[HIGH COURT OF AUSTRALIA.]

KU-RING-GAI MUNICIPAL COUNCIL . . APPELLANT;
DEFENDANT,

AND

ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES . . . . RESPONDENT.
PLAINTIFF,

THE MINISTER FOR PUBLIC WORKS OF NEW SOUTH WALES . . . . APPELLANT;
DEFENDANT,

AND

REGINALD CLARK TURNER AND ALAN TASMAN GURR . . . . . RESPONDENTS.
PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1957.

SYDNEY, *Apr.* 1, 2; *Sept.* 12.

Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.

Land — Acquisition — Resumption — Compensation — Interest — Quantum — Right — Vested — Accrual — Gazette notification — Statute — Amendment — Prospective or retrospective operation — Existing right — Effect — Intention — Local Government Act 1919-1945 (*N.S.W.*), *ss.* 532, 536—*Public Works Act* 1912 (*N.S.W.*), *ss.* 43-45, 126 (1), (2), (3)—*Land Acquisition (Charitable Institutions) Act* 1946, *ss.* 3 (1), 5—*Interpretation Act of* 1897 (*N.S.W.*), *s.* 8.

In the absence of evidence of an intention discoverable in s. 5 of the *Land Acquisition (Charitable Institutions) Act* 1946 (N.S.W.) to substitute a reduced rate of interest for an acquired right to interest at four per cent per annum on moneys payable by way of compensation in respect of a resumption the variable rates of interest provided for in s. 126 of the *Public Works Act* 1912 (N.S.W.) as amended by s. 5 aforesaid are by virtue of s. 8 of the *Interpretation Act* of 1897 not applicable to moneys so payable in respect of a resumption effected prior to the amending Act coming into operation.

Sydney Municipal Council v. *Troy* (1927) A.C. 706 considered.

H. C. OF A. 1957.

KU-RING-GAI MUNICIPAL COUNCIL v. ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES.

Decision of the Supreme Court of New South Wales (Full Court): *Attorney-General for New South Wales* v. *Ku-ring-gai M.C.*; *Turner* v. *Minister for Public Works* (*N.S.W.*) (1957) S.R. (N.S.W.) 17; 73 W.N. 636, affirmed.

APPEALS from the Supreme Court of New South Wales.

In actions brought in the Supreme Court of New South Wales by way of writs of summons between (i) the Attorney-General for the State of New South Wales as plaintiff and the Ku-ring-gai Municipal Council as defendant and (ii) Reginald Clark Turner and Alan Tasman Gurr as plaintiffs and the Minister for Public Works (N.S.W as defendant in pursuance of s. 55 of the *Common Law Procedure Act* 1899, a special case was stated in each action.

The questions for determination were similar in each case and depended upon the construction of s. 126 of the *Public Works Act* 1912 (N.S.W.) as amended by s. 5 of the *Land Acquisition (Charitable Institutions) Act* 1946.

In the first-mentioned action the case was stated in the following terms (omitting certain formal passages):

1. On 4th July 1944 the defendant council made an application under ss. 532 and 536 of the *Local Government Act* 1919, as then amended, for the approval of His Excellency the Governor to that council acquiring by way of resumption certain land and deposited a sum with the Minister being the estimated cost of compensation for the resumption of the land together with interest and all necessary charges and expenses incidental to such resumption and also gave an undertaking to pay any additional amount required.

2. The said land was duly resumed by notification in the Government *Gazette* No. 106 of 20th September 1946.

3. A notice of claim and abstract dated 19th December 1946 was duly received from Christopher Bowes Thistlethwayte, William Lyle Patison and Reginald Clark Turner, the then trustees of the estate of William Moore deceased, the owner of the resumed land wherein they claimed the sum of £66,000 being £55,000 as value of property and £11,000 as compensation.

4. A notice of valuation of such claim at the sum of £15,000 was duly issued to the said trustees.

5. The trustees being dissatisfied with that valuation commenced an action to recover compensation for such resumption and claimed therein the sum of £66,000.

6. The action was remitted to the Land and Valuation Court for determination under s. 9 of the *Land and Valuation Court Act* 1921 and after hearing the action *Sugerman* J., the judge of the Land and Valuation Court, did on 20th March 1953, determine the

compensation payable by the Minister in respect of the resumption at the sum of £35,000.

7. At the request of the Minister *Sugerman* J. stated a case for the decision of the Full Court of the Supreme Court and in a judgment dated 28th September 1953 that court upheld the decision of *Sugerman* J.

8. The Minister subsequently appealed to Her Majesty in Council against the decision of the Full Court of the Supreme Court and such appeal coming on to be heard the Lords of the Judicial Committee of the Privy Council reported to Her Majesty as their opinion that the appeal should be dismissed whereupon the aforesaid sum of £35,000 together with statutory interest at the appropriate rate became due and payable by the Minister to the trustees.

9. A claim was duly made by the Minister upon the defendant council for additional moneys to enable payment of compensation and statutory interest to be made to the claimants such interest being calculated at the rate of £4 per cent per annum from the date of resumption, namely, 20th September 1946 up to the date of payment.

10. As at the date of resumption, namely, 20th September 1946, provision for the payment of statutory interest upon compensation for land resumed was to be found in s. 126 of the *Public Works Act* 1912 which in so far as relevant was in the following terms :— " 126. (1) In all cases where compensation or costs are awarded or adjudged to be paid by the Constructing Authority, the amount thereof shall be paid to the party lawfully entitled thereto, or to his agent duly authorised in that behalf, within one month after such amount is determined. Provided that in every such case the party claiming payment shall be bound to make out a title to the lands or interest in lands in respect of which he claims to the satisfaction of the Constructing Authority. (2) If such compensation is payable in respect of land taken or acquired by notification in the *Gazette*, it shall bear interest at the rate of four per cent per annum from the time of such notification."

11. This provision was amended by the *Land Acquisition (Charitable Institutions) Act* 1946 which was assented to on 27th December 1946, the relevant amendment being found in s. 5 of the amending Act and being in the following terms :—" 5. The Public Works Act, 1912, as amended by subsequent Acts, is amended—(a) . . . (b) by omitting from subsection two of section one hundred and twenty-six the words ' it shall bear interest at the rate of four per cent per annum from the time of such notification ' and by inserting in lieu thereof the words ' it shall, for the period of twelve months

H. C. OF A. 1957.

KU-RING-GAI MUNICIPAL COUNCIL v. ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES.

next following the time of the notification, bear interest at the rate of four per centum per annum, and thereafter shall bear interest at the rate payable by a bank on a fixed deposit with the bank for a period of twelve months of a sum equivalent to the amount of such compensation : Provided that where at any time or from time to time after the expiration of the said period of twelve months and before the compensation is paid, the rate of interest payable by a bank on a fixed deposit as aforesaid is altered, the compensation shall as from the date of the alteration bear interest at that altered rate '."

12. The rate of interest payable by a bank in New South Wales upon a fixed deposit for a period of twelve months on the sum of £35,000 was one per cent from and including 29th September 1947 to and including 29th July 1952 ; one and one-half per cent from and including 30th July 1952 to 31st December 1954 ; and one and three-quarters per cent from and including 1st January 1955 until the commencement of this action.

13. The defendant council refused and still refuses to pay interest calculated as set out in par. 9 hereof and paid interest on the said sum of £35,000 calculated as follows :

For first year following date of resumption, four per cent per annum.

From 20th September 1947 to 29th July 1952, one per cent per annum.

From 30th July 1952 to 31st December 1954, one and one-half per cent per annum.

From 1st January 1955 to date of payment one and three-quarters per cent per annum.

14. On 23rd May 1955 a notice of intention to institute proceedings against the defendant council to recover the amount of the difference between the sums arrived at by calculating interest on the basis referred to in pars. 9 and 13 hereof, was duly given.

In the action secondly mentioned the case was stated in the following terms (omitting certain formal passages) :

1. On 20th September 1946, the then trustees of the will of William Moore late of Lawson, New South Wales, homoeopathic practitioner, deceased, were, as such trustees, the registered proprietors for an estate in fee simple of about forty-eight acres of land at Gordon, New South Wales.

2. By reason of the deaths since that date of certain trustees and by reason of certain consequent appointments of new trustees, the plaintiffs are the present trustees of the said will.

3. By notification published in the *Gazette* on 20th September 1946 pursuant to s. 536 of the *Local Government Act* 1919, as amended to the said date, the then Minister resumed the land under Div. 1 of Pt. V of the *Public Works Act* 1912, as amended to the said date, and notified that the land was vested in the Council of the Municipality of Ku-ring-gai.

4. Within ninety days from 20th September 1946 (namely, on 19th December 1946) the then trustees of the said will duly served upon the Minister and upon the Crown Solicitor a notice in writing setting forth the matters referred to in pars. (a) and (b) of s. 102 of the *Public Works Act* 1912.

5. At all material times before 27th December 1946 s. 126 of the Act provided as follows :

[Sub-sections (1) and (2) of s. 126 as stated in par. 10 of the first case stated, were set out, after which sub-s. (3) was set out as follows :]

" (3) All moneys by this Act directed to be paid by the Constructing Authority shall be paid by warrant of the Governor addressed to the Treasurer."

6. On 27th December 1946 the Royal Assent was given to the *Land Acquisition (Charitable Institutions) Act* 1946 (Act No. 55 of 1946), s. 5 of which provided that the *Public Works Act* 1912, as amended by subsequent Acts should be amended *inter alia*—

[Sub-section (b) of s. 5 was set out as appearing in par. 11 of the first case stated.]

7. The Minister duly complied with s. 103 of the *Public Works Act* 1912.

8. The trustees of the will and the Minister did not agree as to the amount of compensation payable in respect of the resumption as aforesaid of the land, and the trustees therefore, by writ of summons issued on 25th October 1951, instituted an action in the Supreme Court which action after issue joined was remitted pursuant to s. 9 of the *Land and Valuation Court Act* 1921 to the Land and Valuation Court.

9. The only issue upon the pleadings in that action was the quantum of compensation payable and, the action having been so remitted, the Land and Valuation Court on 20th March 1953 determined that issue and adjudged the amount of the said compensation at £35,000.

10. The said judge having on the written requirement of the Minister stated a case, pursuant to s. 17 of the said Act, for the decision of the Supreme Court thereon, that court on 28th September 1953 duly delivered its decision thereon, from which the Minister

H. C. OF A. 1957.

KU-RING-GAI MUNICIPAL COUNCIL v. ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES.

appealed to Her Majesty in Council, who dismissed the appeal on 22nd July 1954.

11. The Minister on 24th December 1953 paid the trustees of the will £25,250 on account of the sum of £35,000, and on 5th July 1955 paid them the balance, namely £9,750 of the said sum.

12. The Minister has paid the trustees £4,074 0s. 3d. on account of interest, and claims that that amount is the total amount of his liability on account of interest.

13. The plaintiffs claim that interest is payable only in accordance with the provisions of s. 126 of the *Public Works Act* as it stood before it was amended as aforesaid, and that therefore interest is payable at the rate of four per cent per annum on the said sum of £35,000 from 20th September 1946 to 24th December 1953 and on the said sum of £9,750 from 25th December 1953 to 5th July 1955, so that the sum of £10,785 14s. 5d. is payable for interest, of which the sum of £6,711 14s. 2d. is due and unpaid.

14. The defendant disputes the plaintiffs' claim and claims that, on the contrary, interest is payable only in accordance with s. 126 of the *Public Works Act* 1912 as amended by s. 5 of the *Land Acquisition (Charitable Institutions) Act* 1946, and that therefore interest is payable at the rate of four per cent per annum for the period of twelve months next following 20th September 1946 and thereafter (subject to the proviso to sub-s. (2) of s. 126) only at the rate payable by a bank on a fixed deposit with the bank for a period of twelve months of a sum equivalent to the amount of such compensation.

15. The following are particulars since 17th January 1944 of the rate of interest payable by cheque-paying banks in Australia on fixed deposits of any amount for a period of twelve months:

Date from which rate operated	*Rate per cent per annum*
17th January 1944	One and one-half
11th August 1944	One and one-quarter
1st December 1945	One
29th July 1952	One and one-half
1st January 1955	One and three-quarters
15th March 1956	Two and three-quarters.

16. On 27th December 1946 certain resumptions had been effected by notification in the *Gazette* before 1st December 1944 in respect of which compensation had not been wholly paid by 27th December 1946.

The question of law submitted for decision by the court was substantially similar in each case and was as follows: "Whether interest upon so much of the said sum of £35,000 payable as compensation for the subject land as was for the time being unpaid should be calculated: (i) at the rate of four per cent per annum from the date of the resumption until payment, or (ii) at the varying rates provided for in s. 126 of the *Public Works Act* 1912 as amended by s. 5 (b) of the *Land Acquisition (Charitable Institutions) Act* 1946."

The Full Court of the Supreme Court (*Owen*, *Herron* and *Manning* JJ.) answered the questions in the stated cases: (i) Yes; (ii) No. (1).

From that decision the council and the Minister for Public Works appealed by special leave to the High Court.

G. P. Stuckey Q.C. (with him *F. Officer* and *E. E. George*), for the appellant Ku-ring-gai Municipal Council. The amendment effected by s. 5 of the *Land Acquisition (Charitable Institutions) Act* 1946 is prospective from the time it is passed and deals with the ascertainment of compensation at any time thereafter. The procedure is stated in *Collins* on *Valuation of Property Compensation and Land Tax*, 3rd ed. (1949), pp. 244-248. Statutes should not be construed to have a retrospective operation unless such an intention clearly appears from the words used: *Maxwell* on the *Interpretation of Statutes*, 9th ed. (1946), pp. 221 et seq. The *Public Works Act* 1912, as amended, in Pts. V, VI and VII, provides the code for the general regulation of the rights of the Crown to take lands by *Gazette* notification and the rights of the subject, in respect of the lands taken, to compensation. The right to interest does not arise from the *Gazette* notification but flows from an award of compensation. Unless the dispossessed owner establishes his title in compensation and hence no interest becomes payable. The amended s. 126 (2) of that Act is remedial legislation. It was designed to correct what the legislature regarded as wrong. If there is any doubt about whether a particular provision should be construed to be retrospective or prospective, then it ought to be construed as prospective rather than retrospective unless there is a clear indication to the contrary in the words themselves: *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Federated Clerks' Union of Australia, N.S.W. Branch* (2). Under s. 126 (2) of the *Public Works Act* 1912, as amended, interest does not accrue from day to day. Until there has been an adjudication as to the amount of compensation there is no interest payable. The amendment makes

(1) (1957) S.R. (N.S.W.) 17; W.N. 636. 73

(2) (1950) 81 C.L.R. 229, at pp. 245, 246.

H. C. OF A. 1957.

KU-RING-GAI MUNICIPAL COUNCIL v. ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES.

no alteration in the framework of sub-s. (2) of s. 126. The section is prospective in operation and has no retrospective operation whatever. [He referred to *Sydney Municipal Council* v. *Troy* (1) and *West* v. *Gwynne* (2).] As to retrospective legislation and the effect of legislation on existing rights see *South Australian Land Mortgage & Agency Co. Ltd.* v. *The King* (3). The question was dealt with in *Ross* v. *Beaudry* (4).

[McTIERNAN J. referred to *Kraljevich* v. *Lake View & Star Ltd.* (5).]

The right to payment of interest arises when the compensation is ascertained, and the transaction is not closed until there is at least an adjudication on the amount of the award or in fact the amount is paid. No alteration was made in the words "land taken or acquired by the *Gazette* notification" and when it is found that there is an alteration in the method of calculating interest on compensation awarded, then the words "land taken or acquired" are to be taken to refer to all lands, irrespective of when it was taken, whether before or after the amendment. Section 8 of the *Interpretation Act* of 1897 (N.S.W.) speaks of the "repeal" but in this amending Act the legislature used the word "amend" and not "repeal": *Moakes* v. *Blackwell Colliery Co. Ltd.* (6). The same principle as was applied in *Ross* v. *Beaudry* (7) should be applied in this case: see also *West* v. *Gwynne* (8) and *Sydney Municipal Council* v. *Troy* (9). The fact that the calculation of interest is to be made in respect partly of a period already passed, when the amendment came into effect, does not make the amendment retrospective; the amended sub-section applies to all amounts of compensation as and after it came into operation, irrespective of when the notification in the *Gazette* was given: *Reg.* v. *Inhabitants of St. Mary, Whitechapel* (10); *Overseers of Salford* v. *Overseers of Manchester* (11); *Reg.* v. *Inhabitants of Christchurch* (12) and *Master Ladies Tailors' Organisation* v. *Minister of Labour and National Service* (13). All those cases are in line with the construction contended for by the appellant and show that in respect of all

(1) (1926) 26 S.R. (N.S.W.) 507, at pp. 508-510, 512; (1927) A.C. 706, at pp. 709, 710; (1927) 27 S.R. (N.S.W.) 308, at pp. 311, 312.
(2) (1911) 2 Ch. 1, at pp. 11, 13.
(3) (1922) 30 C.L.R. 523, at pp. 546, 547.
(4) (1905) A.C. 570, at pp. 574, 575.
(5) (1945) 70 C.L.R. 647, at p. 652.
(6) (1925) 2 K.B. 64.
(7) (1905) A.C. 570.
(8) (1911) 2 Ch. 1.
(9) (1927) A.C. 706; 27 S.R. (N.S.W.) 308.
(10) (1848) 12 Q.B. 120, at p. 127 [116 E.R. 811, at p. 814].
(11) (1863) 3 B. & S. 599, at p. 603 [122 E.R. 225, at p. 227].
(12) (1848) 12 Q.B. 149, at pp. 152, 156 [116 E.R. 823, at pp. 824, 825].
(13) (1950) 66 T.L.R. (Pt. 2) 728, at p. 730.

compensation assessed after that date for land acquired or taken by notice in the *Gazette* at any time the dispossessed owner is only entitled to interest at the rate under the amended sub-section. The enacting part of sub-s. (2) is complete and unambiguous. One cannot, or should not, alter the plain meaning of an enacting provision by reference to the proviso unless it is clearly necessary to do so: *Jennings* v. *Kelly* (1). The words "is altered" fall naturally into place on the construction now submitted of the sub-section because they relate to periods of time after the amendment, but before the calculation. The construction of the amendment refers to all compensation for all land acquired. It applies to compensation payable in the future, assessed in the future. The substitution of the provisions of s. 126 (2) came into operation at once on the passing of the Act in 1946, therefore the omitted provisions ceased then to have effect and became as if they had never been.

E. T. Perrignon, for the appellant Minister for Public Works. This appellant adopts the argument addressed to the Court on behalf of the other appellant.

J. D. Holmes Q.C. (with him *E. N. Dawes*), for the respondent Attorney-General for the State of New South Wales. Sub-section (1) of s. 126 of the *Public Works Act* 1912 refers to all cases where compensation or costs are awarded or adjudged whether the resumption be effected by *Gazette* notification under Div. 1 of Pt. VII of such Act or by notice to treat under Div. 2 of such Part. Sub-section (2) is confined to compensation payable in respect of a taking by a *Gazette* notification. There is some difficulty in making "such" work as a word to tie in s. 126 (1) because that sub-section is dealing with both types of compensation whereas sub-s. (2) of s. 126 is clearly defined to one type of compensation. "Awarded" in s. 126 (1) refers to the method of determination following a notice to treat whereas "adjudged" refers to the other method of determining compensation, that is on the verdict of the jury by the court which would suggest that the word "such" in sub-s. (2) does not refer back to sub-s. (1) at all but is independently dealing with interest on compensation where the compensation is payable in respect of land acquired by *Gazette* notification. That being so is a reason for saying that sub-s. (2) itself gave the right to interest in respect of this particular method of acquisition—it was

(1) (1940) A.C., at pp. 217, 218, 220.

H. C. OF A. 1957.

KU-RING-GAI MUNICIPAL COUNCIL v. ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES.

not simply a subsidiary provision following on sub-s. (1) and dealing with the assessment of the interest after the assessment of the compensation, that it was giving an independent right to interest on compensation. Section 45 converts all rights into rights to compensation, therefore, on notification in the *Gazette* the dispossessed owner has in lieu of his land, the right to be paid compensation arrived at in a particular manner and that is the right he gets immediately on publication of the notice in the *Gazette*. The right to compensation under s. 45 includes a right to interest and it does that either as a result of the construction of the Act, apart altogether from s. 126 (2), or, alternatively, that s. 126 (2) does give the right. The word "compensation" includes "interest": *Inglewood Pulp & Paper Co.* v. *New Brunswick Electric Power Commission* (1). If there was no s. 126 (2) in the *Public Works Act* that case would be authority for the proposition that interest would be payable as from the date of the taking, which is notification in the *Gazette*, and interest would be payable on the compensation money when the compensation money was assessed. Whether interest was payable and the amount thereof was dealt with in *In re claim of Myles McRae* (2). The right to the payment of interest was recognised as marching with the taking of possession: *In re Piggott and the Great Western Railway Co.* (3). Alternatively, s. 126 (2) gives the right to interest and fixes the rate at which interest is to be paid, as well as the time from which it is to be paid, and in doing so it gives a right to the dispossessed owner which accrues to him at the time when the notice in the *Gazette* is published. When the estate of the owner is converted into a claim for compensation, it is a claim for compensation with interest payable at the rate and from the time specified in the section. The quantification of the compensation is simply a subsequent determination of the value as it was at the date of the notification. The owner at the date of such notification has an assumed right to compensation. If that be so then the *Interpretation Act* of 1897 applies and the rights have all been fixed by the statute in the form it was before the amendment. It is obvious that the word "such" at the commencement of sub-s. (2) of s. 126 cannot be referred back to sub-s. (1) of s. 126; it cannot refer to compensation awarded or adjudged—it would contradict itself. What was said by the judges in *Marcus Clark & Co. Ltd.* v. *Commissioner for Railways* (4) was *obiter dicta* but two of the judges supported the view now submitted to this

(1) (1928) A.C. 492, at p. 498.
(2) (1893) 10 W.N. (N.S.W.) 62.
(3) (1881) 18 Ch. D. 146.
(4) (Full Court, Supreme Court of New South Wales—21st June 1950, unreported.)

Court. One gets the matter in perspective in *Troy's Case* (1). The words in s. 17 of the *Sydney Corporation Act* were very much wider, and included all other Acts that affected the question, including the *Interpretation Act* of 1897. All that has happened in this case is that part of the section has been omitted—in effect repealed—and something else has been substituted for it. The *Interpretation Act* of 1897 still remains. The accrued right of an owner as at the date of the *Gazette* notification was one to compensation and interest at four per cent. The right was preserved by the *Interpretation Act* of 1897. *Troy's Case* (2) is not inconsistent with anything submitted to the Court on behalf of this respondent. It concedes a title to interest arising with the title to compensation, and the result on the rate flows rather from the use of the wide words at the commencement of s. 17 which are different in import from the words used in the 1946 statute. The words in s. 5 of the *Land Acquisition (Charitable Institutions) Act* 1946 do not carry the matter into the same field as the wide words used in *Troy's Case* (2) the latter displaying all other legislation, whereas this only displaced s. 126 as it stood and repealed those words but did no more than that. This respondent adopts the judgment of the court below. That court did not use the proviso in the 1946 Act as a means of construing the substantive amendment to s. 126, but used it rather as emphasising the correctness of the view to which it would otherwise come. *Bennett* v. *Minister for Public Works (N.S.W.)* (3) does not touch this particular question.

M. F. Loxton Q.C. (with him *B. B. Riley*), for the respondents Turner and Gurr. This case raises the question whether, at the time of the coming into force of the *Land Acquisition (Charitable Institutions) Act* 1946, the right to interest at the higher rate was a right that had vested or accrued or was merely an existing right. A vested right is one where the right has been obtained and the liability fixed by operation of law upon events against which the existing law provided: *Kraljevich* v. *Lake View & Star Ltd.* (4), whereas an existing right is merely a right to take advantage of an enactment or of a common law right. No question of retrospectivity arises when vested or accrued rights are sought to be affected. *Abbott* v. *Minister for Lands* (5) was a case of an existing right. The other cases cited by the appellants were also cases of existing rights. In those cases upon the amendment the right was

(1) (1927) A.C., at pp. 708-710; 27 S.R. (N.S.W.), at pp. 310-312.
(2) (1927) A.C. 706; 27 S.R. (N.S.W.) 308.
(3) (1908) 7 C.L.R. 372.
(4) (1945) 70 C.L.R. 647, at pp. 652, 653.
(5) (1895) A.C. 425.

H. C. OF A. 1957. KU-RING-GAI MUNICIPAL COUNCIL v. ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES.

repealed and there was then no right of which advantage could be taken. Here by the operation of the existing law upon events that had happened the respondents' property in the land was converted before the amendment into a chose in action, a claim for compensation. This appears from the *Public Works Act* 1912, ss. 39, 43, 45 (1), (2), 101, 104, 124 and 126. The claim is for compensation " in manner hereinafter provided ", that is to say, to be determined upon the basis provided in s. 124 and to be paid in accordance with s. 126 (1) as to time, with interest at the rate provided in s. 126 (2). " Claim " is synonymous with " right ". It vested in substitution for the rights taken. In the absence of a contrary intention the repeal of s. 126 (2) would not at common law take away a right to interest that had vested or accrued. Section 8 (b) of the *Interpretation Act* of 1897 is relied upon. Here there is no contrary intention. The words of the section as amended do not express an intention that the amended rate shall apply to all resumptions nor is there any such intention by necessary implication. The words used on their interpretation limit the scope of the amended section to resumptions after 27th December 1946, and the right to interest at the higher rate in this case remains unaffected by the amendment.

G. P. Stuckey Q.C., in reply. It was not the correct use of the words " from now on " to effect an acquired right if they reduced interest rates *in futuro* : *West* v. *Gwynne* (1). The members of the Court in *Marcus Clark & Co. Ltd.* v. *Commissioner for Railways* (2) agreed with the view now submitted on behalf of the appellants. The definition of a vested right as a right obtained by operation of law on events which have already happened, does not go far enough ; there must be something done to assert the right. That is the very point in *Abbott* v. *Minister for Lands* (3) ; *Hamilton Gell* v. *White* (4) and *Reynolds* v. *Attorney-General for Nova Scotia* (5). In dealing with the matter of compensation regard should be had to the words in sub-s. (3) of s. 45 of the *Public Works Act*. If the appellant succeeds in the appeal it should be awarded costs.

M. F. Loxton Q.C., by leave. This is a test case. In the circumstances in any event the respondent should not be ordered to pay costs.

Cur. adv. vult.

(1) (1911) 2 Ch. 1.
(2) (Full Court, Supreme Court of New South Wales—21st June 1950, unreported.)
(3) (1895) A.C. 425.
(4) (1922) 2 K.B. 422.
(5) (1896) A.C. 240.

The following written judgments were delivered :—

DIXON C.J., MCTIERNAN AND TAYLOR JJ. These are appeals from orders of the Supreme Court of New South Wales answering certain questions in cases stated by the parties in two related actions. The questions raised concern the rate of interest which the compensation payable in respect of the acquisition of some land should carry. The acquisition is that which was the subject of the appeal to the Privy Council reported under the title *Minister for Public Works* v. *Thistlethwayte* (1). It appears that the Ku-ring-gai Municipal Council applied under ss. 532 and 536 of the *Local Government Act* 1919, as amended, for the approval of the resumption of the land and undertook to recoup the expenditure on account of compensation. That was as long ago as 4th July 1944. Thereupon on 20th September 1946 a notification was published in the *Gazette* resuming the land. As a result of proceedings which ended with the decision of the Privy Council already mentioned the compensation stood determined at £35,000 together with statutory interest. Of the two proceedings in which the cases were stated, one is by the landowners against the Minister to enforce their right to interest and the other by the Attorney-General on behalf of the Crown against the municipality to enforce, so far as it concerns interest, the undertaking to recoup the Crown's expenditure in respect of compensation. In both cases stated the same question is necessarily raised. It is how, having regard to Act No. 55 of 1946, s. 5, the interest is to be calculated. By the combined operation of s. 536 (4) and (5) of the *Local Government Act* 1919 (N.S.W.), as amended, and ss. 43, 44, 45 of the *Public Works Act* 1912 (N.S.W.) as amended the land vested in the municipality as from 20th September 1946 and the estate or interest of the landowners was turned into a claim for compensation : a claim entitling them on making out title to compensation as provided by the Act. By s. 126 (1) of the *Public Works Act* payment of compensation where it is awarded or adjudged to be paid is required to be made to the party entitled thereto within one month after such amount is determined. A proviso makes that subject to showing title. There follows sub-s. (2) which was as follows—(2) If such compensation is payable in respect of land taken or acquired by notification in the *Gazette*, it shall bear interest at the rate of four per cent per annum from the time of such notification.

Had this provision remained unamended the landowners would have been entitled to interest on the compensation viz. £35,000 at four per cent per annum from 20th September 1946 until payment.

(1) (1954) A.C. 475.

H. C. OF A. 1957.

KU-RING-GAI MUNICIPAL COUNCIL v. ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES.

Dixon C.J. McTiernan J. Taylor J.

But on 27th December 1946 Act No. 55 of 1946 was passed and it contains an amendment of sub-s. (2) of s. 126 of the *Public Works Act*. The statute is called the *Land Acquisition (Charitable Institutions) Act* 1946 and s. 3 (1) says that the provisions of the Act shall apply to and in respect of such institutions as the Governor may from time to time by notification published in the *Gazette* declare to be institutions for the purposes of this Act, and to and in respect of those institutions only. No such institution is concerned in the present case and it is only by putting aside this expression of the legislative will that s. 5 which enacts the amendment of the *Public Works Act* 1912 can be held to apply. Section 5 simply opens with the words " The Public Works Act 1912, as amended by subsequent Acts, is amended . . . " and then the amendments are stated. One is naturally entirely incredulous as to the real existence of an intention that this amending provision should be confined as s. 3 (1) provides. But there is nothing but incredulity to warrant the court in denying any effect, in the case of s. 5, to the completely clear and emphatic restriction upon the operation of the whole Act. However the parties were so incredulous that they proceeded to discuss s. 5 and the effect of the amendment it makes as if s. 5 were a general enactment.

The problem which arises from so treating s. 5 in its application to s. 126 (2) of the *Public Works Act* 1912 is a difficult one. Paragraph (b) of s. 5 provides that the *Public Works Act* 1912 as amended by subsequent enactments is amended " (b) by omitting from subsection two of section one hundred and twenty-six the words 'it shall bear interest at the rate of four per cent. per annum from the time of such notification' and by inserting in lieu thereof the words 'it shall, for the period of twelve months next following the time of the notification, bear interest at the rate of four per centum per annum, and thereafter shall bear interest at the rate payable by a bank on a fixed deposit with the bank for a period of twelve months of a sum equivalent to the amount of such compensation: Provided that where at any time or from time to time after the expiration of the said period of twelve months and before the compensation is paid, the rate of interest payable by a bank on a fixed deposit as aforesaid is altered, the compensation shall as from the date of the alteration bear interest at that altered rate'."

There is nothing in the text to suggest an answer to the question whether the legislature adverted to acquisitions already made where the compensation had not then been assessed or paid and whether it possessed any actual intention as to the application or want of application of the amendment to such cases.

The form of the amendment is to repeal the words of s. 126 (2) which provide that the rate of interest which the compensation shall bear is to be four per cent per annum and then in lieu thereof to insert words providing bank rate after twelve months at four per cent. Perhaps too much should not be made of the form of the amendment but it happens to bring out the fact that in an amendment of this kind there is an abrogation of an old provision and the introduction of a new one. Before the common law rule was changed by such provisions as s. 8 of the *Interpretation Act* of 1897 of New South Wales this meant that so far as the previous law went it had no operation that could support the continued existence of rights arising out of a transaction that had not been completed. In the absence of some provision to the contrary it was just as if the previous provision had never existed except as to transactions passed and closed: *Surtees* v. *Ellison* (1); *Victorian Stevedoring & General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2); *Maxwell* v. *Murphy* (3).

It appears to us that the first step is to decide whether the "right" to interest at four per cent per annum existing in the plaintiffs at the passing of Act No. 55 of 1946 is of a description which s. 8 of the *Interpretation Act* would keep alive. Otherwise the old law would apply unless something to the contrary can be found in s. 5 (b). Section 8 (b) is the most material part. It provides that "where an Act repeals in the whole or in part a former Act, then, unless the contrary intention appears, the repeal shall not . . . (b) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under an enactment so repealed". Although in cases of amendment the "retrospectivity" of the amending provision is often discussed without express reference to s. 8 (b) or analogous enactments, it seems to us that it applies as much to a repeal to make way for a substitutional provision as to a simple repeal. If there is any manifestation of an intention in the amending enactment that the amendment should apply to rights etc., arising from events that have already occurred then the application of s. 8 (b) will be negatived. But, if not, the rights so arising are supported and continued by that paragraph of s. 8. In the present case s. 126 (2) of the *Public Works Act*, before its amendment, conferred a right to interest at four per cent per annum from the notification in the *Gazette* calculated on an amount then unascertained and payable at an uncertain future time. The interest doubtless accrued

(1) (1829) 9 B. & C. 750, at p. 752 [109 E.R. 278, at p. 279].
(2) (1931) 46 C.L.R. 73, at pp. 105, 106.
(3) (1957) 96 C.L.R. 261, at pp. 266-268.

H. C. OF A. 1957.

KU-RING-GAI MUNICIPAL COUNCIL v. ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES.

Dixon C.J. McTiernan J. Taylor J.

from day to day. In these circumstances there is doubtless something to be said for the view that the right at any given date as for instance 27th December 1946 to that rate of interest during the remaining period in which compensation should remain unpaid is not a " right accrued under the enactment ". But on consideration we think that it is such a right. It is a right conferred as part of the reparation for the loss of the owner's land which the statute provides as the equivalent of the enjoyment of the land of which the owner has been deprived. He is given a capital sum with four per cent per annum thereon until payment. The ascertainment of the capital sum must be worked out under the statutory provisions. But it is none the less true that the owner on the loss of his land " acquires " a right in recompense therefor and the interest represents the deprival of income pending the payment of the capital sum, income representing the enjoyment of the land of which he has been deprived.

Beginning with the view that there is an " acquired right " to interest at four per cent per annum, we think that before the amendment is construed as substituting a reduced rate for this " acquired right " some evidence of an intention to produce that effect should be discoverable in s. 5 of No. 55 of 1946.

There is in our opinion no evidence or indication of such an intention to be discovered. The whole amendment is expressed in a way altogether consistent with an intention to affect only resumptions made after it comes into operation.

We therefore think that the amendment does not apply to the present case and that the judgment of the Supreme Court is right.

We do not fail to appreciate the use made by the appellant of *Sydney Municipal Council* v. *Troy* (1), but we think that the fact that we are here dealing with the deprivation of a right to a rate of interest obtained as a result of resumption under the statutes is of vital importance. Further the nature of the amendment made is very different from the positive statutory statement as to interest under consideration in that case. It is we think fallacious to reason from that case to the present. In our opinion the appeal should be dismissed.

FULLAGAR J. These two appeals from the Supreme Court of New South Wales were heard together. On 20th September 1946 the Council of the Municipality of Ku-ring-gai compulsorily acquired (or " resumed ") certain land in its municipal district, of which the respondents in the second case were the owners. The amount of

(1) (1927) A.C. 706.

compensation payable to them in respect of the land was not finally determined until some time in 1953. It is common ground that interest on this amount is payable to the former owners from the date of the resumption to the date of payment but the rate of interest is in dispute. The reason why there were two proceedings in the Supreme Court is that the compensation and interest are payable by the Crown to the former owners, but the Crown is entitled to be indemnified by the council of the municipality. In each of the two actions the parties agreed on a case stated for the Full Court. The effect of the answers given by the Full Court to the questions asked by the cases is that the rate of interest payable is four per cent per annum. The appellant contends that a lower rate is payable for at least a part of the period. The question depends on the effect to be given to an amendment of s. 126 of the *Public Works Act* (N.S.W.) which came into force shortly after the date of resumption. It is necessary, however, to refer to a number of provisions of the *Local Government Act* 1919 and the *Public Works Act* 1912.

At the time of the resumption s. 532 of the *Local Government Act* provided that the council might acquire land for any purpose of the Act by, *inter alia*, " resumption ". Section 536, so far as material, provided : " (1) Where the council proposes to acquire land by resumption it may apply to the Governor through the Minister. (2) The Council shall make provision to the satisfaction of the Governor for the payment of compensation for the land together with interest and all necessary charges and expenses incidental to the resumption. (3) The Governor may authorise the appropriation or resumption of the land. (4) Thereupon the Minister for Public Works may—(a) appropriate or resume the land by *Gazette* notification under Division 1 of Part V of the Public Works Act 1912 ; and (b) notify that the land is vested in the council. (5) Thereupon the land shall vest in the council." The council and the Minister proceeded under these provisions, and 20th September 1946 was the date on which the relevant notification was published in the *Gazette*.

So far as compensation is concerned, we have to turn to the *Public Works Act*. The effect of a *Gazette* notification under Div. 1 of Pt. V of that Act was, by virtue of s. 45 (1) to vest the whole estate and interest of the former owners of the land in the acquiring authority. Sub-sections (2) and (3) of s. 45 were in the following terms :—" (2) Every such estate and interest shall, upon the publication of such notification as aforesaid be taken to have been

H. C. OF A. 1957.

KU-RING-GAI MUNICIPAL COUNCIL v. ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES.

Fullagar J.

converted into a claim for compensation in pursuance of the provisions hereinafter contained. (3) Every person shall upon asserting his claim as hereinafter provided and making out his title in respect of any portion of the said resumed lands be entitled to compensation on account of such resumption in manner hereinafter provided."

The provisions to which the words "hereinafter provided" refer were contained in Pt. VII of the Act. Section 101 provided that the former owners should be "entitled to receive such sum of money by way of compensation for the land of which they have been deprived under this Act as shall be agreed upon or otherwise ascertained under the provisions of this Division of this Act." The succeeding sections of Div. 1 of Pt. VII provided for the assessment of compensation, where the amount was in dispute, in proceedings in the Supreme Court or a district court. Division 3, which comprised ss. 124 and 125, dealt with the basis on which compensation was to be assessed. Division 4, which is headed "*Payment*" consisted of s. 126. Section 126 provided: "(1) In all cases where compensation or costs are awarded or adjudged to be paid . . . the amount thereof shall be paid to the party lawfully entitled thereto, or to his agent duly authorised in that behalf, within one month after such amount is determined. Provided that in every such case the party claiming payment shall be bound to make out a title to the lands or interest in lands in respect of which he claims to the satisfaction of the Constructing Authority. (2) If such compensation is payable in respect of land taken or acquired by notification in the *Gazette*, it shall bear interest at the rate of four per cent. per annum from the time of such notification."

If s. 126 had stood in its then form, it would have been quite clear in the present case that the former owners of the land acquired were entitled to interest at the rate of four per cent per annum from 20th September 1946 to the date of payment of the amount of compensation assessed. On 27th December 1946, however, the *Land Acquisition (Charitable Institutions) Act* 1946 came into force. Section 5 of that Act was in the following terms: "The Public Works Act, 1912, as amended by subsequent Acts, is amended . . . (b) by omitting from subsection two of section one hundred and twenty-six the words 'it shall bear interest at the rate of four per cent. per annum from the time of such notification' and by inserting in lieu thereof the words 'it shall, for the period of twelve months next following the time of the notification, bear interest at the rate of four per cent. per annum, and thereafter shall bear interest at the rate payable by a bank on a fixed deposit with the bank for a period of twelve months of a sum equivalent to the amount of

such compensation: Provided that where at any time or from time to time after the expiration of the said period of twelve months and before the compensation is paid, the rate of interest payable by a bank on a fixed deposit as aforesaid is altered, the compensation shall as from the date of the alteration bear interest at that altered rate '."

It may be noted in passing that it might possibly have been argued, having regard to the title to the Act and the context in which the amendment of s. 126 (2) found itself, that it was intended to apply only to cases where land had been resumed for the purposes of charitable institutions. No such argument, however, was put, and I think that the correct view is that the amendment was intended to apply generally.

In my opinion, to construe the enactment of 1946 as applying to cases where the *Gazette* notification had been published before its commencement would be to give to it a retrospective operation within the meaning of the rule that " no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require that construction " (*Broom's Legal Maxims*, 8th ed., p. 25). I pointed out recently in *Maxwell* v. *Murphy* (1) that, when the word " retrospective " is used in this connexion, it is not used in its strict meaning of " *ex post facto* " (2). A true *ex post facto* statute is a comparatively rare thing. What the rule really means is that prima facie a statute must not be construed so as to change the legal character, or the legal consequences, of past events and transactions. The expression " change the character of past transactions " is used by *Willes* J. in the well known passage in *Phillips* v. *Eyre* (3). In *Reg.* v. *Guardians of Ipswich Union* (4), *Cockburn* C.J. said: " It is a general rule that, where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts coming into existence after the Act " (5). In *Kraljevich* v. *Lake View & Star Ltd.* (6), *Dixon* J. stated the rule in similar terms. He said: " The presumptive rule of construction is against reading a statute in such a way as to change accrued rights the title to which consists in transactions passed and closed or in facts or events that have already occurred " (7). So in that case it was held that an amendment of a *Workers' Compensation Act*, which altered the method of assessment of compensation in certain cases, was not applicable to a case in which the accident to the worker had occurred before the

(1) (1957) 96 C.L.R. 261.
(2) (1957) 96 C.L.R., at p. 285.
(3) (1870) L.R. 6 Q.B. 1, at p. 23.
(4) (1877) 2 Q.B.D. 269.
(5) (1877) 2 Q.B.D., at p. 270.
(6) (1945) 70 C.L.R. 647.
(7) (1945) 70 C.L.R. at p. 652.

H. C. OF A. 1957.

KU-RING-GAI MUNICIPAL COUNCIL v. ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES.

Fullagar J.

amendment came into force: cf. *Moakes* v. *Blackwell Colliery Co. Ltd.* (1); *Clement* v. *D. Davis & Sons, Ltd.* (2); *British Broken Hill Pty. Co. Ltd.* v. *Simmons* (3). Those were all cases relating to workers' compensation. The fact or event to which the relevant legal consequences attached was the accident to the worker. In the present case the fact or event to which the relevant legal consequences attach is the notification of resumption in the *Gazette*. Prima facie the amendment of 1946 must be read as not attaching new and different legal consequences to a notification published before that amendment became law.

The rule is, of course, only a rule of construction. There is no more than a presumption, which must yield to any sufficient indication of a contrary intention. In the present case, however, everything tends to reinforce, rather than to negative, the presumption. For not only are the words in their natural meaning apt to refer only to future *Gazette* notifications, but the greatest difficulty is encountered in applying them to past notifications. Clearly there might be cases in which, at the time when the Act of 1946 came into force, more than twelve months had elapsed since the notification without any assessment of compensation having been made. We were informed that there was in fact a number of such cases. The amended sub-section, as the learned judges of the Supreme Court in effect pointed out, cannot be applied to such cases without what really amounts to a distortion of what it says.

It was suggested by counsel for the appellants that in such a case the rate of four per cent would be payable in respect of the period between the date of the *Gazette* notification and the date when the amendment became law, and at the bank rate on fixed deposits from the date when the amendment became law to the date of payment. Such a construction did not, it was said, give to the amendment a retrospective operation. But it is impossible, in my opinion, to make the amended sub-section mean that. Such a construction gives to the amended sub-section only a partial operation in such cases, and it seems obvious that it was intended, in every case to which it applied, to cover the whole ground and to prescribe the totality of interest payable. Or perhaps it is more correct to say that such a construction makes the words of the amendment mean something that they cannot possibly mean. For the amendment says that interest at four per cent shall be payable "for the period of twelve months next following the time of the notification". It says neither more nor less than that, and it can

(1) (1925) 2 K.B. 64.
(2) (1927) A.C. 126.
(3) (1921) 30 C.L.R. 102.

mean neither more nor less than that. Yet the suggested construction makes it mean "for the period of twelve months next following the time of the notification, and for such further period, if any, as may have elapsed between the time of the notification and the date of commencement of this Act". It seems to me to be impossible to get any such meaning out of the language used. The suggested construction derives no support from *Sydney Municipal Council* v. *Troy* (1), where the amending enactment in question was entirely different in form and in substance.

For these reasons I am of opinion that the amendment effected by the Act of 1946 applies only to cases where the notification is published after it came into force, and that it has therefore no application to the present case. Since one effect of that amendment was to repeal the old sub-s. (2) of s. 126, it might be suggested that there is, in the result, no provision on which the former owners of the land in question here could rely as entitling them to payment of any interest at all. But this is the very situation with which the provision contained in s. 8 (b) of the *Interpretation Act* of 1897 (N.S.W.) was designed to deal. That enactment provides that "where an Act repeals in the whole or in part a former Act, then, unless the contrary intention appears, the repeal shall not . . . (b) affect any right privilege obligation or liability acquired accrued or incurred under an enactment so repealed." The former owners were entitled before 27th December 1946 to interest at the rate of four per cent per annum from date of notification to date of payment, and in that respect they had clearly, in my opinion, a right which had been acquired by them before the Act of 1946 became law, and which was preserved to them by s. 8 (b) of the *Interpretation Act* after the Act of 1946 became law.

It was argued that no "right" to compensation was "acquired" until the amount of compensation payable was ascertained by agreement or by assessment under the Act. But I cannot regard this view as tenable. Some colour is perhaps lent to it by the use of the word "claim" in s. 45 (2) of the *Public Works Act*, and by the fact that it is to a later part of the Act that we have to refer in order to find out the nature and incidents of the compensation payable. But the real and substantial effect of s. 45 is to give to the *Gazette* notification the immediate effect of depriving the owner of resumed land of all the rights of an owner of land, and to substitute therefor a right to receive a sum of money. It seems to me to give him immediate rights in the true sense of that word. The rights are defined later in the Act, and one of those rights is

(1) (1927) A.C. 706.

H. C. OF A. 1957.

KU-RING-GAI MUNICIPAL COUNCIL v. ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES.

Fullagar J.

the right to receive interest under s. 126. It can make no difference that the right is not quantified until the amount is agreed or assessed. Even a " right " to unliquidated damages for a tort would, in my opinion, be a right within the meaning of s. 8 of the *Interpretation Act*. The view which I take is supported, if it needs the support of authority, by the cases relating to workers' compensation, which I have cited above, and by *Hamilton Gell* v. *White* (1). In *Kraljevich* v. *Lake View & Star Ltd.* (2), *Dixon* J. said : " Section 16 of the *Acts Interpretation Act* " (which was the Western Australian equivalent of s. 8 of the *Interpretation Act* of 1897 of New South Wales) " keeps the old provisions of clause 18 alive for the purpose of assessing the amount of the appellant's redemption payment " (3). And his Honour referred to what was said by *Scrutton* L.J. in *Moakes* v. *Blackwell Colliery Co. Ltd.* (4).

The appeals should, in my opinion, be dismissed.

KITTO J. These are appeals against the answers given by the Full Court of the Supreme Court of New South Wales to questions submitted by special cases stated by the respective parties to two actions.

In 1944 the appellant council applied to the Governor under s. 536 of the *Local Government Act* 1919 (N.S.W.) for the resumption of certain land forming part of the estate of one William Moore deceased. The council in its application undertook to recoup the Department of Works and Local Government for any expenditure incurred on account of compensation for the land and interest and all necessary charges and expenses incidental to the resumption. On 20th September 1946, the land was resumed, in accordance with s. 536 (4) (a), by *Gazette* notification under Div. 1 of Pt. V of the *Public Works Act* 1912 (N.S.W.), and by the same notification the Minister under s. 536 (4) (b) notified that the land was vested in the council. By virtue of s. 536 (5), this had the effect that the land became vested in the council and not, as in the case of a resumption under the *Public Works Act* independently of the *Local Government Act*, in the Constructing Authority on behalf of the Crown (cf. the former Act, s. 43).

The rights of the trustees of the deceased's estate with respect to compensation are governed by the provisions of the *Public Works Act*. There is not now any question outstanding with respect to the compensation moneys themselves, but a dispute has arisen as to the rate of interest which the trustees are entitled to receive from

(1) (1922) 2 K.B. 422.
(2) (1945) 70 C.L.R. 647.
(3) (1945) 70 C.L.R., at p. 653.
(4) (1925) 2 K.B., at p. 70.

the Crown and which the Crown is entitled to have recouped to it by the council. For the determination of this dispute the trustees have sued the Minister (by whom, as a corporation sole by virtue of s. 4 of the *Public Works Act*, s. 126 of that Act provides that the compensation shall be paid), and the Attorney-General on behalf of the Crown sues the council. It is in the two actions thus brought that the special cases have been stated.

The Act provides two methods of resumption, namely acquisition by *Gazette* notification (Div. 1 of Pt. V) and acquisition by notice to the parties interested (Div. 4 of Pt. V). It is with the former only that we are here concerned. The matter of interest on compensation moneys where a resumption has been effected by that method is governed by s. 126 (2) of the *Public Works Act*. Before its amendment in 1946, that sub-section was in these terms: "If such compensation is payable in respect of land taken or acquired by notification in the *Gazette*, it shall bear interest at the rate of four per cent. per annum from the time of such notification." But by s. 5 of the *Land Acquisition (Charitable Institutions) Act* 1946, the words "it shall bear interest at the rate of four per cent per annum" were omitted, and words were substituted which gave interest at four per cent per annum for the first twelve months after the notification and thereafter interest at the rate payable by a bank on a fixed deposit for twelve months of a sum equivalent to the amount of the compensation. There was added a proviso dealing with variations which may occur in the bank rate of interest on fixed deposits between the expiration of the twelve months and the payment of the compensation.

The amending Act came into force on 27th December 1946, three months after the date of the resumption in the present case. The question which arises is whether the rate of the interest payable to the trustees is governed by the original or by the amended provisions of s. 126 (2). The trustees say by the original provisions and the council by the amended provisions, because the fixed deposit rate was considerably lower than four per cent during the period between the expiration of twelve months from the date of the resumption and the payment of the compensation to the trustees.

On the construction of the amending Act it may be open to question whether the amendments made by s. 5 are intended to apply only in respect of resumptions for the purposes of such institutions as the Governor declares to be institutions for the purposes of the Act; for s. 3 (1) provides that the provisions of "this Act" shall apply to and in respect of such institutions and

H. C. OF A. 1957.

KU-RING-GAI MUNICIPAL COUNCIL v. ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES.

Kitto J.

such institutions only. In the view I take of the case, however, it is unnecessary to pursue this question.

The argument in favour of the application to this case of the amended provisions of s. 126 (2) places emphasis on the word " payable ". The compensation is not " payable ", it is said, until the time for payment has arrived, and therefore the only right with respect to interest is one which springs into existence at that time, as a right to a lump sum. The time for payment of compensation is governed by sub-s. (1) of the same section : it is to be paid to the party lawfully entitled or his agent within one month after such amount is determined, provided that in every case the party claiming payment shall be bound to make out his title to the satisfaction of the Constructing Authority. In the present case the amount of the compensation was not determined until 1953, so that on the suggested construction of s. 126 (2) the right of the trustees to interest arose under that provision as amended, and therefore the rate applicable from time to time is to be ascertained in accordance with the amendment.

The argument for the trustees, on the other hand, treats the introductory words of s. 126 (2), not as meaning that the right of a dispossessed owner in respect of interest has no existence until the time for payment of compensation as prescribed by s. 126 (1) has arrived, but merely as confining the application of s. 126 (2) to the class of cases in which the resumption is effected by the method of *Gazette* notification. It is contended that immediately upon the publication of a notification there arises in every person who had any estate or interest in the land affected, an immediately vested right to be paid in accordance with the Act the proper amount of compensation together with interest thereon at the rate or rates prescribed by s. 126 (2). Accordingly it is said that in the present case the trustees acquired on 20th September 1946 a right to compensation plus interest at four per cent per annum, and that this right, having been acquired before the Act of 1946 came into force, is not affected by the amendment of s. 126 (2) which that Act introduced.

This contention is based alternatively upon s. 8 (b) of the *Interpretation Act* of 1897 (N.S.W.) and upon the rule of construction that a statute ought not to be understood as operating retrospectively unless there is some positive indication of intention that it shall so operate. Section 8 (b) of the *Interpretation Act* provides that where an Act repeals in the whole or in part a former Act, then, unless the contrary intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued and incurred

under an enactment so repealed. The Act of 1946 repealed a part of the *Public Works Act* by omitting the words prescribing the rate of four per cent in s. 126 (2), and only by way of substitution did it go on to enact the words prescribing the new variable rate. It contained nothing to indicate an intention to affect rights which had been acquired before its enactment. The contention of the trustees must therefore be upheld if the submission is correct that their right to interest was a " right acquired " before the Act of 1946 came into force.

It would be difficult to resist this submission if s. 126 (2) were found as part of s. 45, for that section operates to create substantive rights immediately upon the publication of a notification. After making it an immediate consequence of a resumption that the estate and interest of every person entitled to the land resumed is deemed to have been conveyed to the Constructing Authority, the section goes on to provide that every such estate and interest shall, upon the publication of the notification of resumption, be taken to have been converted into a claim for " compensation in pursuance of the provisions hereinafter contained ", and that every person shall, upon asserting his claim as provided and making out his title, be entitled to compensation on account of the resumption " in manner hereinafter provided ". In this section, " claim " obviously means an enforceable right, which is acquired at once though it is a right to a payment at an unascertained future time ; and " entitled " must mean " entitled to receive ", and must therefore refer to the maturing of the right into a right to immediate payment. But interest is not dealt with at this point in the Act. The topic is relegated to Div. 4 of Pt. VII, which contains those of the provisions foreshadowed in s. 45 which regulate the time, conditions and manner of the payment of compensation ; and there it is embedded among provisions which are concerned, not with the creation of substantive rights, but with prescribing matters of machinery. It is because of these considerations arising on the structure of the Act that the argument is plausible which denies that any right to interest vests in the dispossessed owner until, the required preliminary steps having been taken and the prescribed period having expired, the time for payment has arrived.

But clearly enough s. 126 (2), despite its position in the Act, creates a substantive right. It is a right given to the former owner of the land to compensation for the loss of his right to retain possession while the compensation remains unpaid : *Inglewood Pulp & Paper Co.* v. *New Brunswick Electric Power Commission* (1). As is

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

H. C. OF A. 1957.

KU-RING-GAI MUNICIPAL COUNCIL v. ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES.

Kitto J.

appropriate in a provision having this purpose, it does not take the form of a direction for payment—which might have lent some support to the notion that there is no right until the time for payment arises—but provides that the compensation "shall bear interest" from the time of the notification. This strongly suggests that it shall commence to bear interest at that time, and therefore that the right to have it bear interest arises at that time in favour of the former owner. The operation of s. 126 (2) in each case to which it applies is that upon the notification being published it gives the former owner an immediate assurance that in the inevitable interval of time before his compensation is paid, during which he will have neither the right to possession of the land nor the opportunity to derive income from the money which is to take its place, interest will be accruing so as to become payable to him when he receives the compensation. Things must be done and a time must elapse before either will be payable, and the quantum of each depends upon events; but, although for these reasons they are both characterised by some uncertainty neither is, in point of right, contingent or only a possibility. A right to both has been acquired: cf. *Hamilton Gell* v. *White* (1).

There is an analogy with the situation which has often been considered in the realm of workers' compensation law. As at the time of a worker's injury it is true that the exact amount of compensation which will be payable depends on many factors, such as the particular circumstances and the quality of the injury (including, of course, the duration of the resulting incapacity), whether death supervenes, and the state of the worker's family; but the method of calculation is fixed once and for all, and the true view is that rights have been acquired and liabilities incurred immediately upon the happening of the injury: *Clement* v. *D. Davis & Sons, Ltd.* (2); *Stevens* v. *Railway Commissioners for New South Wales* (3); cf. *Kraljevich* v. *Lake View & Star Ltd.* (4).

The amending Act, it should be observed, cannot be read as meaning that in respect of past resumptions the interest upon unpaid compensation moneys shall be altered for the future only. In this respect it is in marked contrast with the enactment which engaged the attention of the Privy Council in *Sydney Municipal Council* v. *Troy* (5). It is so expressed that if the new provisions as to interest apply to a past resumption at all they must apply retrospectively as from the date of the notification, so that, in a

(1) (1922) 2 K.B. 422.
(2) (1927) A.C., at p. 131.
(3) (1930) 31 S.R. (N.S.W.) 138, at p. 143; 48 W.N. 69.
(4) (1945) 70 C.L.R. 647.
(5) (1927) A.C. 706.

case where compensation for a resumption effected more than twelve months before the amendment was still outstanding when the amendment took effect, the four per cent interest which the compensation was bearing from the end of the twelve months to the date of the amendment must be treated as not having accrued, and interest at the new rate must be regarded as having accrued in its place. Even apart from s. 8 (b) of the *Interpretation Act*, a construction which would give the amendment that operation should be rejected if another is fairly open.

The view I have expressed accords with that of the learned judges of the Supreme Court, and I would accordingly affirm the answers which their Honours gave to the questions in the special cases.

In my opinion the appeals should be dismissed.

Appeals dismissed with costs.

Solicitors for the appellant Ku-ring-gai M.C., *Dowling, Tayler, Pratt & Nicol.*

Solicitor for the respondent Attorney-General, *F. P. McRae*, Crown Solicitor for New South Wales.

Solicitor for the appellant Minister for Public Works, *F. P. McRae*, Crown Solicitor for New South Wales.

Solicitors for the respondents Turner and Gurr, *W. A. Gilder, Son & Co.*

J. B.