think it was a question of fact for *Mansfield* S.P.J. to decide whether reliance can be placed upon the rent fixed by the lease as an index of annual value. Though his use of it is complained of as wrong in law by a ground of appeal, erroneously, there is no ground directed to the question whether in fact it represented a rent arrived at by reference to the real value of the tenancy to the respondent club. Nor was

(1) (1945) 70 C.L.R. 459.

(2) (1944) 68 C.L.R. 261.

that made a feature of the argument of the appeal. I am therefore not prepared to disturb the conclusion adopted by *Mansfield* S.P.J., namely, that the rent formed a prima-facie index of annual value which is not rebutted.

Accordingly I accept, though not without misgiving, the assessment of £6,000 per annum as the value of the occupation of the premises of which the Commonwealth deprived the respondent club and apply that value to the period from 30th June 1943 to 31st July 1944, a period of thirteen months.

From 31st July 1944 the respondent club and not the Commonwealth was in possession of the Doomben Park racecourse, except the piece of land forming the straight six furlongs. No doubt the principle of the decisions of this Court to which I have referred continued to apply to the latter piece of land until the fee simple was resumed. But to the main part of the course it ceased to apply when possession was restored to the club. There was no longer any estate or interest in land compulsorily taken. But though possession of the land was restored, the usefulness of the land to the respondent club was impaired, or temporarily destroyed, because of the physical condition in which the land was left. To assess compensation for that involves arriving at the cost of reparation and at the loss suffered by the occupier because the occupier cannot put it to proper use. This is a somewhat different conception from that of ascertaining the annual value of a site occupied, independently of the particular situation of the occupier who has been dispossessed. I do not think that in the case of *Brickworks Ltd.* v. *Minister for Army* (1) the result would have been the same, if the question had been compensation for loss of the possible use of the premises for brick-making by reason of the physical condition in which the premises were left. I think that to employ the rent fixed by the lease as the measure of this loss becomes very unreal. On the other hand it seems probable that the sum of £125 for every racing meeting held at Albion Park course that would have been held at Doomben Park course leaves some charges insufficiently covered. Some expenditure at Doomben Park must have been thrown away during this period, if only of the wages of the caretaker, plumber and gardener. The proportion of the rent attributable to the straight six furlongs at an average rate per acre, not a very satisfactory basis, is £184 a month. This perhaps should be allowed in respect of the period up to the resumption of that piece of land which we were told was 10th June 1948, that is after the hearing by the Board of Review.

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It is not easy to be sure what loss the respondent club really suffered by reason of their inability to race at Doomben Park course between 31st July 1944 and 31st May 1946. But it seems just to rely upon the preparedness of the club up to October 1945 to accept £158 per month, remembering, however, that only half the wages of the caretaker and the plumber are included in that sum and no wages for the gardener. It is impossible to form more than an estimate but I would award £200 a month in addition to the £184 a month referable to the occupation of the piece of land retained by the Commonwealth.

For the period from 31st July 1944 to 31st May 1946 I would assess the compensation at £384 a month or £8,448. For the period from 30th June 1943 to 31st July 1944 I would assess it at £500 a month or £6,500. For the period from 15th December 1941 to 30th June 1943 I think the determination made must stand. The determination was for an amount of £2,691, which has been paid. For the period from 1st July 1943 to 31st May 1946 an amount of £4,537 3s. was paid on 22nd January 1948 in respect of occupation as distinguished from physical damage. On 24th May 1944 a sum of £79 18s. 3d. was paid, representing insurance which must be referred to the same head and credited accordingly. The remainder of the amount paid on that day is not referable to compensation for mere occupation in the period to which it relates.

The result of my consideration of the case up to this point is that the compensation assessed for occupation by the Commonwealth of the racecourse and for its subsequent impairment of use would stand as follows:—

Period	*Amount*	*Payment*	*Balance*
15th Dec. 1941 to 30th June 1943	£2,691 13 2	£2,691 13 2	Nil
30th June 1943 to 31st July 1944	£6,500 0 0	£79 18 3	£6,420 1 9
31st July 1944 to 31st May 1946	£8,448 0 0	£4,537 3 0	£3,910 17 0
			£10,330 18 9

In addition it appears to me that in respect of the piece of land retained by the Commonwealth £184 a month should run on from 31st May 1946 until 10th June 1948. But possibly some or all of this period is outside the reference to the Compensation Board and outside the review by the Supreme Court.

There remain, however, two points of law, relied upon by the Commonwealth, which if correct would operate in the case of one

of them to bar the claim and in the case of the other of them to prevent the recovery by the respondent club of the greater part of it.

The first point is that at the time when the claim was lodged which is the foundation of these proceedings it was out of time. That is the claim of 19th October 1945. The " thing done " was completed, so it is said, when on 31st July 1944 possession was restored to the respondent club, and reg. 60D (1) of the General Regulations fixes two months or such further time as the Minister allows as the period within which a claim may be made. Regulation 21 (1B) of the Hirings Administration Regulations, a clause which came into force on 24th August 1944, enables the Central Hirings Committee or its delegate to enlarge the time. *Mansfield* S.P.J. considered that, as the straight six furlongs had not been given up, time had not begun to run. Upon the interpretation I have given to the regulations, however, it must be taken that time runs from the end of the particular period selected as the subject of the claim propounded. I am not prepared to say that a limitation of two months is just, so as to be inconsistent with s. 51 (xxxi.) of the Constitution. It is a very brief time. But be that as it may, I think that the Commonwealth is in a position to rely on the limitation as an objection to the claim. The letter accompanying the claim asked for further time. The request was not expressly answered but a determination was given and sent to the respondent club with a formal notification that they might request a reference to a Compensation Board and that otherwise it would be binding. A request to refer was made and the Minister referred the claim accordingly to a Board.

Moreover an amended claim had been asked for by the Commonwealth and supplied before the actual determination. I do not think that under the regulations it is open to the Minister to accept a claim, give a determination, make a reference, and then, before the Compensation Board and afterwards before the Court upon review, object that there was no valid claim because it was out of time. In any case I think that the Commonwealth is precluded upon the facts from saying that further time was not allowed.

The second point relates to the title of the respondent club to the use and occupation of the land after 30th April 1942. The lease or agreement for a lease under which the club or its trustees held the racecourse at the time when the Commonwealth entered expired on that day. There was an option of renewal for another year which was exercised. A lease for another two years was granted as from 1st May 1943. Then there was another lease for two years as from 1st May 1945. When the option was exercised

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and the first of the two successive leases was granted the Commonwealth held the land, which it occupied under its statutory right. There was no lease under seal, at all events for the period covered by the option. It is said that no interest could pass to the club as lessee under the exercise of the option or the grant of the lease, because the owner in fee simple, Doomben Park Recreation Grounds Proprietary Ltd., held in reversion. The Commonwealth was in possession under a statutory title of indefinite duration and, so it was contended, the owner had only a reversion expectant on the determination of the Commonwealth's interest. The common-law doctrine was invoked that an immediate grant of a leasehold interest in the reversion, as distinguished from an *interesse termini* to take effect at the end of an existing term, must be by grant and so under seal. Accordingly if the interest in the reversion is of no greater duration than the balance of the existing term, is intended to take effect in reversion immediately and is made by parol, it is ineffectual at common law. This is explained in *Smith* v. *Stapleton & Heycock* (1); see *Neale* v. *MacKenzie* (2). A concurrent lease, if made by deed, operates as an assignment of the reversion upon the first lease for the term of the second or concurrent lease. But if made by parol for a less term than the original lease it is ineffectual. An assignment by deed for a term of years of the reversion entitles the assignee to the rents. These principles are inapplicable to the present case. The Commonwealth was not the grantee of a term of years. It was in under a statutory right enabling it to occupy at will, that is at the Commonwealth's will. The period of occupation is undefined; there is no reversion expectant upon a recognized common-law interest. The real difficulty is that the lease for the period beginning 1st May 1943 is subsequent to the Commonwealth's entry. The previous renewal was the result of an option which existed at the date of the entry. Both interests were however, intended to take effect immediately so as to give an immediate right to the rents and profits of the land including the compensation for exclusion from occupation. The Commonwealth was bound to compensate either the owner or the club for depriving the one or other of the right to occupy the premises. I see no reason why the right to possession should not be granted by a lease although the Commonwealth was in actual possession. The Commonwealth recognized the respondent club as the person entitled to possession and compensation for exclusion

(1) (1573) 2 Plowden 427, at p. 432 [75 E.R. 642, at p. 649].

(2) (1835) 2 C. M. & R. 84 [150 E.R. 36]; (1837) 1 M. & W. 747 [150 E.R. 635].

therefrom. In my opinion the respondent club is entitled in virtue of its successive leases to the compensation because of the entry of the Commonwealth and the retention of possession.

I think that the appeal should be allowed with costs. The amount of compensation due should be reduced to £10,331. The respondent club should have the costs of the proceedings by way of review in the Supreme Court.

McTIERNAN J. I agree with the conclusions reached by the Chief Justice and *Dixon* J. on the question of law to which those conclusions respectively relate, except that I agree with the latter's conclusion as to the principle upon which compensation should be assessed in respect of the period from 31st July 1944, when the Commonwealth gave up possession of the land except "the six furlongs," to 1st June 1946, when that land became fit for racing. In respect of that period I agree with *Dixon* J. that compensation ought not to be assessed on the basis of an acquisition or taking of the respondent's right of possession but on the basis of its loss of the use of the land which was returned to it, for racing, and concur in his Honour's order determining the amount of compensation which ought to be paid to the respondent.

Appeal allowed with costs. Order of Supreme Court varied by substituting the sum of £10,331 *for the sum of* £32,579 14*s.* 6*d.*

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

Solicitors for the respondent: *D. J. O'Mara & Robinson.*

B. J. J.